JOE MARTINEZ COBARRUBIO v. STATE TEXAS

675 S.W.2d 749 (1984) | Cited 11 times | Court of Criminal Appeals of Texas | September 26, 1984

None

McCormick, Judge

On original submission, this Court, relying on Braudrick v. State, 572 S.W.2d 709 (Tex.Cr.App. 1978), found that the "element" of "under the immediate influence of sudden passion arising from an adequate cause" is in the nature of a defense to the offense of murder that must be disproved by the State if raised by the evidence in order to establish the offense of murder. The opinion on original submission then went on to boldly state without statutory or case authority that:

"With the nature of the 'element' of 'sudden passion' in mind, it becomes apparent not only that the burden of proving the lack of sudden passion must be placed upon the prosecution, but also that this burden must be so placed in the paragraph of the charge applying the law of murder to the facts of the case."

The opinion then went on to make the novel holding that where the charge was worded with the defensive issue of sudden passion deleted from the paragraph on murder and placed only in the voluntary manslaughter paragraph there existed a likelihood that the jury would affirmatively answer the murder paragraph and never even consider the defensive issue of sudden passion.

It has long been the general rule that a reviewing court should read the charge as a whole. Doyle v. State, 631 S.W.2d 732 (Tex.Cr.App. 1982) (Opinion on Rehearing). This rule, however, is not applicable when an entire element of the offense is omitted from the application paragraph. Doyle v. State, supra (where the culpable mental state was omitted from the jury charge).

The Court's opinion on original submission relied on Braudrick v. State, supra, in its analysis of the "elements" of murder and voluntary manslaughter. In Braudrick, a panel of this Court found that the fact that the accused was "not acting under the immediate influence of sudden passion arising from an adequate cause" was an implied element of murder, as distinguished from a statutory element (see V.T.C.A., Penal Code, Section 19.02) and must be proved only where the evidence adduced at trial raised the issue that the accused was acting under such an influence. But, the author of the Court's opinion in Braudrick also went on to write that the fact that the defendant was acting "under the immediate influence of sudden passion arising from an adequate cause" is in the nature of a defense to murder that reduces the offense to voluntary manslaughter. So, although not quite an element of murder, this issue of "sudden passion" does in fact seem to be a defense to murder and as a matter of

burden of proof is to be treated like a defense.

I submit that, according to Braudrick, "sudden passion" is then not an element that must be charged in the application paragraph of murder. In fact, if we read Braudrick closely, we see that the panel therein approved the court's charge which in essence is identical to the charge before us today.[1] Since the absence of sudden passion is not an element (statutory) of murder, proper review of the court's charge is to read it as a whole. Doyle v. State, supra. Taken as a whole, the charge as worded requires the jury to consider all the elements of murder as well as the defense of sudden passion. There is no error, must less fundamental error in the charge in the instant case.

To hold that error is present in the charge as given presumes that the jury reads portions of the charge in a vacuum. I would show the Court that in paragraph 17 the court instructed the jury as follows:

"In your deliberations you will consider this charge as a whole. . . ."

Clearly, upon reading the charge as a whole, one finds complete and correct instructions to the jury on the law of murder and voluntary manslaughter.

If we extend the position of the opinion on original submission to its logical end, this Court would have to hold that in every case failure to include every defense raised by the evidence in the paragraph applying the law of the primary offense to the facts of a case would be fundamental error. It would also follow that in instances where a trial court is submitting the offense of murder and the lesser included offense of involuntary manslaughter, the absence of reckless conduct should also be submitted in the paragraph applying the law of murder to the facts. This reasoning could also be applied in cases where criminally negligent homicide is being submitted as the lesser included offense of murder. Such reasoning taken to its extreme would totally disrupt the current format for the submission of jury charges.

The speculative conclusion made by the opinion on original submission assumes that juries never read past the paragraph applying the law to the facts. If this is so, why doesn't this court just take the final leap and do away with every portion of the charge except the paragraph applying the law to the facts.

This is not to say that the Court is wrong in saying that it would be acceptable to include the absence of "sudden passion" in the paragraph applying the law of murder to the facts. However, there are other proper ways of submitting the defensive issue of sudden passion and the charge as submitted in the instant case contains one of those acceptable ways.

Finally, this Court has held that it is not fundamental error for failure to give a charge on defensive theories. Hawkins v. State, 660 S.W.2d 65 (Tex.Cr.App. 1983); White v. State, 495 S.W.2d 903

(Tex.Cr.App. 1973); Paredes v. State, 500 S.W.2d 160 (Tex.Cr.App. 1973). If these cases are correct, how can it be fundamental error to charge on defensive theories?

Because I find that the reasoning of the opinion on original submission erroneous and I feel that rehearing should be granted, I must dissent to the Court's denial of the State's motion for leave to file a motion for rehearing.

1. "Here, although the implied element of murder was not charged in the murder paragraph of the jury instruction, it was adequately charged in the voluntary manslaughter paragraph. That portion of the jury instructions charged: "'Now if you find beyond a reasonable doubt that on or about the 29th day of October, 1974, in Aransas County, Texas, the defendant, Les Newton Braudrick, did then and there intentionally or knowingly cause the death of an individual, K. W. Smith, by stabbing him with a knife, but you further find and believe from all the facts and circumstances in evidence in the case, the defendant, in killing the deceased, if he did, acted under the immediate influence of sudden passion arising from an adequate cause, or if you have a reasonable doubt as to whether defendant acted under the immediate influence of a sudden passion arising from an adequate cause, then you will find the defendant guilty of voluntary manslaughter. (Emphasis added)'" Braudrick v. State, supra, at 710, 711.