Criminal Law - Double Jeopardy - Prior Conviction of First Degree Murder Resulting in a Penalty of Life Imprisonment Held to Be an Implied Acquittal of the Death Penalty on a Retrial Secured on Defendant's Appeal. People v. Henderson (Cal. 1963)

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CRIMINAL LAW — DOUBLE JEOPARDY — PRIOR CONVICTION OF FIRST DEGREE MURDER RESULTING IN A PENALTY OF LIFE IMPRISONMENT HELD TO BE AN IMPLIED ACQUITTAL OF THE DEATH PENALTY ON A RETRIAL SECURED ON DEFENDANT’S APPEAL. *People v. Henderson* (Cal. 1963).

Defendant, charged with first degree murder, waived trial by jury and pleaded guilty to the crime as charged. The court imposed a penalty of life imprisonment. Defendant appealed on the ground that his conviction was improper since he had been allowed to plead guilty without the benefit of legal counsel. The District Court of Appeal reversed the judgment and remanded the case for a new trial. In the subsequent jury trial defendant was again convicted of first degree murder and the penalty fixed at death. On automatic appeal to the Supreme Court of California one of defendant’s numerous contentions was that the imposition of the death sentence after an appeal from a conviction carrying a penalty of life imprisonment violated the constitutional and statutory prohibitions against double jeopardy. Reversing on the ground that the trial court failed, on its own motion, to instruct the jury as to the defense of diminished responsibility the court further stated in considering the defense of double jeopardy that in light of the basic purpose of the state constitution the prohibition against double jeopardy precluded imposition of the death sentence under such conditions. *People v. Henderson*, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963).

The doctrine of double jeopardy is deeply ingrained in Anglo-American jurisprudence. The fifth amendment to the Constitution provides: “*No person shall be subject for the same offense to be twice put in jeopardy of life or limb, . . . .” Each of the states has incorporated a similar clause into its system of laws.¹ The California Constitution includes a provision: “*No person shall be twice put in jeopardy for the same offense; . . . .”²

In its simplest form double jeopardy is a second prosecution for the same offense,³ and may arise when an accused is actually put to trial twice for the same crime.⁴ Normally legal jeopardy attaches in a criminal prosecution when the accused has been put to trial upon a valid, written accusation, before a court of competent jurisdiction, after arraignment, and after a competent jury has been empanelled

¹ Dangel, Criminal Law 348 (1951).
⁴ Ibid.
and sworn, or a judge lawfully sitting without a jury has begun to hear evidence.\(^6\)

A verdict of not guilty operates as an acquittal of the crime charged and of every other offense of which the defendant could have been convicted on the original charge.\(^6\) A similar rule applies to a conviction since it constitutes a bar to a subsequent prosecution for the same crime, or for any other crime of which the defendant could have been convicted on the same charge at the prior trial.\(^7\)

However, where on motion or appeal of the accused\(^8\) a new trial is secured, the defense of former jeopardy is considered to have been waived, and the defendant may again be tried for the same crime.\(^9\) Despite the latter rule, the majority of jurisdictions hold that in such a case the defendant has not waived the defense of double jeopardy as to crimes of a magnitude greater than the crime of which the defendant was originally convicted.\(^10\) In such a case the theory is that there has been an implied acquittal of all greater crimes of which the accused could have been convicted on the original trial.\(^11\)

Under California law prior to the 1958 California Supreme Court decision in \textit{Gomez v. Superior Court}\(^12\) a conviction of a lesser offense (as distinguished from a conviction of a lesser degree of an offense divided into degrees) barred prosecution upon a trial de novo for the greater offense charged, even though the first conviction had been set aside or reversed at defendant's request. The leading California case is \textit{People v. Gilmore}\(^13\) in which the defendant was indicted for murder and convicted of manslaughter. The conviction was set aside upon the defendant's motion. Upon retrial he was convicted of murder. The second conviction was reversed on appeal, the court holding that a conviction of manslaughter is in contemplation of law an acquittal of every offense charged in the indictment of a

\(^5\) Jackson v. Superior Court, 10 Cal. 2d 350, 74 P.2d 243 (1937); 14 CAL. JUR. 2d Criminal Law 175 (1954).

\(^6\) People v. Webb, 38 Cal. 467 (1869).

\(^7\) E.g., CAL. PEN. CODE §§ 654, 1023; People v. Kehoe, 33 Cal. 2d 711, 204 P.2d 521 (1949); Smith v. United States, 177 F.2d 434 (10th Cir. 1949).

\(^8\) California provides for an automatic appeal in all cases resulting in a penalty of death. CAL. PEN. CODE § 1239.

\(^9\) People v. Ham Tong, 155 Cal. 579, 102 Pac. 263 (1909); People v. Scales, 18 Ill. 2d 283, 164 N.E.2d 76 (1960).


\(^11\) Green v. United States, \textit{supra} note 10. In a minority of jurisdictions if a new trial is obtained at defendant's request the entire case is thrown open as if there had been no previous trial. The theory is that the defendant has waived the defense of double jeopardy completely, or alternatively, that the new trial is merely a continuation of the original action. For a compilation of citations of cases following the foregoing rules, Green v. United States, \textit{supra} at 216-18 n.4 (dissenting opinion).

\(^12\) 50 Cal. 2d 640, 328 P.2d 916 (1958).

\(^13\) 4 Cal. 376 (1854).
magnitude greater than the particular crime of which the prisoner was found guilty.\textsuperscript{14}

However, in \textit{People v. Keefer}\textsuperscript{15} where the court considered the issue of whether a defendant could be convicted of murder in the first degree after having appealed from a conviction of murder in the second degree, the court did not adopt the \textit{Gilmore} rule of implied acquittal. In the \textit{Keefer} case the original conviction was not considered a bar to a subsequent conviction of murder in the first degree. To achieve this result the court distinguished between lesser included crimes as opposed to lesser degrees of a crime divided into degrees. \textit{People v. Haun}\textsuperscript{16} was cited as authority for the distinction which was presumably intended by the Legislature when it created two degrees of murder. The \textit{Keefer} court, relying on \textit{Haun}, offered the following interpretation of legislative intent:

\begin{quote}
[T]he legislature recognized the fact that some murders, comprehended within the same general definition, are of a less cruel and aggravated character than others, and deserving of less punishment. It did not attempt to define the crime of murder anew, but only to draw certain lines of distinction by reference to which the jury might determine, in a particular case, whether the crime deserved the extreme penalty of the law or a less severe punishment.\textsuperscript{17}
\end{quote}

Expanding on this doctrine the \textit{Keefer} court continued:

The fact that a severer [sic] penalty is to be imposed in one case than the other does not change the effect of a previous conviction, and the defendant who, on his own motion, secures a new trial, subjects himself to a retrial on the charge of murder, whether the first verdict was guilty of the first or of the second degree. At the second trial he may, if the evidence justifies such verdict, be found guilty of murder of the first degree.\textsuperscript{18}

The \textit{Keefer} case by distinguishing the \textit{Gilmore} rule created a unique distinction in California law, a distinction which was followed\textsuperscript{19} and enlarged upon until the \textit{Gomez} decision was rendered. The distinction created was simply that as between lesser included offenses and lesser degrees of a crime divided into degrees, the doctrine of implied acquittal would apply only to convictions of the former class.

The rationale of the \textit{Keefer} court can be clarified by an examination of the wording of the constitutional provision dealing with

\textsuperscript{14} Ibid.
\textsuperscript{15} 65 Cal. 232, 3 Pac. 818 (1884).
\textsuperscript{16} 44 Cal. 96 (1872).
\textsuperscript{17} 65 Cal. at 235, 3 Pac. at 820.
\textsuperscript{18} Id. at 235, 3 Pac. at 821.
double jeopardy. Article I, § 13 of the California Constitution provides: "No person shall be twice put in jeopardy for the same offense; . . . ." In construing this phrase the term "offense" has been judicially declared to mean the identity of the crime charged, and not the act by which, or the transaction in which, the crime was committed. View ing the crime of murder in light of this interpretation, the courts found that the intent of the Legislature in dividing the crime into two degrees was not to re-define the crime of murder but, rather, was merely to provide a guide for the jury in determining culpability. The crime of murder remained a single offense: the unlawful killing of a human being with malice aforethought. Therefore, after a conviction of a lesser degree of a crime divided into degrees it was deemed proper upon a trial de novo to allow a conviction of any degree of the crime since the crime still constituted in contemplation of law only one offense. One of the many problems inherent in such a differentiation is the difficulty encountered in distinguishing between a lesser included offense and a lesser degree of a crime divided into degrees. In many cases such a fine distinction could mean on appeal the difference between risking several years imprisonment or one's life.

A collateral problem is the application of the doctrine of implied acquittal to cases where significantly differing penalties are provided as punishment for the same crime. This issue was first raised in California in 1907 when the California Supreme Court, following the reasoning of the Keefer case, held in People v. Grill that a defendant appealing from a conviction of first degree murder which carried a penalty of life imprisonment could be sentenced to death upon a retrial gained by his initiative. In support of its holding the court said:

The discretion given to the jury to mitigate the punishment upon a conviction of murder in the first degree, and inflict imprisonment for life only, does not divide, . . . that degree of murder into two degrees, but merely reduces the punishment. . . . The former conviction was not an acquittal of the first degree of murder nor of any degree thereof.

23 People v. Grill, 151 Cal. 592, 91 Pac. 515 (1907) (defendant sentenced to death after appeal from conviction carrying life sentence).
24 E.g., CAL. PEN. CODE § 190 provides life imprisonment or death as penalties for first degree murder.
25 151 Cal. 592, 91 Pac. 515 (1907). Keefer relies on People v. Haun for its interpretation of legislative intent whereas Grill cites no authority but expresses the same view.
26 151 Cal. at 598, 91 Pac. at 517.
Although the Grill court disclaimed any express reliance on the Keefer line of cases, it is apparent that its holding is, nevertheless, consistent with and impliedly dependent upon the reasoning in Keefer.

In 1958 in Gomez v. Superior Court\(^{27}\) the California Supreme Court was confronted with the first of the two latent problems created by its theretofore unchallenged position.\(^{28}\) The issue presented in Gomez was whether or not petty theft was a lesser included offense within, or a lesser degree of, the crime of grand theft. Faced with the necessity of making an arbitrary distinction, the court chose to abrogate the rule which made the distinction necessary. In overruling itself the court relied heavily upon the reasoning of the United States Supreme Court in Green v. United States.\(^{29}\) There, a divided Court held that a defendant convicted by a jury of second degree murder could not be retried on the original charge of first degree murder after a successful appeal because to do so would place him in jeopardy twice for the same offense in violation of the fifth amendment of the federal constitution. In considering the implications of a contrary rule the Court remarked:

\[
[A] \text{defendant faced with such a 'choice' takes a 'desperate chance' in securing the reversal of the erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma.}^{30}\]

The Gomez court, accepting this rationale, rejected the arguments of the prosecution and stated that there was no sound reason for the distinction drawn by the California cases since neither the state constitution nor the statutes required it.\(^{31}\) Since Gomez eliminated what had become a spurious distinction, the court was no longer compelled to apply that rationale in determining the collateral issue of implied acquittal in cases involving significantly differing penalties for the same offense.

Since the doctrine of implied acquittal is now the accepted rule in cases of both lesser included crimes and crimes of lesser degree, the Henderson court had no sound basis upon which to hold otherwise in considering the penalty issue. The court followed the rationale of Gomez and applied the doctrine of implied acquittal to the penalty issue and in holding that the defendant was twice placed in jeopardy by a second conviction carrying the death sentence stated:

\[^{27}\] 50 Cal. 2d 640, 328 P.2d 976 (1958).
\[^{28}\] There is a paucity of dissenting opinions in the California cases dealing with this subject.
\[^{29}\] 355 U.S. 184 (1957).
\[^{30}\] Id. at 193.
\[^{31}\] 50 Cal. 2d at 647, 328 P.2d at 981.
A defendant's right to appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal.32

Although the Henderson court achieved a reasonable result in light of the Gomez rationale, in doing so it necessarily extended the legislative intent by establishing what seems to be two grades of first degree murder: (1) an atrocious, sordid crime committed for personal profit or by an habitual criminal, justifying the imposition of the death penalty, and (2) murder without the vicious elements which characterize (1) and therefore justifying the imposition of a penalty of life imprisonment only.33

Such an extension of legislative intent could have far-reaching implications in California penal law. A series of decisions firmly establishing an additional division of the crime of first degree murder by judicial fiat would probably necessitate legislative consideration of the propriety of such a fractionization.

The creation of a new offense within the crime of first degree murder necessitates a re-examination of the justification for applying a particular penalty. If such a division, based primarily upon express considerations of culpability and elements of atrociousness, is to be created, reason dictates that the death penalty be limited to the higher of the two grades of first degree murder. Such a limitation, whether based upon case law or upon statute, would be consistent with the application of the implied acquittal doctrine espoused in the Henderson decision. The fundamental principle upon which the Henderson decision is based is simply that a conviction entailing imposition of the penalty of life imprisonment is by implication a finding by the trier of fact that the offense is devoid of some element warranting the death penalty. Would it not be logical to apply this concept to the penalty issue in the original trial and thereby distinguish from the outset the factual basis upon which the conviction and penalty rest? By establishing such a doctrine either judicially or legislatively and requiring the trier of fact to be governed by its provisions from the outset, the death penalty and the factors upon which its imposition depends could be expressly passed upon by the trier of fact and would thereby become tangible, positive elements capable of definitive proof and overt defense. Such a requirement

32 60 Cal. 2d at 497, 386 P.2d at 686, 35 Cal. Rptr. at 86.
33 See 38 Dick. L. Rev. 276. This conclusion does not necessarily follow from the decision in Henderson, but rather, is drawn by implication. The distinguishing elements noted are merely illustrative, and do not reflect any absolute finding, nor preclude distinction based on other grounds.
would undoubtedly remove much of the aura of uncertainty which now surrounds the role of the trier of fact in determining the imposition of the death penalty. If the death penalty is to be retained it should be made a consequence of definite acts and circumstances, rather than a matter to be determined by the trier of fact by means of some ethereal, intuitive sense of justice.

The implications of the Henderson decision not only illuminate the existence of a fundamental problem in California penal law, but also supply the impetus for its ultimate solution. The apparent creation of two grades of first degree murder affords an opportunity for a complete redefinition of the crime of first degree murder and its attendant penalties.

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