

CHARGE OF THE COURT:

BLYTHIN, J.: Ladies and gentlemen of the Jury, some of the statements which will now be made to you may be repetitious of what has already been said to you, either upon your impaneling as a jury or thereafter at some points during the course of this trial. Those statements are not repeated here because the court entertains any thought that you have forgotten them or would disregard them, but because the law places upon the trial judge the obligation of outlining to you at this point in this proceeding the issues that are to be here determined and to state to you the principles of law which are to govern you in the determination of those issues. When we refer to determining issues we are merely referring to determining what the facts are. It has undoubtedly occurred to you that deciding what the facts are in a case of this kind is a very important function. It is, in fact, an all-important function and is exclusively your function. With it I have nothing whatever to do, and if by anything that has been said or done during the progress of this trial, or by something that is now said, or by some emphasis which you may think I place on something I now say, there is expressed -- there is created in your minds some impression that I have formed

some opinion as to what the facts are in this case, you are now instructed to disregard and dismiss such impression entirely and to proceed to arrive at your own conclusions on the basis of instructions now being given to you. You are the sole judges of the facts in this case.

Coming, however, to state the principles of law which are to govern you in your determination of the issues in this case, it is my function, and mine alone, to state those and it is your duty as jurors to follow those principles without question or challenge; and that is true even though you may believe that the court is not stating those principles correctly or that the law ought to be different to that which is stated to you. Jurors are not judges of the law but are the judges of the facts on the basis of the law as stated by the trial judge.

A case of this kind comes into this court by the filing of an indictment by the grand jury of this county. An indictment is merely a piece of white paper, on which is printed, typewritten, written; or possibly some of each; a statement that someone has done something, which, if it is true, would constitute a violation of a criminal law of this State. In this case such an indictment was filed charging defendant Sam H. Sheppard with

Murder in the First Degree; it being claimed that on or about the 4th day of July 1954 Sam H. Sheppard killed Marilyn Sheppard. The fact that an indictment has been filed raises no presumption whatever of guilt of any crime. A person named in an indictment and therein charged with a crime is presumed to be innocent and that presumption remains with him until he is shown to be guilty under the conditions and by the degree of proof which I shall now outline to you.

When the indictment in this case was filed in this court it became the duty of Sam H. Sheppard to appear and to enter his plea to the charge made in the indictment. He appeared and pleaded Not Guilty. When he did that he placed in issue, meaning in dispute, each and every element of the crime charged against him and placed upon the State the burden, if he is to be found guilty, of proving him guilty beyond a reasonable doubt; such proof including proof of each and every element of the crime charged.

A defendant in a criminal case is presumed to be innocent until he is proved guilty of the crime charged, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he shall be acquitted. This presumption of innocence places upon the State the burden of proving him guilty beyond reasonable doubt.

By presumption of innocence is meant that cloak which the law throws over every citizen in our society, giving him, in a sense, a favorable position in society as distinguished from an unfavorable one; the place of an honest man as distinguished from a dishonest man, and an innocent man as distinguished from a law violator, and keeps that cloak over him unless and until proof is furnished that such citizen is not entitled to the protection of that cloak and, in a case of a charge of crime, to be guilty of it by evidence showing it beyond a reasonable doubt, as that term is understood under our law.

What is a reasonable doubt is something about which reasonable minds could have different views and for that reason the legislature of Ohio has enacted into law the State's own definition of reasonable doubt and has made it the duty of the trial judge in every criminal case to read that definition to the jury for its guidance. It is as follows:

"A reasonable doubt is not a mere possible doubt, because everything relating to human affairs or depending upon 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 that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

Section 2901.01 of the Revised Code of Ohio, in its pertinent part, provides that:

"No person shall purposely, and either of deliberate and premeditated malice, kill another."

The indictment in this case, eliminating its caption and certain formalities, charges:

"that Sam H. Sheppard on or about the 4th day of July 1954, at the county aforesaid, unlawfully, purposely and of deliberate and premeditated malice killed Marilyn Sheppard contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio."

The mention of "county aforesaid" in that indictment has reference to Cuyahoga County.

You will note that the charge in the indictment is based directly on the section of the Revised Code just quoted. You will recall that in order to arrive at a

verdict of guilt it is essential that each and every element of the crime charged be proven beyond a reasonable doubt. It therefore becomes important to determine what those elements are. They must be found in the law itself without diminution or enlargement by any thoughts or notions entertained by us.

The elements, in their chronological order, are these:

(1) "No person."

That expression embraces the entire population. It singles out no particular person and, for that reason, there must, before guilt can be established, be an identity of person. Only one person is accused in the indictment in this case. That person is Sam H. Sheppard, and unless you are able, under the evidence in this case, to eliminate all other persons and, further, to establish that Sam H. Sheppard is the person who committed the act charged you need go no further and would be obligated to render your verdict in his favor.

(2) "Shall purposely."

This relates to killing. To do an act purposely is to do it intentionally and not by mischance or accident. Intent is a state of mind and we have not yet found the means of peering into the mind and viewing within it an intent there formed. We therefore must

resort to an appraisal of those things which generally become the form of expression of an intent. We look to what is said, if anything; what is done, if anything; movements made which indicate a relationship to each other; the natural result to be expected from such movements; the weapon or instrument used, if any, in the commission of an act and especially such that may readily cause injury or death to another, having in mind that every person capable of reasoning is presumed to intend the probable and natural consequences of his voluntary acts. If a deadly instrument or weapon is used wilfully and in a manner calculated to destroy life a jury may infer the intent or purpose to kill by such instrument or weapon. Intent is an element which must be found to be present simultaneous with the act of killing.

(3) "Either of deliberate and premeditated malice."

When we speak of malice in common parlance and in everyday affairs we usually refer to ill-will, bitterness, hatred, spite or jealousy. In a legal sense malice does not mean those things but may include one or more of them. To do an act maliciously in a legal sense is to do an act without just cause or excuse for doing it, and with a design and intent to injure another. It is an act expressive of a disregard of social duty and of a

heart bent on mischief.

Such malice as an element of murder in the first degree must have been deliberate and premeditated. The words "deliberate and premeditated" mean that the purpose to kill was considered and that it was turned over in the mind, or thought about, before it was put into execution. The law does not fix a time for which such deliberation and premeditation must have existed. It may be for months, weeks, days, hours or a very short period of time. If the malicious purpose be formed a sufficient length of time to enable the killer to consider and contemplate his unlawful act before its commission it satisfies the legal requirement of deliberate and premeditated malice.

(4) "Kill another."

There must be a killing. The mere fact that a death occurred does not, of course, mean that a murder has been committed. It must be shown that the death of the person claimed to have been killed was caused by the acts charged.

The jurisdiction of this court in criminal matters does not extend beyond the boundaries of Cuyahoga County so that before any verdict of guilt of any crime is rendered here the offense involved must be found to have been committed in this county.

If, therefore, you find that Sam H. Sheppard purposely and either of deliberate and premeditated malice killed Marilyn Sheppard in Cuyahoga County it will be your duty to find him guilty of murder in the first degree.

While the indictment in this case charges only murder in the first degree it embraces within its terms certain crimes of an inferior degree, namely; "Murder in the Second Degree" and "Manslaughter, First Degree." It is therefore possible for you to find that the defendant in this case is not guilty of murder in the first degree but that, nevertheless, the elements of murder in the second degree or of manslaughter, first degree, are present and that he is guilty of one of those specified crimes.

Section 2901.05 of the Revised Code of Ohio provides that:

"No person shall purposely and maliciously kill another."

Such an act is designated as murder in the second degree.

If you find that Sam H. Sheppard is not guilty of murder in the first degree on the basis of the evidence and the rules which I state to you it will be your duty to move a step further and to determine whether the elements of murder in the second degree are present. The

elements of murder in the second degree are precisely the same as those of murder in the first degree with the one exception that the act of malicious killing need not be the result of deliberation and premeditation. I will not undertake to repeat the definition of the elements because their character is the same with the one exception mentioned. It follows that if you find that Sam H. Sheppard is not guilty of murder in the first degree as charged but do find that he purposely and maliciously killed Marilyn Sheppard in Cuyahoga County it will be your duty to find him guilty of murder in the second degree.

Section 2901.06 of the Revised Code of Ohio provides that:

"No person shall unlawfully kill another."

Such an act is designated as manslaughter, first degree.

The words "first degree" in the section and in this connection are of no vital importance in this particular case. The legislature of our State undertook to divide the crime of manslaughter into two classes -- one being manslaughter, first degree, and being one in which no motor vehicle is involved; and manslaughter, second degree, being one in which the operation of a motor vehicle is involved. It is therefore possible for you to find that the defendant Sam H. Sheppard is not

guilty of either murder in the first degree or murder in the second degree but that nevertheless the elements of manslaughter, first degree, are present. We look to the law itself for those elements. Again we have:

(1) "No person."

I shall not repeat what I have said about the necessity of finding that Sam H. Sheppard is the person. What was said in that connection within the requirements in the case of murder in the first degree has equal application here.

(2) "Shall unlawfully kill another."

A killing is unlawful when without cause. It is an intentional or unintentional killing but without being prompted or motivated by malice of the character I have described to you. It is that killing which is done in the heat of passion due to some provocation, and takes place before enough time has elapsed to permit such passion to cool down and thereby avoid the unfortunate killing.

If you find Sam H. Sheppard not guilty of either murder in the first degree or murder in the second degree, but do find that he did unlawfully kill Marilyn Sheppard in Cuyahoga County under the conditions last recited to you it will be your duty to find him guilty of manslaughter, first degree.

You are in no event to find Sam H. Sheppard guilty of any offense outlined to you unless each and every element of that particular offense is found by you to have been proven beyond a reasonable doubt. On the other hand it is not to be your privilege to be generous by rendering your verdict finding him guilty of a lesser offense when and if in the judgment of the twelve of you the evidence discloses beyond a reasonable doubt his guilt of a higher offense.

If you find that the evidence in this case does not, under the rules outlined to you, disclose Sam H. Sheppard guilty beyond a reasonable doubt of any one of the three offenses mentioned it will be your duty to find him Not Guilty.

There are two classes or types of evidence and both are involved in most cases of the kind and character of this case. They are designated as Direct Evidence and Circumstantial Evidence. Both are proper and one is as effective as the other if equally convincing under the rules of law for its application. Direct Evidence is that given by a witness on the basis of the dictates of his own senses -- what he himself heard; what he saw; what he did; what he said -- matters which he himself knows. Circumstantial Evidence is that which is furnished as to a fact which may not be the fact or

situation sought to be proven but is a fact from which a fair inference can be drawn tending to prove the fact or situation sought to be shown or proven. I believe that a very simple and homely example or illustration of each of the two types of evidence mentioned may be helpful.

Illustrating now what would be direct evidence, let us assume that I had on a certain day a very fine cherry tree in my yard. The family happens to be away on that day and when I return about 5 o'clock in the evening I find my cherry tree chopped down. I proceed to investigate and first make inquiry of my next door neighbor Mr. Smith. I ask him if he saw any stranger doing anything in my yard on that day. He replies: "Yes, I saw George Washington chop it down with an ax." That would constitute direct evidence because Mr. Smith is relying on his own sense of sight and states what he himself saw with his own eyes. For that reason he is able to give direct evidence that George Washington chopped down that cherry tree.

Let us now consider a case of Circumstantial Evidence in the same connection. Assume that on inquiry of Mr. Smith, my neighbor, he, in answer to my question, says that he did not see anyone chopping down my tree.

I then ask him: "Did you see anyone about my place today?"

He replies: "Yes, I saw George Washington walk along your driveway from the yard to the street with an ax on his shoulder." Here is evidence of a fact which does not directly prove who chopped down my cherry tree but which permits a natural and fair inference that George Washington was in my yard with an ax combined with the fact that my tree was chopped down would constitute very definitely a piece of circumstantial evidence to be weighed in the consideration of a charge against George involving the act of chopping down that tree. It is for you to determine how much of circumstantial evidence adduced in this case is credible and what fair inferences are to be drawn from it. You are instructed that any inference drawn must in every instance be drawn from a proven or established fact. In other words, you are not to draw a second or further inference upon an inference but that is not to say that you are confined to drawing only one inference from one fact. There is no limit to the number of independent inferences that may be drawn from a fact. The rule is simply that every inference must be drawn from, and based on, a fact and that once having drawn an inference one may not draw a second inference from the first.

It is necessary that you keep in mind, and you are so instructed, that where circumstantial evidence is

adduced it, together with all other evidence, must convince you on the issue involved beyond a reasonable doubt and that where circumstantial evidence alone is relied upon in the proof of any element essential to a finding of guilt such evidence, together with any and all other evidence in the case, and with all the facts and circumstances of the case as found by you must be such as to convince you beyond a reasonable doubt and be consistent only with the theory of guilt and inconsistent with any theory of innocence. If evidence is equally consistent with the theory of innocence as it is with the theory of guilt it is to be resolved in favor of the theory of innocence. /

The law does not require the State to prove motive in this case. The presence or absence of motive shown by the evidence may be considered by you in determining intent, or its presence or absence in the mind of the defendant Sam H. Sheppard, so that if you find beyond a reasonable doubt that the defendant is guilty of any offense under these instructions, then you should find him guilty whether or not a motive has been established.

Some evidence has been given in this case concerning the claimed general conduct and reputation of the defendant and it is proper to present such evidence for your consideration. It is not admitted because it

furnishes proof of guilt or innocence but because it is a matter of common knowledge that people of good character and reputation do not generally commit serious or major crimes. Such evidence, if believed, may be of some help to you in your consideration of the total evidence and the situation as a whole. The court wishes to caution you, however, that good character and a good reputation will not avail any person charged with a crime against proof of guilt beyond a reasonable doubt.

You are, as already stated, the sole judges of the facts in this case as well as the credibility of the witnesses who have testified in this trial. In determining what you are going to believe it is your privilege to resort to those means and processes that you resort to in everyday life in resolving conflicting statements and facts in dispute and in honestly and rationally arriving at what, in your judgment, the truth actually is. Without meaning to mention all of those means and processes the court mentions a few for illustration and your guidance. You may take into consideration the demeanor of a witness on the witness stand; his willingness or unwillingness to answer questions put to him; the reasonableness, or otherwise, of the answers given by him; the opportunity which he had, if any, to observe and know the things that he testifies to. In addition, you

may take into consideration the interest, if any, which a witness has in the outcome of this trial. You are not to arrive at your conclusion on the basis of consideration of part of the evidence. Your final conclusion is to be based on full, fair and honest consideration of all the evidence but that is not to say or mean that you must believe all of the evidence. You are privileged to believe all that an individual witness testifies to, or disbelieve all of it. You may believe part and disbelieve part of it but you are not to do so on the basis of any prejudice, sympathy, motive or aim other than to arrive at what the actual truth is. In and of itself, the source of evidence is not the test of its value. It may come from a professional person, a public official or the most humble of laymen. The real and final test is whether or not you find the truth within it. You are not to decide this case on the basis of the number of witnesses nor on the length of their testimony. Testimony is to be judged on the basis of its quality rather than its quantity.

With the penalty, if any, which will be imposed in case of a finding of guilt you have nothing to do excepting in one instance. In the event that you find the defendant guilty of murder in the first degree you will have the duty of determining whether or not you will

recommend mercy.

You are not obligated to recommend mercy and your discretion in that matter is not subject to the dictation or control of any others or in any sense. You are not to recommend mercy out of considerations of prejudice, sympathy, or favor, or for the purpose of avoiding what you may consider an unpleasant task or duty. If you come to consider a recommendation of mercy you will scan the evidence and determine whether there exist within the evidence some facts and circumstances which lead you to believe that in the exercise of your sound discretion and judgment you should recommend mercy in spite of your finding of guilt of murder in the first degree.

If you find the defendant guilty of murder in the first degree and do not recommend mercy it will be the obligation of the court to sentence the defendant to death. If you find the defendant guilty of murder in the first degree and do recommend mercy the penalty imposed will be imprisonment in the penitentiary for life.

When you retire to your jury room it will be your duty to elect from your number a person to act as your foreman. That person may be a man or woman but, just for convenience, I will refer to that person as if he were a man. He will have neither authority nor duties beyond those of any other juror excepting those that I will now

specifically mention. He will be the chairman of your deliberations. That is a very important item. You have been cautioned during the progress of this trial not to discuss this case with anyone and to so refrain from discussion of it among yourselves, either in your jury room or elsewhere.

You are now to fully discuss and consider among yourselves in your jury room all the evidence in this case and it will be the duty of your foreman to see to it that every member of this jury has full and a fair opportunity to express his or her views upon any part or all of the evidence in this case and to urge upon his and her fellow-jurors the fair inferences which he or she believes can be fairly drawn from any portion or all of the evidence in the case. This is important because you will not be able to return a verdict in this case unless all twelve of you are in agreement upon that verdict. Your verdict will therefore represent the composite judgment of twelve people together. In arriving at final judgment it is the duty of every juror to fairly and patiently, listen to the views of his or her fellow-jurors on the evidence and to join in a reasonable manner in a common effort to correctly evaluate it and, upon it, to arrive at a just verdict. That is not to say that any juror must surrender his or her judgment to that of any other person when that

judgment is honest and real after fair discussion, and collaboration. The foreman will also have the duty of affixing his signature to the form of verdict upon which all jurors have agreed. It is not necessary that any juror other than the foreman sign the verdict.

You will have with you in your jury room the indictment filed in this case but you are instructed that it is not evidence and that the fact that it is here raises no presumption of guilt. It goes with you to your jury room for the sole purpose of having you know exactly what the charge against Sam H. Sheppard actually is.

You will also have with you the exhibits which have been admitted in evidence in this case. Those exhibits are evidence and are to be considered by you as such to the same extent that you consider the spoken word.

You will, too, have with you five forms of verdict. Only one of these forms is possible or permissible in this case. Each form is completely filled out with the exception of the signature of your foreman. They are:

1. Guilty of Murder in the First Degree as charged in the indictment.
2. Guilty of Murder in the First Degree as charged in the indictment, but we do recommend mercy.
3. Not Guilty of Murder in the First

Degree but Guilty of Murder in the
Second Degree.

4. Not Guilty of Murder either in the
First or Second Degree but Guilty of
Manslaughter, First Degree.

5. Not Guilty.

You will have with you in your jury room a copy
of the instructions which I have just read to you and you
may refer to it for guidance if you should find it
necessary to do so.

If and when you have agreed upon a verdict your
foreman will sign the form which is expressive of your
finding.