COMMONWEALTH v. JONES, C.P. Franklin County Branch, No. 499 of 1981

Criminal Law - Murder - Third Degree

1. Third degree murder is a killing done with legal malice but without specific intent to kill.

2. Murder of the third degree can involve the specific intent to harm a victim as long as the intent falls short of the specific intent to kill.

3. After a defendant pleads guilty to a general charge of murder, the Commonwealth has the burden of presenting evidence to establish first degree murder and the defendant has the burden of reducing it to involuntary manslaughter.

District Attorney for the Commonwealth

Public Defender for the Defendant

OPINION AND ORDER

EPPINGER, P.J., July 22, 1982:

After entering a plea of guilty to murder, Donald Eugene Jones was found to have committed murder in the third degree. A motion for a new degree of guilt hearing was filed and overruled without an opinion. He was sentenced and has appealed the sentence because, he says, the court improperly relied upon the presumption that a plea of murder generally is a plea to murder in the third degree and that the law places an improper burden upon the defendant to reduce it to a lower degree, and because the Commonwealth's evidence was insufficient to sustain the court's finding of murder in the third degree.

This was an uncomplicated case. The defendant was barred from a club, apparently by the victim, and when defendant went inside he was not allowed to remain despite his protest. Later the two met outside the club and defendant aired his gripe. This led to an encounter in which the victim, the bigger man, was prevailing. He tried to get the defendant to admit defeat to no avail. Finally bystanders agreed to hold the defendant on the ground while the victim got up and left. But they didn't hold him long enough.

As the victim was walking away, the defendant was released, got up, and saying the victim had his coming,

compliance with the Disciplinary Rules. Since the majority of the improper advertisements were placed "inadvertently" or in "ignorance" of DR 2-105(A) and the attorneys involved assured us of future compliance, Disciplinary Counsel did not seek the imposition of any disciplinary sanctions, in those cases.

We do not know how widespread such improper advertising is across the Commonwealth and we do not intend to canvass all of the daily newspapers and telephone book "yellow pages" in all of the cities and towns in this state to seek out potential violators. However, it is believed that there may be a significant number of those attorneys who advertise in the "yellow pages" and elsewhere who may be unfamiliar with the provisions of DR 2-105(A).

Therefore, until such time as a formalized program is adopted in Pennsylvania giving recognition to "specialties" of the practice of law and with the sincere hope of eliminating future disciplinary problems in this area, this letter is intended to advise all members of the Bar of our interpretation of the provisions of DR 2-105(A) of the Code, as they relate to lawyer advertising, and to exhort any attorney whose past or current advertisements contain any derivative of the word "specialist" to insure their future advertisements are in conformity with all of the Disciplinary Rules dealing with advertising, including DR 2-105(A).

Unless or until our Supreme Court adopts a program of lawyer specialization or certification, attorneys may not advertise that they are "specialists." DR 2-105(A) prohibits such conduct.

Very truly yours,

A. B. Zerfoss

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Chief Disciplinary Counsel

defendant took out a gun and fired at him from about five yards. Before the shot, the victim saw what was happening and tried to get around a car. Instead of the bullet going directly into the victim's back, it went into his right shoulder, penetrated his chest, fractured a rib, perforated the top of both lungs and the esophagus and lodged in the left side of the chest wall.

After the shot, defendant went to the victim and they got into a second scuffle, during which the victim was trying to get the gun from the defendant. Another person disarmed the defendant, removed the shells and gave the gun back. Apparently, at the time it did not seem that the victim had been so badly hit that the wound would be fatal.

The evidence in the case showed that the death of Robert Webb, the victim, was a malicious killing. Malice is wanton and reckless conduct manifesting an extreme indifference to the value of human life going beyond negligent killing. *Commonwealth v. Taylor*, 461 Pa. 557, 564, 337 A.2d 545, 548 (1975). Third degree murder is a killing done with legal malice but without specific intent to kill. Murder of the third degree can involve the specific intent to harm a victim as long as the intent falls short of the specific intent to kill. *Commonwealth v. Pitts*, 486 Pa. 212, 219, 404 A.2d 1305, 1308 (1979). "Malice is properly implied when a deadly weapon is directed to a vital part of the body." *Commonwealth v. Palmer*, 448 Pa. 282, 288, 292 A.2d 921 (1972).

At a degree of guilt hearing, the Commonwealth has the burden of presenting evidence to establish first degree murder and the defendant has the burden of reducing it to involuntary manslaughter, if that is what the defendant contends it is. See e.g. *Commonwealth v. Geiger*, 475 Pa. 249, 254-55, 380 A.2d 338 (1977); *Commonwealth v. Moore*, 473 Pa. 169, 173, 373 A.2d 1101, 1103 (1977); *Commonwealth v. Ewing*, 439 Pa. 88, 91, 264 A.2d 661, 662 (1970).

Relying on *Mullaney v. Wilbur*, 421 U. S. 684, 44 L.Ed. 2d 508, 95 S. Ct. 1881 (1975) defendant says the burden can never be placed on defendant to reduce the degree of guilt below third. In *Mullaney*, the court was dealing with a Maine statute requiring a defendant charged with murder to prove that he acted in the heat of passion or sudden provocation in order to reduce the homicide to manslaughter. The Court found that the rule violated the Due Process Clause of the Fourteenth

Amendment which places upon the prosecution the burden to prove every fact necessary to constitute the crime beyond a reasonable doubt. The Court thus concluded that it was the state's burden to prove the absence of heat of passion or sudden provocation when the issue was properly presented. In that case the defendant had entered a plea of not guilty and was entitled to the presumption of innocence.

In this case the defendant has already entered a guilty plea to murder generally. We believe the defendant did not present evidence to reduce the crime to voluntary manslaughter. In addition the Commonwealth's evidence was sufficient to show beyond a reasonable doubt that the death of the victim was a malicious killing and was the crime of murder in the third degree.

This opinion is filed in support of the Court's finding that the defendant is guilty of murder in the third degree.

SHOTTS v. KOUGH, C.P. Fulton County Branch, No. 385 - 1980-C

Trespass - Trial without jury - New Trial - Fair Trial - Conduct of Court - Amendment of Complaint

1. Only the most unusual circumstances will warrant the grant of a new trial to the verdict winner on the grounds that the verdict is inadequate and against the weight of evidence or law.

2. The verdict of a trial judge sitting without jury is entitled to great weight and a new trial will be granted only upon showing of a clear abuse of discretion.

3. Leave to amend a complaint by adding an averment of wanton conduct would be in error in that it would permit introduction of a new cause of action.

4. A verdict winner seeking a new trial due to alleged errors during the trial must show that the errors, even if proven, caused the alleged incorrect results and that the favorable verdict did not cure the errors.

Gary Deane Wilt, Esquire, Attorney for plaintiffs

George F. Douglas, Jr., Esquire, Attorney for defendant

OPINION AND ORDER

EPPINGER, P.J., July 29, 1982:

There was an automobile accident on June 26, 1979. Lois Shotts and her daughter, Mindy, were injured in the accident. They and Lois' husband, Nelson, sued the other operator, Wayne Kough. The case was tried without a jury and Lois was awarded $18,300, Nelson, $2200 [1] and Mindy, $1000. The plaintiffs filed exceptions according to the requirements of Pa. R.C.P. 1038 and asked us to set aside the verdict and grant a new trial before a jury.

Plaintiffs' first four exceptions charge that the verdict is so disproportionate to the injuries and damages proved as to be against the weight of the evidence and the law. The second set of exceptions propose that plaintiffs were denied their right to a fair trial.

The grant of a new trial is within the discretion of the trial court. New trials should be ordered only when "the judicial process has resulted in the working of an injustice upon any of the parties." *Kiser v. Schlosser*, 389 Pa. 131, 133, 132 A. 2d 344 (1957). Considering the evidence in the light most favorable to plaintiffs, the verdict winners as required by *Johnston Truck Rental Co., Inc. v. Fowler-McKee Co.*, 281 Pa. Super. 271, 422 A. 2d 164 (1980), we find that the sum of verdict is supported by the evidence.

Only the most unusual circumstances will warrant the grant of a new trial to the verdict winner on the grounds that the verdict is inadequate and against the weight of evidence or law. *Battistone v. Benedetti*, 385 Pa. 163, 122 A. 2d 536 (1956). A verdict of a trial judge sitting without a jury is entitled to great weight, and circumstances warranting a new trial must be "a clear abuse of discretion." See *Baird v. Dun & Bradstreet, Inc.*, 446 Pa. 266, 285 A 2d 166 (1971) and *Johnston*, supra.

Lois suffered a fracture of the right Tibia and Fibula and of the left elbow. She had othe minor injuries. She was cared for in the hospital but was released with a total leg cast and a cast on her left forearm. She had to use a wheelchair upon discharge. She continued under the physicians' care and reached the point where she could use crutches. She was referred to an orthopedic surgeon who recommended the

1. Defendant's carrier paid the property damage claim.