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MANSLAUGHTER: PRELIMINARY STUDY OF CATEGORIES OF VOLUNTARY MANSLAUGHTER

Voluntary manslaughter at common law is usually defined as an intentional homicide committed without malice aforethought but in the heat of passion caused by adequate provocation.¹ The purpose of this note is to determine whether this definition is all embracing, or to state it in a different manner, whether there is more than one category in voluntary manslaughter.

In order to clearly present the problem to the reader, the use of the following analysis is suggested in the case of an intentional homicide:

- (1) Is the intentional killing either justifiable or excusable? If so, the accused is acquitted.
- (2) If the answer to (1) is "no" the next question is, Does the homicide fall within one of the recognized categories of murder? Or to put the question in another way, Is malice aforethought present? If so, the homicide is murder and not manslaughter and therefore not a concern of this note.
- (3) If the answer to (2) is "no", the homicide is necessarily voluntary manslaughter.

If the above analysis is applied and the conclusion reached that the defendant is guilty of voluntary manslaughter, an adequate provocation would *necessarily* be found in the facts of the case if the usual common law definition is correct. If the defendant is guilty and an adequate provocation is not present, then it must be concluded that there is another or other categories in the law of voluntary manslaughter.

To decide such a question one must have a knowledge of what the courts have held to be an adequate provocation. Many definitions have been given but a summation of them all seems to result in the rule that the adequate provocation necessary to reduce an intentional killing from murder to manslaughter is that provocation which is of such a nature as would, in the mind of a reasonable man, stir resentment and produce action arising from passion rather than judgment. The passion referred to in the definition is commonly described as heat of passion and is a necessary element

¹Olds v. State, 44 Fla. 452, 33 So. 296 (1902), Cottrell v. Commonwealth, 271 Ky. 52, 111 S. W 2d 445 (1937) Commonwealth v. Carroll, 326 Pa. 135, 191 Atl. 610 (1937).

²Miller v. Commonwealth, 163 Ky. 246, 173 S. W 761 (1915) State v Borders, 199 S. W 180 (Mo. 1917), Wooten v. State, 171 Tenn. 362, 103 S. W 2d 324, 326 (1937).

of provocation.³ It is also necessary that the homicide must have been committed before the lapse of a reasonable time for cooling,⁴ and that the provocation must have given rise to the heat of passion which was the cause of the act that resulted in the homicide.⁵

As to what circumstances have been held by the courts as giving rise to adequate provocation, the weight of authority seems to be that assault and battery,⁶ mutual quarrel or combat, unlawful arrest,⁷ and the detection by a husband of his wife in an act of adultery⁸ engender adequate provocation. The test of whether there is adequate provocation is objective, *i.e.* whether or not the provocation was sufficient to excite the passions of a reasonable man,¹⁰ and is a question of fact to be determined by the jury.¹¹ However, it is to be noted that the killing will be murder if *actual malice* is present in any of the above cases.

The foregoing cases involving provocation are embraced within the limits of the common law definition of voluntary manslaughter and establish what the writer will designate as category (A) of voluntary manslaughter. The definition used in this category is the usual one for common law voluntary manslaughter.

The next step is to determine whether there is another or other categories of voluntary manslaughter. A conviction of voluntary manslaughter in the *absence* of adequate provocation would demand another category or categories. It is in this respect that *Commonwealth v. Beverly*¹² is particularly interesting. The defendant in the case was tried for the murder of two men while they were robbing his chicken roost. The jury failed to agree and the commonwealth asked the Court of Appeals for a certification of the

³ *Shorter v. Commonwealth*, 252 Ky. 472, 67 S. W 2d 695 (1934) *State v. White*, 138 N. C. 704, 51 S. E. 44 (1905) *State v. Carter*, 58 N. E. 2d 794 (Ohio App. 1944), Perkins, *The Law of Homicide* (1946) 36 J. CRIM. L. 391, 422.

⁴ See note 3 *supra*.

⁵ See note 3 *supra*.

⁶ *Williams v Commonwealth*, 80 Ky 313 (1882) *State v. Merri- rick*, 171 N. C. 788, 88 S. E. 501 (1916) *Butler v State*, 108 Tex. Cr. R. 643, 2 S. W 2d 254 (1928).

⁷ *Gann v State*, 30 Ga. 67 (1860), *Hanna v Commonwealth*, 242 Ky. 584, 46 S. W 2d 1098 (1932) *State v Coble*, 177 N. C. 588, 99 S. E. 339 (1919).

⁸ *State v. Kuykendall*, 37 N. M. 135, 19 P 2d 744 (1933), *Dick- ey, Culpable Homicides In Resisting Arrest* (1933) 18 CORN. L. Q. 373, 379; Note (1945) 34 Ky. L. J. 73, 74.

⁹ *State v. Yanz*, 74 Conn. 177, 50 Atl. 37 (1901) *State v. Lee*, 6 W W Harr. (36 Del.) 11, 171 Atl. 195 (1933), *State v Imundi*, 45 R. I. 318, 121 Atl. 215 (1923)

¹⁰ *People v. Gingell*, 211 Cal. 532, 296 Pac. 70 (1931) *Rivers v. State*, 75 Fla. 401, 78 So. 343 (1918), *State v. Henderson*, 24 Ore. 100, 32 Pac. 1030 (1893).

¹¹ See note 10 *supra*.

¹² 237 Ky. 35, 34 S. W 2d 941 (1931).

law. The ruling was that the instruction of the trial court was improper in not informing the jury that they might find the defendant guilty of voluntary manslaughter on the theory that he had used more force than was reasonably necessary to prevent the felonious taking of his chickens. The following instruction was given to be used in another trial upon the same facts:

"The taking and carrying away of chickens or other fowls of the value of \$2.00 or more without the consent of the owner with the intent to convert the same to the use of the taker, and to deprive permanently the owner of his property therein, is a felony

"The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant, in this county and before the finding of the indictment herein, did willfully shoot the deceased with a pistol, a deadly weapon, from which he died within a year and a day and if you further believe from the evidence that at the time he did so the deceased, Wilburn, and his companion McGuire, acting in concert, were engaged in the act of committing the felony aforesaid, or that said Wilburn was so doing, and that the defendant without malice aforethought, or *not in a sudden affray or in sudden heat and passion*, or not in self defense (as set out in Instructions Nos. 1, 2, and 4) shot and killed the deceased solely to protect his property and to prevent said Wilburn and McGuire, or said Wilburn, from committing the felony as aforesaid, then you are authorized to find the defendant guilty of voluntary manslaughter" ¹³ (Italics supplied)

Since heat of passion is a necessary element of adequate provocation, the above instruction would permit a conviction of voluntary manslaughter where there was no provocation present as a mitigating factor. The result is that there is at least a second category of voluntary manslaughter to be designated as category (B) and defined as follows:

Voluntary manslaughter is also an intentional homicide committed in the absence of malice aforethought and without provocation and resulting from the use of more force than is reasonably necessary to prevent the commission of a non-violent statutory felony

It is not the writer's intention to make this note inclusive. In support of the position that the common law definition does not embrace all of the possible categories, it is to be noted that Dean Burdick has written that "A definition which limits voluntary manslaughter to a homicide committed in the heat of passion caused by provocation, confines this crime within bounds that are too narrow."¹⁴ Also Professor Perkins in discussing mitigation other

¹³ *Id.* at 42, 34 S. W. 2d at 945.

¹⁴ 2 BURDICK, LAW OF CRIME (1946) sec. 461.

than provocation has said, "manslaughter includes some killings involving other types of mitigation,"¹⁵ and Bishop in his work on criminal law has stated, "There are cases, not of excited passion, wherein the conduct of the person slain has been such as to make the killing, though in cold blood, manslaughter when otherwise it would be murder."¹⁶

In conclusion it is submitted that since provocation is not a necessary element for a conviction of voluntary manslaughter, the usual common law definition does not embrace every case of voluntary manslaughter under (3) of the analysis of intentional homicide suggested in the early part of this note. It may be concluded that there are at least two, perhaps more, categories in common law voluntary manslaughter.

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¹⁵ Perkins, *The Law of Homicide* (1946) 36 J. CRIM. L. 391, 426.

¹⁶ 2 BISHOP, CRIMINAL LAW (9th ed. 1923) sec. 698.