NEW YORK LAW JOURNAL

Commission
General

MONDAY, MAY 27, 1963.
Volume 149—No. 102.

Elimination of the Mandatory Death Penalty for Murder in the First Degree

By RICHARD G. DENZER

By affixing his signature to a bill sponsored by the New York State Temporary Commission on Revision of the Penal Law and Criminal Code, Governor Rockefeller on May 3, 1963, struck from the criminal law of New York the mandatory death penalty for first degree murder. This law, which passed both houses of the Legislature overwhelmingly, was introduced by Assemblyman Richard J. Bartlett, chairman of the commission.[1]

The present law, which will be superseded on July 1, 1963, by the new enactment, provides a mandatory death penalty for intentional and premeditated murder,[2] while permitting a jury to recommend life imprisonment for those convicted of felony-murder and of the "depraved" type of killing.[3] Certain of the kidnaping provisions of the Penal Law also provide for the death penalty but permit a jury recommendation of an indeterminate term of imprisonment from twenty years to life.[4]

The new law first declares that: "Murder in the first degree is punishable by *life imprisonment unless the death sentence is imposed* as provided by section ten hundred forty-five-a." It then permits a defendant to plead guilty to first degree murder with a sentence of life imprisonment, if the court and district attorney consent to such plea. It further provides that, upon a defendant being found guilty of first degree murder after trial, the court, without further recourse to the jury, *shall* sentence a defendant to life imprisonment if he was under eighteen years of age when he committed the crime; and, with regard to a defendant over eighteen, *may* impose such sentence if it is satisfied that "substantial mitigating circumstances" militate against imposition of the death penalty.

Then follows a new section, which sets forth the procedure for the jury's determination of whether life imprisonment or the death penalty shall be imposed. (Provided, of course, that the court has not already imposed life imprisonment as stated above.) Briefly, this proceeding, which may be described as the "second stage," provides that the same judge shall reconvene the same jury that found the defendant guilty "as promptly as practicable" to hear evidence on "any matter relevant to sentence," which may consist of "Any relevant evidence not legally privileged * * * regardless of its admissibility under the exclusionary rules of evidence."

Many jurisdictions avoid the imposition of the mandatory death penalty by providing—as present New York law does only with respect to felony-murder and the "depraved" type of killing—that the jury may recommend mercy in all murder cases. Certainly this would make for a simpler statutory formulation than the two-stage trial. However, in the traditional one-stage trial with permissible mercy recommendation, shortcomings of significant importance inhere. For the most part, the jury, confronted with the problem of whether or not to recommend mercy, is groping in the dark. It seldom has the information upon which it can logically predicate its decision. As a result, the jury often bases such decision solely on its instinctive or emotional reaction. Even in those jurisdictions where the jury's recommendation of mercy is not binding, judges in almost all instances accept the recommendation. Then, too, since it is widely required that the mercy recommendation be unanimous, a hung jury sometimes results, not because the members thereof disagree on the question of the defendant's guilt, but only because they cannot all agree to spare or not to spare his life. This creates the further problems and burdens of a retrial of the entire case.

The two-stage trial eliminates these thorny issues. Since in the sentencing stage the jury may hear evidence concerning "defendant's background and history, and any aggravating or mitigating circumstances," it will have available to guide it much of the same type of information that is presently available only to the sentencing judge in the pre-sentence investigation report.

Another advantage of this procedure is that if a jury cannot agree upon a penalty verdict in the second stage only the sentencing proceeding need be retried[5]—and then only if the court fails to exercise its discretion to impose life imprisonment.

When all the evidence is in, the court charges the jury "on any matters appropriate in the circumstances, including the law relating to the possible release on parole of a person sentenced to life imprisonment." The objective of the latter provision is to acquaint juries with the fact that, for the purpose of computing eligibility for parole, a sentence of "life imprisonment" is equivalent to an indeterminate term, the minimum of which is forty years and the maximum of which is natural life.[6]

[The author of the accompanying article is counsel to the Temporary State Commission on Revision of the Penal Law and Criminal Code, sponsor of the bill to eliminate the mandatory death penalty for murder in the first degree.—EDITOR.]

(1) Laws of 1963, chapter 994.
(2) Penal Law, sec. 1045(1).
(3) Penal Law, sec. 1045(2).
(4) See Penal Law, sec. 1250.

For the death penalty to be imposed, the jury must so agree unanimously. If the jury is hung, the court has two alternatives: It may either impanel a new jury to determine the sentence only, or it may itself impose the sentence of life imprisonment.

On an appeal from the imposition of the death penalty, if the Court of Appeals finds substantial error only in the second stage proceeding, the case is remanded to the trial court for mandatory imposition of a sentence of life imprisonment.

A comparable two-stage procedure is provided for kidnaping prosecutions. Also, necessary conforming amendments to the Code of Criminal Procedure have been made.

The commission which drafted and sponsored this bill is engaged in an extensive and intensive study and revision of the Penal Law, Code of Criminal Procedure and Correction Law, which together make up the bulk of New York's statutory criminal law.

The commission's plan is to concentrate the major portion of its early effort on revision of the Penal Law. The approach to this task involves three basic phases of work, which have been termed (1) excision and relocation, (2) internal revision of basic material, and (3) structural regrouping. The progress thus far made in each of these categories is outlined in the commission's interim report dated February 1, 1963.[7] The kind of Penal Law revision contemplated by the commission cannot be accomplished in piecemeal fashion, i. e., by gradual or sporadic amendment of various portions, articles and sections of this law. The only intelligent approach to an over-all revision of the sort being undertaken is one which uproots, reorganizes, integrates and completes the project in its entirety as a unified operation. This means that the revised Penal Law will ultimately be submitted as a complete "package" for consideration by the Legislature.

The commission, nevertheless, decided that recommendations concerning some vital areas of the Penal Law should be dealt with immediately rather than be left for inclusion in the final, over-all revision. One of these areas is the whole question of capital punishment. Last year the commission undertook a detailed study of this problem, in the course of which it held three public hearings in various parts of the state, and expects to publish a special report on that subject within a short time. Meanwhile, the members of the commission were unanimously agreed that New York should do away with the mandatory death penalty for first degree murder. For a long while New York had been the only state which still clung to the notion that conviction for so-called "common law murder" must be followed by the death penalty. In all the other states (except those which have abolished the death penalty) the judge or the jury is empowered to decide whether a convicted murderer is to live or die. So far as the process by which the decision is arrived at is concerned, only California and Pennsylvania employ a two-stage procedure such as is contained in New York's new formulation.

The new law becomes effective July 1, 1963; trials commencing on or after that date will be conducted in accordance with the new two-stage procedure outlined above. On that day a milestone on the road to a better Penal Law for New York State will be reached.

(5) Section 2 of the act provides that a recorded verdict of guilty after the first stage "* * * shall not thereafter be subject to jury reconsideration."

(6) Penal Law, sec. 1945(6).

(7) Leg. Doc. No. 8 (1963). A limited number of copies of this report are available. Requests should be addressed to the Temporary Commission on Revision of Penal Law and Criminal Code, No. 155 Leonard Street, New York 13, N. Y.