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## ILLEGAL ARREST AS SUFFICIENT PROVOCATION TO MITIGATE A HOMICIDE

Legal provocation is a concession the law has made to the frailty of man. Where a killing, although not justifiable nor excusable, is committed under such provocation as the law deems sufficient to arouse in an ordinary reasonable man such great heat of passion as would render him deaf to the voice of reason and if such passion is in fact aroused, it is but manslaughter and not murder.<sup>1</sup> Thus, there are two prerequisites for mitigation: (1) legal provocation, which is a question of law and (2) heat of passion, which is a question of fact. It is with the first of these that we are to be primarily concerned.

That an attempted illegal arrest constitutes such legal provocation has been recognized since the childhood days of our law.<sup>2</sup> While the commentators have generally contented themselves with the mere statement that an illegal arrest is a legal provocation,<sup>3</sup> such has never been, and is certainly not today sufficient. The problem calls for the resolution of two conflicting social interests—on the one hand are the desirability and the necessity for upholding the dignity of the law and the resulting protection of society and on the other is the cherished ideal of individual liberty and freedom from oppression. With two such fundamental concepts at war, compromise, which is never entirely satisfactory, is the only solution. The Texas court well states the problem thus:

“ here we approach a field of legal inquiry which cannot well be styled *terra incognita* in the law, and yet, by reason of the embarrassments incident to a protection of personal liberty, on the one hand, and the due conservation of the officers of the law on the other, it cannot be said that its limits are exactly defined, or that further explorations are relieved altogether of difficulties.”<sup>4</sup>

Changing social conditions have tipped and will continue to tip the scales slightly in favor of one of the two interests involved. In the past the political philosophy of absolutism and the distrust thereof which survived it placed emphasis on the doctrine of human liberty but today with the increasing complexities of life and the better realization of the fact that the individual in the interests of the whole of society must make repeated sacrifices, it may well be

<sup>1</sup> 1 Russell, Crimes 513-514 (3d ed. 1843)

<sup>2</sup> Tackett v. State, 11 Tenn. (3 Yerg.) 392 (1832) Buckner's Case, Style 467, 82 Eng. Rep. 867 (1665), see, FOSTER, CROWN LAW 312 (2d ed. 1791)

<sup>3</sup> 1 EAST, PLEAS OF THE CROWN 233 (1803) FOSTER, CROWN LAW 312 (2d ed. 1791), 1 BISHOP CRIMINAL LAW sec. 868 (9th ed. 1923), 1 RUSSELL, CRIMES 580 (3d ed. 1843)

<sup>4</sup> Alford v. State, 8 Tex. Cr. R. 545, 563 (1880).

that the balance has shifted. Courts now serve to check the former unrestrained power of rulers and grant relief and protection in the event that personal liberty is violated.

"Hence the necessity can scarcely ever arise for the citizen to take the law in his own hands, and by a kind of rude primitive justice, belonging to a past age, protect his personal liberty from such invasion as he may consider unlawful.

"It is better that personal liberty should be regulated by law and that law executed and submitted to in the light of civilization, and with the concessions, which every citizen is bound to make for the good of all, than to have the vicious take advantage of defects of procedure and shoot down the civil officers of the land. "3

A review of the cases, considering the interests involved and the question as to which is the more deserving of the protection of modern society, is essential to determine what, if any, restrictions have been imposed on the broadly stated rule of the common law.

Numerous decisions are but repetitions of the common law rule—if the arrest was illegal, the offense was manslaughter.<sup>5</sup> While in most of these cases the question of malice was not involved, there is language to the effect that the offense can in no instance be greater than manslaughter if the officer was proceeding without authority. The Mississippi court in its decision of *Williams v. State*<sup>6</sup> held that the applicable statute made the offense manslaughter even though malice was present if such malice did not exist prior to the unlawful arrest. Also adopting the same view is the language of the Massachusetts court:

" although in many cases the act might be done under such circumstances of deliberate cruelty as would equal or surpass, in point of atrocity and moral turpitude, many cases recognized as murder; yet the prisoner must be tried by the rules of law, and not by the aggravation of the offense, as tried and tested by another and different standard."<sup>8</sup>

Such views ignore the second prerequisite of mitigation as set forth *supra*, and while the primary concern of this note is with what constitutes legal provocation, the obvious danger of a purely objective standard calls for comment. It is to be remembered that the rationale of all instances where there is said to be provocation sufficient to

<sup>5</sup> *Alsop v. Commonwealth*, 4 Ky. L. Rep. 547, 552-553 (1882)

<sup>6</sup> *Plemmons v. State*, 43 Ga. App. 344, 158 S.E. 630 (1931) *Commonwealth v. Carey* 66 Mass. (12 Cush.) 246 (1853), *People v Burt*, 51 Mich. 199, 16 N.W. 378 (1883) *Williams v. State*, 122 Miss. 151, 84 So. 8 (1919), *Poteete v. State*, 68 Tenn. (9 Baxt.) 261 (1878) *Rex v. Ades*, 6 C. & P. 388, 172 Eng. Rep. 1289 (1834)

122 Miss. 151, 84 So. 8 (1919)

<sup>8</sup> *Commonwealth v. Carey* 66 Mass. (12 Cush.) 246, 251 (1853).

mitigate the homicide from murder to manslaughter is that such provocation ordinarily arouses such heat of passion as to render the inflamed mind blind to reason. These cases where the provocation is an illegal arrest should constitute no exception.

Other courts state the rule as above with the additional requirement that there be an absence of express malice.<sup>9</sup> If it is to be understood that the courts in the first category, with the possible exception of the Mississippi and Massachusetts courts, imply a subjective standard, then there is no difference between the two positions. Certainly a subjective standard is required unless an exception to the general law of mitigation is to be created. But even a rule with an express stipulation against the presence of malice will not suffice. Although it is conceded to be the view of most of the courts, it is felt that such a rule is far too lenient. It is the opinion of the author that the law should not concede as a matter of law that heat of passion is aroused in the ordinary reasonable man by mere illegality of arrest and an absence of express malice.

That such a view is not that of the author alone is attested by the attempts of some courts to place limitations of varying degrees upon the rule. The early decision is *Mackalley's Case*<sup>10</sup> distinguished between cases where the warrant was illegal and where the process was merely erroneous. Such a distinction is valid; for does it not stand to reason that where but for a mere error in process the arrest would be valid, the knowledge of such minor infirmity could not produce the inflamed passion required for mitigation? Another limitation which should be expressly included in the rule is that the killing must be committed in resistance to the illegal arrest and must be essential to the escape of the prisoner.<sup>11</sup> In *People v. Gilman*,<sup>12</sup> the officer permitted the defendant to go inside while the officer awaited without. Rather than fleeing, or at least remaining within if it is not required that a man flee from his own home, the defendant armed himself and came out shooting. Obviously such killing was committed in revenge rather than under the sway of passion and is murder. A similar situation was presented in *Regina v. Sattler*<sup>13</sup> where the deceased, an officer, was returning the illegally arrested defendant to England by boat, from which he could not escape. The killing of the officer by the defendant under such circumstances was held to be murder. Unquestionably such a limitation is proper, for if an illegally arrested person may secure his liberty without

<sup>9</sup> *State v. Ward*, 5 Har. (Del.) 496 (1854) *Roberson v. State*, 43 Fla. 156, 29 So. 535 (1901), *People v. White*, 333 Ill. 512, 165 N.E. 168 (1929) *State v. Burnett*, — Mo. — 188 S.W. 2d 51 (1945) *State v. Kuykendall*, 37 N.M. 135, 19 P. 2d 744 (1933) *Moore v. Commonwealth*, 86 Va. 443, 10 S.E. 534 (1890)

<sup>10</sup> 9 Co. Rep. 61b., 77 Eng. Rep. 824 (1611)

<sup>11</sup> *Napper v. State*, 200 Ga. 626, 38 S.E. 2d 269 (1946) *Briggs v. Commonwealth*, 82 Va. 554 (1886)

<sup>12</sup> 47 Cal. App. 118, 190 Pac. 205 (1920)

<sup>13</sup> *Dears. & B.* 539, 169 Eng. Rep. 1111 (1858).

resorting to the extreme of killing but still kills, such is done in a spirit of revenge rather than a spirit of passion. It is a punitive act and the law does not and cannot permit a man to be the judge of his own cause.

In *Ex Parte Sherwood*<sup>14</sup> it was held that where the illegality of the arrest was unknown to the defendant, it could arouse no provocation in him and the slaying would be murder. Since the law refuses to mitigate where the arrest is lawful, it should do likewise where the illegality is unknown. The law requires that citizens submit to lawful arrest, as indeed it must do or decree its destruction, and mitigates only for the passion aroused by the unlawful restraint of personal liberty. If the defendant believed that the arrest was lawful, he should not be permitted to claim that he was inflamed thereby, upon subsequently learning of its illegal character. While the early English case of *The Queen v. Tooley*<sup>15</sup> held that ignorance of the illegality was no bar to mitigation, the decision therein has been severely criticized.<sup>16</sup> An identical problem is presented where the defendant is unaware that an attempt is being made to arrest him. In the absence of other mitigating factors this must be murder for no provocation could arise from an unknown attempt to illegally arrest, and it has so been held.<sup>17</sup>

In addition to the decisions considered which attempt to place limitations on the general rule, there is a Nebraska case the language of which indicates that if the victim of an illegal arrest is driven to the alternative of submission or homicide, he may adopt the latter course with impunity.<sup>18</sup> However, such a view contains so little merit as to render it unnecessary to discuss it. A few other cases show a reluctance on the part of the courts to mitigate under any circumstances,<sup>19</sup> but it is felt that the language used was broader than the facts presented and that the writers of the opinions were unaware of any intimation that illegal arrest could not constitute provocation.

In the above discussion no mention has been made of the guilt of the party sought to be arrested. It is hoped that such has been noted with surprise by the reader, for it is felt by the author that

<sup>14</sup> 29 Tex. App. 334, 15 S.W. 812 (1890).

<sup>15</sup> 2 Ld. Raym. 1296, 92 Eng. Rep. 349 (1709)

<sup>16</sup> FOSTER, CROWN LAW 312-316 (2d ed. 1791).

<sup>17</sup> *State v. Middletown*, 26 N.M. 353, 192 Pac. 483 (1920)

<sup>18</sup> *Simmerman v. State*, 14 Neb. 568, 17 N.W. 115 (1883) see I WHARTON, CRIMINAL LAW sec. 541 (11th ed. 1912). (In footnote 6 of such section, the Nebraska case is miscited and reference was obviously to the Simmerman case. While the Delaware case sustains the point made, the Texas cases belong in the self defense category.)

<sup>19</sup> *People v. Bradley*, 23 Cal. App. 44, 136 Pac. 955 (1913) (But see the subsequent case, *People v. Gilman*, *supra*, note 12) *Noles v. State*, 26 Ala. 31 (1885). (But in the later case of *Sanders v. State*, 181 Ala. 35, — 61 So. 336, 340 (1913), the *Noles* case is cited for the proposition that if excessive force is used in resisting, it is murder) see *Alsop v. Commonwealth*, 4 Ky. L. Rep. 547, 551-553 (1882)

the guilt or innocence of the defendant of the charge for which the arrest is sought to be made is the most important factor in determining whether a reasonable man would have been legally provoked. The question of whether a guiltless conscience should be a requirement of legal provocation in the case of an unlawful arrest has received but scant attention from the courts. In the case of *People v. Burt*,<sup>20</sup> it was held that proof of guilt of the defendant of the crime for which the deceased was attempting to arrest him was improper. And the Washington court has held that an offer by the defendant of proof of innocence of the offense for which he was being arrested was properly rejected.<sup>21</sup> However in the latter case the arrest was legal, so there could be no mitigation in any event. While it may be true, as the Georgia court states, that, "Every man, however guilty has a right to shun an illegal arrest by flight,"<sup>22</sup> the mere fact of illegality alone and the right of flight is not so impelling as to require that the law decree that the situation is one from which heat of passion might arise. The *dicta* of the Pennsylvania court in its decision of *Brooks and Orme v. Commonwealth*<sup>23</sup> contain the only extended discussion of the question. The court therein states:

"An innocent man is unconscious of guilt, and may stand on his own defense. When assailed under a pretence which is false his natural passion arises, and he turns upon his assailant with indignation and anger. To be arrested without cause is to the innocent great provocation. If in the frenzy of passion he loses his self-control and kills his assailant, the law so far regards his infirmity that it acquits him of malicious homicide. But this is not the condition of the felon. Conscious of his crime, he has no just provocation—he knows his violation of law, and that duty demands his capture. Neither reason nor law accords to him that sense of outrage which springs into a mind unconscious of offence, and makes it stand in defense of personal liberty."<sup>24</sup>

Such logic is irresistible. A person who has violated the law should anticipate that an attempt will be made to bring him to justice. If a person is anticipating apprehension it should not be said that mere illegality in the apprehension, in the absence of an assault and battery or other recognized provocation, would give rise to such heat of passion as would mitigate. An analogous situation could arise where a fugitive is attempted to be apprehended.<sup>25</sup> Although the officer is unaware that the person is a fugitive from justice and is arresting without authority on a different charge, the fugitive should be anticipating an attempt to arrest him and if he kills to resist the arrest

<sup>20</sup> 51 Mich. 199, 16 N.W. 378 (1883)

<sup>21</sup> *State v. Symes*, 20 Wash. 484, 55 Pac. 626 (1899).

<sup>22</sup> *Thomas v. State*, 91 Ga. 204, —, 18 S.E. 305 (1892)

<sup>23</sup> 61 Pa. 352 (1869)

<sup>24</sup> *Id.* at 360.

<sup>25</sup> *Williford v. State*, 121 Ga. 176, 48 S.E. 962 (1904)

it should be murder. Where a person who has not a guiltless conscience is attempted to be arrested and resists, it is difficult to see how a reasonable man could find that the killing was not committed from fear of being brought to justice rather than passion.

In summary it may be stated that the general rule is that if there is an illegal arrest, the killing of the officer will be no more than manslaughter in the absence of express malice, although this limitation may not be expressly stated. However, in view of the needs of present day society, it is believed that the person temporarily deprived of his liberty should submit and avail himself of his legal right of redress. It is submitted that the following requirements for mitigation in the case of illegal arrest do no violence to either established legal thought or the public policies involved:

- (1) the arrest must in fact be illegal,
- (2) the defendant must have knowledge of the illegality of the arrest,
- (3) the killing must be done in and must be necessary to the resistance of the illegal arrest,
- (4) the defendant must have a guiltless conscience, *and*
- (5) heat of passion must in fact exist in the defendant.

In addition to the restrictions placed on the availability of provocation in the case of an illegal arrest, a reformation of the law enforcing system is required. There is a crying need for better personnel in law enforcing agencies in this country and they should be adequately instructed as to the extent of their authority and as to the rights of private persons. Furthermore, they should be held to a strict accountability for acts done in excess of their authority. It is an unfortunate fact that officers of the law, drunk either with power or from fear, frequently maltreat the public. Equally unfortunate is the fact that "blue-ribbon" juries from a sense of obligation for the protection afforded their property almost invariably vindicate the officer if the case ever reaches the court. Judges and jurors, as well as police officers, should be impressed with the fact that unlawful enforcement of the law merits contempt rather than respect. Admittedly the conclusions herein advanced are not a panacea; none is possible. But it is thought that they afford the maximum protection to each of the public interests involved in view of the needs of modern society.

JOHN J. HOPKINS