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Criminal Law - Murder - Proof of Malice. *Biddle v. Commonwealth*, 206 Va. 14 (1965)

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and is "powerless to stop drinking."²⁴ He is apparently under the same disability as the person who is forced to drink and since the involuntary drunk is excused from his actions, a logical analogy would leave the chronic alcoholic with the same defense. However, the court refuses to either follow through, refute, or even mention the analogy and thus overlook the serious implication of the statements asserting that when the alcoholic drinks it is not his act. It is content with the ruling that alcoholism and its recognized symptoms, specifically public drunkenness, cannot be punished.

Charles McDonald

Criminal Law—MURDER—PROOF OF MALICE. In *Biddle v. Commonwealth*,¹ the defendant was convicted of murder by starvation in the first degree of her infant child and on appeal she claimed that the lower court erred in admitting her confession and that the evidence was not sufficient to sustain the first degree murder conviction. The evidence indicated that the defendant had the ability and means to feed the infant. An autopsy revealed that the infant had not been fed for several days as the entire intestinal tract and stomach were empty. There was no evidence of any disease and the infant when born was in perfect health.

The Supreme Court of Appeals of Virginia ruled that the confessions were admissible but reversed the lower court on the grounds that the Commonwealth had not proved beyond a reasonable doubt that the defendant wilfully or maliciously withheld food from the infant as required by Virginia Code Section 18.1-21, under which defendant had been convicted.

The Virginia statute states that:

"Murder by poison, lying in wait, imprisonment, *starving* . . . is murder in the first degree. All other murder is murder of the second degree."²

Although both an intent to kill and malice are usually necessary

24. Public Health Service publication, No. 730, "Alcoholism", as prepared by the National Institute of Mental Health, National Institutes of Health, U.S. Department of Health Education and Welfare (1965).

1. 206 Va. 14, 141 S.E.2d 710 (1965).

2. VA. CODE ANN., § 18.1-21 (1964 Cum. Supp.).

to constitute murder in the first degree, the Virginia courts in interpreting this statute have held that homicide by any of the means enumerated is murder in the first degree even without an actual intent to kill,³ yet the killing must still be a wilful or malicious act and this element must be proved beyond a reasonable doubt. The malicious element of the crime can be either express or implied.⁴ Implied malice is inferred from a wilful and deliberate act and may be assumed from the circumstances attending the killing.⁵ It has been held, for example, that malice may be inferred from the act done and the probability of death resulting,⁶ from the character of the killing itself,⁷ or by evidence establishing a "reckless disregard of human life, and a heart regardless of social duty and fatally bent on mischief, existence which is inferred from the acts done or words spoken."⁸ In *Bristow v. Commonwealth*⁹ the court held "that a man must be taken to intend that which he does, or which is the immediate or necessary consequence of his act," and the law will imply malice from the wilful act. Another Virginia case held that if the act is dangerous and indicates a disregard of human life causing the death of another, the act is murder even though he didn't intend to kill.¹⁰ Thus it is sufficient under the Virginia statute to convict one of first degree murder even though there was no actual intent to kill provided that express or implied malice was proven.

The amount of evidence necessary to prove malice in order to convict one of murder by starvation had never been decided by a Virginia court. The general rule in regard to this type of homicide is stated that if the evidence shows that the neglect was careless only, then the killing

3. *Merrit v. Commonwealth*, 164 Va. 653, 180 S.E. 395 (1935); *Howell v. Commonwealth*, 67 Va. (26 Gratt.) 995 (1875); *Jones v. Commonwealth*, 28 Va. (1 Leigh) 654 (1829); 2 *Bish. Cr. Law* 686 (1923), states that ". . . if the exposure or neglect is of a dangerous kind, it is murder. For example, if from an infant of tender years the person under obligation to provide for it wilfully withholds needful food or any other needful thing, *though not with the intent to kill*, and by reason thereof the child dies, he commits murder."

4. *Stapleton v. Commonwealth*, 123 Va. 825, 96 S.E. 801 (1918); *Harrison v. Commonwealth* 79 Va. (4 Hans.) 374 (1884); VA. CODE ANN. § 18.1-21, p. 162.

5. *Presley v. Commonwealth*, 185 Va. 261, 38 S.E.2d 476 (1946); *Scott v. Commonwealth*, 143 Va. 510, 129 S.E. 360 (1925).

6. *State v. Litman*, 106 Conn. 345, 138 Atl. 132 (1927).

7. *Oliver v. Commonwealth*, 151 Va. 533, 145 S.E. 307 (1928); *Hudson v. State*, 207 Ark. 18, 179 S.W.2d 164 (1944); *Farino v. State*, 203 Wis. 374, 234 N.W. 366 (1931).

8. *Burkhart v. State*, 127 Tex. Crim. 1, 74 S.W.2d 692 (1934).

9. 56 Va. (15 Gratt.) 634 (1859); also *Scott v. Commonwealth*, *supra* note 5.

10. *State v. Saunders*, 108 W.Va. 148, 150 S.E. 519 (1929).

is manslaughter,¹¹ however, if the evidence indicates that the death was the result of a wilful neglect or the direct consequence of a malicious omission of a duty, then it is murder.¹² Thus whether the killing is manslaughter or murder depends upon the nature and character of the neglect.¹³ Among the few cases dealing with murder by starvation, several indicate that murder convictions have been sustained. In a recent Massachusetts case the court held that one who intentionally withholds foods and liquids from a baby and as a result it dies is guilty of murder.¹⁴ Furthermore, in *Lewis v. State*¹⁵ a conviction of murder was given to one who caused the death of a child by failure to supply proper food and by exposure to inclement weather. In *Williams v. State*¹⁶ the court stated that if the mother maliciously placed her child near a hot stove the act was murder. Several other cases also have held that the wilful omission of a duty resulting in death, such as the duty of a mother to feed a child, is murder.¹⁷

In the present case the Virginia Supreme Court acknowledged the general rule in starvation cases and found that the evidence was not sufficient to establish the malice necessary for murder in the first degree. The reasons given by the appellate court were that the defendant had been upset by a family argument and that from a general consideration of all the facts the verdict was not supported by the evidence. Ordinarily an appellate court will not reverse a judgment unless it is clearly wrong because of the trial courts position in hearing and seeing the witnesses.¹⁸ Nevertheless, the court reversed and gave no other reasons except for the provocation caused by the family argument. In *Common-*

11. *Pallis v. State*, 123 Ala. 12, 26 So. 339 (1899); *Gibson v. Commonwealth*, 106 Ky. 360, 50 S.W. 532 (1899); *Craig v. State of Maryland*, 200 Md. 590, 155 A.2d 684 (1959); *Stehr v. State of Nebraska*, 92 Neb. 755, 139 N.W. 676 (1913); *Reg. v. Handley*, 13 Cox C. C. 79 (1875).

12. *Commonwealth v. Hall*, 322 Mass. 523, 78 N.E.2d 644 (1948); *Lewis v. State*, 72 Ga. 164 (1883); 47 HARV. L. REV. 531-3 (1934).

13. *Territory v. Manton*, 8 Mont. 95, 19 P. 387 (1888).

14. *Commonwealth v. Hall*, *supra* note 12.

15. 72 Ga. 164 (1883).

16. 88 Ga. App. 761, 77 S.E.2d 770 (1953).

17. *Rex v. Saunders*, 7 C. + P. 277, 173 Eng. R. 122 (1928); *Rex v. Plummer*, 1 Car. + K. 600, 174 Eng. R. 954 (1929); *Rex v. Crumpton*, Car. + M. 597, 174 Eng. R. 651 (1929); *Reg. v. Gibbons and Proctor*, 13 Cr. App. R. 134 (1918) (case held that both husband and wife guilty of murder for starving daughter).

18. *Howell v. Commonwealth*, *supra* note 3; *Reed v. Commonwealth*, 63 Va. (22 Gratt.) 924 (1872); VA. CODE ANN. § 8-491 (1950).

wealth v. Hall,¹⁹ under a similar factual situation, the Massachusetts appellate court upheld a murder conviction stating that "we have no doubt that such conduct obtaining here would constitute murder . . .," and that the evidence warranted the finding that her act of starving the infant was malicious. The defendant in the present case, as in the Massachusetts case, owed a duty to support and maintain her child,²⁰ and which duty was neglected. The evidence in each case indicated defendant's disregard of her infant's life, especially since each defendant had the means and ability to provide for the infant.²¹ Thus under similar facts the two courts have reached different decisions. The only variance appears to be the stress laid upon the family argument as provocation by the Virginia court.

It has been held that it is not sufficient provocation to neglect to support a child because of any marital dereliction²² or censural conduct²³ by either parent. In a recent South Dakota case the court expressly stated that a child is not deprived of the duty owed to it by its parents because of any family argument.²⁴ However, under the circumstances of the present case the Virginia court has either accepted a family argument as sufficient provocation to justify defendant's neglect to support her child or in finding adequate provocation the court has laid undue influence to the family quarrel in its reasoning and as a result has been "more lenient to her than she seems to have been to this dependent and helpless child."²⁵

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19. *Commonwealth v. Hall*, *supra* note 12 (the evidence in this case indicated that defendant's baby was illegitimate but that by the law of the state the mother still owed a duty to support it; medical evidence revealed no signs of disease and that the baby died of starvation and dehydration as a result of the defendant's having left the infant in the attic without providing food for several days).

20. *McClagherty v. McClagherty*, 180 Va. 51, 21 S.E.2d 761 (1942); *Boaze v. Commonwealth*, 165 Va. 786, 183 S.E. 263 (1936); *Michalcoe v. Holub*, 130 Va. 425, 107 S.E. 704 (1921) (case held that it is legal duty of a parent to support his child and not merely a moral obligation).

21. *State v. Noakes*, 70 Vt. 247, 40 Atl. 249 (1897) (states that to prove guilt in starvation cases there must be the capacity, means, and ability to support the child); *Rex v. Saunders*, *supra* note 17 (case held that if husband supplied wife with food + she wilfully neglects to give it—then it is murder); *Lewis v. State*, *supra* note 15.

22. *Parivash v. Yousef*, 214 A2d 314 (N.J. 1965).

23. *Fry v. State*, 36 Ga. App. 312, 136 S.E. 466 (1927); also *Commonwealth v. Hall*, *supra* note 12 (held that even the fact that an infant is illegitimate does not provide sufficient provocation to take its life).

24. *State v. Zobel*, 134 N.W.2d 109 (S.D. 1965).

25. *Lewis v. State*, 72 Ga. 171 (1883).