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VIGNETTES OF THE CRIMINAL COURTS[1]

CHARLES C. ARADO[2]

CHARGED WITH KILLING WITNESS TO A ROBBERY

A policeman in civilian clothes was held up and wounded. A colored garage attendant was witness. The defendants on trial were charged with having returned the following week for the purpose either of threatening or doing away with this eye-witness. The theory of the State was that the defendants had been mistaken as to the identity of their victim, the defendant appearing at the trial as a witness against them. Although the State's theory sounded far-fetched, it may have been true. In all events it was a difficult contention to sustain. The men on trial were arrested in California several months after the commission of the crime, and were now being called upon to give a satisfactory reason for having changed their residence. The newspapers described them as noted gangsters.

During the selection of the jury the prosecutor was in a jovial mood and noticeably friendly toward his adversary. Here was defense atmosphere. It lent effectiveness to everything that the defending attorney said or did. At the same time the tension in the jury box was relieved. The jurors were made to feel that their burden would be light. If the prosecuting attorney were friendly and genial, the jurors certainly should not scowl during these preliminary proceedings.

The jurors had been questioned by the court as to their freedom from any conscientious scruples against the infliction of the death penalty, so nothing was said about it by the attorneys. It is an advantage to the defense that this gruesome inquiry be behind them. The thought of imposing the death penalty is then not kept fresh in the jurors' minds. An opportunity is offered to propound a number of questions which will eradicate this unpleasant feature of their duty from their consciousness. It occupies a steadily decreasing hold upon their imagination, until, by the time that the selection of the panel has been completed the minds of the first four will be absorbed with other theories of law and evidence and the bugbear in every murder trial (from the defense viewpoint) will have been almost wiped away.

[1] The last contribution under this general title, and by the same author, may be found in this Journal, XXVII, 1, 31-44.

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There was nothing conspicuous about the appearance of the three defendants. Their ages ranged from thirty-two to forty years.

The judge never interrupted the proceedings. His attention was so fixed upon the reading of documents and books before him that it was ten minutes to one when the defending attorney stepped before the court and suggested a recess. The court immediately granted it. This incident caused the jury to lean toward the defense attorney for two reasons: First, they were impressed with his consideration of their comfort; secondly, they felt that this lawyer must have had the favorable ear of the court for the latter to grant his request so readily. These are the little things that help win verdicts.

A juror stated that he was a foreman at the Western Electric Plant. Counsel asked him about the number of years of service with that company, the number of men under his management, and the nature of his work. With this approach the position in life of the juror was stressed. He relished this reference to his dignified office.

A juror who stated that he had previously testified fo the State in a criminal case, as an eye-witness, was excused.

An employee of the International Harvester Co. was also excused. This was due to the sensational $80,000 payroll hold-up occurring at the plant a few years ago. In the trial which followed, counsel in this case had appeared for the defense. Naturally he felt that these employees would be bitterly prejudiced against gangsters.

He asks only the vitally important questions concerning place of birth, residence of family, work record, previous jury service, and possible personal interest in the outcome of any criminal trial. He then asks, "Do you understand that you are enforcing the law just as much when you acquit in a proper case as when you convict in a proper case?" Another question which he asks frequently is, "If you were the attorney for the defendant, and there were twelve men with your frame of mind, would you be willing to accept them to try the issues in your case?" In conclusion he asks, "Is there any reason that you know why you couldn't be fair to both sides?" He does not go into a minute explanation of legal propositions in the defendant's favor. Not once does he mention that a defendant is presumed innocent or that the indictment is not to be considered as evidence against him. He seems to rely exclusively upon his five-minutes study of the man before him while propounding his

questions, to determine whether the juror will prove a favorable prospect.

Sitting behind the defending attorney is a redoubtable grey-haired investigator who has long given loyal support to the leading prosecutors in their important triumphs. He has been content to sit in the background, to receive no public acclaim for his work. The lawyers with whom he cooperated, however, would not hesitate to admit that much of the success following their clever sallies and brilliant trial moves were due to this quiet but brainy officer. He has prepared so many cases for trial and sat through them that he has become a past master in the art of gathering evidence and presenting it. He not only prepares evidence to make out a case, but is able to detect the motive of opposing counsel during the progress of the trial and to instigate a counter-offensive movement. He will sometimes shift his theory, developing points in testimony which will block the path of the opposition. Rebuttal witnesses will be called who will completely demolish opposing strategy. He renders invaluable aid to defending attorneys, for he knows all the tricks of prosecuting. He also has an entree into the office, which might prove very valuable under certain circumstances. Respect for his keen intelligence was clearly demonstrated when a word from him caused this leading defense attorney to refrain from further questioning a prospect. He responded instantly, "Mr. ———— will be excused."

Opposed to the defense in this case is an investigator who likewise has had vast experience in assisting prosecuting attorneys try their cases. These two men were invariably assigned to spectacular trials. Now the anomalous situation is presented of their matching wits against each other.

Upon completing an examination of a panel of four jurors, counsel says, "The defense will tender the new ones." This is the easiest way to handle the matter, though it sounds a little more business-like and makes a better impression to use the names of the jurors as, "The defense tenders Mr. ———— for examination." From the orderly manner in which the examination was proceeding, it appeared that the jury would be selected within a short time, considering the notoriety of the principals, and in spite of the fact that State and defense were very cautious. Haste makes waste when a defendant's fate is to be placed in the hands of a jury, as it does in many other instances. Yet both defense attorney and his investigator were marvels when it came to sizing up character in a hurry.

The attorney asks, "Are you a member of any organization that is attempting to tell the judges and juries how they should try cases? If you have any pre-conceived notions as to how this case should be tried, not consistent with the law that we have outlined here, we ought to learn of them.

At one period he asks, "Do you know the defendants or any witnesses for the State? Maybe the prosecutor ought to read those names to the jurors." The judge promptly instructed the prosecutor to do so. The defense investigator had interviewed all of them and knew exactly what they were going to say upon the stand. If the State failed to call these witnesses, or called any not named, the defense was in a position to argue against this discrepancy.

Lawyer and investigator wrote questions and answers in their notebooks. Another prominent criminal law never takes a note during his examination of the jury. Here is an example of directly different trial methods, with marked success attending each of them.

It was surprising that there was no court reporter at this stage of the trial. It made the case appear to be one in which there was a scarcity of funds. As a matter of fact, the defense had nothing to fear because they knew that this judge would be fair to both sides. He always leaves the examination of jurors entirely in the hands of the attorneys. With no necessity for a court reporter, the inference of indigency due to failure to provide a court reporter during the selection of the jury might prove a point in the defendant's favor.

The State failed to substantiate its theories by competent evidence and the jury acquitted the defendants.

Summary

The animosity toward a defendant charged with killing a material witness to a case might easily be imagined. A juror is likely to place himself in the same position as that of the witness. He too has been called to do his duty towards the State. In addition, the jury in this case could see that the defendant's were professional bandits. Yet, the defense was so skillfully interposed that the State found it impossible to make out a case against these men. The account shows that there is sharp distinction to be made between the heinousness of an offense and the evidence in the hands of the State relied upon to secure a conviction. No matter how serious the offense, unless there is provable evidence to be introduced against the accused, there is not much reason for worry by defense

counsel in the case. A trial court instructs the jury that they are to consider only evidence that he decides is admissible. If the commission of the offense has been perpetrated in a manner which leaves no witnesses available to substantiate it, there can be no legally competent judgment returned against an accused.

TWO MEN SHOOT AT EACH OTHER. THE WOMAN FALLS.

The defendant, a man about sixty years of age, approached the home of Frank Holly at one o'clock in the morning. It appeared that the latter had put out all lights in the house to lure his victim into it, since he had suspected him of having improper relations with his wife. When Mrs. Holly learned what was going on she rushed out of her room with arms upraised, crying, "Frank, don't do it." At this moment, half a dozen shots were fired by each man. In the fusilade, Mrs. Holly fell mortally wounded.

In his final argument, the defending attorney talked the entire afternoon. He must have brought his mind to bear upon a thousand physical facts, arguing that each of them was consistent with his theories of innocence. There was an air of supreme confidence about his demeanor, yet he did not intend to omit a single item which might help his client.

The State could not establish the fact that it was the defendant's gun which discharged the fatal bullet. It was also apparent that the husband of the deceased had started the shooting. Because the defendant was the intruder in the triangular affair, however, the State chose to make him the victim of their attack. Defense counsel stressed the point that the husband of the victim had been a political worker in the ward in which the two assistant State's attorneys were leaders.

It was shown that ten days before the trial the two prosecutors interviewed various witnesses at Holly's home. Defense counsel wittily referred to the home as a branch of the State's attorney's office, shouting, "Holly and these two prosecutors were brother-precinct captains."

Relying upon a theory of self-defense, the main difficulty, as heretofore pointed out, lay in the fact that the accused was an intruder.

It appeared from the evidence that the defendant had been in an auto with Mrs. Holly and three other married men on one occasion. While there was no direct evidence of intimate relations, the State's theory was made clear.

The State explained Holly's shooting upon a theory that he was insanely jealous of his wife.

The defendant had never been in any criminal trouble and produced a number of character witnesses to testify as to his good reputation in the community in which he lived for peacefulness and quietude and as a decent, law-abiding citizen.

In the course of his argument, defense counsel exclaimed, "According to the State's original interpretation of the facts, the accused was guilty of an assault with intent to kill the husband. That was a bailable offense. The powers that be, however, arranged for the lower court to convene at a late hour in the night and issue a warrant charging the defendant with murder. He was then held *incommunicado* a week."

A strong point in the state's case lay in the fact that the accused was carrying a gun. The prosecutors maintained that he knew he was playing with fire and was carrying a gun to see it through, to kill if necessary. Holly, on the other hand, had a right to have a gun in his home. The State could also explain that it was natural for the husband to shoot an intruder coming into his home at such a late hour in the night.

The twist of fate in this case was most unusual. Exactly the same set of circumstances would not recur in a century. Each man intended to kill the other. Both loved the innocent victim. There were innumerable points of argument on either side. A jury would return a verdict according to the particular slant that they would take upon the whole matter. A subsequent jury might just as reasonably return an opposite verdict.

Defense counsel made it clear that the jury was to consider it as a murder case, and not manslaughter. He wished to avoid a compromise verdict. He evidently felt that the jury would not send the defendant to the penitentiary for a minimum period of fourteen years in a case where he had shot to save his life.

The jury could not look upon this fracas as one in which the accused had planned to commit murder. It was plain to them that he would be one of the last men in the world to kill Mrs. Holly intentionally. The shooting was the result of a quarrel which had not been anticipated. The firing, which resulted in death, was an offshoot of a quarrel with a husband who happened to be at home. The defendant had no intent to kill even Holly. His only purpose in coming was to see the wife.

According to the State's own theory, the defendant was an admirer of Mrs. Holly. This was consistent with the defense conten-

tion that death was the result of an accident; a misadventure. The accused must have suffered intensely for having been a factor in bringing about her death. While the State argued that the defendant's wrong-doing was the source of all the trouble, the defense maintained that the husband's quick shooting was the direct cause of the tragedy.

If Holly, himself, had been killed the State would have had a stronger case. There would have been no element of misadventure, then, because of the previous bad feeling between the men. Mrs. Holly's death, however, characterized the affair as an accident. It revealed a muddled affair in which two men had pulled the triggers of their guns too eagerly. Had they brought bare fists into play instead of revolvers, Mrs. Holly would have been living today. A fair conclusion from the evidence was that her death was a pure accident, far removed from the intention of either party to consummate.

The prosecutor's last words to the jury were, "I know that you will do your full duty. If ever a set of circumstances warranted the extreme penalty, here it is. He uttered this sentence in a low, emotional pitch, as though it were difficult for him to express this weighty personal conclusion. Was he asking for death, with the hope of securing a manslaughter verdict? A minimum penalty for murder, fourteen years, should have been highly pleasing to him.

At one stage in his final argument the prosecutor said, "I'll now answer defense counsel why the dying declaration of Mrs. Holly was not introduced. When the accused was brought before Mrs. Holly, she exclaimed, "That's the man who shot me."

Defense counsel asked the prosecutor to tell about her subsequent conversation. The latter replied sharply, "I refuse to inject error into this record."

An experienced investigator had appeared for the defense to testify about bullet holes. Also, two doctors appeared for the State in connection with the removal of bullets from the body of the deceased.

The police had testified that upon the defendant's arrest he said, "I guess I've put the rope around my neck." Policemen frequently utilize such an expression in a criminal trial. It forms a very impressive approach for the prosecutor. The jury will remember a passage of this character at the expense of much evidence of less sensational character. The State might have closed its argument with these words ringing in the jurors' ears.

The prosecutor made the facts clearer than defense counsel had

done. Perhaps it was to the advantage of the defense that the facts remained hazy. The two State's attorneys fought doggedly for a conviction. Really a defense case, they balanced matters so that the result was seriously in doubt when it finally went to the jury.

According to the prosecutor, the defendant came to the home and rang the bell. No one answering, he was heard to exclaim, "I'll make you open the door, you ————." He then came upstairs and demanded to be let in. He fired at the threshold of the door. Previous to his approach to the Holly residence he had loaded his gun with eight cartridges and carried six more of them in his pocket. After the shooting, he hurried from the scene. He went to a nearby delicatessen store where he had a couple of drinks. It was at this shop that he mumbled to a mutual friend, "I have just had a shooting affair with Frank. Dorothy fell. I guess I've put the rope around my neck." He then went back to Holly's home and walked up the rear steps still determined upon gaining entrance. He was arrested at this spot by an officer and brought into the presence of Mrs. Holly who said, "He just shot me."

The defense introduced evidence to show that the husband had threatened to "get the defendant." There was also evidence that the accused had made similar threats. But the latter occurred two years before the shooting. Previous threats by each party were held admissible upon the theory that they tended to characterize the shooting.

Defense counsel contended that the accused rang the door bell and that there was no unlawful entrance.

It seemed a mistake for the State to have these prosecutors appearing in the case, since they were personally acquainted with all the parties involved. The defense made capital of the point that it was a prosecution of the heart instead of the head. At any rate, the jury returned a verdict of not guilty.

Summary

Although the indictment charged the defendant with a wilfull slaying, the facts were clear that the accused had no intention to kill the victim. Upon the theory that a person who acts unlawfully is responsible for the consequences even though a specific intention is not established, the state charged the accused with murder. The intention of the defendant to kill the husband was transferred when the wife became the victim. The manner in which self-defense is developed is pointed out.