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Criminal Law and Procedure - Responsive Verdicts

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parently, the entire arrangement for the purchase of the timber from the landowner was the result of negotiations carried on exclusively by the company; that McAllister was neither present at the time nor was he aware that the agreement to purchase was contemplated until after it had been concluded; and that it was the company to whom the landowner was to look for payment. Unfortunately, the court did not see fit to devote any portion of its opinion to an explanation of how McAllister acquired ownership.[12]

It would appear that the result reached in the present case could more easily be justified on the ground that the work which was performed was not a part of the regular business of the Gross and Janes Tie Company.[13] Section 1, Subsection 2, of the Workmen's Compensation Act requires that an employee must show as a condition precedent to recovery that he was performing services "in the course of his employer's trade, business, or occupation." This same requirement has been made a part of Section 6 of the act.[14] Since there was uncontradicted evidence in the record to show that the tie company was not engaged in the business of manufacturing ties, but rather its business was confined to the purchase of manufactured ties, recovery could have been denied on this basis.

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CRIMINAL LAW AND PROCEDURE—RESPONSIVE VERDICTS—Under a bill of information charging defendant with the crime of aggravated arson, the jury returned a verdict of guilty of "simple arson in the sum of $150." *Held,* simple arson is not responsive to a charge of aggravated arson because it is not an included offense, as required by Article 386 of the Code of Criminal Procedure of 1928 as amended by Act 147 of 1942. Motion in arrest of judgment sustained. *State v. Murphy,* 38 So. (2d) 254 (La. 1948).

At the time of the trial, Act 161 of 1948 amending Article

12. The court did find that the original purchase agreement was not binding upon the tie company or the landowner and that therefore title to the ties did not vest in the company until they were cut and delivered by McAllister, but, as far as this writer can discover, it never did explain how it found that McAllister became owner of the ties prior to the time he delivered them to the company.

13. Instead the court said, "the sole issue before us is whether, on the basis of these facts, McAllister was in truth an employee or a contractor of Gross and Janes Company. If the facts justify such an answer, then, unquestionably, the defendant, as the insurance carrier of Gross and Janes, is clearly liable for compensation." 33 So.(2d) 575, 576.

14. Horrell v. Gulf and Valley Cotton Oil Company, Inc., 131 So. 709 (La. App. 1930); Wilson v. Roberts, 194 So. 88 (La. App. 1940).

386 of the Code of Criminal Procedure was not yet in effect. Thus the court on appeal very properly decided the case on the "lesser included offense" theory of responsive verdicts which had developed under Article 386 before the recent amendment. It was a well-established principle that all the elements of the lesser crime must necessarily be included in the definition of the greater crime charged in order that a verdict of guilty of the lesser crime be responsive.[1] In his opinion Chief Justice O'Niell points out that "the gravamen of aggravated arson is foreseeable danger to human life; whereas the gravamen of the offense of simple arson is the damaging of the property of another without his consent." An essential element of the crime of simple arson is that the property belong to "another," but this is not necessary to the crime of aggravated arson.[2] Therefore, as aggravated arson does not include all the elements of simple arson, a verdict of guilty of the lesser offense would not be responsive.

While the rule of the jurisprudence prior to 1948 was properly applied in the *Murphy* decision, the result would have been different under the recent amendment to Article 386, which sanctions simple arson as responsive to a charge of aggravated arson.

The scheme of responsive verdicts set up by the 1948 amendment to Article 386 is not based primarily on the lesser included offense theory. Trial convenience and expediency were the controlling objectives of the District Judges' Association in drafting the new responsive verdict statute. The specific groupings of verdicts were arrived at through a compromise of two conflicting considerations: the danger of confusing the jury with numerous superfluous charges, and the disadvantage of forcing the prosecution to resolve possible close factual questions as to which crime should be charged in the indictment. This pragmatic approach resulted in the elimination of many verdicts which had previously been included as responsive under the lesser included offense theory.[3] In a few instances, such as the principal case, the

1. State v. Roberts, 213 La. 559, 564, 35 So. (3d) 216, 217 (1948); State v. Antoine, 189 La. 619, 180 So. 465 (1938), discussed generally in (1944) 5 LOUISIANA LAW REVIEW 603. See also Arts. 405, 406, Code of Crim. Proc. of 1928; Art. 5, La. Crim. Code of 1942.

2. Art. 51, La. Crim. Code of 1942: "Aggravated Arson is the intentional damaging by any explosive substance, or the setting fire to any structure, watercraft, or movable, wherein it is foreseeable that human life might be endangered. . . ." Art. 52, La. Crim. Code of 1942: "Simple arson is the intentional damaging by any explosive substance or the setting fire to any property of another, without the consent of the owner. . . ."

3. See The Louisiana Legislation of 1948 (1948) 9 LOUISIANA LAW REVIEW 41 for a discussion of La. Act 161 of 1948.

included verdicts embrace lesser and generic offenses which were formerly non-responsive, since they contain elements not necessary to the more serious crime. An example may illustrate these changes. Where murder was charged, guilty of manslaughter, negligent homicide,[4] attempted murder and attempted manslaughter[5] were formerly included as responsive verdicts. The new provisions exclude attempts and negligent homicide as responsive to murder, for the practical reason that such additional charges are usually inappropriate to the facts and serve only to create confusion in the minds of the jury. On the other hand, manslaughter is still treated as responsive because of frequent close questions of fact as to whether an intentional killing was done in the "heat of passion."

In most instances the new statute has reduced the number of responsive verdicts. However, in the arson crimes, considerations of trial convenience resulted in adding guilty of simple arson as a responsive verdict to a charge of aggravated arson, despite the fact that all elements of the lesser offense are not necessarily included in aggravated arson. This addition was made because of possible close questions, in cases where the property of another was burned, as to whether there was "foreseeable danger to human life," in which case the arson would be aggravated rather than simple.

One of the most interesting aspects of the *Murphy* decision is the question raised in the opinion by Chief Justice O'Niell, when he declared, by way of dictum:

> "Whether it is necessary also, in a prosecution for aggravated arson, under the provisions of Act No. 161 of 1948, in order to make a verdict of guilty of simple arson responsive, that the indictment shall state also that the property damaged, by the explosive substance, or set on fire, was the property of another person, other than the party accused, and that the damaging or setting fire to the property was done without the consent of the owner, is a matter which we need not decide in this case."

Some support for the affirmative of the question is presented by the analogous case of *State v. Pace*,[6] where the defendant was

4. Art. 386, La. Code of Crim. Proc. of 1928, as amended by La. Act 147 of 1942; State v. Stanford, 204 La. 439, 15 So. (2d) 817 (1943); State v. Malmay, 209 La. 476, 24 So(2d) 869 (1946).

5. State v. Brown, 214 La. 18, 36 So. (2d) 624 (1948), overruling State v. Bray, 210 La. 573, 27 So. (2d) 337 (1946) and State v. Love, 210 La. 11, 26 So. (2d) 156 (1946).

6. 174 La. 295, 140 So. 482 (1932).

charged with robbery and convicted of larceny. Although larceny was then a lesser and generic offense, it was held that larceny was not responsive unless the indictment alleged the amount stolen. This allegation is essential to a charge of the graded offense of larceny, but immaterial to the crime of robbery.

On the other hand, it may be argued that the scope of the charge is to be measured by the new responsive verdict statute, which specifically enumerates the responsive verdicts. From the nature of the statute, it may be implied that an indictment for the greater offense is automatically an indictment of the lesser offenses which are listed as responsive. This construction of the statute removes the necessity of additional allegations in the indictment.

Whether additional allegations should be required or not, the prosecution is not relieved of the necessity of proving all the elements of the lesser offense. For example, if the defendant were charged with aggravated arson and the jury returned a verdict of guilty of simple arson, a motion for a new trial would be appropriate if there were insufficient evidence to support a finding that the property belonged to another and was burned without his consent.[7]

As a practical matter, the question is of limited significance. The only other instance under the new statute on all fours with the arson situation is the case of aggravated and simple criminal damage to property;[8] although rape and kidnapping appear similar, careful analysis of the definitions in the articles dealing with those crimes shows that the lesser offenses do not contain new and independent elements.[9] In all other cases, the responsive verdicts are clearly lesser and included offenses within the meaning of the established jurisprudence.

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7. Overruling of this motion presents a question for review on appeal only if there is no evidence in support of an essential element of the crime. State v. McDonell, 208 La. 602, 23 So. (2d) 230 (1945); State v. Giangosso, 157 La. 360, 102 So. 429 (1924); State v. Wells, 147 La. 822, 86 So. 268 (1920).

8. Arts. 55, 56, La. Crim. Code of 1942.

9. Arts. 41, 42, 43, La. Crim. Code of 1942, merely codify the traditional common law definition of rape as sexual intercourse without the lawful consent of the woman. See Commonwealth v. Burke, 105 Mass. 376, 7 Am. Rep. 531 (1870). In Louisiana the offense has been subdivided according to the aggravated nature of the offense, but in all cases lack of valid consent is a generic element. Similarly, the kidnapping articles require a carrying away of the victim without his lawful consent. Intent to extort is merely the aggravating element of kidnapping. Arts. 44, 45, La. Crim. Code of 1942.