Chapter 5

HOMICIDE

A. MURDER

1. EARLY, TRADITIONAL LAW—THE MALICE FACTOR

COMMONWEALTH v. WEBSTER

Supreme Judicial Court of Massachusetts, 1850.
59 Mass. 295, 386.

The defendant, professor of chemistry, in the medical college, in Boston, attached to the university at Cambridge, was indicted in the municipal court at the January term, 1850, for the murder of Dr. George Parkman, at Boston, on the 23d of November, 1849. . . .

The government introduced evidence, that George Parkman, quite peculiar in person and manners, and very well known to most persons in the city of Boston, left his home in Walnut Street in Boston in the forenoon of the 23d of November, 1849, in good health and spirits; and that he was traced through various streets of the city until about a quarter before two o'clock of that day, when he was seen going towards and about to enter the medical college: That he did not return to his home: That on the next day a very active, particular, and extended search was commenced in Boston and the neighboring towns and cities, and continued until the 30th of November; and that large rewards were offered for information about Dr. Parkman: That on the 30th of November certain parts of a human body were discovered, in and about the defendant's laboratory in the medical college; and a great number of fragments of human bones and certain blocks of mineral teeth, imbedded in slag and cinders, together with small quantities of gold, which had been melted, were found in an assay furnace of the laboratory: That in consequence of some of these discoveries the defendant was arrested on the evening of the 30th of November: That the parts of a human body so found resembled in every respect the corresponding portions of the body of Dr. Parkman, and that among them all there were no duplicate parts; and that they were not the remains of a body which had been dissected: That the artificial teeth found in the furnace were made for Dr. Parkman by a dentist in Boston in 1846, and refitted in his mouth by the same dentist a fortnight before his disappearance: That the defendant was indebted to Dr. Parkman on certain notes, and was pressed by him for payment; that the defendant has said that on the

23d of November, about nine o'clock in the morning, he left word at Dr. Parkman's house, that if he would come to the medical college at half past one o'clock on that day, he would pay him; and that, as he said, he accordingly had an interview with Dr. Parkman at half past one o'clock on that day, at his laboratory in the medical college: That the defendant then had no means of paying, and that the notes were afterwards found in his possession. . . .

[The defendant was tried before the Chief Justice, and Justices Wilde, Dewey and Metcalf. The opinion of the court on the law of the case was given in the charge to the jury as follows:]

SHAW, C. J. Homicide, of which murder is the highest and most criminal species, is of various degrees, according to circumstances. The term, in its largest sense, is generic, embracing every mode by which the life of one man is taken by the act of another. Homicide may be lawful or unlawful; it is lawful when done in lawful war upon an enemy in battle, it is lawful when done by an officer in the execution of justice upon a criminal, pursuant to a proper warrant. It may also be justifiable, and of course lawful, in necessary self-defence. But it is not necessary to dwell on these distinctions; it will be sufficient to ask attention to the two species of criminal homicide, familiarly known as murder and manslaughter.

In seeking for the sources of our law upon this subject, it is proper to say, that whilst the statute law of the commonwealth declares that "Every person who shall commit the crime of murder shall suffer the punishment of death for the same;" yet it nowhere defines the crimes of murder or manslaughter, with all their minute and carefully-considered distinctions and qualifications. For these, we resort to that great repository of rules, principles, and forms, the common law. This we commonly designate as the common law of England; but it might now be properly called the common law of Massachusetts. It was adopted when our ancestors first settled here, by general consent. It was adopted and confirmed by an early act of the provincial government, and was formally confirmed by the provision of the constitution declaring that all the laws which had theretofore been adopted, used, and approved, in the province or state of Massachusetts bay, and usually practiced on in the courts of law, should still remain and be in full force until altered or repealed by the legislature. So far, therefore, as the rules and principles of the common law are applicable to the administration of criminal law, and have not been altered and modified by acts of the colonial or provincial government or by the state legislature, they have the same force and effect as laws formally enacted.

By the existing law, as adopted and practiced on, unlawful homicide is distinguished into murder and manslaughter.

Murder, in the sense in which it is now understood, is the killing of any person in the peace of the commonwealth, with *malice afore-*

thought, either express or implied by law. Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.

Manslaughter is the unlawful killing of another without malice; and may be either voluntary, as when the act is committed with a real design and purpose to kill, but through the violence of sudden passion, occasioned by some great provocation, which in tenderness for the frailty of human nature the law considers sufficient to palliate the criminality of the offence; or involuntary, as when the death of another is caused by some unlawful act not accompanied by any intention to take life.

From these two definitions, it will be at once perceived, that the characteristic distinction between murder and manslaughter is malice, express or implied. It therefore becomes necessary, in every case of homicide proved, and in order to an intelligent inquiry into the legal character of the act, to ascertain with some precision the nature of legal malice, and what evidence is requisite to establish its existence.

Upon this subject, the rule as deduced from the authorities is, that the implication of malice arises in every case of international homicide; and, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily established by the party charged, unless they arise out of the evidence produced against him to prove the homicide, and the circumstances attending it. If there are, in fact, circumstances of justification, excuse, or palliation, such proof will naturally indicate them. But where the fact of killing is proved by satisfactory evidence, and there are no circumstances disclosed, tending to show justification or excuse, there is nothing to rebut the natural presumption of malice. This rule is founded on the plain and obvious principle, that a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own acts. Therefore, when one person assails another violently with a dangerous weapon likely to kill and which does in fact destroy the life of the party assailed, the natural presumption is, that he intended death or other great bodily harm; and, as there can be no presumption of any proper motive or legal excuse for such a cruel act, the consequence follows, that, in the absence of all proof to the contrary, there is nothing to rebut the presumption of malice. On the other hand, if death, though wilfully in-

tended, was inflicted immediately after provocation given by the deceased, supposing that such provocation consisted of a blow or an assault, or other provocation on his part, which the law deems adequate to excite sudden and angry passion and create heat of blood, this fact rebuts the presumption of malice; but still, the homicide being unlawful, because a man is bound to curb his passions, is criminal, and is manslaughter.

In considering what is regarded as such adequate provocation, it is a settled rule of law, that no provocation by words only, however opprobrious, will mitigate an intentional homicide, so as to reduce it to manslaughter. Therefore, if, upon provoking language given, the party immediately revenges himself by the use of a dangerous and deadly weapon likely to cause death, such as a pistol discharged at the person, a heavy bludgeon, an axe, or a knife; if death ensues, it is a homicide not mitigated to manslaughter by the circumstances, and so is homicide by malice aforethought, within the true definition of murder. It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed; it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words "malice aforethought," in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design, in contradistinction to accident and mischance.

In speaking of the use of a dangerous weapon, and the mode of using it upon the person of another, I have spoken of it as indicating an intention to kill him, or do him great bodily harm. The reason is this. Where a man, without justification or excuse, causes the death of another by the intentional use of a dangerous weapon likely to destroy life, he is responsible for the consequences, upon the principle already stated, that he is liable for the natural and probable consequences of his act. Suppose, therefore, for the purpose of revenge, one fires a pistol at another, regardless of consequences, intending to kill, maim, or grievously wound him, as the case may be, without any definite intention to take his life; yet, if that is the result, the law attributes the same consequences to homicide so committed, as if done under an actual and declared purpose to take the life of the party assailed. . . .

The true nature of manslaughter is, that it is homicide mitigated out of tenderness to the frailty of human nature. Every man, when assailed with violence or great rudeness, is inspired with a sudden impulse of anger, which puts him upon resistance before time for cool reflection; and if, during that period, he attacks his assailant with a weapon likely to endanger life, and death ensues, it is regarded as done through heat of blood or violence of anger, and not through mal-

ice, or that cold-blooded desire of revenge which more properly constitutes the feeling, emotion, or passion of malice.

The same rule applies to homicide in mutual combat, which is attributed to sudden and violent anger occasioned by the combat, and not to malice. When two meet, not intending to quarrel, and angry words suddenly arise, and a conflict springs up in which blows are given on both sides, without much regard to who is the assailant, it is mutual combat. And if no unfair advantage is taken in the outset, and the occasion is not sought for the purpose of gratifying malice, and one seizes a weapon and strikes a deadly blow, it is regarded as homicide in heat of blood; and though not excusable, because a man is bound to control his angry passions, yet it is not the higher offence of murder.

We have stated these distinctions, not because there is much evidence in the present case which calls for their application, but that the jury may have a clear and distinct view of the leading principles in the law of homicide. There seems to have been little evidence in the present case that the parties had a contest. There is some evidence tending to show the previous existence of angry feelings; but unless these feelings resulted in angry words, and words were followed by blows, there would be no proof of heat of blood in mutual combat, or under provocation of an assault, on the one side or the other; and the proof of the defendant's declarations, as to the circumstances under which the parties met and parted, as far as they go, repel the supposition of such a contest.

With these views of the law of homicide, we will proceed to the further consideration of the present case. The prisoner at the bar is charged with the wilful murder of Dr. George Parkman. This charge divides itself into two principal questions, to be resolved by the proof: first, whether the party alleged to have been murdered came to his death by an act of violence inflicted by any person; and if so, secondly, whether the act was committed by the accused. . .

This case is to be proved, if proved at all, by circumstantial evidence; because it is not suggested that any direct evidence can be given, or that any witness can be called to give direct testimony, upon the main fact of the killing. It becomes important, therefore, to state what circumstantial evidence is; to point out the distinction between that and positive or direct evidence.

The distinction, then, between direct and circumstantial evidence, is this. Direct or positive evidence is when a witness can be called to testify to the precise fact which is the subject of the issue on trial; that is, in a case of homicide, that the party accused did cause the death of the deceased. Whatever may be the kind of force of the evidence, that is the fact to be proved. But suppose no person was present on the occasion of the death, and of course that no one can be

called to testify to it; is it wholly unsusceptible of legal proof? Experience has shown that circumstantial evidence may be offered in such a case; that is, that a body of facts may be proved of so conclusive a character, as to warrant a firm belief of the fact, quite as strong and certain as that on which discreet men are accustomed to act, in relation to their most important concerns. It would be injurious to the best interests of society, if such proof could not avail in judicial proceedings. If it was necessary always to have positive evidence how many criminal acts committed in the community, destructive of its peace and subversive of its order and security, would go wholly undetected and unpunished?

The necessity, therefore, of resorting to circumstantial evidence, if it is a safe and reliable proceeding, is obvious and absolute. Crimes are secret. Most men, conscious of criminal purposes, and about the execution of criminal acts, seek the security of secrecy and darkness. It is therefore necessary to use all modes of evidence besides that of direct testimony, provided such proofs may be relied on as leading to safe and satisfactory conclusions; and, thanks to a beneficent providence, the laws of nature and the relations of things to each other are so linked and combined together, that a medium of proof is often thereby furnished, leading to inferences and conclusions as strong as those arising from direct testimony. . . . The evidence must establish the *corpus delicti*, as it is termed, or the offence committed as charged; and, in case of homicide, must not only prove a death by violence, but must, to a reasonable extent, exclude the hypothesis of suicide, and a death by the act of any other person. This is to be proved beyond reasonable doubt.

Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition and they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations

of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether. . .

[The jury returned a verdict of guilty, and the defendant's sentence of death by hanging was sustained by the Supreme Judicial Court of Massachusetts. Subsequently, Dr. Webster confessed:

"On Tuesday the 20th of November, I sent the note to Dr. Parkman. . . . It was to ask Dr. Parkman to call at my rooms on Friday the 23d, after my lecture. . . . My purpose was, if he should accede to the proposed interview, to state to him my embarrassments and utter inability to pay him at present, to apologize for those things in my conduct which had offended him, to throw myself upon his mercy, to beg for further time and indulgence for the sake of my family, if not for my own, and to make as good promises to him as I could have any hope of keeping. . . .

"Dr. Parkman agreed to call on me as I proposed.

"He came, accordingly, between half-past one and two. . . . He immediately addressed me with great energy: 'Are you ready for me, sir? Have you got the money?' I replied, 'No, Dr. Parkman'; and was then beginning to state my condition and make my appeal to him. He would not listen to me, but interrupted me with much vehemence. He called me 'scoundrel' and 'liar', and went on heaping upon me the most bitter taunts and opprobrious epithets. . . . I cannot tell how long the torrent of threats and invectives continued, and I can now recall to memory but a small portion of what he said. At first I kept interposing, trying to pacify him, so that I might obtain the object for which I had sought the interview. But I could not stop him, and soon my own temper was up. I forgot everything. I felt nothing but the sting of his words. I was excited to the highest degree of passion; and while he was speaking and gesticulating in the most violent and menacing manner, thrusting the letter and his fist into my face, in my fury I seized whatever was the handiest,—it was a stick of wood,—and dealt him an instantaneous blow with all the force that passion could give it. I did not know, nor think, nor care where I should hit him, nor how hard nor what the effect would be. It was on the side of his head, and there was nothing to break the force of the blow. He fell instantly upon the pavement. . . . Perhaps I spent ten minutes in attempts to resuscitate him; but I found that he was absolutely dead. . . .

"My next move was to get the body into the sink which stands in the small private room. By setting the body partially erect against the corner, and getting up into the sink myself, I succeeded in drawing it up. There it was entirely dismembered. . . .

"There was a fire burning in the furnace of the lower laboratory. . . . The head and viscera were put into that furnace that day. . . .

"When the body had been thus all disposed of, I cleared away all traces of what had been done. I took up the stick with which the fatal blow had been struck. It proved to be the stump of a large grape vine, say two inches in diameter, and two feet long. . . . I had carried it in from Cambridge . . . for the purpose of showing the effect of certain chemical fluids in coloring wood. . . . I put it into the fire. . . ."

The full confession appears in Bemis, Report of the Case of John W. Webster, pp. 564–71 (1850).

Had the above story been told at the trial, and believed, should the jury, in light of the judge's charge, have convicted Dr. Webster of murder or manslaughter?]*

NOTES

Malice aforethought

1. As Chief Justice Shaw noted in his charge to the jury in the Webster case, supra, "[T]he characteristic distinction between murder and manslaughter is malice, express or implied."

With respect to the meaning and significance of the term "malice," consider the following:

"The meaning of 'malice aforethought', which is the distinguishing criterion of murder, is certainly not beyond the range of controversy. The first thing that must be said about it is that neither of the two words is used in its ordinary sense. . . . 'It is now only an arbitrary symbol. For the "malice" may have in it nothing really malicious; and need never be really "aforethought", except in the sense that every desire must necessarily come before—though perhaps only an instant before—the act which is desired. The word "aforethought", in the definition, has thus become either false or else superfluous. The word "malice" is neither; but it is apt to be misleading, for it is not employed in its original (and its popular) meaning.' 'Malice aforethought' is simply a comprehensive name for a number of different mental attitudes which have been variously defined at different stages in the development of the law, the presence of any one of which in the accused has been held by the courts to render a homicide particularly heinous and therefore to make it murder. . . . As Stephen put it '. . . when a particular state of mind came under their notice the Judges called it malice or not according to their view of the propriety of hanging particular people. . . .'." Report of the Royal Commission on Capital Punishment, 26–28 (1953).

2. Consider, with respect to the present English concept, the case of Hyam v. Director of Public Prosecutions, 2 All E.R. 41 (1974), the defendant was a woman who had been abandoned by her lover in favor of another

* For an interesting account of the trial of Dr. Webster, see the article by Justice Robert Sullivan, "The Murder Trial of Dr. Webster, Boston, 1850", in 51 Mass.L.Q. 367 (1966) and 52 ibid., 67 (1967). Also see the same author's book "The Disappearance of Dr. Parkman" (1971), in which he states that the "charge to the jury" by Justice Shaw was not the one actually delivered, but rather an extensively rewritten and moderated third draft, partly composed after Webster's execution.