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## Criminal Procedure - Indictments - Due Process - Former Acquittal

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## RECENT DECISIONS

CRIMINAL PROCEDURE—Indictments—Due Process—Former Acquittal—A defendant, once acquitted of murder, may be retried under a manslaughter indictment and convicted of manslaughter, although the evidence presented proved the crime of murder but not that of manslaughter.

*Commonwealth v. Frazier*, 420 Pa. 209, 216 A.2d 337 (1966).

The Supreme Court of Pennsylvania, speaking through Chief Justice Bell, has decided that a defendant acquitted on a charge of murder may be retried, and convicted of voluntary manslaughter where the evidence in the second trial is sufficient to sustain a murder conviction, but not that of voluntary manslaughter. Defendant was indicted under two separate bills of indictment in 1961; one for murder, and the other for voluntary and involuntary manslaughter. The following year he was tried for murder. The jury found the defendant guilty of voluntary manslaughter. Subsequently the defendant appealed to the Pennsylvania Supreme Court, which reversed the verdict of the trial court because of prejudicial error in the instructions to the jury and a new trial was ordered.<sup>1</sup>

Defendant was again brought to trial on June 21, 1965; this time he was tried for voluntary and involuntary manslaughter under the second indictment. When the prosecution concluded its case the defendant demurred on the ground that the State had failed to establish the necessary elements of voluntary manslaughter; namely, passion or legally adequate provocation.<sup>2</sup> The defendant's demurrer was sustained by the trial court, whereupon the Commonwealth appealed.<sup>3</sup>

In Pennsylvania, a jury verdict in the first trial, finding the defendant guilty of voluntary manslaughter, has the legal effect of acquitting him on the charge of murder.<sup>4</sup> In such a case as this, however, although the evidence is legally insufficient to establish the elements of manslaughter, the jury may return a manslaughter verdict regardless of this fact. The only requirement is that the evidence be such as would support a murder conviction.<sup>5</sup> The defendant, as a result, may not be retried for murder in that this would violate his right to be protected from being twice put in

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1. *Commonwealth v. Frazier*, 411 Pa. 195, 191 A.2d 369 (1963).

2. *Commonwealth v. Root*, 403 Pa. 571, 170 A.2d 310 (1961); *Commonwealth v. Nelson*, 396 Pa. 359, 152 A.2d 913 (1959).

3. *Commonwealth v. Frazier*, 420 Pa. 209, 216 A.2d 337 (1966).

4. *Commonwealth v. Flax*, 331 Pa. 145, 200 Atl. 632 (1938); *Commonwealth v. Deitrick*, 221 Pa. 7, 70 Atl. 275 (1908); *Commonwealth v. Gabor*, 209 Pa. 201, 58 Atl. 278 (1904).

5. *Commonwealth v. Frazier*, *supra* note 1.

jeopardy for the same offense.<sup>6</sup> He can and was retried for voluntary manslaughter in the *Frazier* case after the supreme court reversed the trial court's previous manslaughter verdict.<sup>7</sup>

The court, in overruling the defendant's demurrer, justified the position taken on the basis of public policy. According to Chief Justice Bell, the primary purpose of our penal laws is to protect society. In order to accomplish this purpose all criminals must be incarcerated.<sup>8</sup> The court failed, however, to go any further than expounding its own jurisprudential attitude toward the criminal law and its purpose. No authority whatever was cited to sustain the position taken. The apparent legal implications which the case presented were ignored. In short, the opinion as written is void of any true legal analysis.

The court has now extended the Pennsylvania rule of allowing a verdict of manslaughter to be returned on a murder indictment<sup>9</sup> to include the present fact situation where the indictment is for manslaughter, and the evidence would support a murder conviction. Two constitutional issues, undiscussed by the majority, but which certainly must merit some consideration from the court are those of "due process"<sup>10</sup> and "double jeopardy," as it effects one's right to due process.<sup>11</sup>

The dissenting opinions of Justices Jones<sup>12</sup> and Cohen<sup>13</sup> recognize that the due process argument should have been considered by the majority of the court. Both dissenting justices were dissatisfied with the decision since it enunciates a principle of law contrary to the concept of "fundamental fairness" afforded those accused of crime in our society. The defendant had been indicted for voluntary manslaughter, not murder. Notwithstanding this fact, the evidence produced by the Commonwealth alleged the crime of murder, a crime of which the defendant had been previously acquitted. In overruling the defendant's demurrer, the court has permitted a defendant to be tried and convicted for a crime which he did not commit, at least according to the allegations and the evidence. As Justice Cohen stated:

No appeal to emotions . . . should deprive any accused of the right to know the nature of the crime with which he is charged and to require the evidence upon which he is convicted to con-

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6. Commonwealth *ex rel.* Walker v. Banmiller, 186 Pa. Super. 338, 142 A.2d 758 (1958).

7. Commonwealth v. Frazier, *supra* note 1.

8. Commonwealth v. Frazier, *supra* note 3.

9. Commonwealth v. Comber, 374 Pa. 570, 97 A.2d 343 (1953).

10. U.S. Consr. amend. XIV.

11. *Ibid.*

12. Commonwealth v. Frazier, *supra* note 3, at 214, 216 A.2d at 339.

13. *Id.* at 217, 216 A.2d at 340.

form with the charged crime. To do so deprives him of his liberty without due process.<sup>14</sup>

The law of the Commonwealth of Pennsylvania protects its citizens from the perils of retrial after an acquittal.<sup>15</sup> In the *Frazier*<sup>16</sup> case, after the defendant had been acquitted of murder, the court permitted the murder indictment<sup>17</sup> to be transmitted into a charge of manslaughter, the effect of which was that although the jury could not return a verdict of murder, they could treat the manslaughter indictment as though it were one for murder in order to return the lesser verdict of manslaughter. The court has extended the merger doctrine which permits a manslaughter verdict where the indictment is for murder to the *Frazier*<sup>18</sup> situation. There, although the indictment was for manslaughter, the effect was to retry the defendant for murder, with the not insignificant exception that the jury was deprived of returning a murder conviction. In all other respects, however, the court has treated the manslaughter indictment as though it were synonymous with one for murder. The question such a course of action raises, however, is whether this is a violation of the defendant's constitutional rights<sup>19</sup> by subjecting him to retrial for a crime of which he was formerly acquitted.<sup>20</sup>

The majority of the court failed to consider this aspect of the case and as a result these issues are left unresolved. Insofar as the court failed to consider them, one must infer that the court has found them devoid of any merit.

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14. *Ibid.*, 216 A.2d at 341.

15. Commonwealth *ex rel.* Walker v. Banmiller, *supra* note 6. See also, *United States v. Wilkins*, 348 F.2d 844 (2d Cir. 1965), wherein the Court of Appeals for the Second Circuit has found that the double jeopardy provision of the United States Constitution is applicable to the states through the "due process" clause of the Fourteenth Amendment. The Pennsylvania courts, governed by the Third Circuit Court of Appeals on federal questions, is not restricted by this decision.

16. Commonwealth v. Frazier, *supra* note 3.

17. Commonwealth v. Frazier, *supra* note 1.

18. Commonwealth v. Frazier, *supra* note 3.

19. *United States v. Wilkins*, *supra* note 15.

20. Commonwealth *ex rel.* Walker v. Banmiller, *supra* note 6.