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Criminal Law And Procedure—Manslaughter The Same In New York And North Carolina For Purpose Of Habitual Criminal Statute

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interest in the preservation of the deterrent effect of the sure and certain, as well as expeditious and orderly, administration of criminal justice. It has been said that "Justice is not a one-way street—that law-abiding citizens and law-abiding communities are entitled, at least equally with criminals, to the protection of the law."[17]

J. P. M.

MANSLAUGHTER THE SAME IN NEW YORK AND NORTH CAROLINA FOR PURPOSE OF HABITUAL CRIMINAL STATUTE

After defendant was convicted of manslaughter in the first degree, the State filed an information at the time of sentencing which charged him as a second felony offender. Previously, the defendant had been convicted of common law manslaughter in North Carolina. On the basis of these convictions, defendant was sentenced under Penal Law section 1941 and received an indeterminate term of twenty to forty years. After serving six years of that term, defendant commenced this coram nobis proceeding on the ground that the North Carolina conviction was not one which could form the basis of a conviction under the New York habitual criminal statute.[1] Special Term denied the application, and this decision was unanimously affirmed by the Appellate Division.[2] *Held,* affirmed, two justices dissenting. Though manslaughter in North Carolina is a common law rather than a statutory crime, it is defined as "the unlawful killing of a human being without malice and without premeditation,"[3] which amounts to the same prohibition as under section 1049 of the Penal Law, and therefore, the North Carolina crime is a valid predicate for second felony sentencing in this state. *People v. Perkins,* 11 N.Y.2d 195, 182 N.E.2d 274, 227 N.Y.S.2d 663 (1962).

Section 1941 subdivision 1 of the Penal Law states:

> . . . a person, who, after having been once or twice convicted within this state, of a felony, of an attempt to commit a felony, or, under the laws of any other state, . . . of a crime which, if committed within this state, would be a felony, commits any felony, within this state, is punishable upon a second or third offense, as follows:
>
> If the second or third felony is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than

victed criminal who escapes sentencing on the basis of the rule laid down in the instant case. The record shows (supra note 1) that since April 9, 1953, when the Bronx County Court failed to sentence him he has been incarcerated almost continuously. His career in crime includes charges of assault, rape, robbery, felonious assault upon a police officer, possession of burglary tools, as well as parole and probation violations. If the delayed sentencing of the relator in the instant case has worked an injustice, it does not readily present itself upon a close reading of the record.

17. Commonwealth v. Redline, 391 Pa. 486, 514, 137 A.2d 472, 483 (1958) (dissenting opinion).

1. N.Y. Penal Law § 1941.
2. People v. Perkins, 13 A.D.2d 998, 216 N.Y.S.2d 762 (2d Dep't 1961).
3. State v. Benson, 183 N.C. 795, 799, 11 S.E. 869, 871 (1922).

> his natural life, then such person must be sentenced to imprisonment for an indeterminate term, the minimum of which shall be not less than one-half of the longest term prescribed upon a first conviction, and the maximum of which shall be not longer than twice such longest term.

This section has been upheld as constitutional.[4] The fact that it imposes heavier penalties on second and third offenders by no means places a second punishment on the first offense but merely increases the punishment for the latest conviction.[5] If the prior conviction is from another jurisdiction, the conviction must be of a *crime* which if committed in New York would be a felony.[6]

In order for the prior conviction in a foreign jurisdiction to serve as the basis for sentencing under the habitual criminal statute in New York, the minimum statutory limit defining the crime in that foreign jurisdiction as a felony must define a crime which is a felony in New York; in other words, the minimum requirement for a felony in a foreign jurisdiction must be at least the same or greater than the New York requirement. In *People v. Olah*,[7] the defendant had previously been convicted of larceny, a felony. The minimum statutory limit in New Jersey for such a felony was $20; the corresponding New York limit was $100. It was held that the defendant, who had stolen property valued at $200, had not committed such a crime which if committed in New York would be a felony; therefore, he could not be sentenced as a second felony offender. It is the *statute* in the foreign jurisdiction, not the indictment charging the specific acts, which defines the *crime*. If the foreign indictment charging a crime specifies acts which more than meet the minimal requirements for that state's statute, the courts in New York will refrain from considering the surplusage contained in that indictment. Thus, in *Olah* the amount in excess of $20 ($180) was surplusage and not considered by the court because all that was material was that defendant stole $20. *Olah* is in "accord with the generally accepted judicial feeling that the length of a defendant's sentence should be within the discretionary power of the trial judge instead of subject to the legislative mandate of the recidivist law."[8] That decision also recognizes the possibility that a defendant, who realizes that he has undoubtedly violated the criminal standard in the foreign state, might not, at trial in that state, defend himself on the issue of the extent of his criminal act, never anticipating that his conviction may serve as the basis of a second felony offense under the habitual criminal statute. For example, the defendant in *Olah*, knowing that he had stolen more than $20 and, thus was guilty of a felony, may have reasoned that it was useless to argue that he had stolen less than $100 (an amount which was only a misdemeanor in New York).

4. People ex rel. Fernandez v. Kaiser, 230 App. Div. 646, 246 N.Y. Supp. 309 (3d Dep't 1930).
5. People v. La Sasso, 182 Misc. 538, 44 N.Y.S.2d 93 (County Ct. 1943).
6. People v. Olah, 300 N.Y. 96, 89 N.E.2d 329 (1949).
7. Ibid.
8. 50 Colum. L. Rev. 247, 250 (1950).

In the instant case, the defendant claimed that he could have raised the defense, coming to the aid of others, on a manslaughter charge in New York, whereas he was not allowed this defense in North Carolina. Though he had not pleaded such a defense in North Carolina, he contended that there was a variance between the definition of manslaughter in the two states, i.e., they were different crimes. The Court held that where the only difference between the law of New York and that of the foreign jurisdiction is one of *defense,* the prior conviction in the foreign jurisdiction is a conviction "of a crime which, if committed within this state, would be a felony . . . ," and, therefore, can serve as the basis for the sentencing under section 1941 of the Penal Law. The dissent objected that manslaughter in New York and manslaughter in North Carolina are different crimes by virtue of the availability of a defense in New York not available in North Carolina, and it is immaterial whether defendant actually did kill in the defense of another.

Obviously, section 1941 of the Penal Law acts as a deterrent to criminals. However, the principal legislative intent was to make certain that those who have shown themselves unable to live in society (habitual criminals) should be removed from society by lengthy prison terms. It is not reasonable to assume that the Legislature intended that merely because a defendant was previously convicted in a foreign jurisdiction of a crime denoted as a felony in that jurisdiction that the conviction should serve as the basis for second felony sentencing without regard to the acts which the defendant actually committed. If the defendant is to be sentenced in New York under a New York statute, a New York standard noting which crimes constitute felonies should be applicable. For example, if the defendant in the *Olah* case had stolen over $20 (a felony in New Jersey) and under $100 (a misdemeanor in New York), it would be unjust to consider this as a second or third felony in New York. The court in *Olah* went far beyond this construction and indicated that, no matter how great the amount stolen, a conviction under the New Jersey larceny statute could not serve as the basis of a second felony sentencing. This decision was not in accord with the legislative intent apparent in Section 1941. It may be that there were excellent policy reasons for the *Olah* decision. Penological studies have indicated that habitual criminal statutes are only retributive, and in no way aid the reformation of prisoners. However, even in this light, there are two possible criticisms of the *Olah* decision. First, if the Legislature enacted section 1941 of the Penal Law with an obvious purpose, the Court should not have emasculated that purpose.[9] Second, even if the language of the statute was unclear and construction by the Court was necessary, the Court should

9. 25 N.Y.U.L. Rev. 653, 655: "It would seem that the legislative intent to punish more severely those who have previously been convicted of acts which in New York would be a felony is not being carried out and hardened criminals with past convictions will receive lighter sentences on a mere technicality of law"; 63 Harv. L. Rev. 1448: "[T]he effect of the present construction is to deprive the public of much of the protection that habitual offender laws have intended to give."

have stated the true basis for its decision, namely, the policy considerations, and should not have clouded the area with illogical semantics. The problems caused by such a decision can easily be discerned in the instant case. Here, *Olah* was not overruled but in fact was relied on by the majority. The Court declared that the crimes were identical in both states and only the defenses to that crime differed. If *Olah* is to be followed, this distinction is invalid. As the dissent stated, "these differences support [defendant's] . . . conclusion that he *could have been convicted* in North Carolina of acts which would not support a conviction in this state."[10] That principle was apparently vital in the *Olah* decision. The Court of Appeals in *Olah* and in the instant case has used questionable reasoning in arriving at its decision. The former case appears to be diametrically opposed to the legislative intent of section 1941; the latter case, an exception to *Olah,* is in accord with the legislative intent of this habitual criminal statute.

Bd.

OPINION OF DEFENDANT'S SANITY BASED ON DIRECT OBSERVATION SHOULD HAVE BEEN ALLOWED ALTHOUGH PRECEDED BY HYPOTHETICAL QUESTION

Defendant was indicted for murder in the first degree; his sole defense was predicated on the theory of insanity. In support of defendant's contentions, his expert witness testified that psychiatric examinations on three occasions before trial revealed that defendant had a syphillitic condition resulting in brain damage and had a medical record of two head injuries resulting in unconsciousness at the time of each injury. Following this testimony, the doctor was asked the hypothetical of whether a person having a similar history, who on the night of the killing consumed a considerable quantity of liquor, would be laboring under such a defect of reason as not to know the nature and quality of his act or that such act was wrong. The doctor characterized such a person as one "suffering with pathological intoxication" and "insane." Defense counsel then asked him if it was his testimony that the defendant was insane at the time of commission of the act. The answer, however, was precluded by an objection which was sustained, but the court later asked this question of a medical expert for the prosecution, who had made an examination of defendant before trial to determine defendant's capability of understanding the charge, and he answered that the defendant was not insane *at the time of his act.* The district attorney, in his closing argument, implied to the jury that since the prosecution witness testified to actual experience and defense counsel merely to insanity based on the hypothetical, the prosecution witness' testimony was entitled to more weight. Defendant appealed from his conviction, and the Court of Appeals, two judges dissenting, reversed and ordered a new trial. *Held*: failure to allow the defense witness to testify as to his opinion based on

10. People v. Perkins, 11 N.Y.2d 195, 197, 182 N.E.2d 274, 276, 227 N.Y.S.2d 663, 665 (1962).