University of Baltimore Law Forum

Volume 8
Number 2 *February, 1978*

Article 16

2-1978

Recent Decisions - State and Federal: Merger Doctrine Examined

John Jeffrey Ross

ing buyer will trade." *Id.* Without this evidence of value, the jury's verdict would not be based on articulable objective facts. Even though the owner testified she originally had paid $750.00 for the property and the accused (certainly not a *willing* buyer) paid $100.00 to repurchase the television set, neither purchases were indicative of fair market value.

The Court stated that the only departure from the strict rule of proof would be where the "stolen property (1) had been recently purchased at a price well in excess of $100.00; (2) was in 'mint condition' at the time of the theft; and (3) was not subject to 'prompt depreciation or obsolescence.' " 376 A.2d at 444.

The government's proof was thus sufficient to sustain a conviction only for petit larceny, a misdemeanor. With this charge, all that is necessary is for the government to show that the stolen items had value.

The Court closed with an oblique reference to what may be poor trial preparation on the part of the U.S. Attorney's Office. It noted, at 376 A.2d 444 n. 3, that there has been "a continuing indication of failure in governmental proof sufficient to establish a felony rather than a misdemeanor in larceny cases of this nature."

Merger Doctrine Examined

by John Jeffrey Ross

On July 13, 1974, a young woman was allegedly raped in the District of Columbia. This event provoked a search by her relatives and friends for some neighborhood justice. Mrs. Mary Harris, grandmother of the assault victim, accompanied this crowd of vigilantes to a Washington home wherein the rapist was thought to reside. As two men from the group forced their way through the front door they shot down an innocent third party, Louis Sisler, who tried to prevent their entry.

Sisler died at an emergency room shortly thereafter, but not before he provided, by way of admissible "spontaneous utterances," testimony leading to the murder and burglary convictions of the assailants. *See Harris v. United States,* 373 A.2d 590 (D.C. App. 1977).

The tragic events of that day have led to further prosecutions, and the District of Columbia Court of Appeals has recently adjudicated the appeal of Mrs. Harris from her convictions for conspiracy to commit assault with a dangerous weapon, attempted first degree burglary while armed, and felony murder. Mrs. Harris had been brought to justice for her role in aiding and abetting the forcible entry of the murder victim's home and his shooting. *Harris v. United States,* 377 A.2d 34 (D.C. App. 1977).

On appeal, Mrs. Harris claimed that the trial court erroneously resolved the following issues against her:

[1]Sufficiency of the evidence to sustain accomplice guilt for attempted first degree burglary;
[2]statements by the decedent admitted against her;
[3]sufficiency of the evidence to show accomplice guilt for the first degree felony murder;
[4]refusal by the trial court to impanel, *sua sponte,* a second jury to hear Mrs. Harris' untimely insanity defense or to conduct a voir dire of the jurors to determine prejudice against such a defense;
[5]prejudical statements by the prosecutor concerning Mrs. Harris' insanity defense, even though the trial court provided instructions to mitigate their impact.

She further complained that the offenses upon which the felony murder accusation was based should have been *merged* with the homicide, thus removing support for the first degree murder conviction.

The court affirmed the convictions, indicating by a recital of the group's purposeful actions that the evidence, when viewed in a light most favorable to the government, clearly showed criminal animus for revenge and armed, forcible entry into the victim's home—thus sufficient evidence for attempted first degree burglary while armed. *Id.,* at 36-37. Concerning accomplice guilt, the court saw as dispositive numerous actions by Mrs. Harris indicative of her role as a motivating force in the group's search for revenge which led it to the scene. The court rejected her claim that her leaving the scene prior to the murder was sufficient to avoid criminal liability.

The court reasoned that absent an affirmative move to "disavow or defeat" the criminal purpose, or "definite decisive" steps showing complete abandonment of the illegal undertaking, the departure was ruled insufficient "as a matter of law" to show withdrawal from the criminal enterprise. *Id.,* at 38.

As to Harris' liability in the felony murder, the court stated that the killing was within the scope of the burglary perpetrated by Harris and her principals; a natural and probable consequence of, and not merely "coincident" to, the illegal entry. 377 A.2d at 37-38.

On the failure of the trial court to impanel, *sua sponte,* a second jury to hear her insanity defense or to question veniremen of the present panel to determine prejudice against this defense, the court stated that Harris had abruptly changed her defense tactics at trial by an untimely assertion of the insanity defense; there was no *right* to a second jury, and that absent a timely request by counsel for voir dire on the insanity issue, the trial judge did not abuse her discretion in the manner in which she conducted the trial. Also fatal to the appellant's claim was the absence of objection to the "manner and method" of the court's use of the jury. In addition, the court dismissed claims that the prosecutor made statements of such import as to prejudice the defense. It was held that proper jury instructions remedied their effect, and that a fair trial was preserved. 377 A.2d at 39-40.

The final issue to be considered was Mrs. Harris' claim that the felony murder conviction must be reversed because the offenses on which the felony murder was based should have been merged into that homicide as lesser included offenses. In other words, she contended that 1) the burglary was based upon the intent to commit assault with a dangerous weapon;

2) the assault, with elements common to the homicide, must be merged with it; and 3) there being no underlying separate felony, there was no felony murder. The defense thus read the facts as showing an intent to enter the home solely to assault Sisler, i.e. one continuous criminal transaction from entry to homicide.

The doctrine of merger, where not abrogated by statute, is applicable so that an accused will not face "double punishment" for one act. At common law, the rule was given effect where the same act generated more than one offense. *Klein v. State*, 151 Md. 484, 135 A.591 (1926); MILLER, CRIMINAL LAW, 50 (1934); CLARK AND MARSHALL, CRIMES, § 2.03 (7th Ed. 1968).

The defense theory in *Harris* failed for three basic reasons. First, the burglary was a distinct offense committed for the demonstrated purpose of finding an individual the attackers thought was *other than the murder victim. See Harris v. United States*, 373 A.2d 590, 593 n. 8. This intent to enter to find the "third party" gave the burglary a specificity apart from the homicide—an element of intent separate from the killing. Second, 22 D.C. Code § 2401 proscribes as felony murder a killing in *any housebreaking*. Third, "[T]he societal interest served by the burglary statute [22 D.C. Code § 1801], protection of occupied dwellings, is separate and distinct from that of the murder statute, security and value of the person." 377 A.2d at 38.

As the Court of Appeals stated in a case clearly on point:

> [Defendant] committed burglary by knowingly entering [victim's] home with the intent to assault him. Having committed the burglary and violated the appurtenant societal interests, it was still possible for [defendant] and his companions to withdraw from the premises without attacking [the victim]. But continuation of this criminal conduct resulted in the death . . . and the commission of a second distinct crime.

Blango v. United States, 373 A.2d 885, 888 (D.C. App. 1977).

The court in *Blango* found that a conviction for felony murder was appropriate for policy reasons even where the criminal event was isolated, in terms of both *mens rea* and *actus reus*, to the immediate parties, i.e. no intent was shown to enter for a purpose other than to kill the immediate victim. An even stronger case against merger is thus found in *Harris* where there are indicia of two separate criminal purposes.

In this case, where the homicide is ancillary to the attempted burglary, the following observation is appropriate:

> It is said that if [the accused] arms himself with the intent to shoot anyone who interferes with the commission of the burglary, he is chargeable with such premeditation as to render him guilty of murder in the first degree.

1 WARREN ON HOMICIDE § 74 at 332 (1938).

Ancient Decisions

by Robert C. Becker

There it is, volume one, number one. It is all done in one paragraph and about one-quarter of the page. Still it *is* the first reported case in United States jurisprudence.

In days when Maryland was more freely dispensed than it is today, one William Boreman filed a preliminary claim to four hundred acres at Nanjemoy. Charles County people take note. He had the ground surveyed, occupied it, and considered it his own. He failed, however, to perfect a patent to his land within the time specified in the original warrant.

Meantime, Captain William Stone, apparently realizing the defect in Boreman's claim, filed and perfected a patent to the same land. When Captain Stone undertook to occupy land then his, dispute naturally arose. It came to the attention of the provincial court. *Stone v. Boreman* 1 H & McH 1 (1658).

The court held that Boreman had lost his claim by failing timely to perfect his patent. Stone was the rightful owner of the land in question. Boreman was still entitled to four hundred acres and might have it elsewhere in a "convenient place." *Id.* at 2. Basic equity is affordable where land is plentiful.

The interesting part of this rather short report concerns the treatment of the surveyor who laid out Boreman's original claim. The court seems to hold that he should have known of the fault in Boreman's filing and should have either warned him of it or simply refrained from the commission. At any rate he is held responsible for surveying, without charge, such new claim as Boreman shall take and perfect.

This is a decision hardly possible in today's circumstances. Land is not granted four hundred acres at a time; rather it is bitterly litigated by the foot. It is necessarily the product of an era when royal charters were framed in terms of latitudes north and south to the setting of the sun. Still, it is a decison embodying the virtues of brevity and fairness, criteria we yet strive to meet.

An Afternoon Spent Browsing in the
Dusty Section of a Small Law Library

1 Harris & McHenry (1658)

photo by John Clark Mayden