QUEENSLAND LAW REFORM COMMISSION

ABOLITION OF THE DISTINCTION BETWEEN WILFUL MURDER AND MURDER

REPORT NO. 2

16 March 1970

A Report of the Queensland Law Reform Commission

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To the Honourable P.R. Delamothe, O.B.E., M.L.A.,
Minister for Justice and Attorney-General,
BRISBANE.

Item 8 in Part A of the approved programme of the Law Reform Commission requires the Commission:-

> "To consider whether the distinction should be "maintained between the crimes of wilful "murder and murder."

The accompanying commentary represents the recommendations of the Law Reform Commission on this subject. The Commission circulated a working paper on this topic to the persons and bodies set out in Appendix A to this Report. No comments adverse to our proposals were received.

The Commission recommends that Section 301 of the Criminal Code be repealed and that Section 302(1) be amended by inserting at the commencement of that sub-section the words: "If the offender intends to cause the death of the person killed or that of some other person or.....".

W. B. Campbell. Chairman

Raymond Lynch Member

S.H. McPherson Member

Member

BRISBANE
16th March, 1970.

COMMENTARY

Queensland and Western Australia are the only Australian States which have made (and they still retain) a distinction between the offences of wilful murder and murder. The material provisions of the Queensland Criminal Code were precisely followed by the corresponding sections of the Code of Papua and New Guinea and of the Western Australian Code. Tasmania is the only other Australian State which has enacted a Criminal Code and the latter contains no offence known as wilful murder, nor does such a distinction between the offences of wilful murder and murder exist in the common law (non-code) jurisdictions of New South Wales, Victoria, South Australia, New Zealand and England. It is material to the arguments set out in this paper that, in Western Australia, wilful murder carries the death penalty (W.A. Code s.282(a)). Murder, not being wilful murder, is punished as in Queensland (W.A. Code s.282(b)).

The offence of wilful murder is described in s.301 of the Criminal Code as follows:-

> ".....a person who unlawfully kills another, intending to cause his death or that of some other person, is guilty of wilful murder."

Murder, in the form most commonly encountered (and the fact that there are other forms of the offence does not affect the present argument), is defined by s.302 as follows:-

> ".....a person who unlawfully kills another.....if the offender intends to do to the person killed or to some other person some grievous bodily harm.....is guilty of murder."

In the Criminal Code as originally enacted in 1899, s.305 was as follows:-

> "Any person who commits the crime of wilful murder or murder is liable to the punishment of death."

In his letter to the Attorney-General which accompanied the draft Criminal Code which he submitted in 1897, Sir Samuel Griffith made the following observation:

" In the jurisprudence of many countries a distinction is made between different kinds of murder according to their heinousness. Thus we hear of murder in the "first" and "second" degree and of murder "with extenuating circumstances". It has occurred to me that the simplest distinction and that which best indicates the different views actually taken by the ordinary mind of different cases of homicide is between wilful murder - that is to say intentional killing, and murder - that is to say killing which, though unintentional, is done under such circumstances as to warrant the infliction of the last penalty. I have accordingly framed the chapter on homicide (Chapter 38) on this basis and have suggested (Section 677) that in the case of murder, not being wilful murder, sentence of death may (as in other capital cases except treason and wilful murder) be "recorded instead of being actually passed".

The s. 677 mentioned in Sir Samuel's letter was enacted as s. 652 of the Code with some verbal alterations which in no way affected the substance of the section. Its provisions were as follows:-

" Provided that when a person is convicted of any crime punishable with death, except treason and wilful murder, if the Court is of opinion that, under the circumstances of the case, it is proper that the offender should be recommended for the Royal mercy, the Court may, if it thinks fit, direct the proper officer, instead of asking the offender whether he has anything to say why sentence of death should not be passed upon him, to ask the offender, and thereupon such officer is to ask the offender, whether he has anything to say why judgment of death should not be recorded against him.

In any case the Court may abstain from pronouncing sentence of death, and may, instead thereof, order judgment of death to be entered of record.

And thereupon the proper officer is to enter judgment of death on record against the offender in the usual form, as if sentence of death had actually been pronounced by the Court against the offender in open court.

A record of judgment of death so entered has the same effect in all respects as if sentence of death had been pronounced in open court."

The section was based upon s. 43 of The Criminal Practice Act of 1865, which was repealed by the Third Schedule of the Criminal Code Act. That section provided for the recording of judgment of death, instead of the pronouncement of it, in the case of a conviction of "any capital felony except murder". It is to be noted that in 1865, when the criminal law of Queensland was in the main based upon the English common law, there was no distinction between wilful murder and murder.

In turn, that section was based upon an Act of the United Kingdom: the Judgment of Death Act, 1823 s. 1, which is still in force. It, too, provided for the recording of judgment of death in the case of a conviction of "any felony except murder". However, it no longer applies to murder, since in the United Kingdom the death penalty for all kinds of murder was abolished by the Murder (Abolition of Death Penalty) Act 1965, the schedule of which repealed the words "except murder" in s. 1 of the Judgment of Death Act 1823. There are still capital felonies in the United Kingdom (see Archbold, 36th ed., para. 652), and it is to these that the Act now applies.

The only consequence of the distinction between wilful murder and murder, under the provisions of the Code as originally enacted, was that in the case of a conviction of the latter offence judgment of death could be recorded instead of being actually pronounced. Even this consequence seems to have had only one practical effect, for the prerogative of mercy could be exercised as well in the case of wilful murder as in that of murder. The provision in the final sentence of the section, however, no doubt had the effect of making the subsequent act of the hangman lawful in a case of murder in which the prerogative of mercy had not been exercised and in which judgment of death had been recorded instead of being pronounced.

Section 2 of The Criminal Law Amendment Act of 1922 (Qld.), provided that "the sentence of punishment by death shall no longer be pronounced or recorded, and the punishment of death shall no longer be inflicted". Section 3 (xiv) of the same Act amended s. 305 (quoted above), so as to read as follows:-

> " Any person who commits the crime of wilful murder or murder is liable to imprisonment with hard labour for life which cannot be mitigated or varied under section nineteen of this Code".

Section 3 (xviii) repealed s. 652. Thus capital punishment was abolished, and the repeal of s. 652 did away with the only difference which could follow from a conviction of wilful murder as opposed to a conviction of murder. Yet the distinction between the two offences was preserved.

Under the common law, as stated earlier in this paper, there is no such offence as wilful murder. Murder, speaking very generally and ignoring the concept of malice aforethought which has no place in the criminal law of Queensland, may be described for the purpose of this paper as an unlawful killing in which the offender intends either to kill or to inflict grievous bodily harm. It therefore includes both wilful murder and murder as defined in the Code.

For these reasons the distinction between wilful murder and murder is now meaningless. Its preservation has a positive disadvantage which arises in this way. Section 576 of the Code provides, inter alia, as follows:-

> " Upon an indictment charging a person with the crime of wilful murder, he may be convicted of the crime of murder or of the crime of manslaughter, if either of those crimes is established by the evidence....."

It happens not infrequently that a jury acquits of wilful murder and convicts of murder in a case in which the evidence points overwhelmingly to wilful murder. It cannot be said that a jury is to be blamed for this, and it would not matter if it stopped there. But in many cases it does not stop there. An appeal may be brought and may be successful, and a new trial may be ordered. Because the accused has been acquitted of wilful murder he cannot be tried again for that offence; on the second trial therefore he is tried for murder, that is, for an unlawful killing in which the intention was not to cause death, but to cause grievous bodily harm. But the evidence upon the second trial remains the same as that upon the first; that is, it points unerringly to an intention to kill. It is almost impossible in such a case for a Judge to sum up convincingly to a jury; that is, to direct them that they must be satisfied beyond a reasonable doubt that the accused intended, not to kill, but to do grievous bodily harm; they have heard the evidence and know the direction in which it points. A trial conducted in such circumstances is highly artificial, and it is widely thought that it has led to acquittals which are quite unjustified.

Dr. Colin Howard, in his book Australian Criminal Law makes the remark (at p. 38) that "in Queensland at the present day the distinction between wilful murder and murder is of no practical importance because the sentence on conviction of either is fixed at life imprisonment with hard labour". But he appends a footnote to the effect that "The type of conviction may have some bearing on Executive clemency". It is apprehended, however, that having regard to the provisions for parole, this is unfounded; it imputes to the Executive the tendency, no doubt quite unwarranted, to act according to a rule of thumb.

It is of significance, at this point, to refer to the material provisions of the Draft Criminal Code for the Australian Territories which has been prepared after many years of intensive and scholarly research by The Law Council of Australia and submitted by the latter body, in the early part of 1969, to the Attorney-General of the Commonwealth. The Draft Code (s. 70) defines murder as follows:-

"(1) Except as hereinafter provided a person who kills another:-

(a) intending to kill any person; or

(b) intending to do grievous bodily harm to any person; or

(c) whilst committing or attempting to commit any of the offences referred to in sub-section (2) hereof or whilst impeding the detection, apprehension, or prosecution of a person who has committed or attempted to commit any such offence, he being aware that there is at least a substantial risk of his killing or doing grievous bodily harm to any person;

is guilty of the indictable offence of murder.

(2) The offences referred to in sub-section (1) hereof are as follows:-

(i) Treason
(ii) Murder
(iii) Piracy
(iv) Robbery
(v) Kidnapping
(vi) Abduction
(vii) Resisting lawful arrest
(viii) Escaping from lawful custody
(ix) Rape
(x) Burglary
(xi) Arson
(xii) Unlawful destruction of property by means of explosives."

It can be seen that the Draft Code draws no distinction between the offences of wilful murder and murder. The Commentary on the Draft Code, which was prepared by the experienced Queensland Co-ordinating Committee, states:-

> " In the homicide sections, specific mental elements have been expressly included in the drafting. It is in this field that the law has traditionally distinguished finely the relevant mental states, under the influence, no doubt, of the existence of capital punishment. We have not, it will be noted, drawn any section as a "capital murder" section. The question of capital punishment lay outside our terms of reference."

In the light of the above considerations there is no longer any legal reason for preserving in Queensland this fine distinction between wilful murder and murder. Section 301 of the Code should be repealed, and s. 302(1) should be amended so as to read as follows:-

> " If the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm."

The third last sentence of the section does not need any amendment, i.e. the sentence which reads "In the first case it is immaterial that the offender did not intend to hurt the particular person who is killed.

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