

INDEX.

	PAGE
Writ of Error to Supreme Court.....	i
Return of Supreme Court.....	ii
Writ of Error to Essex Quarter Sessions.....	1
Return of Essex Quarter Sessions.....	2
Indictment	2
Plea	4
Judgment	4
Court's Charge to Jury	47
Exception to Charge.....	50
Certificate of Judge	50
Certificate of Court Stenographer.....	51
Assignment of Errors (Supreme Court).....	52
Specification of Causes (Supreme Court).....	55
Opinion of Supreme Court.....	57
Remittitur	59
Assignments of Error	60

TESTIMONY FOR THE STATE.

Alice Bishop,	direct examination.....	6
	cross "	8
	re-direct "	15
Julia Bishop,	direct examination.....	16
	cross "	21
John H. Garry,	direct examination.....	24
	cross "	24

TESTIMONY FOR DEFENDANT.

Alexander Naujoks,	direct examination.....	27
	cross "	27
	re-direct "	32
John Bishop,	direct examination.....	34
	cross "	35
	re-direct "	36
Andrew Hahn,	direct examination.....	36
	cross "	38
	re-direct "	38

		PAGE
Angelo Farisi,	direct examination.....	38
	cross ".....	39
	re-direct ".....	39
	re-cross ".....	39
Edna L. Ryan,	direct examination.....	39
	cross ".....	40
Mary Goering,	direct examination.....	40
Eva Kapeski,	direct examination.....	41
Mary Hahn,	direct examiantion.....	42
	cross ".....	42
Philip David,	direct examination.....	43
	cross ".....	43
John Eaton,	direct examination.....	43
	cross ".....	44
Henry H. Brixus,	direct examination.....	44
	cross ".....	45

STATE'S REBUTTAL.

Alice Bishop,	direct examination.....	45
J. Henry Clark,	direct examination.....	45
	cross ".....	45
	re-direct ".....	46

Writ of Error.

WRIT OF ERROR TO SUPREME COURT.

Filed.

New Jersey Court of Errors and Appeals

NEW JERSEY, ss.

10

The State of New Jersey to the Judge of the
(SEAL) Court of Common Pleas constituting the New Jersey Supreme Court in and for the State of New Jersey, GREETING:

Because in the record and proceedings and also in the giving of judgment upon a certain indictment in the name of the State of New Jersey against Alexander Naujoks, for conspiracy, manifest error hath intervened, to the great damage of the said State of New Jersey, as from its complaint we have received information; we being willing in this behalf to correct the error in due manner, if any shall be, and that speedy justice be done to it, the said State of New Jersey, DO COMMAND YOU that if judgment be thereon given, then that you do, distinctly and openly, send under your seal, the record and proceedings aforesaid, with all things touching the same, together with the entire record of the proceedings had upon the trial of said indictment to our Supreme Court, on the twelfth of October, nineteen hundred and twenty, and this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon for correcting that error, what of right and according to the laws and customs of New Jersey ought to be done.

20

30

WITNESS, Edwin R. Walker, Chancellor of the State of New Jersey, at Trenton, this twenty-eighth day of September, nineteen hundred and twenty.

THOMAS F. MARTIN,

Clerk.

J. H. HARRISON,
Attorney.

40

Return.

RETURN OF SUPREME COURT.

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

10

WM. S. GUMMERE,
C. J.

20

30

40

Writ of Error.

WRIT OF ERROR.

Filed.

New Jersey Supreme Court

NEW JERSEY, ss.

10

(L. s.) The State of New Jersey, to our Judges of our Court of Oyer and Terminer of the County of Essex, constituting the Court of General Quarter Sessions, in and for said County, GREETING: Because in the record and proceedings and also in the giving of judgment upon a certain indictment in the name of the State of New Jersey, against one Alexander Nayoks for assault and battery and abuse, in the City of Newark, in the County of Essex, found in our Court of Oyer and Terminer and in and for said County heard and determined, manifest error hath intervened to the great damage of him, the said Alexander Nayoks, as from his complaint we have received information, we being willing in that behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said Alexander Nayoks, do command you that if judgment be thereupon given that then you do send the record and proceedings aforesaid together with all things touching and concerning the same, to us, under your seal, distinctly and openly, and this writ, so that we may have them before our Supreme Court of Judicature, at Trenton, on the fifth day of July next, that inspecting the records and proceedings aforesaid, we may further do thereupon for correcting the error that which of right and according to law shall be fit to be done.

20

30

Witness, WILLIAM S. GUMMERE, Chief Justice of our said Supreme Court, at Trenton, the sixteenth day of June, A. D. nineteen hundred and nineteen.

ENOCH L. JOHNSON,

Clerk.

40

McDERMIT & McDERMIT,
Attorneys.

*Indictment.***RETURN.**

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX, } ss.

10 I, HARRY V. OSBORNE, Judge of the Court of Quarter Sessions in and for Essex County, New Jersey, do hereby certify and return to the Supreme Court of Judicature of the State of New Jersey the Indictment, Judgment, Record and Proceedings together with the entire record of the Proceedings had at the trial and all things touching and concerning the same as by the within Writ to me directed, I am commanded.

(L. s.) IN WITNESS WHEREOF I have hereunto set my hand and official seal at Newark, N. J., this 13th day of _____, A. D. 1919.

20

H. V. OSBORNE,
Judge of the Quarter Sessions Court,
Essex County, N. J.

INDICTMENT.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX, } ss.

30 Be it remembered that at a Court of Oyer and Terminer, holden at Newark, in and for the County of Essex on the second Tuesday in December, in the year of our Lord one thousand nine hundred and eighteen, by the Honorable William S. Gummere, Chief Justice of the Supreme Court of Judicature, of the State of New Jersey, and holding the said Court of Oyer and Terminer in and for the County of Essex, New Jersey, by the oath of J. Henry Bachellor, John J. Crawley, Michael Loprete, Emil Baer, Davis R. Mitchell, Henry Berg, Ralph B. Smith, Sr., Leo N. Lissner, Alfred C. Craddock, George W. Fisher, Jr., Louis J. Wurth, Karl Oswald, George R. Swain, Edward Blau, Frederick C. Breidenbach, Nathaniel P. Gardener, Francis J. Reynolds, Philip T. Turk, Charles W. Hummel, Harry J. Stanley, August Buermann, Jr., Ernest P. Bogenhard, Matthias Ludlow, good and lawful men of the said County of Essex, duly commissioned and then and there duly sworn and charged to enquire in behalf of the State of New Jersey, in and for the said County of Essex, it is presented in manner and form following, to wit:

40

Indictment.

Essex County, to wit:

The Grand Inquest for the State of New Jersey, and for the body of the County of Essex, upon their oath, Present, that Alexander Naujoks, late of the City of Newark, in the said County of Essex on the fifteenth day of August, in the year of our Lord, one thousand nine hundred and eighteen, with force and arms, at the City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, in and upon one Alice Bishop in the peace of God and of this State then and there being, an assault did make, and her the said Alice then and there did beat, wound and illtreat, and other wrongs to said Alice then and there did, to the great damage of the said Alice contrary to the form of the Statute in such case made and provided and against the peace of this State, the government and dignity of the same. 10

And the Grand Inquest, upon their oath, aforesaid, do further Present, That the said Alexander Naujoks, being then and there above the age of sixteen years on the fifteenth day of August in the year of Our Lord one thousand nine hundred and eighteen, at the city aforesaid, in the County of Essex aforesaid, and within the jurisdiction of this Court, in and upon one Alice Bishop in the peace of God and of this State then and there being an assault did make, with an intent her, the said Alice then and there to carnally abuse, the said Alice, being then and there a woman under the age of sixteen years to the great damage of the said Alice contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same. 20 30

J. H. HARRISON,
Prosecutor of the Pleas.

On the fourth day of February A. D. nineteen hundred and nineteen, on which day the said Indictment was presented by the Grand Jury aforesaid, to the said Court of Oyer and Terminer, and the said Justice did then and there order the said indictment to be handed down to the Court of Quarter Sessions, in and for said County of Essex, and then and there the said indictment was duly delivered and duly filed by the Clerk of said Court and an entry of such order and delivery and filing was there and then made in the minutes of said Court at the same time pursuant to the statute in such case made and provided. 40

*Judgment.***PLEA.**

10 And afterwards, that is to say, on the sixth day of February, A. D. nineteen hundred and nineteen, at the Court of Quarter Sessions, holden at Newark, in and for the County of Essex, before the Honorable Harry V. Osborne, presiding Judge of the Court of Common Pleas, Alexander Naujoks, in the custody of John R. Flavell, Sheriff of the County of Essex aforesaid, and the said Alexander Naujoks being brought before the bar in his own proper person and forthwith being demanded of and concerning the premises in the above indictment specified and charged upon him, how he would acquit himself thereof, say that he is not guilty thereof, and therefore for good and evil he puts himself upon the country, etc., and J. Henry Harrison, Prosecutor of the Pleas of said State, for said County of Essex in this
20 behalf doth the like.

JUDGMENT.

30 Therefore, let a Jury thereupon come before the Court of Quarter Sessions to be holden at Newark, in and for the County of Essex, on the nineteenth day of February, A. D. nineteen hundred and nineteen, then next ensuing twelve free and lawful men, each of whom shall be a citizen of this State and resident within the County of Essex aforesaid, above the age of twenty-one years and under the age of sixty-five years, by whom the truth of the matter may be better known and who are not of kin to the said Alexander Naujoks to recognize upon their oath whether the said Alexander Naujoks is Guilty of the premises in the said indictment specified or Not Guilty because the said J. Henry Harrison, Esq., Prosecutor, etc., as the said Alexander Naujoks puts himself upon the Jury and the same time is given to the parties aforesaid at the same place.

40 And now, that is to say, the second day of June, A. D. nineteen hundred and nineteen, to which date the trial of said issue was postponed, at the same Court of Quarter Sessions holden before the Honorable Harry V. Osborne, Judge of the Court of Common Pleas, comes the said J. Henry Harrison, who prosecutes as aforesaid, and the said Alexander Naujoks and the jury

Judgment.

of whom mention is before made, and by the said John R. Flavell, Sheriff of the County of Essex, for this purpose empanelled and returned, to wit: After the following number of challenges were exhausted: By the State 1, by the defendant 1. William G. Hainski, John Frey, Charles B. Wilson, Andrew V. Driscoll, John Galm, Edward Hodecker, Homer Fleming, J. Whitfield Colyer, William E. Madison, John Poncet, Anthony N. Koch, Albert J. Kauffman, who, being called, were sworn upon that jury who to speak the truth of and concerning the premises and thereupon the trial of said issue was commenced and continued until the third day of June, A. D. nineteen hundred and nineteen, when the jury returned into Court in charge of the officer sworn to attend them, and then and there in the presence of the Prosecutor, defendant and Court do say upon their oath they find the said defendant, Alexander Naujoks, Guilty as charged, and so they say all.

10

20

Judgment Signed,
June 16, 1919.
HARRY V. OSBORNE,
Judge.

Whereupon all and singular, the premises being seen and by the Court now here fully understood it is on this sixteenth day of June, A. D., nineteen hundred and nineteen, ORDERED and adjudged that the

said Alexander Naujoks be committed to the State Prison of this State for a term of not less than Five years and not more than Twelve years at hard labor upon this conviction and from thence until the costs are paid which said costs are taxed by the Clerk at the sum of seventy-eight dollars and sixty-eight cents and the said defendant be in mercy, etc.

30

40

Alice Bishop, direct.

ESSEX COUNTY COURT OF QUARTER SESSIONS.

Monday, June 2, 1919.

STATE

vs.

ALEXANDER NAUJOKS.

Indictment No. 83, April Term, 1919.

*Assault and Battery and
Intent to Abuse.*

Before Hon. Harry V. Osborne, Judge, and jury.

For the State appears John A. Bernhard, Esq., Second Assistant Prosecutor of the Pleas.

For the defendant appear Messrs. McDermit & McDermit, by Frank M. McDermit, Esq.

Mr. Bernhard opens in behalf of the State.

ALICE BISHOP, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q Alice, how old are you? A Eleven.

Q Where do you live? A 52 Crawford street.

Q Newark? A Newark, New Jersey.

Q With whom do you live? A Sir?

Q Who lives there besides you? Do you live with your mother and father? A Father and mother and three brothers.

Q What school do you go to? A Washington street school.

Q Do you know Mr. Naujoks? A Yes, sir.

Q Do you know where his store is? A Yes.

Q Where? A West Kinney street.

Q How close to Washington? A Half a block in.

Q And towards what street? A Towards Halsey street.

Q Then it is on West Kinney street between Washington and Halsey? A Yes, sir.

Q What kind of a store is it? A Candy store and cigar store.

Q Have you been in there? A Yes, sir.

Q Did anything happen at any time while you were in there?

A Yes, sir.

Q When? A June.

Alice Bishop, direct.

Q What year? A 1918.

Q Last year? A Yes, sir

Q What time of the day? A Afternoon.

Q What afternoon? A Thursday afternoon.

Q What time? A Two o'clock.

Q Whereabouts did this happen? A In the back of the store. 10

Q How did you get back there? A He dragged me back.

Q From where? A From the candy store.

Q Anybody with you? A No.

Q Who dragged you back? A Alexander Naujoks.

Q What were you doing in the candy store? A Buying candy.

Q Any other persons in the candy store? A No, sir.

Q You tell the Court and jury just what happened, how he took hold of you and how he got back in the room and what happened in the back room. You tell it in your own way. A I came in to buy candy and he got me by the back of my dress like that (illustrating) and he dragged me in the candy store and threw me on the bed face down and then he put his private into my private. 20

Q Go on. A That is all I know.

Q Did you stay there? A He pushed me down and he laid on top of me and I had to stay.

Q How long were you there? A Half an hour.

Q What did he do while you were there half an hour? A He put his private into my private. 30

Q How were you dressed? A I had all my clothes on and he took down my pants.

Q Who did? A Alec Naujoks.

Q After you had been there for half an hour what then did you do? A He gave me a penny and chased me out of the store.

Q What did you do after you were chased out of the store? A I went home.

Q What did you do when you got home? A I went upstairs and done my work, what my mother told me.

Q Was your mother home? A No, sir.

Q What time did your mother get home? A Five o'clock. 40

Q What did you do when your mother got home at five o'clock? A I didn't tell her nothing.

Q You did not tell her? A No, sir.

Q When did you tell her? A When it first started.

Alice Bishop, cross.

Q What? A When the court first started.

Q How many days afterwards, what happened? A I didn't tell her nothing at all; she didn't know nothing.

Q Now then, at any time from the time you went in the store that afternoon until you came out again was there anyone with you? A No, sir.

10 Q Was there anyone in the store besides you and Mr. Naujoks? A No, sir.

Cross examination by Mr. McDermit.

Q How old are you? A Eleven years old.

Q How long have you known Naujoks? A Ever since he was on—

Q How often did you go to the store there? A Not very often.

20 Q What were you doing there? You say this was in June?
A Yes, sir.

Q Were you subpoenaed in court before? Did you ever go before in court to tell this story? A No, sir.

Q Sure about that? A Yes, sir.

Q Did you ever tell anybody it was on the 15th of August?
A No, sir.

Q Sure about that? A Yes, sir.

Q Never told your mother anything about it? A No, sir.

Q Never told your father anything about it? A No, sir.

30 Q Who did you tell about it? A Nobody.

Q You must have told somebody about it? A No, sir.

Q Never did? A No, sir.

Q Did you go before the Grand Jury downstairs? A Yes, sir.

Q You were called there, were you not? A Yes, sir.

Q Some police officer brought you there, didn't he? A Yes, sir.

Q A policeman? A Yes, sir.

Q And you talked with him about the case? A Yes, sir.

Q And he asked you what had occurred? A Yes, sir.

40 Q Who asked you? A In the First Criminal Court.

Q Then you were in the First Criminal Court before bringing you to the Grand Jury? A Yes, sir.

Q Then you have told your story twice before, have you? A Yes, sir.

Alice Bishop, cross.

Q When was it you were in the criminal court? A I don't know.

Q Didn't you say in the criminal court that this occurred on August 15th? A I don't know.

Q What is your name? A Alice Bishop.

Q Did you say down in the First Criminal Court before the judge down there that it was the 15th of August that Naujoks took you to the back room? A I don't know; I forget. 10

Q What makes you think it was the 15th of June?

The Court. I do not think she said it was the 15th; she said it was in June.

Q What time in June was it? A Two o'clock.

Q What date? A Thursday.

Q On what date of the month? A I don't know.

Q What time did you quit going to school? A One o'clock school goes in. 20

Q Were you still going to school when this occurred? A We had a holiday.

Q School was over, was it? A Yes, sir.

Q Was it over for the term? A No, sir.

Q Had you gone on your vacation yet? A Yes, sir.

Q So it occurred after the summer closing of the schools, is that right? A Yes, sir.

Q You say that that occurred about two o'clock in the afternoon? A Yes, sir.

Q What did you go into the store for? A For candy. 30

Q And did you get the candy? A No, sir.

Q Why not? A Because I didn't have a chance to get it.

Q When you came in there he came out, did he not, grabbed hold of you and carried you in the back room? A Yes, sir.

Q Is that right? A He dragged me in the back room.

Q Did he say anything to you at all? A No, sir.

Q Open his mouth to you in any way? A No, sir.

Q Did he tell you why you were going into the back room? A No, sir. 40

Q You say that when he was in the back room he laid you with your stomach down on the bed and kept you there for half an hour? A Yes, sir.

Q And that he placed his private into your private? A Yes, sir.

Alice Bishop, cross.

Q What did you do during that time? A I was hollering and crying.

Q Did you see any doctor or anything after that? A No, sir.

Q Did anybody ever make an examination of your privates?
A I was in the headquarters.

10 Q Who was it made the examination there? A Dr. Clark.

Q When was it he made the examination? A The day we were all in court.

Q How long after the time that you say you were in Naujok's back room was it that you went into court? A Sir?

Q How long from the time that you say this occurred in Naujok's back room that you went into court? A About four months after.

Q Naujoks had been arrested charged with some trouble in that neighborhood, hasn't he? A I don't know.

20 Q And the officer came to your house to see you. How did anybody find out when you didn't tell them that Naujoks had something to do with you? A Stella Prine was caught stealing a watch. She was selling the watch at the Five and Ten cent store.

Q She was selling a watch down on Market street? A Yes, sir.

Q A watch that was stolen from Naujoks? A Yes, sir.

Q She was a colored girl? A Yes, sir.

Q And you went with her to Market street? A Yes, sir.

30 Q To the Five and Ten Cent store? A Yes, sir.

Q She had been in to Naujoks' that day, into his store and had stolen his watch? A Yes, sir.

Q And you went with her to Market street near Halsey street to sell this watch; is that right? A In the Five and Ten Cent store.

Q And while you were in the Five and Ten Cent store trying to sell this watch a policeman came in and arrested you and the colored girl? A No, sir; the colored girl was brought in the automobile and we came up afterwards.

40 Q How did the officer know where you lived? A We had to tell him.

Q The first time when this colored girl was arrested and after she was arrested for stealing a watch from Naujoks you told the officer the story? A Yes, sir.

Alice Bishop, cross.

Q The colored girl said he had something to do with her in the back room and that was the reason she stole the watch? A Yes, sir.

Q And she told you the same story? A No, sir; she told me she found the watch under a sewer pipe, under a piece of paper.

Q What occurred with you before was after that. Before you went to Market street to sell the watch were you in Naujoks' room or afterward? A No, sir.

Q It was afterward? A I wasn't in his room at all.

Q You were not in his room at all? A Only in June.

Q You say in June. When were you arrested, in September or October? When was the colored girl arrested for stealing the watch from Naujoks? A I think it was October.

Q How did you come to go with her up to Washington street to sell this watch, to this Five and Ten Cent store? A She was calling for me at my house and I went with her.

Q Did she go to the same school with you? A Yes, sir.

Q And she was passing your house and you went with her and then she was taken away in the patrol wagon? A Yes, sir.

Q And they kept her down in the station. Who took your name down? A I went down, me and another girl, and he said we should come upstairs, and he brought us upstairs and he asked us what is our name, and told me to tell the whole story.

Q After she was arrested she was kept at the police station down at Headquarters? A Yes, sir.

Q Then you were sent for by the police and brought up there? A We came up there.

Q Somebody sent for you and then the colored girl told you to tell the whole story? A No, the judge told us to tell the whole story.

Q Did you tell the judge that she stole the watch? A I told the judge that she found the watch, like she told me.

Q She told you to say that she found the watch on the street in the lot? A Found the watch by the sewer pipe with a piece of paper wrapped over it.

Q A piece of paper wrapped over it in the lot? A By the sewer pipe.

Q Found the watch by the sewer pipe? A Yes, sir.

Q And that was the watch that you were trying to sell? A Yes, sir.

10

20

30

40

Alice Bishop, cross.

Q Now, then, what did she say that Naujoks had done to her?

A She didn't say anything to me.

Q Why was it that they sent for you to go up there if she didn't talk to you about it? A After that she told me.

Q After that she told you he had done something to her? A Yes, sir.

10 Q And she told you that he brought her in and laid her on the bed and put his privates into her privates; is that what she said? A Yes, sir.

Q Then she told you to tell the whole truth? A Yes, sir.

Q And then you told the judge that he carried you in the bedroom and laid you on your stomach and that he put his private into your private? A I told him that it was June or August.

Q Who told you to use the word "private"? A Stella Prine.

20 Q Who was Stella Prine; she was another girl that was around there? A That is the colored girl.

Q She is the girl that was with you when the watch was taken? A No, that is another Stella.

Q Stella Prine told you to use the word "private"? A Yes, sir.

Q And it was Stella Prine that told you to say that he put his private into your private? A No, sir.

Q She used the word "private"? A Yes, sir.

30 Q She told you that Naujoks had put his private into her private? A Yes, sir.

Q And that is how you came to use the word private? A Yes, sir.

Q You don't know when this occurred? A No, sir.

Q You don't know whether this occurred in May, June, July or August? A August or June.

Q That was a matter between you— A August or June.

Q Which is it? A I don't know, but I think it was in June.

40 Q Didn't you say before the Grand Jury and didn't you say at the police court that it was the 11th of August? A I don't remember saying.

Q You were in the Grand Jury late in September? A Yes, sir.

Q And the colored girl was there? A Yes, sir.

Q And you told your story to the Grand Jury? A Yes, sir.

Alice Bishop, cross.

Q Didn't you say that the time you were carried in was the 15th of August? A I don't remember.

Q Who else was with you besides Stella Prine at the store in Market street? A Martha McGurk.

Q Is she here today? A Yes, sir.

Q What did they do with her? A He done the same thing, but she didn't steal anything on him. 10

Q She didn't tell anything on him?

Mr. Bernhard. She didn't steal anything on him, the witness said.

Q Is the colored girl here today? A Yes, sir.

Q The same Stella Prine? A The colored girl's name is Stella Prine.

Q Now, this store is an open store on the first floor? A Yes, sir.

Q And there is a middle room there, isn't there? A He has got three rooms. 20

Q Three rooms and back room? A Yes, sir.

Q And nobody came in the store while you were there? A No, sir.

Q Were there any doors locked in the rear? A Yes, sir.

Q He locked the rear doors, did he? A Yes, sir.

Q What else did he do, did he lock the store door, too? A Yes, sir.

Q And then carried you in, so the store was closed? A Yes, sir. 30

Q And nobody came to the door while you were there at all? A No, sir.

Q Nobody tried to get in? A No, sir.

Q No other boys or girls at all? A No, sir.

Q He sells soda water? A And ice cream and candy and cigars.

Q A newspaper store and cigars? A Yes, sir.

Q You see many people come in and out of there, don't you? A Yes, sir.

Q You are sure it was two o'clock and you can't fix the time, and he kept you there half an hour? A Yes, sir. 40

Q And you complained to nobody after you came out? A The shoemaker only I saw.

Q Did you see the shoemaker? A Yes, sir.

Alice Bishop, cross.

Q Did you talk to the shoemaker? A No, sir.

Q The shoemaker was there, wasn't he? A He wasn't in the store; he was in his shoe place.

Q Is that the shoemaker that was in the court house the last time that you were up here? A Yes, sir.

10 Q And he saw you come out when he was sitting in there?
A He did look out of the window at me.

Q Well, now, did you bow to him or speak to him? A No, sir.

Q You knew the shoemaker? A Yes, sir.

Q And the shoemaker was right alongside of this store in the front part of his store? A His store is right next to the shoemaker's store.

Q This is one building with a partition wall between the two stores? A Yes, sir.

20 Q Shoemaker's store and the other store? A Yes, sir.

Q These stores are a short distance apart, small little stores?
A Yes, sir.

Q You said that you hollered and cried and screamed and cried? A Yes, sir.

Q What did you holler? A "Help."

Q What else? A Nothing.

Q Did he drag you all the way through? A Yes, sir.

Q You know he is lame, don't you? A Yes, sir.

30 Q You didn't say that he carried you once before, did you?
A No, sir.

Q Did you ever tell anybody that he picked you up and carried you through? A No, sir.

Q You knew the boys and girls around there were annoying him, don't you? A No, sir.

Q And that his clerk had chased some people away? A No, sir.

Q You knew that, didn't you? A No, sir.

Q Who chased you away that day? A Johnny.

40 Q What did he chase you out for? A Alec said "You had better get her away before we get in any more trouble."

Q Who did he say that to? A To John.

Q Then it was John that chased you out? A Yes, sir.

Q You said the store was locked and there was nobody there? A Well, after that.

Alice Bishop, re-direct.

Q John came in, did he? A A day after.

Q So that you went back the following day, did you? A I had my brother the following day with me.

Q You brought your brother in this place the following day, then when you came in there John chased you out, didn't he? A Yes, sir.

Q What did he chase you out for? A Because we asked to buy candy. 10

Q You have been chased out of there a number of times. A Once.

Q And the other colored girl had been chased out for playing with John, pulling out the candy; isn't that so? A I don't know about that.

Q You know you were romping around there and the other girls were romping around there and were trying to take John's money and the candy? A No, sir. 20

Q He chased you out, did he? A No, sir.

Q He chased you out of there and told you never to come back? A He said "Go ahead out."

Q He wouldn't sell you anything? A No, sir.

Q Wouldn't give you anything, told you you had made trouble enough around there? A He says "Before we get in any more trouble than what we are having now."

Q That is all he said? A Yes, sir.

Q Where was Naujoks at that time? A In the front of his store. 30

Q It was the very next day? A Yes, sir.

Q Why did you come back there the next day if he had done what you told this gentleman he did the day before, why did you want to go back there again? A My brother called me for ice cream.

Q Weren't you afraid he would do something to you again? A I wasn't afraid because I had my brother with me.

Q How old was your brother? A Nine years old.

Re-direct examination by Mr. Bernhard.

Q What was the condition of your clothes after you got up from the bed? A They was all wet. 40

Q What did you do when you found they were all wet? A I took them all off and put clean clothes on and washed the old ones.

Julia Bishop, direct.

Q Why did you do that? A So my mother wouldn't know it.

Q Why didn't you tell your mother? A I was afraid.

Q Afraid of what? A Getting a whipping.

By Mr. McDermit.

10

Q So you washed your clothes, did you? A Yes, sir.

At one o'clock P. M. the Court took a recess for one hour.

AFTER RECESS.

JULIA BISHOP, sworn in behalf of the State.

20 *Direct examination by Mr. Bernhard.*

Q (Indicating.) Is this your daughter? A Yes, sir.

Q Are you employed or were you employed last year? A Yes, sir.

Q Whereabouts? A Up in Summer avenue.

Q What time of the year were you employed? A That was about one day a week I went out.

Q Do you remember one day last year Alice telling you something about something that happened? A No, sir; the child was afraid to come home and tell me.

30

Mr. McDermit. I move to strike that out.

The Court. Strike it out.

Q But you did hear it? A I heard it; yes, sir; I heard it when I came home from work, I looked in this man's store; he had lots of children in there and my boy came along and I said, "Charlie," I says, "come over across the street and see if Alice is in the store—"

Mr. McDermit. I move to strike that out, I object.

40

The Court. Strike it out.

Q I am trying to fix the date? A Well, I couldn't really tell you the date, I don't remember.

Q Can you tell us the month? A No, I don't remember, because we didn't think this trouble would come on like this.

Julia Bishop, direct.

Q Can you tell us the year? A It was one summer day; I know it was warm, and I didn't have no ice, and I said to Charlie—

The Court. Never mind what you said to Charlie.

Q You are sure it was warm weather? A Yes, sir. 10

Q Alice went to school? A Yes, sir.

Q Did she go to school all of last year? A No, sir.

Q Just take your time. Listen to the question. Did she go to school during the early part of the year 1918? A Only unless I kept her home on account of sickness.

Q During what month of 1918 did she go to school? A Well, I couldn't really tell you because I don't remember.

Q Don't you know what the school months were? A Well, yes, only I couldn't just exactly tell you, only I kept the child home when she was sick, had tonsilitis. 20

Q How long? A About a week.

Q So that during all the spring, winter and spring of 1918 Alice went to school, is that right, with the exception of one week? A Yes, sir.

Q Do you remember what month that week came in when she had the tonsilitis? A It was part of this spring, starting this summer here. I couldn't tell you. It was getting warm already and the child had a sore throat.

Q You mean starting with September of last year, is that what you mean? A No, it was the starting of this term here. 30

Q Starting of this present term? A Yes, sir.

Q When did you hear about it first? A Why, the other children came around and told it to me—

Mr. McDermitt. I object.. I think the Court ought to instruct the witness.

Witness. Excuse me. This is the first time I have been in court.

Mr. Bernhard. There is no reason why you should be nervous. Only answer the questions. Don't volunteer anything. 40

Q I am trying to find out when you first heard it, that is all. A Well, I couldn't really tell you when this thing—when I heard of it, but the other children—

Q You really can't say? A No, I could not.

Julia Bishop, direct.

Q Can you tell us this: You know, of course, when school ended for the last year; I am speaking of the year 1918; you know there was a summer vacation, don't you? A Yes, sir.

Q Did that summer vacation— A This was some part of the time when I sent the children to the store. That was after school that this thing occurred.

Q It was after school had closed for the summer? A No, sir; that was one time they went to the store for me, up to the hill. I sent the little boy Eddie, and I always look towards where I could get things cheaper because I have other children home besides—

Q Was it after last summer's vacation, that is the question?

By the Court.

Q Was it before or after school closed? A They had school.

Q You know when school closes for the summer? A Yes, sir.

Q When, what month? A June 28th.

Q Now, was it before or after school closed for the summer? A That was before the school closed. I didn't hear nothing, I told you that.

Q When did you first hear about this, you yourself, I mean; was it before or after school closed? A That was, I think, before the school closed that was going on.

Q Not while it was going on, but when you heard about it? A When I heard about it, yes, sir.

Q Before school closed? A Yes, sir.

Q Do you mean before school closed in 1918, is that what you mean? A I don't remember all this thing. I told you the truth, I don't know.

Q Under what circumstances—you must know. Don't tell us what was said to you by anybody just now, but where were you when you heard it? A I was in the house.

Q Who else was in your house? A Well, now, listen, I will tell you this whole thing—

The Court. You cannot do that.

Witness. I will tell you if you will let me talk—

The Court. You can talk all that is necessary, but you must do it the way we want you to do it.

Julia Bishop, direct.

Witness. One rainy day they had school—

The Court. Wait until a question is asked and answer it.

Witness. Well, I try to explain it to you the best I can.

The Court. You answer questions, that is all you have to do.

10

Q Who was present when you first heard about this trouble?
A That was Martha and that little colored girl, Stella.

Q Martha McGurk and Stella Prine? A Yes, sir, and lots got mixed in with it.

Q That is when you first heard it? A Yes, sir.

Q Was there anybody else in the room at the time? A When I heard of this?

Q Yes. A My boy Charlie.

Q Did anybody come after that? A No, sir—well, they were taken that night to the House of Detention.

20

Q What? A They were taken up to the House of Detention for selling the watch in the Five and Ten Cent store.

Q They were taken by an officer? A Yes, sir.

Q Was the officer present when they told this to you? A I didn't know it until twelve o'clock that night.

Q Who told it to you? A Mrs. McGurk told me about Alice being away.

Q Did you hear it from either the officer or Alice? A What about? 30

Q About this trouble. A I didn't know until Mrs. McGurk told me about this one thing—

Mr. McDermit. I ask to strike that out.

The Court. Strike it out.

Q Did you hear about it before or after Alice was taken to the House of Detention? A Well, a little boy told me that—

Objected to.

40

Q Really, don't you understand my questions? A I really don't know. I am all excited.

Mr. Bernhard. You don't listen.

Witness. Yes, I do.

Julia Bishop, direct.

The Court. You listen to these questions. If you would listen you would hear it.

Witness. Well, I am excited.

Q Don't be excited. You said that Alice was taken to the House of Detention, didn't you? Did you hear about it before or after Alice was taken to the House of Detention. Isn't that clear? A Yes, sir.

Q When did you hear about it, before or after? A Oh, I heard it once before.

Q You heard it before? A Yes, sir.

Q How long before, the same day? A That was in the summer time when they didn't have no school.

Q Then did the officers come to your house one night? A Yes, sir.

Q When was that? A I don't remember.

Q Was it the winter time or summer time? A I think it was in the summer time.

Q But you don't remember the month? A No, sir.

Q Who are in your family? A There is John and there is Charlie and there is the smallest boy that used to go with Alice.

Q Four children? A Yes, sir.

Q And yourself? A Yes, sir, and my husband.

Q That is six, all together? A Yes, sir.

Q Where was Mr. Bishop when Alice was taken to the House of Detention? A Why. I think at the present time he was to his lodge meeting.

Q How long was she there? A Overnight.

Q And then she came back? A Yes, sir; they took her down to the First.

Q Did you go to the First with her? A Yes, sir.

Q When did you go, before or after Alice had been to the House of Detention? Don't you understand that you went to the First Precinct with Alice? A Down to Franklin street. I went to get the children out of there.

Q Then you went to the police court? A Yes, sir.

Q And you went along? A Yes, sir.

Q When was that that you went to the police court? A I don't really know; I couldn't tell you.

Q You do know whether it was before or after Alice had been in the House of Detention? Don't you remember? Don't

Julia Bishop, cross.

you understand my question? A I don't know when that was. I know they took the children up to Franklin street—

Q Do you know Dr. Clark? A Yes, sir; they took them up there.

Q How do you know that? A Because I went with the child there.

Q Do you remember when you went to Dr. Clark? A Well, I couldn't tell you the date. I know I was there with the child. 10

Q Do you remember the month? A No, sir.

Q Do you remember how many months it was back from the present time? A No, sir, I couldn't tell you because I never—

Q Do you remember whether it was in the summer time or the winter? A Well, it wasn't so cold.

Q But you were present at Dr. Clark's at the time that he made the examination? A Yes, sir.

Q If you don't understand the next question please say so and I will repeat it. How much time passed from the time you first heard of the trouble until you went to Dr. Clark with Alice? A Well, a little boy told me once before. 20

Q I understand that. I am taking that as one time and taking the time that you went to Dr. Clark as another time. What time passed, months, days or what? A That was a couple of months.

Q From the time you first heard of it until you went to Dr. Clark a couple of months passed; isn't that so? A Yes, sir.

Cross examination by Mr. McDermit.

Q You didn't hear anything about Alice a couple of months before you went to Dr. Clark. You heard something about the defendant in the case, isn't that so? You hadn't heard anything about Alice when you first heard the information and heard about some other girls with Naujoks? A No, sir; that is all I know about is the colored girl and the other girl. 30

Q When you said to the Prosecutor and told him that you first heard about it, you mean the time that the Prine girl was arrested for stealing the watch, don't you—that is the first you heard it? A I heard it off the little boy when he gave five cents to get matches and in the meantime he came back and the little boy says he went to get in the store on Kinney street where his sister was, he had the door locked; that is all I know. 40

Mr. McDermit. I move to strike that out.

Julia Bishop, cross.

The Court. Strike out anything in that answer that is not responsive.

Q When did you first learn that Alice had some trouble with Naujoks, when did you first actually learn that? A When the little boy came home and told me about this before.

10 Q When was this? A Well, I couldn't really tell you what that was. It was in one summer time, sent the children up to the hill near Naujoks' store and the little boy said—

Q Don't tell anything about the little boy. When was your girl sent to the House of Detention, October or November? A I couldn't tell you really.

Q It was late in the fall? A Yes, it was.

Q And she had been arrested? A Yes, sir.

Q And you went down to get her out? A Yes, sir.

20 Q And they had been arrested in connection with the stealing of a watch? A Not the next day; they was taken the same—they was taken to the House of Detention the one time. The next time we had to go to court on Franklin street. They was taken the second time to the court.

Q Did you ever go down to the store yourself? A No, sir, I pass the store.

Q You know where it is located? A Yes, sir.

Q And you live on Crawford street, don't you? A Yes, sir.

30 Q You live on Crawford street, near Washington? A I live at the middle of the block, 52.

Q That is between what streets? A Between Washington and High.

Q You live about midway up the block, do you? A Yes, sir.

Q Then his store is about a block from that as you come north on Washington? A Yes, sir.

Q Then you turn down into West Kinney street to his store? A Yes, sir.

Q That store has been there quite some time? A That store has been there quite some time, but he hasn't been there.

40 Q How long has he been there? A I didn't count how many months he has been there, but he is there but a while.

Q You didn't know anything about this trouble, so far as your girl was concerned, until after she was arrested; isn't that so? A The little boy told me about it.

Julia Bishop, cross.

Q Now, you will have to cut the little boy out; you can't speak about that. The first you heard from her herself about any trouble between this man and herself was after she had been arrested; isn't that so? That is a plain question. Isn't that true? A I heard before.

Q You heard first from her; that is, from her alone, after the officer came and took her to the House of Detention? A 10
No, that was before, the little boy told me.

Q No. A Yes, sir.

The Court. The question is whether or not she first heard it from the daughter, and she says no, she first heard it from the little boy. Is that it?

Witness. Yes, sir. The boy said—

The Court. Do not tell me what he told you.

Q When did you first hear it from the girl? A I heard 20
it from the girl when the girl was taken to the House of Detention.

Q When was that? A I couldn't tell you, because I think—

Q After she was taken to the House of Detention she was brought to police headquarters? A Yes, sir.

Q And from police headquarters to the police station? A Taken to Dr. Clark.

Q That was when she told you the story? A Yes, sir.

Q Wasn't that in November of last year? A I don't know.

Q Don't you know it was November? A Sure, I know it 30
was November.

Q That is the time the girl was in the House of Detention, or in November? A It wasn't so cold or it wasn't so—

Mr. Bernhard. If you do not know don't say so.

Q You never heard anything from this girl in regard to this matter until after she was in the House of Detention? A Yes, 40
sir.

Q The only story you ever heard from the boy was that when he went there to this store this man on one occasion sent him out to get matches? A Yes, sir; that he had the door locked and wouldn't let him in when he came back.

Q He sent him out to get matches on one occasion and when he came back the door was locked, so you finally got that in?
A Yes, sir.

John H. Garry, direct—cross.

JOHN H. GARRY, sworn in behalf of the State.

Direct examination by Mr. Bernhard.

Q You are a sergeant of police, City of Newark, and have been a long time? A Yes, sir.

10 Q Well, in investigating matters for the police department, did you have occasion to go to the house of Alice Bishop? A I had an occasion to take a statement from Alice Bishop herself.

Q And after the statement was taken from Alice what became of Alice? A She was sent to the House of Detention.

Q When was she taken to the House of Detention? A November 11th.

Q Was that the first time your attention had been called to this thing? A Yes, sir.

20 Q How long was she at the House of Detention? A Only one night.

Q Then what happened? A She was brought to the court the next day to testify in the case against Naujoks.

Q Then what? A Previous to being turned over to her mother she was turned over to Dr. Clark.

Q Was that the next day after she was taken to the House of Detention? A Yes, sir.

Cross-examination by Mr. McDermit.

30 Q Do you remember anything about the date of the arrest of the colored girls, when she tried to sell the watch at the five and ten-cent store? A I wasn't connected with that.

Q Do you remember from any records that you have what that case is? Have you any way of furnishing to the jury the date which the colored girl was taken to the police station? A I kept no record of that because it was Lieutenant Sebold's case.

Q Didn't you produce the watch in court that day? A In the First Precinct?

40 Q Yes. A Lieutenant Sebold presented it there.

Q Didn't you have possession of it there? A No, sir; Lieutenant Sebold had possession of the watch.

Mr. Bernhard. Reserving the right to call Dr. Clark, the State rests.

Colloquy.

Mr. McDermitt. That might be a reservation that I am unable to consent to. It may be that I am entitled to his examination at this time.

Mr. Bernhard. Dr. Clark will testify, as I understand it, that there were no parts broken, as far as he was able to determine, but it helps to fix a date from his record. There is no contention on the part of the State that Dr. Clark will testify that there was actual penetration. 10

The Court. Any evidence of violence?

Mr. Bernhard. Not on the day of the examination, but I would not like to be bound by that last statement to the last question.

Mr. McDermitt. Counsel for defendant won't object to that, if the State desires it. Dr. Clark made an examination of this girl and found she had not been penetrated. I am willing to go on with the case. 20

Mr. McDermitt opens on behalf of the defendant.

During the opening for defendant, defendant's counsel says: "You will do the same as the other jury did and exonerate him."

The Court. You know, Mr. McDermitt, that is improper and highly prejudicial to the State's case. A remark of that kind ought not to be made to the jury, and it is made for the sole purpose of taking advantage of its impropriety. 30

Mr. McDermitt. Part of the other case got to the jury and I didn't object to it.

The Court. I don't recall whether the other case you referred to related to this particular child or not, so that this case has never been tried.

Mr. Bernhard. There is absolutely no way that the State can remove the prejudice from Mr. McDermitt's statement by reason of a case that is foreign and independent of this case. 40

The Court. I think that this Court has the power to declare a mistrial and impanel another jury.

Mr. Bernhard. I am perfectly willing and satisfied that the jury will follow your Honor's direction with reference to that to the utmost of their ability, although it is

Colloquy.

highly prejudicial. It would be a shame to re-impanel a jury.

10 *The Court.* I cannot understand Mr. McDermitt's conduct at all, pursuing such a reprehensible and unprofessional method. It only serves to prejudice the administration of justice in this county. (To the jury.) I will at this time say to the jury what the situation is. Mr. McDermitt, closing his opening remarks, indicated by the last statement the defendant had been exonerated by another jury on this charge. That is not so, and it was a very improper thing for him to say for the purpose of influencing your minds—

Mr. McDermitt. I desire to be heard.

20 *The Court.* I do not care to hear any argument about it, of what your opinion is as to what I am going to say. (To the jury.) As a matter of fact, this defendant was tried for assault and battery and abuse on another child, on another indictment, on another little girl, and in that case, on the facts there presented, which, of course, you know nothing of because you did not hear that case, the jury acquitted him, and I want to say that you are trying this case on the evidence here and not on the evidence there, and you should decide this case, when the time comes, on the evidence here, and not be influenced by this remark of counsel. Mr. McDermitt may have an exception to what I said.

30 *Mr. McDermitt.* Calling the jury's attention to the remark made by counsel—

The Court. I do not care to hear anything further about it. What I have said is on the record and requires no explanation or argument. You have an exception to it and if there is any error in it, you have your relief.

Mr. McDermitt. What I said was that arising out of this defense another jury had exonerated the defendant.

40 *The Court.* I heard exactly what you said, and I stated it correctly. You have your exception.

Defendant's counsel prays an exception to this ruling of the Court, and the same is allowed and is signed and sealed accordingly.

HARRY V. OSBORNE, (L. S.)
Judge.

Alexander Naujoks, direct—cross.

ALEXANDER NAUJOKS, defendant, sworn in his own behalf.

Direct examination by Mr. McDermit.

Q Where do you live? A 45 West Kinney street.

Q And you are the defendant in this case? A Yes.

Q You heard the story that Alice Bishop told to the jury here today? A Yes, sir. 10

Q Did you ever have anything to do with her in your back room? A No; absolutely not.

Q Did you ever drag her into the back room? A No; I didn't

Q Locking the door? A Never had my doors locked and had no keys except for the front door.

Q Did you ever send any boy for matches so that you might take her inside? A Never. I had matches in the store. 20

Q Do you remember her being put out of the store and when it was? A I have chased her out many times, and so has my boy that I have working at the store. In fact, I gave instructions to chase her out every time she came in.

Cross examination by Mr. Bernhard.

Q When did you chase her out? A There were so many times that I couldn't—well, I would have to say about a hundred. It might be more or less.

Q When was the last time? A I should place it about the 6th of December, a few days before I was arrested. 30

Q When was the first time? A A matter of over a year ago.

Q Was it during 1918? A I believe so; yes.

Q Have you known Alice very long? A I should judge over a year.

Q Do you know her by coming into your store? A That is all; by coming into the store.

Q Did you ever own any other store than this one? A Yes; 185 West Kinney street.

Q Did she ever go into that store? A Yes. 40

Q Did you ever talk to her? A No, sir; but ask her what she wanted, or something of that kind.

Q Did she ever answer? A Certainly. She tell me what she would want.

Alexander Naujoks, cross.

Q Did you ever have any other conversation with her? A Not that I can recollect.

Q You remember pretty well, don't you? A Certainly, but you are speaking now of a matter of years.

Q Are you? A I believe so.

10 Q You said a year ago? A Yes; I said a matter of a year ago, about.

Q Not a matter of years, but of a year ago? A If I was up in my other place?

Q She always used decent and civil language to you, did she? A No; I can't that she did.

Q That is the reason I ask you. A That is the time I chased them out.

Q I asked you a minute ago. You didn't tell me the reason. What was the reason? A Because they kept up themselves a
20 perfect nuisance.

Q I am speaking of Alice. A Well, Alice.

Q What conversation did she use that wasn't civil and courteous and decent? A I can't recollect the exact words—as a child, as a bad child, she kept up in the place.

Q Lying? A Yes, certainly; and she would say dirty words.

Q What dirty words did Alice say? A Do you want me to use the exact words?

Q That is what I asked you for? A She said, "Fuck."

Q Why didn't you tell me that when I asked you before? A
30 Well, I didn't know you wanted me to use words like that.

Q Is this the Alice, the little girl that you said used the words that you have just told the Court and jury (indicating)? A Yes.

Q How many times? A I couldn't say.

Q When? A Which place do you mean?

Q Any place, any time. A Well, as I said, I will say it happened about a hundred times.

Q Then she used that word a hundred times? A Not the word I just said.

Q How many times did she use that word, about? A Well,
40 it might have been about half a dozen times.

Q When? A I couldn't say when.

Q Didn't it make an impression upon you that a little girl of eleven years of age would use that kind of language? A Yes, sir, it did.

Q When was it? A I couldn't say what date.

Alexander Naujoks, cross.

Q What month? A Last December was one.

Q When before that? A Well, it might have been several months before that.

Q Might have been every month? A Might be. I couldn't say. How can I tell that?

Q You were there? A Certainly, I was there. 10

Q You heard her use the words? A Yes, sir.

Q You knew her mother, didn't you? A No.

Q Didn't? A No.

Q Never saw her mother? A No.

Q Do you mean that? A I certainly do mean that; yes.

Q Do you recognize that lady that comes in the court room now? A Yes, sir; I recognize her.

Q When did you first see her? A Since I am on this here case.

Q Never before? A No. 20

Q You never saw Mrs. Bishop, the lady that appears at my side, until December, 1918; is that right? A Yes, sir.

Q Had she ever been in your store? A Not to my knowledge

Q You are sure about that? A Certainly, I am sure.

Q Why did you chase Alice out of your store? A Why, because she cut up. I believe I have answered that question.

Q I believe you have, but that is the reason I ask you the second time. Was it because she cut up? A Yes, sir.

Q Not because she used bad words? A Because of things in general and bad words. 30

Q Why don't you say so? Was it because she cut up and because she used bad words? A Both.

Q Your answer is that you chased her out of your store because of both reasons? A Both reasons; yes.

Q You chased her out a hundred times? A Probably a hundred times—about a hundred times. It might be more, and it might be less. I couldn't say.

Q But the only time that you can remember is December? A Well, when you speak of these exact dates—

Q How do you remember the December date? A Well, I was arrested on that day. 40

Q That is the day she was in your store? A No; Alice Bishop wasn't in my store that day; I said three or four days previous to that is the last day I chased her out.

Alexander Naujoks, cross.

Q Did she ever use any other words? A Yes, sir; I believe she used the word "perf."

Q Alice used the word "perf"? A Yes, sir.

Q Did you know what she meant? A Yes; I found out from the colored people [witness laughs].

10 Q What are you laughing at? A A thing like that makes me laugh.

Q What does it mean? A As far as I could find out it means the same thing as I said before.

Q Alice, besides using the word that you told us she used, used the word "perf"? A Yes.

Q How many times did she use that? A I couldn't say.

Q Why not? A I am not marking everything down that occurs. Probably for a year or a year and a half.

Q You kept the candy store? A Certainly.

20 Q You sold candy to little boys and to little girls? A Not only to little boys and little girls. I sold candy to everybody that came in.

Q You sold it to Alice? A I believe so, many times.

Q Last year? A Yes, last year.

Q So after you sold her the candy you chased her out; is that right? A Oh, sometimes after, sometimes before.

30 Q Then you were always willing to take her money and then chase her out? A I was willing to take anybody's money if they behave themselves, but if they bought anything and turned around and cut up and said any such things I chased them out; wouldn't have them in the store.

Q Did you say anything to Alice about using these two words? A Yes, I did. I said, "Alice, you must stop that."

Q When did you find out what "perf" meant, after December? A Well, I knew that maybe a month or two before.

Q How long had Alice been using those two words? A Well, I couldn't say that. About nine months, I should judge.

Q That is, nine months from today, but you didn't begin to find out about it until the month of November; is that right?

A About that, yes.

40 Q Why didn't you ask Alice what she meant by "perf" when she said it? A I don't bother asking children what they mean. I chase them out.

Q Why didn't you take the trouble to find it out? A Because I heard so many colored people use it.

Alexander Naujoks, cross.

Q Why didn't you ask Alice? A It isn't usual for me to ask children when they cut up, I chase them out.

Q Was Alice ever in your back room? A To the best of my knowledge, no.

Q Is there a bed in your back room? A Yes.

Q How do you suppose Alice knew there was a bed in there? A I don't know. I suppose everybody knows there is a bed in the room. 10

Q How do you go in the back room? A You go from the store into another room and there is two small rooms.

Q So you have to go to another room before you could get in the back room; is that right? A Yes, sir.

Q What is the middle room used for? A I have my desk in there and office.

Q What else have you in the back room besides the bed? A A trunk and a stand. 20

Q Besides the two words that you have told us, what other bad words did Alice use? A Well, I don't know as you can class them—whether they are classed as bad words.

Q What are they? A "Well, we have lots of fun with boys" and such kind of remarks, but I don't know whether you can class them as bad words, but they meant bad.

Q In what sense did Alice use the first word that you spoke of? What did she say when she used that word? A Oh, always, "we perf." 30

Q What else? A "You don't know us."

Q Yes. A Well, that is about all that I can remember in them kind of words, of the actual words.

Q Was anybody present when she came in and used those words, or was she alone? A The boy was there.

Q The boy was there, too? A Yes, sir.

Q Was he there when Alice used those words? A Yes, because he chased them out many times himself.

Q Did Alice always cut up that way? A Well, not always; I don't say that.

Q Sometimes she would act like a little angel and sometimes— A Sometimes she would come in, get her things and walk right out again. 40

Q Other times she would act quite to the contrary? A Yes, sir.

Alexander Naujoks, re-direct.

Q Can you tell of any other expressions that she used of substantially the same sort? A No, I don't think I can. It is a long time ago. I can't recollect.

Q How long have you been in that store? A About a year and three months, to be exact, I moved to the place where I am,
10 45 West Kinney street.

Q Where was the door between those two rooms, between the store and the room where you had your desk, or the room where you had your desk in the bedroom? A I don't understand the question.

Q There was a door, you said, did you not? A There were all together three doors—four doors.

Q I suppose there was an outside door leading from the street in? A Yes, sir, and another one from the back in.

Q From the back in where? A To the back room.
20

Q Where is the third door? A Well, the third door counting from the front is where the big room is leading to the back room.

Q That is between the room where you had your desk and the bedroom? A Yes, sir.

Q Then there is no door between the store and where you had your desk? A Yes, sir; there is a door between the room I had my desk and the store.

Q Is there also a door between the room and where you have your desk? A Yes, sir.
30

Q Then there are three doors? A Yes, that is what I say.

Re-direct examination by Mr. McDermit.

Q When were you born? A 4th of March, 1880.

Q Where? A City.

Q What city? A Newark.

Q How long have you been incapacitated, lame?

Objected to.

The Court. It is not re-direct examination.

40 *Mr. McDermit.* She has testified that this man dragged her into the room. I want to show that he is unable to do it physically. It is rebuttal.

The Court. It is properly part of your direct examination. Re-direct examination relates to matters brought

Alexander Naujoks, re-direct.

out on the cross examination and not covered by the direct.

Mr. McDermit. I ask leave to ask this question, how long he has been afflicted.

Mr. Bernhard. We admit that he is afflicted.

Q When were you afflicted? A Since three and a half years old, paralytic stroke. 10

Q And you have been afflicted ever since? A Ever since, yes.

Q Did you lose out of your possession a watch any time during the year 1918?

Mr. Bernhard. I object unless it has some bearing on this particular case.

Mr. McDermit. It was brought out on the direct examination of the State as to the time this girl was arrested and under what circumstances she was arrested. 20

The Court. There was some testimony about a watch which may have been stolen by some little girls and an arrest made and nothing else.

Q Do you know anything about the arrest of some girls at the five and ten-cent store when the watch was stolen? A Yes, sir.

Q What was the girl's name? A She was a little colored girl; I forget her name. The watch didn't belong to me. 30

Q Who did it belong to? A A boy left the watch for fixing.

Q You know nothing about the girls being arrested? A No, sir, I don't know that the watch had disappeared until I was arrested, and I believe Sergeant Garry was the one that pulled the watch out and showed it to me.

Q Did you ever hear of Stella Prine? A Yes, I know, I recollect. That is the colored girl.

Q Was that the girl who had the watch? A Yes.

Q And she was a girl that was arrested and brought into the police station? A Yes, so I was informed. 40

Q Were you not confronted with Stella Prine down at the police station? A I don't believe I confronted her.

Q Never saw Stella Prine at the police station? A I don't think so.

John Bishop, direct.

JOHN BISHOP, sworn in behalf of the defendant.

Direct examination by Mr. McDermit.

Q How old are you? A Fourteen.

Q Where do you go to school? A Morton.

10 Q And you know the defendant here (indicating)? A Yes, sir.

Q And did you work for him at one time in the afternoon?

A Yes, sir.

Q Whereabouts was it? A 145 West Kinney street and 185 West Kinney street.

Q You worked at both places? A Yes, sir.

Q How long had you worked there all together for him?

A About four and a half, five years.

Q This was after school hours? A Yes, sir.

20 Q Do you know a girl by the name of Alice? A Yes, sir.

Q That was here today? A Yes, sir.

Q Did you ever see her in the store? A No, sir, I didn't see her in the—

Q Did you chase anybody out of the store? A Yes, sir.

Q And do you remember who it was you chased out? A Yes, sir.

Q What was her name? A I don't know her name, but I could tell you—

Q Could you tell if you saw the girl? A Yes, sir.

30 Q (Indicating.) This is the girl I refer to. Did you ever see her in the store? A Yes, sir.

Q How often did you chase her out? A Do you mean any month?

Q Any time? A About a hundred times, fifty times—I couldn't tell you.

Q Why did you chase her out? A She would come in and bother us and she would fling up her dress.

Q What else did she do? A Candy, she would take it and didn't want it and everything like that and called out names.

40 Q What kind of names did she call out? A She said "I will get square with you," something like that when we didn't want to give her no candy, different kind of candy, something like that.

Q Did you ever hear her use any bad language in there?

A Yes, sir.

John Bishop, cross.

Q What was it? A "Go to hell," or something like that.

Q Did you have matches around in your place there? Did you ever sell any cigars there? A Yes, sir.

Q Did you keep matches there? A Yes, sir.

Q Did you keep ice cream there? A Yes, sir.

Q Soda? A Yes, sir.

Q You say this girl was there a hundred times? A Yes, sir. 10

Q When did you see her last before the arrest of this defendant? A About a couple of days before that.

Q She had been coming in the months of June, July, August, September and October. How often would she come in a month there? A Oh, about thirty times, or twenty.

Q Every day? A Nearly every day.

Q Did you ever see her at any time that you were there—did the defendant take hold of her and carry her or drag her into the back room? A No, sir. 20

Q Did you ever see anything of that kind done there? A No, sir.

Q June, July or August or any time? A No, sir.

Q You owned a watch? A I waited on the store.

Q Was there any other boy working there? A Yes, sir.

Q And what was his name? A Andrew.

Q How old was he, about? A Ten.

Q In June, July and August and September and October of last year what would Andrew do in the store, in the afternoon and in the evening? A Sometimes we would go and he would have to help, too. 30

Cross examination by Mr. Bernhard.

Q John, where did you get the matches? A We got them from the tobacco company.

Q Did you ever go and get any yourself? A No, sir.

Q Did you ever have to go out on any errands? A Next door.

Q How frequently would you go out on errands? A Every few days, something like that. 40

Q In the afternoon sometimes? A That wouldn't take me any time.

Q You used to have to go out on errands, didn't you? A No, I didn't have to go, only next door.

Andrew Hahn, direct.

Q Next door was the shoe store? A Next door is the grocery.

Q Is that the only place you went on errands? A Yes, sir.

Q Did you work there in the summer of 1918? A Yes, sir.

Q Every day? A Yes, sir.

10 Q You have never heard Alice use other words than the words you have used here? A Other words, sure.

Q What words were they? A Other words.

Q Where do you work now? A Alex.

Q Still work there for Alex, don't you? A Yes, sir.

Q Did you ever see Alice in the back room? A No, sir.

Q Do you know whether she was ever in there or not? A No, sir.

Q How did you put her out? A When she would come in I would push her out, chase her out.

20 Q Who told you to? A Alex always told me.

Q Did you ever hear Alex say, "Put her out before we get in any other trouble?" A Yes, sir.

Re-direct examination by Mr. McDermit.

Q What were the other words that she used that you say you can't just tell? Try and see if you can't tell what the other words were? A "I will get square on you, I will make you trouble," something like that.

Q Did you ever hear the words "perf" used? A Yes, sir.

30 Q Who used that? A The girls, them girls.

Q Is that word used often around there? A Nearly every time she would come in.

Q You don't know what other words were used, do you? A No, sir.

ANDREW HAHN, sworn in behalf of the defendant.

Direct examination by Mr. McDermit.

Q You work down after school in Alex's place? A No, sir.

40 Q Do you go there for your lunch at noon time? A Yes, sir.

Q You saw this girl Alice that was here this morning? A Yes, sir.

Q Did you ever see her there? A Yes, sir.

Andrew Hahn, direct.

Q How often did you see her there? A At noon time when I was eating there I saw her a couple of times.

Q When she came there what did she do? A She bought a soda.

Q Then what did she do? A Then when it was made she didn't want to take it. 10

Q After the soda and then she didn't want to take it, then what else did she do? A Why, she didn't want any at all.

Q Then what took place? A Well, she said she would get even.

Q Did you ever see her jump up on the counter or jump over the counter? A No, sir.

Q Did you ever hear her swear in there, anything indecent or wrong? A No.

Q Did you lose a watch? A Yes, sir. 20

Q Where did you lose the watch? A I left it there to be repaired.

Q You left it with Alex to be repaired, didn't you? A Yes, sir.

Q After you left it there when did you next see the watch? A At the last trial.

Q Did you see it down at the police station or didn't you? A No, sir.

Q You didn't see the watch until the trial before Judge Osborne? A Yes, sir. 30

Q And you last left the watch down at his place to be repaired? A Yes, sir.

Q Do you know who took your watch? A No, sir.

Q Were you in court to find out who took your watch? A Yes, sir.

Q Do you know a colored girl named Prine? Well, anyway you didn't get your watch back until you came in here before Judge Osborne a short while ago; isn't that right? A Yes, sir.

Q And the watch is still in the possession of the police, isn't it? A Yes, sir. 40

Q Would you know the watch if you saw it? See if this is your watch (showing witness watch)? A Yes, sir.

Q And that watch you last left with Alex, didn't you, to be repaired? A Yes, sir.

Angelo Farisi, direct.

Q And you never saw it again until you saw it here in court? A Yes, sir.

Cross examination by Mr. Bernhard.

Q Where did you last see it in Alec's place? A When I went home in the afternoon.

10 Q I know, but whereabouts? A On the table in the back room.

Q Alice came in and ordered a soda and didn't like it and said she didn't want it; is that right? A What?

Q Didn't want the soda? A Yes, sir.

Re-direct examination by Mr. McDermit.

Q You were in there at noon hour, you went to have your lunch? A Yes, sir.

20 Q You lived in that vicinity? A I lived up on the hill.

Q And you went every day to get your meal there? A Yes, sir.

Q Except Saturdays? A Yes, sir.

ANGELO FARISI, sworn in behalf of defendant.

Direct examination by Mr. McDermit.

Q How old are you? A Sixteen.

30 Q Where do you live? A 199 Warren street.

Q Where did you live last year, in July, August and September, the same place? A Yes, sir.

Q Do you know the defendant here, Alec? A Yes, sir.

Q Did you know this Alice who was here today? A Yes, sir.

Q Did you ever see her come in the store? A Yes, sir.

40 Q Tell us what you saw down there? A I went in the store one Sunday to buy something and there I saw Alec chasing the girl out, she jumped over the counter and he told me to come the other way, and he chased her out of the store and when she got outside she made faces.

Q When he chased her out did she jump over the counter? A Yes, sir.

Q And then she made faces? A Yes, sir.

Edna L. Ryan, direct.

Cross examination by Mr. Bernhard.

Q Then she was behind the counter. A No, sir, he chased her out from behind the counter and I chased her out.

Q I say, she was behind the counter? A Yes, sir.

Re-direct examination by Mr. McDermit.

Q Did she jump over the counter or not? A She jumped over the counter. Alec was chasing her out and she jumped over the counter. 10

Q From one side of the counter to the other? A Yes, sir.

Re-cross examination by Mr. Bernhard.

Q From the inside to the door? A No, sir, from the inside inside.

Q There are two counters there? A There is one; there is one in back of the big one on the side. 20

Q Then there are two? A Yes, sir.

Q Which one was it? A The big one she jumped over, the ice cream, of course.

Q When was that? A One Sunday when I was there.

Q How long were you in the store? A I was in there for about half an hour.

Q How long was Alice in there? A I don't know how long she was in. I know when I went in she was in there.

Q How long before he chased her out? A About half an hour. 30

Q How long before he chased her out? A About half an hour.

Further direct examination by Mr. McDermit.

Q He asked you to chase her out, did he? A Yes, Alec did.

Q What was the matter with her that he couldn't chase her out and made you chase her out? A She jumped over the counter and she wouldn't get out for him.

Q And she wouldn't get out? A She wouldn't go out. 40

EDNA L. RYAN, sworn in behalf of the defendant.

Direct examination by Mr. McDermit.

Q Where do you live? A 349 Halsey street.

Mary Goering, direct.

- Q How old are you? A Thirty-two.
 Q Are you a married lady? A Yes, sir.
 Q Where is your husband? A He is at work.
 Q He lives with you? A Yes, sir.
 Q Have you got any children? A Four.
 10 Q Have you a daughter? A Yes, sir.
 Q How old is your daughter? A Thirteen.
 Q Is she here today? A No, sir.
 Q Did she work during the summer time for Alec here?
 A Yes, sir, she did.
 Q Last summer? A Yes, sir.
 Q How long has she worked there? A Well, I think it
 was some time from June to December.
 Q During that period of time did you visit the store your-
 self? A Why, yes, I was in there three or four times, some-
 20 times, a day.
 Q And how close do you live to where his store is? A
 About a block and a half.
 Q When you went to this store were there many people com-
 ing in and out of it? A Sometimes it was full.
 Q Do you know what the reputation of the defendant Alec is
 in the neighborhood, as to his reputation for peaceableness and
 for virtue, whether it is good or bad? A It is very good.
Cross examination by Mr. Bernhard.
 30 Q Your daughter stopped working there in December of
 last year? A Last year.

MARY GOERING, sworn in behalf of the defendant.

Direct examination by Mr. McDermit.

- Q Do you know the defendant here? A Yes, sir, I know
 the man.
 Q How long do you know him? A Well, about a couple
 of years.
 40 Q You live on West Kinney street? A Yes, sir; right across
 the street from him.
 Q Right opposite from where he keeps the store? A Yes,
 sir.
 Q And you go to the store? A Yes, sir.
 Q Go there frequently? A Yes, sir.

Eva Kapeski, direct.

Q How often do you go there? A I go there every day four or five times.

Q You have children of your own? A Yes, sir.

Q How much of a family have you got? A Only one girl.

Q How old is the girl? A Thirteen.

Q Does she ever go there, too? A Yes, sir.

Q Does she go over there frequently with you? A Just as often as I give her pennies to spend and buy something. 10

Q Do you know what this man's reputation is in the neighborhood for being a peaceable citizen or being a virtuous man, whether it is good or bad? A So far as I know, the man is decent and honest; that is all I can tell, and no man like that would do any harm to nobody.

Not cross examined.

EVA KAPESKI, sworn in behalf of the defendant. 20

Direct examination by Mr. McDermit.

Q Do you live in Newark? A Yes, sir.

Q Do you know Alec here? A Yes, sir.

Q Your boy John worked in his store? A Yes, sir.

Q And you go in his store a good many times? A Yes, sir.

Q How often do you go there? A I always go see Johnny; sometimes Johnny comes late home and I take a walk with my husband and I bring Johnny home, and sometimes Johnny got from Alec carfare and he— 30

Q How often did you go to the store last summer? A From the store home.

Q Last summer, in 1918? A 1918, I went every week.

Q 1918, every week? A Yes, sir, about three times, not only once.

Q Your boy was working there every day, was he? A Yes, sir.

Q Every afternoon? A Yes, sir.

Q And in August and July and in June? A Yes, sir. 40

Q You don't live in the neighborhood where he lives? A Before I lived, but not now.

Q How long since you lived there? A About a year.

Q How long had you known him in the other neighborhood where he lived? A Four years I know him.

Mary Hahn, direct—cross.

Q Do you know whether his reputation was good or bad for peaceableness? A It was very good.

Not cross examined.

MARY HAHN, sworn in behalf of the defendant.

10 *Direct examination* by Mr. McDermit.

Q You are the mother of Andrew Hahn, are you? A Yes, sir.

Q The boy that testified in regard to the watch? A Yes, sir.

Q You know about the watch, do you? A Yes, sir.

Q Do you know how Alec, the defendant, came to get possession of the watch? A My boy used to go down there and eat his dinner at noon time and the watch was broke, so he said,
20 "I will take the watch down to Alec to be repaired," so he took it down at noon time before school and that afternoon someone came in and stole the watch.

Q Did you live in the same neighborhood with Alec before he moved from the uptown store? A Yes, sir.

Q How long had you known Alec down in the other store in that neighborhood? A About a year.

Q How close did you live to that store down there? A To the new store?

Q No, the old store? A Right opposite.

30 Q What was his reputation in the neighborhood for being a peaceable and honest citizen? A I always heard he was an honest lad.

Q Never heard anything against his honesty? A No, sir.

Q Or against his chastity? A No, sir.

Cross examination by Mr. Bernhard.

Q There were a great many other stores there? A Yes, sir.

Q In that neighborhood there were a great many business places? A There was only one on the corner—

40 Q I mean down where he is. A I don't know anything about that.

Philip David—John Eaton, direct.

PHILIP DAVID, sworn in behalf of the defendant.

Direct examination by Mr. McDermit.

Q Mr. David, you know the defendant here, do you? A Yes, sir.

Q You know him how long? A Two years.

Q And knew both of his places of business in West Kinney street? A Yes, sir. 10

Q Did you frequently visit those places of business? A Yes, sir.

Q How often did you go there a month? A Nearly every day.

Q And what would you have to do there every day? A Used to buy cigars and soda and cigarettes.

Q Meet other people there? A Yes.

Q Do you know what his reputation was as a peaceful and honest and chaste citizen in the neighborhood there—good or bad? A It was good. 20

Cross examination by Mr. Bernhard.

Q What is your business? A Machinist.

Q There are other stores around there? A Yes; up there there is a few other stores.

Q Quite a good many around Washington and Kinney streets, aren't there? A Yes, sir.

JOHN EATON, sworn in behalf of the defendant. 30

Direct examination by Mr. McDermit.

Q You know Alec how long? A Twenty-three years.

Q You lived in the same neighborhood with him Down Neck, years ago? A Yes, sir.

Q You have visited him right along since you have lived down there? A Yes, sir.

Q And kept track of him all the time? A Most always; yes, sir.

Q How often have you been to his place on Kinney street? A Sometimes three times, sometimes four times, sometimes once a week. 40

Q What would you do there? A I used to pay him a friendly visit.

Henry H. Brixus, direct.

Q You know from your observation and your talking with people around there what his reputation was as a law-abiding citizen, whether it was good or bad? A Good.

Cross examination by Mr. Bernhard.

10 Q Who did you talk with around there? A I never talked with anybody.

Q That is what you were asked. A I know people around the neighborhood that would talk if there was anything bad.

Q You would come from Down Neck all the way up to Washington and Kinney streets? A I didn't live Down Neck; I lived up on the hill.

Q When were you there—every day in the month? A All during the five years, I think five years, that he kept the store on the upper part of Kinney.

20 Q I am speaking of Kinney and Washington street. Are you speaking of the lower part of Kinney street? A I am speaking of both places.

Q You went to that store every day? A No, not every day.

Q Nearly every day? A I was sometimes nearly every day, every week.

Q What do you mean? A Some weeks I would be there every day.

Q If you worked how could you go there every day? A Because I could. I got through early.

30 Q Then you are there some part of every day? A Yes.

Q Why? A Simply because we are friends.

Q How far away did you live? A I lived on Hawthorne avenue.

Q You came up here every day to see Naujoks? A Yes, sir.

Q Why? A Simply to wile away the time.

Q But you work, don't you? A I told you I didn't work all day.

HENRY H. BRIXUS, sworn in behalf of the defendant.

40 *Direct examination by Mr. McDermit.*

Q How long have you known Mr. Naujoks? A Ever since he took the store.

Q And do you visit his place? A Yes, sir; mostly every evening.

J. Henry Clark, direct.

Q And you live in that neighborhood, do you? A Yes, sir.

Q Do you know what his reputation is as a peaceable, honest, chaste citizen in the neighborhood? A Yes, sir.

Q Good or bad? A Yes, sir.

Q You can't say it is both. You are in a hurry. Is it good or bad? A Good, as far as I know. 10

Cross examination by Mr. Bernhard.

Q Did you ever talk with anybody about him? A A friend of mine what I palled around with, he visits him, too.

Q You and your friend meet there at night? A Yes, sir.

Q Sort of a hanging out place? A Not exactly hanging out. I meet there an evening just to get a cigar and then we go out together.

Q A little ice cream and a little soda? A No, sir.

Q Nothing stronger? A No, sir; I don't believe in it. 20

DEFENDANT RESTS.

ALICE BISHOP, recalled in behalf of the State in rebuttal.

Direct examination by Mr. Bernhard.

Q Alice, what was in that back room where you were taken?

A A bed, a trunk and gas stove and telephone.

Not cross examined.

30

J. HENRY CLARK, sworn in behalf of the State in rebuttal.

Direct examination by Mr. Bernhard.

Q Dr. Clark, did you examine Alice Bishop at your office or at the police court in July? A Yes. December 11, 1918, Police Headquarters, 8:10 P. M., at the request of Detective Corbally. Found a young girl, ten years old, with the following result, "Negative." That means, no evidence of injury to the parts in question; parts were normal.

Q That was 8:10 in the morning or at night? A P. M., in the evening. 40

Cross examination by Mr. McDermit.

Q That examination would indicate that the vagina had not been punctured? A Yes, sir.

J. Henry Clark, re-direct.

Q And it would show, so far as you can see there, that no injury had been done when you say it is normal? A I mean by that, no laceration of the hymen; there might have been, in fact, an attempt—I don't know anything about that. I only speak of the effect on the hymen, of the body of the girl. The hymen was not ruptured; that means there was no penetration.

10 Q And there was nothing to indicate at that time any laceration or injury whatever? A No laceration.

Q Or injury whatever? A Of the hymen.

Q Or any laceration or injury of any other part of the body? A That is the only part that can be lacerated to indicate penetration.

Q Was there anything to indicate injury, any contusion or abrasion to indicate injury to the girl? A No; there were no contusions and abrasions.

20 *Re-direct examination by Mr. Bernhard.*

Q Any abrasion or contusion that the girl had in August would have passed away before you made your examination in December? A Oh, yes; easily enough.

STATE RESTS.

DEFENDANT RESTS.

Mr. McDermit sums up in behalf of the defendant.

30 Adjourned until tomorrow, Tuesday, June 3rd, 1919, at 10 o'clock A. M.

Tuesday, June 3, 1919.

Continued pursuant to adjournment.

Present, counsel as before stated.

Juror No. 3. Would it be possible to hear the testimony of the physician again, Dr. Clark, who testified yesterday?

40 *The Court.* Yes.

(The testimony of Dr. Clark is read.)

Mr. Bernhard sums up for the State.

The Defendant. Can I have the jury take the telephone book down? I have no telephone in my place.

Court's Charge to Jury.

The Court. The only question is whether the little girl testified that there was a telephone in the place. I will take care of that question in disposing of the case to the jury.

CHARGE TO JURY.

10

The Court charged the jury as follows:

OSBORNE, J.

The indictment in this case charges the defendant with assault and battery with intent to abuse.

There are two counts, one for assault and battery and one for the abuse. The abuse necessarily involves an assault and battery, so that if the defendant is guilty of having abused this child, the lesser charge of assault and battery is merged into the greater one of assault and battery and abuse, and if you find the defendant guilty of abuse your verdict should be guilty as charged. That will cover the situation.

20

The statute under which this indictment is laid provides that "Any person who, being of the age of sixteen years or over, shall unlawfully and carnally abuse a woman child under the age of twelve years, with or without her consent, shall be guilty of a crime against the laws of this state.

To convict of the crime of abuse it must be shown that the accused was of the age of sixteen years or over. Of course, it is quite apparent in this case that the defendant is over that age. That he shall have unlawfully and carnally abused the woman—that is, the child in this case. That is a question, of course, for your determination. That she shall be under the age mentioned in the statute. The testimony is that she is eleven years of age.

30

The first and third of these propositions relating to the age of the defendant and the girl there is no serious controversy about. The real question, therefore, is whether he abused her.

Carnal abuse is the assault or debauchery of the female sexual organs by the genital organs of the male, but it falls short of knowledge with its accompanying penetration—that is to say, actual penetration under this statute is not a necessary element. So that, therefore, so far as ascertaining the guilt or innocence of the accused is concerned, whether or not there was actual penetration, is immaterial.

40

Court's Charge to Jury.

Now, there are certain elementary propositions of law which I will first dispose of.

10 In the first place, the defendant is presumed to be innocent until he is proven guilty. That is a presumption of law that goes with every defendant charged with crime. The burden is upon the State to satisfy you beyond a reasonable doubt of his guilt. If, after a consideration of all of the evidence in the case, you cannot say that you feel an abiding conviction, to a moral certainly, that he is guilty, it will be your duty to acquit him. If, on the other hand, you are so satisfied, then you should convict.

20 You will recall the testimony, of course, and you must rely upon your own recollection, not upon that of counsel or the Court. We, in referring to the testimony by way of illustrating the facts and circumstances which it is proper to bring to your attention, may inadvertently misstate facts. In any event, your own recollection should be your guide. For instance, the defendant has just called my attention to a circumstance in regard to the telephone. The prosecutor, in his summing up, said that the child stated that there was a telephone in the room. Whether the child said so or did not say so is a question for your determination. If the child did not say so it was merely a mistake in referring to it. If the child did say so you will recall that fact, and whether the child was or was not mistaken is for you to say. If the child said there was a telephone the defendant had the opportunity to deny it on the witness-stand if he cared to do so.

30 You should only consider the evidence in the case as shown to by the witnesses. We cannot go outside of the sworn testimony of witnesses in determining what the facts are in this case. If we did, we would have the utmost confusion. You should confine your deliberations and your consideration to the testimony adduced on the witness-stand given in an orderly and proper manner, subject to the rules of evidence which have been found by many years of usage to be proper and necessary in order that the case may be conducted along the right channels. You should not be swayed by your sympathies, either for the child or for the defendant. You should not be influenced by the possible consequences to this defendant. You have your duty to perform and the Court has its duty to perform. The imposition of the penalty is the responsibility of the Court, subject to the provisions of the statute. Your function is to determine the facts, 40 the question of the guilt or innocence of this defendant upon this

Court's Charge to Jury.

charge, based upon the facts laid before you. It is your function to weigh the evidence, to determine its credibility, to accept that which you believe to be true and reject that which you believe to be untrue or unworthy of belief. Questions of fact are entirely your province.

This child says that on a date in June, the exact day she is unable to determine—and I may say that the exact date is immaterial if you believe the offense took place—the date laid in the indictment is the 11th of August—but if you are satisfied beyond a reasonable doubt that this occurred in June as stated by her—and there is some other evidence relating to the time which you will recall—the date laid in the indictment, as I say, is immaterial because the indictment may be amended to conform to the facts as disclosed by the evidence. She says that she was in this store and that the defendant took her in the back room, laid her on the bed and there abused her. It is true that no actual physical injury was done, but that does not make any difference in a case of this character. It is a moral injury. With children of immature minds it may far outweigh, in its serious consequences, any physical injury. She says that he then gave her a penny and chased her out of the store. You have heard such other testimony on the part of the State as has been offered in corroboration of this circumstance.

The defendant has produced evidence of his good character, which is entirely proper in a case like this, for your consideration. If you believe, in considering it, that a reasonable doubt exists, even though that doubt be engendered merely by his previous good reputation, he is entitled to an acquittal.

I do not think that it is necessary for me to say anything further in the case. I think I have made the principles of law clear, the importance of the case to the community, its importance to the defendant and the seriousness of the obligation which rests upon you. If, after considering it carefully, and weighing the evidence, you are satisfied beyond a reasonable doubt of the defendant's guilt you should so find. Of course, if you are not so satisfied, you should find him not guilty.

(The jury retires.)

Certificate of Judge.

Defendant's counsel prays a general exception to the charge of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

H. V. OSBORNE, (L. S.)
Judge.

10

STATE

vs.

ALEXANDER NAUJOKS.

20

STATE OF NEW JERSEY, }
ESSEX COUNTY. } *ss.*

I, Harry V. Osborne, presiding judge of the Essex County Court of General Quarter Sessions and Essex County Court of Oyer and Terminer, and the judge who presided over the afore-said cause, certify that the above printed book contains the entire record of the proceedings had upon the trial of the said cause, and that the same is returned by the plaintiff-in-error therein with the writ of error bringing up the bill of exceptions signed and sealed in this cause.

30

H. V. OSBORNE,
*Presiding Judge of the Essex County Court of Oyer
& Terminer and General Quarter Sessions.*

40

Certificate of Court Stenographer.

STATE

vs.

ALEXANDER NAUJOKS.

10

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

I, Walter W. Ressler, the official stenographer of the Essex County Court of General Quarter Sessions, Part II, do hereby certify that the foregoing transcript contains the entire record of the proceedings and testimony taken by me at the trial of the case of the State of New Jersey *v.* Alexander Naujoks, on Indictment No. 83, April Term, 1919, for assault and battery and intent to abuse, which trial was held before the Honorable Harry V. Osborne, presiding judge of the Essex County General Quarter Sessions Court in and for the County of Essex, and a jury, on Monday, June 2, 1919, at Newark, New Jersey.

20

WALTER W. RESSLER.

30

40

*Assignments of Error.***ASSIGNMENT OF ERRORS.**

Filed.

NEW JERSEY SUPREME COURT.

10

STATE OF NEW JERSEY,

*Defendant-in-Error,**On Writ of Error.**vs.**Assignment of
Errors.*

ALEXANDER NAUJOKS,

Plaintiff-in-Error.

20

Afterwards, to wit, in the Supreme Court of Judicature comes the said Alexander Naujoks, by McDermit & McDermit, his attorneys, and says, that in the record and proceedings aforesaid and also in the giving of the verdict and judgment there is manifest error in this to wit:

30

1. In that upon the trial of said court the Trial Judge unwarrantedly and severely reprimanded defendant's counsel, for the alleged following remark made in his address to the jury—"You will do the same as the other jury did and exonerate him," and that in the Trial Judge's refusal to hear counsel on the subject and state what he actually said and what the continuity of thought was in his argument, the colloquy of the Court being:

The Court. You know, Mr. McDermit, that is improper and highly prejudicial to the State's case. A remark of that kind ought not to be made to the jury and it is made for the sole purpose of taking advantage of its impropriety.

Mr. McDermit. Part of the other case got to the jury and I didn't object to it.

40

The Court. I don't recall whether the other case you referred to related to this particular child or not, so that this case has never been tried.

Mr. Bernhard. There is absolutely no way that the State can remove the prejudice from Mr. McDermit's statement by reason of a case that is foreign and independent of this case.

The Court. I think that this Court has the power to declare a mistrial and impanel another jury.

Assignments of Error.

Mr. Bernhard. I am perfectly willing and satisfied that the jury will follow your Honor's direction with reference to that to the utmost of their ability, although it is highly prejudicial. It would be a shame to reimpanel a jury.

The Court. I cannot understand Mr. McDermit's conduct at all, pursuing such a reprehensible and unprofessional method. It only serves to prejudice the administration of justice in this county. (To the jury.) I will at this time say to the jury what the situation is. Mr. McDermit, closing his opening remarks, indicated by the last statement that the defendant has been exonerated by another jury on this charge. That is not so, and it was a very improper thing for him to say for the purpose of influencing your minds—

10

Mr. McDermit. I desire to be heard.

The Court. I do not care to hear any argument about it of what your opinion is as to what I am going to say. As a matter of fact, this defendant was tried for an assault and battery and abuse on another child on another indictment and on another little girl, and in that case on the facts there presented, which of course you know nothing of, because you did not hear that case, the jury acquitted him, and I want to say that you are trying this case on the evidence here and not on the evidence there, and you should decide this case, when the time comes, on the evidence here, and not be influenced by this remark of counsel. Mr. McDermit may have an exception to what I said.

20

Mr. McDermit. Calling the jury's attention to the remark made by counsel—

30

The Court. I do not care to hear anything further about it. What I have said is on the record and requires no explanation or argument. You have an exception to it and if there is any error in it, you have your relief.

Mr. McDermit. What I said was that arising out of this defense another jury had exonerated the defendant.

The Court. I heard exactly what you said and I stated it correctly. You have your exception.

40

Defendant's counsel prays an exception to this ruling of the Court and the same is allowed and is signed and sealed accordingly.

H. V. OSBORNE,
Judge."

Assignments of Error.

2. In that the Court erred in charging the jury, "So that, therefore, so far as ascertaining the guilt or innocence of the accused is concerned, whether or not there was actual penetration is immaterial."

10 3. In that the Court erred in charging the jury, "If the child said there was a telephone the defendant had the opportunity to deny it on the witness stand if he cared to do so."

20 4. In that the Court erred in charging the jury, "This child says that on a date in June, the exact day she is unable to determine—and I may say that the exact date is immaterial if you believe the offense took place—the date laid in the indictment is the 11th of August—but if you are satisfied beyond a reasonable doubt that this occurred in June as stated by her—and there is some other evidence relating to the time which you will recall—the date laid in the indictment as I say, is immaterial because the indictment may be amended to conform to the facts as disclosed by the evidence."

5. In that the Court erred in charging the jury, "She says that she was in this store and that the defendant took her in the back room, laid her on the bed and there abused her."

30 6. In that the Court erred in charging the jury, "It is true that no actual physical injury was done, but that does not make any difference in a case of this character. It is a moral injury. With children of immature minds it may far outweigh, in its serious consequences, any physical injury."

Plaintiff-in-error, Alexander Naujoks, prays that the judgment aforesaid be reversed and altogether held for nothing and that he may be restored to all things he has lost by reason of the said judgment, etc.

McDERMIT & McDERMIT,
Attorneys for Plaintiff-in-Error.

Service of a copy of the within assignment of errors is hereby acknowledged this 6th day of January, 1920.

40

J. H. HARRISON,
Attorney of Defendant-in-Error.

*Specification of Causes.***SPECIFICATION OF CAUSES.**

Filed.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY,

*Defendant-in-Error,**vs.*

ALEXANDER NAUJOKS,

Plaintiff-in-Error.

10

On Writ of Error.
Specification of
Causes.

Alexander Naujoks, the plaintiff-in-error by McDermit & McDermit, his attorneys, hereby specifies the causes in the record relied upon for relief or reversal in the aforesaid cause as follows:

20

1. That there is no evidence sufficient to uphold a verdict of guilty.

2. In that the Court severely reprimanded counsel for defendant, without cause, before the jury to the prejudice of the defendant.

3. In that the Court instructed the jury to disregard the opening remarks of defendant's counsel to the prejudice of the defendant and his defense.

30

4. In that the Court erroneously stated to the jury the opening remarks of defendant's counsel and the Court refused to hear counsel to state what he said and the continuity of his argument thereon.

5. In that the Court erred in stating to the jury that, defendant's counsel had said, that the present case had been tried before another jury and the defendant acquitted when, as a matter of fact, defendant's counsel had made no such statement whatsoever.

6. In that the Court absolutely refused to hear counsel or permit him to state what he actually said in his opening to the jury.

40

7. In that the Court absolutely refused to hear counsel or permit him to state what the remarks were what he had said to the

Specification of Causes.

jury and correct the statement of the Court as to what the Trial Judge stated to the jury, which was not correct and untrue, all of which was to the defendant's prejudice.

10 8. In that by reason of the Trial Court's action in reprimanding counsel for defendant, unwarrantedly and the incorrect statement of the Court to the jury, as to what counsel had said in his opening remarks to them, and in the Court's instruction to the jury in regards to same, the defendant suffered manifest wrong and injury and was prejudiced thereby.

9. In that the Court charged the jury: "So that, therefore, so far as ascertaining the guilt or innocence of the accused is concerned, whether or not there was actual penetration is immaterial."

20 10. In that the Court charged the jury: "If the child said there was a telephone the defendant had the opportunity to deny it on the witness-stand if he cared to so do."

30 11. In that the Court charged the jury: "This child says that on a date in June, the exact day she is unable to determine—and I may say that the exact date is immaterial if you believe the offense took place—the date laid in the indictment is the 11th of August—but if you are satisfied beyond a reasonable doubt that this occurred in June as stated by her—and there is some other evidence relating to the time which you will recall—the date laid in the indictment, as I say, is immaterial because the indictment may be amended to conform to the facts as disclosed by the evidence."

12. In that the Court charged the jury: "She says that she was in this store and that the defendant took her in the back room, laid her on the bed and there abused her."

13. In that the Court charged the jury: "It is true that no actual physical injury was done, but that does not make any difference in a case of this character. It is a moral injury. With children of immature minds it may outweigh, in its serious consequences any physical injury."

40

McDERMIT & McDERMIT,
Attorneys for Plaintiff-in-Error.

Service of a copy of the within copy of Specification of Causes is hereby acknowledged this 6th day of January, 1920.

J. H. HARRISON,
Attorney for Defendant-in-Error.

Opinion of Supreme Court.

OPINION OF SUPREME COURT.

Filed June 11, 1920.

NEW JERSEY SUPREME COURT.

February Term, 1920.

10

THE STATE,

Defendant-in-Error,

vs.

ALEXANDER NAUJOKS,

Plaintiff-in-Error.

*Error to Essex
Sessions.*

Argued February Term, 1920.

Decided June Term, 1920.

20

McDermit & McDermit, for plaintiff-in-error.

J. Henry Harrison and John A. Bernhard, for the State.

Argued before the Chief Justice, Minturn and Black, *J. J.*:

Per Curiam:

Defendant was indicted and convicted for assault and battery and carnal abuse, and the case is here on exceptions, as well as upon review of the record, under section 136 of the Criminal Practice Act.

It is urged that the testimony is weak and does not support a verdict against defendant. It need be only circumstantial as the basis for a verdict.

30

Manziano v. Public Service Gas Co., 92 L. 325.

Here it was that and more, and the jury were the judges of its weight and credibility. A physical injury to the child as a result of the assault is not indispensable as the basis for a verdict of guilty.

State v. Hummer, 73 L. 714.

The objections to the charge of the Court are insubstantial, since at most they were mere comment, and the jury were instructed that they alone were to judge the facts. Since this case was submitted the case of *State v. Sing Lee* was decided by the Court of Errors and Appeals, in which the question presented

40

Opinion of Supreme Court.

here, by a general exception to the charge, *i. e.* that the date of the happening of this crime was "immaterial," and that the indictment may be amended to conform to the fact, was considered by that Court, and made the basis of that adjudication. It was there held that the date of the occurrence was material, and that it was error for the Trial Court to allow an amendment in that respect. That decision necessitates the reversal of this conviction on that ground.

10

20

30

40

Remittitur.

REMITTITUR.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY,

Defendant-in-Error,

vs.

ALEXANDER NAUJOKS,

Plaintiff-in-Error.

On Writ of Error.

Remittitur.

10

This cause having been submitted on briefs at the February Term, nineteen hundred and twenty, of the New Jersey Supreme Court, by J. H. Harrison, Esquire, attorney of the defendant-in-error, and Frank M. McDermit, Esquire, attorney of the plaintiff-in-error, and this Court having considered the same and finding error in the record and proceedings in the Essex County Court of Quarter Sessions,

20

It is thereupon ordered and adjudged that the judgment of the Essex County Court of Quarter Sessions, removed by the writ of error into this Court, be reversed in all things, and that the record be remitted to the Essex County Court of Quarter Sessions to be proceeded with according to law and the practice of said Court.

Entered September 21, 1920,

30

On motion of

FRANK M. McDERMIT,
Attorney of Plaintiff-in-Error.

A true copy.

ENOCH L. JOHNSON,
Clerk.

40

Assignments of Error.

ASSIGNMENTS OF ERROR.

Filed.

New Jersey Court of Errors and Appeals

10

THE STATE OF NEW JERSEY,

Plaintiff-in-Error,

vs.

ALEXANDER NAUJOKS,

Defendant-in-Error.

*On Writ of Error
to Supreme
Court.*

*Assignments of
Error.*

20 Afterwards comes the State of New Jersey by J. H. Harrison, its attorney, and says, that in the record and proceedings aforesaid there is manifest error, to wit:

1. Because the judgment of the Supreme Court in said cause was entered in favor of Alexander Naujoks, where it should have been entered in favor of the State of New Jersey.

2. Because the Supreme Court reversed and set aside the judgment entered on the conviction of the said Alexander Naujoks in the Essex County Court of Quarter Sessions, whereas it should have affirmed the said judgment.

30 3. Because there was error in the record and proceedings before the Supreme Court.

And the said plaintiff-in-error and the State of New Jersey prays that the judgment aforesaid in the Supreme Court be reversed and that the conviction of said Alexander Naujoks be in all things affirmed, and that the record and proceedings be remitted to the Supreme Court according to law and the rules and practice of said Court.

Dated October 27, 1920.

J. H. HARRISON,
Prosecutor of the Pleas,
Attorney for Plaintiff-in-Error.

40

Service of a copy of the within is hereby acknowledged this 27th day of October, 1920.

McDERMIT & McDERMIT,
Attorneys for Defendant-in-Error.

New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,

Plaintiff-in-Error,

vs.

ALEXANDER NAUJOKS,

Defendant-in-Error.

*On Writ of
Error.*

*Sur Indictment
for Assault and
Battery and
Abuse.*

BRIEF FOR DEFENDANT-IN-ERROR.

The defendant was tried and convicted on an indictment charging him with assault and battery and abuse upon one Alice Bishop.

I.

Here we make our first objection to this appeal, and that is, that the writ of error as taken by the State is inadvertently issued, in that it takes up for review, case, p. 1, fol. 15; "Because in the record and proceedings and also in the giving of judgment upon a certain indictment in the name of the State of New Jersey against Alexander Naujoks, *for conspiracy* manifest error hath intervened, to the great damage of the State, etc."

The indictment in the name of the State against the defendant was for assault and battery and abuse, case, p. 3, there never at any time was an indictment for conspiracy against this defendant. My contention, therefore, is that judgment of the Supreme Court for review before this Court is not properly here presented, as it is upon a writ of error to review an alleged conviction on an indictment which was never in existence and no conviction had thereon.

Counsel discovered this after the printed books were served on him, which was at a very late day, and I am presenting it for the first time here in my brief.

II.

The defendant appealed his conviction to the Supreme Court, which reversed the said conviction, said Court deciding, case, p. 57, fol. 44:

“Since this case was submitted the case of *State v. Sing Lee* was decided by the Court of Errors and Appeals, in which the question presented here, by a general exception to the charge, *i. e.*, that the date of the happening of this crime was ‘immaterial,’ and that the indictment may be amended to conform to the fact, was considered by that Court, and made the basis of that adjudication. It was there held that the date of the occurrence was material, and that it was error for the Trial Court to allow an amendment in that respect. That decision necessitates the reversal of this conviction on that ground.”

The State now appeals from this sane and sound decision of the Supreme Court on the contention that it is bad law. In effect, that the *Sing Lee* decision is not good law to reverse the conviction of the present case, in that it did not apply.

The argument advanced by the State is unsound, and the fallacy of the reasoning contended is obvious.

The assignment of error upon which the Supreme Court decided the case is as follows, case, p. 54, fol. 12, assignment number 4:

“This child says that on a date in June, the exact day she is unable to determine—and I may say that the exact date is immaterial if you believe the offense took place—the date laid in the indictment is the 11th of August—but if you are satisfied beyond a reasonable doubt that this occurred in June, as stated by her—and there is some other evidence relating to the time which you will recall—the date laid in the indictment, as I say, is immaterial, because the indictment may be amended to conform to the facts as disclosed by the evidence.”

The case of *State v. Sing Lee*, 110 Atl. 113, is squarely on all fours with this case, and it is decisive of the question here contended. The Court not only amended the indictment by reason of his charge, but stated that proof of date was “immaterial.” The fallacy of this charge is clearly shown by the decision in the *Sing Lee* case, in that “the offense of carnal

abuse is not a continuing one, as open and notorious lewdness, etc.; hence, where the indictment charged that the offense occurred on a particular day, it could not be amended to charge the offense on other days, on the theory that it was continuous."

And, further, that the indictment cannot be amended save as to formal matters, and, "In view of the constitutional declaration that no person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury, it was error for the Trial Court at the conclusion of the State's case to allow amendment of the indictment so as to charge the commission of the offense on a day different from that laid, and the allowance of such amendment deprived defendant of his constitutional right."

In the present case the Court of his own motion amends the indictment in his charge to the jury, and again states that the proof of the date is "immaterial."

It has been held in our state that where time is of the essence of the offense, proof of it is necessary.

Ketline v. State, 58 N. J. L. 462.

In *State v. Shapiro*, 98 Atl. 437, this Court held:

"Where the date alleged in an indictment of the time of the commission of the crime is not of the essence of the offense, proof that it was committed on that day is unnecessary, and proof that it was committed at any time within the period not covered by the statute of limitation is sufficient. But the date on which the offense was committed though not an ingredient of the offense may relatively become, like any other fact in a case, a matter of vital importance."

It would be a lamentable state of affairs if, as contended by the State in cases of abuse, the State could amend the date according to the facts as disclosed at trial. When they lose sight of the fact that it is a fact of vital importance for a prosecutor to know the facts of his case before going to trial, preparation means nothing under the argument advanced by the State. What would happen to B if he came into court to prove an alibi under the date alleged in the indictment for abuse? Crimes of this character either take place on a day certain or the crime was not committed.

That the date was a matter of importance is forcibly illustrated in this case in view of the Court's charge. A sharp issue was raised as to this point, both on examination of the complainant and her mother, Mrs. Julia Bishop. The complainant could not say when it was, whether June or August, and the mother could give no time, nearest she came to being November, about four or five months after the alleged crime was alleged to have been committed. The fixing of the date was important as to corroboration and as to the defendant's defense and the proof as to the date in the indictment was of the essence of the offense.

State v. Shapiro, 98 Atl. 437.

An offense of carnal abuse is not a continuing one justifying amendment charging offense on different date—the date is of the essence of the offense and is a matter of substance and not form.

State v. Sing Lee, 110 Atl. 113.

Where indictment is amended to charge offense on different day, defendant is deprived of constitutional safeguard of trial on indictment.

State v. Sing Lee, *id*;

State v. Ham, 72 N. J. L. 4.

A resume of the evidence in this case I feel will not go amiss.

This case was brought up for review on bill of exceptions and specifications of causes with certificate bringing up the entire record under Section 136 of the Criminal Procedure Act of 1898.

The evidence in this case is very weak. The only direct testimony appearing in the case against the defendant is that of Alice Bishop, the complainant (page 7, line 19):

“I came in to buy candy and he got me by the back of my dress like that (illustrating) and he dragged me in the candy store and threw me on the bed face down and then he put his private into my private.”

Q Go on? A That is all I know.

Q Did you stay there? A He pushed me down and he laid on top of me; I had to stay.

Q How long were you there? A Half an hour.

Q What did you do while you were there half an hour?

A He put his private into my private.

Q How were you dressed? A I had all my clothes on and he took down my pants.

She further testified that she received a penny from the defendant and chased her out of the store and she went home; that she did not tell her mother what had happened. She was asked (page 7, line 42):

Q What did you do when your mother got home? A I didn't tell her anything.

Q You did not tell her? A No, sir.

Q When did you tell her? A When it first started.

Q What? A When the Court first started.

Q How many days afterwards, what happened? A I didn't tell her nothing at all; she didn't know nothing.

On cross examination, she testified (page 8, line 20, etc.):

Q You say this was in June? A Yes, sir.

Q Were you subpoenaed in court before? Did you ever go in court before to tell this story? A No, sir.

Q Sure about that? A Yes, sir.

Q Did you ever tell anybody it was on the 15th day of August? A No, sir.

Q Sure about that? A Yes, sir.

Q Never told your mother anything about it? A No, sir.

Q Never told your father anything about it? A No, sir.

Q Who did you tell about it? A Nobody.

Q You must have told somebody about it? A No, sir.

Q Never did? A No, sir.

She further testified on cross examination that she went into the defendant's store to get candy, but she had no chance to get it, as the defendant grabbed her and pulled her into the back room, committing an outrage upon her (page 9, line 30), and that at the time she was "hollering and crying" (page 10, line 10), her cross examination continuing on same page:

Q Did you see any doctor or anything after that? A No, sir.

Q Did anybody make an examination of your privates? A I was in headquarters.

Q Who was it made the examination there? A Dr. Clark.

Q When was it he made the examination? A The day we were all in court.

Q How long after that time that you say you were in Naujok's back room was it that you went into court? A Sir?

Q How long from the time that you say this occurred in Nauioks' back room that you went into court? A About four months after.

Then she goes on to testify that one Stella Prine had been caught for stealing a watch from defendant's store, and on being arrested complainant began to relate her story to the Court after having had a conversation with Stella Prine. Complainant's testimony appears as follows on page 12, line 10:

Q And she told you that he brought her in and laid her on the bed and put his privates into her privates; is that what she said? A Yes, sir.

Q Then she told you to tell the whole truth? A Yes, sir.

Q And then you told the judge that he carried you in the bedroom and laid you on your stomach and he put his private into your private? A I told him it was June or August.

Q Who told you to use the word "private"? A Stella Prine.

Q Who was Stella Prine; she was another girl that was around there? A That is the colored girl.

(Page 12, line 30.)

Q She used the word "private"? A Yes, sir.

Q She told you that Naujoks had put his private into her private? A Yes, sir.

She further testified that she did not know whether she told the Grand Jury it was in August or June that it happened. It seems that a watch had been stolen from the defendant's store by the girl Stella Prine and she with the complainant were attempting to sell it on Market street at the five and ten cent store, when they were arrested by the officer and Stella Prine in justification of her crime for stealing begins to make a serious charge against the defendant, and then the complainant for the first time begins to make her charge against this defendant, which is none other than a rehearsed story prompted by the ingenuity of this girl Stella Prine, as the complainant's story is vague and uncertain, fictitious from beginning to end, without any corroboration, as on page 15, line 15, her testimony is as follows:

Q You were romping around there and the other girls were romping around there and were trying to take John's money and the candy? A No, sir.

Q He chased you out, did he? A No, sir.

Q He chased you out of there and told you never to come back? A He said, "Go ahead out."

Q He wouldn't sell you anything? A No, sir.

Q Where was Naujoks' at that time? A In front of his store.

Q It was the very next day? A Yes, sir.

Q Why did you come back there the next day if he had done what you told these gentlemen he did the day before. Why did you want to go back there again? A My brother called me for ice cream.

Q Weren't you afraid he would do something to you again? A I wasn't afraid because I had my brother with me.

Q How old is your brother? A Nine years old.

She testifies on pages 13 and 14 that after the alleged assault she complained to nobody; that she saw the shoemaker next door, but that she did not talk to him, and that the shoemaker saw her. That the shoemaker was right alongside of the defendant's store, being right next to the defendant's place of business.

The State then called the mother, Mrs. Julia Bishop.

On page 16, line 27, she is asked:

Q Do you remember one day last year Alice telling you something about something that happened? A No, sir; the child was afraid to come home and tell me. (The latter part of answer struck out.)

She further testified she could not fix any date. That she had heard something when she came home from work in seeing children in the defendant's store, all of which testimony was struck out. (On page 17, line 30.) She testifies:

Q When did you hear about it first? A Why, the other children came around and told it to me—

Q I am trying to find out when you first heard it, that is all? A Well, I couldn't really tell you when this thing—when I heard of it—but the other children—

Q You really can't say? A No, I could not.

Then she further testifies that she heard of the trouble after her girl was arrested, together with Stella Prine, for stealing the watch. There is no evidence that complainant, her daughter, ever complained to her about any outrage that defendant may have committed upon her. There is absolutely no corroboration of this fact in any part of the testimony on the part of the State. The only evidence is that the complainant, which is very vague and uncertain.

The next witness for the State was Sergeant John H. Garry, who testified that on November 11th he took a statement from Alice Bishop, the complainant, as to an alleged outrage supposed to have been committed upon her by defendant, and this is the first time her mother hears of it, when the officer calls at the

house, being about four or five months after it is alleged to have taken place.

The next witness for the State was Dr. Henry Clark, whose testimony is found on pages 45 and 46, which is as follows:

Q Dr. Clark, did you examine Alice Bishop at your office or at the Police Court in July? A Yes; December 11, 1918, Police Headquarters, 8:10 P. M., at the request of Detective Corbally. Found a young girl, ten years old, with the following result: "Negative." That means, no evidence of injury to the parts in question; parts were normal.

Q That was 8:10 in the morning or at night? A P. M., in the evening.

Cross examination by Mr. McDermit.

Q That examination would indicate that the vagina had not been punctured? A Yes, sir.

Q And it would show, so far as you can see there that no injury had been done when you say it is normal? A I mean by that, no laceration of the hymen; there might have been an attempt. I don't know anything about that. I only speak of the effect on the hymen of the body of the girl. The hymen was not ruptured; that means there was no penetration.

Q And there was nothing to indicate at that time any laceration of injury whatever? A No laceration.

Q Or injury whatever? A Of the hymen.

Q Or any laceration or injury of any other part of the body? A That is the only part that can be lacerated to indicate penetration.

Q Was there anything to indicate injury, any contusions or abrasions to indicate injury to the girl? A No, there were no contusions and abrasions.

Then the doctor testifies that any abrasions or contusions the girl had in August would have passed away by the time he made the examination in December. In this connection, I wish to call the Court's attention to the testimony of the complainant, Alice Bishop (page 15 bottom and top of page 16), where she testifies as follows:

Q What was the condition of your clothes after you got up from the bed? A They was all wet.

Q What did you do when you found they were all wet? A I took them all off and put clean clothes on and washed the old ones.

Q Why did you do that? A So my mother wouldn't know it.

Q Why didn't you tell your mother? A I was afraid.

Q Afraid of what? A Getting a whipping—

It seems rather a little far fetched to assume that this girl was telling the truth. This is not the usual case where a girl submits to the carnal abuse and fears her parents' wrath. But it is a case, as contended and testified to by the complainant, where defendant forcibly assaults her and penetrates her private parts, causing an emission to take place.

That the evidence is very weak cannot be questioned, there being only the uncertain evidence of the complainant. The only fact she directly testifies pointedly about is of the assault. As he grabbed her, laid her down on her stomach and "put his private into my private" and that she found her clothes "wet," which she changed, washing the old ones.

What were her clothes "wet" from, not blood, for she would have testified to the fact. Did the defendant insert his male organ into the privates of the complainant? If not, did he assault her? Was there a crime of carnal abuse committed? These are the questions which present themselves to one's mind after a careful consideration of the testimony, as to whether or not there was an assaulting of debauchery of the sexual organs of the complainant by the male genitals, and on what day did the assaulting and debauchery take place.

From the foregoing state of facts it can be seen that the case against the defendant was very weak. That the only statement directly involving the defendant being the few words stated by the complainant in her testimony, "He grabbed me and laid me down, and put his privates into my privates." These words are nothing more than the conception and tutilage of her girl friend, Stella Prine, coached by her while under arrest on complaint made by the defendant for stealing a watch from his store, as all other evidence is negative of the outrage of ever having taken place. In no part of her testimony is she corroborated, either as to time, dates or marks on her body, or bloody undergarments, or of having complained to her mother or any other person of an outrage having been committed upon her. The testimony shows, most clearly, that on the next day she was in the defendant's store to buy ice cream. That, if anything as alleged had ever taken place, the neighbors would have heard her screaming, if she did call for help, as she stated, but on cross examination she testified that she only said "Help."

Where violence is done, medical proof is indispensable. Dr. Clark found the complainant to be "negative." He found no evidence of injury to her private parts in question (page 45, line

35). That her parts were normal. Her private parts were not punctured. He found them normal and correct.

The evidence leads irresistably to the conclusion that the defendant at no time ever committed carnal abuse on the complainant. There is no testimony of any blood stains on her garments, she says; the "drawers were wet." If her parts had been abused there would have been lacerations; no evidence of any in this case, or if punctured by the act of carnal abuse by penetration the fact would have been testified to by Dr. Clark; but he found she was not injured there at all. The first time anything is said about the alleged affair is when complainant is brought to Headquarters for having stolen a watch, which is about four or five months after she claims the assault took place—a rather stale time to first complain. No date was proven.

I also argued before the Supreme Court the following assignments as follows, which I place before this Court in order to satisfy my client that I have not been remiss in my duty to him as his counsel:

Assignments 2 and 6.

The Court charged the jury:

"It is true that no actual physical injury was done, but that does not make any difference in a case of this character. It is a moral injury. With children of immature minds it may far outweigh, in its serious consequences, any physical injury." (Assignment 6.)

This is prejudicial error, in that the jury is made to understand that the defendant was guilty of having committed a crime of assault and battery and carnal abuse, withal he did no physical injury. The charge is prejudicial to the defendant, and was to his defense, because counsel argued to the jury, the fact of no physical injury, no bloodstains, lateness of the complaint on the part of the complainant, medical testimony in favor of the defendant, the weakness of the complainant's story, failure of corroboration, her story against that of the defendant, with all the defects in her testimony, failed to have been corroborated, were entirely swept away by this charge of the Court. In order to convict a defendant for assault and battery and carnal abuse, the State must prove an assault, and battery and carnal abuse. Therefore, actual injury must take place, otherwise there is no crime. Actual physical hurt is necessary to convict one under

the statute, which reads: "Any person who, being of the age of sixteen years or over, shall unlawfully and carnally abuse a woman child under the age of twelve years, with or without her consent, shall be guilty of a crime against the laws of this state."

A person necessarily does physical injury when he commits the crime of carnal abuse under this statute, and if the physical injury is lacking then there has been no crime committed. Our Courts have held that the effect of the statute is to render the infant incapable of giving consent to the prohibited intercourse. That her submission to the abuse is not a consent which will eliminate from it the element of an assault.

Farrell v. State, 54 N. J. L. 416.

Therefore, in a case of this kind it is necessary that there be actual physical injury, because necessarily there is an assault involved in the commission of the crime.

Preceding this part of the charge the Court charged: "So that, therefore, so far as ascertaining the guilt or innocence of the accused is concerned, whether or not there was actual penetration is immaterial." (Assignment 2.)

Here the Court again assumes, or rather has the jury assume, that there was some penetration, not actual, but some, however slight, and again that it disposes of the fact if whether or not an assault and battery and abuse took place.

Our Courts have held that criminal abuse, which is the assaulting or debauching of the sexual organs of a female by the male genitals, does not connote penetration, and hence is not identical with criminal knowledge, that is, sexual intercourse, or with rape.

State v. Humner, 73 N. J. L. 714.

But there must be an assaulting and debauching of the sexual organs of the female child and not as the Court charged the jury: "It is true that no actual physical injury was done, but that does not make any difference in a case of this character. It is a moral injury. With children of immature minds it may far outweigh, in its serious consequences, any physical injury." This is erroneous. There must be an assaulting and debauching of the sexual organs of the female by the male genitals.

I respectfully submit that the defendant suffered manifest wrong and injury by these charges as charged by the Court. It was tantamount to a direction of a verdict withal there was no evidence of any assault and debauchery in the case.

III.

Assignment 3.

The third assignment of error reads as to the charge to the jury: "If the child said there was a telephone the defendant had the opportunity to deny it on the witness stand if he cared to do so."

On page 46, line 45, defendant states to the Court:

"Can I have the jury take the telephone book down? I have no telephone in my place."

The Court. The only question is whether the little girl testified that there was a telephone in the place. I will take care of that question in disposing of the case to the jury.

The way the Court took care of the defendant was as above set forth in the assignment of error, that the defendant could have denied it if he cared to do so. When, as a matter of fact, the defendant denied having a phone and the Court assured him that he would take care of that question in charging the jury, and in doing so, erroneously charged that the defendant did not deny having a telephone, to the defendant's manifest wrong and injury.

I respectfully submit that the opinion of the Supreme Court should be sustained and the reversal allowed to stand.

Respectfully submitted,

FRANK M. McDERMIT,

Of Counsel with Defendant-in-Error.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,

Plaintiff-in-Error,

vs.

ALEXANDER NAUJOKS,

Defendant-in-Error.

*On Writ of
Error.*

*Indictment
for Assault and
Battery and
Abuse.*

BRIEF FOR STATE OF NEW JERSEY.

The defendant was convicted of assault, battery and abuse upon the complaining witness, Alice Bishop, who was eleven years of age at the time the offense is alleged to have been committed. Upon appeal to the Supreme Court, the judgment was reversed, because the Trial Court charged:

“That the date of the happening of this crime was immaterial, and that the indictment may be amended to conform with the fact was by that Court made the basis of that adjudication. It was there held that the date of the occurrence was material, and that it was error for the Trial Court to allow an amendment in that respect. This decision necessitates the reversal of this decision on that ground.”

The indictment alleged August 15, 1918, as the date of the alleged offense, whereas the evidence of the complaining witness testified that it occurred in June, 1918 (p. 6).

The Court charged:

“This child says that on a date in June, the exact date she is unable to determine—and I may say that the exact date is immaterial, if you believe the offense took place—the date laid in the indictment is the 11th of August—but if you are satisfied beyond a reasonable doubt that this occurred in June, as stated by her—and there is some other evidence relating to the time which you will recall—the date laid in the indictment, as I say, is immaterial, because the indictment may be amended to conform with the facts as disclosed by the evidence” (p. 49).

State v. Sing Lee was cited by the Court as requiring a reversal. That opinion states:

“The effect of the judicial action of the Trial Judge was to amend the indictment so as to include within the

scope of its second count an allegation of the commission of offense by the defendant, of which he was not indicted by the Grand Jury.”

And again,

“And so in the case *sub judice* the grave fault committed was to allow an amendment which in effect altered the indictment, in substance, by substituting for the date of June 10th, the day alleged therein on which the crime was committed, the date of June 1st and June 3rd, thereby charging the defendant with a commission of *two separate crimes* of like character, in a single count, whereas the indictment of the Grand Jury was predicated only upon the commission of a single offense. The error in permitting such amendment is too glaring to justify any further comment.

“For it is patent that the amendment was a substitution of two offenses for one which in effect was equivalent to adding a count to the indictment, and hence, was prejudicial to the defendant’s defense upon the merits of the case.”

We have read this opinion carefully and it does not seem to us to control the present situation, because the motion in the Sing Lee case was to amend by *inserting two dates in the indictment*, apparently upon the theory of a continuous offense. Whatever the theory was, the Court of Errors held, that such an amendment of that kind could not be made. That is not the crux of this case. If the decision in the case of *State v. Sing Lee*, means that an indictment may not be amended as to the date, then it seems to be in conflict with Section 33 of the Criminal Procedure Act:

“No indictment for any offense shall be held insufficient for want of the averment of any matter unnecessary to be proved. * * * In any case where time is not of the essence of the offense, *nor for stating the time imperfectly*, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, on an impossible day or a day that never happened, etc. * * *”

The indictment in the case at bar stated the time imperfectly, in that the witness testified that the offense occurred in June, 1918, whereas the indictment charged August 11th. The Trial Court held that the date in the indictment was immaterial.

“If there had been no date, the omission could have been cured by amendment.”

Ketline v. State, 58 Law 462.

It could not have been cured by inserting a date beyond the statutory period, neither could there have been inserted a day subsequent to the finding of the indictment.

A rule of law is a rule of reason. It is submitted that the Legislature never intended that a defendant charged with a crime which involved the evidence of children, seven, eight, nine, ten or eleven years of age, as complaining witnesses, if strict proof of the date alleged in the indictment was not available. In this particular case the offense was not known to the parent until months after it had been committed. Many children do not even know the calendar months, and those of foreign parentage and in some instances of foreign birth would be of no avail as witnesses, if the rule in the Sing Lee case is inflexible. The object of the amendment provision was to make the procedure elastic enough to do justice to the parties. Suppose a case where the facts were not learned until after an indictment had been found until just before the limitation expired, and where the case was brought to trial after such limitation. If the indictment alleged August and during the course of the trial it appeared that the offense occurred in June, the defendant, of necessity, must be exonerated because an amendment would not be legal. That is not an extreme supposition. The discrepancy in the date does not prejudice a defendant in any of his legal rights, because if he is prepared for one date and the evidence discloses another, he will be protected by an application for an adjournment. What we have just said presents an actual situation with which the State is frequently confronted.

When a child appears before the Grand Jury, the thing uppermost in her mind is the fact of the occurrence, and not its date. Indeed, she may not herself be able to fix any exact date. But before the Grand Jury, and at the trial, an approximate date can be fixed by the State, by the general facts, and circumstances of the case. Any witness, even a child, must rely on his or her memory. The State must depend upon the recollection of the witness, and an amendment may be necessary. Not an amendment to two dates, as in the Sing Lee case, or even no amendment at all, as in this case. The Supreme Court seems to have gained the impression that the indictment here was amended, for in the opinion it is said:

“That it was error for the Trial Court to allow an amendment in that respect.”

That question is not raised in this issue, and, therefore, the underlying and controlling reason for the decision in the Sing Lee case does not apply.

The opinion of the Supreme Court in the case at bar expressly holds that there was no error in the record except the fact that the indictment was amended from August 11th to June.

We respectfully urge and insist that the Court of Errors and Appeals in the Sing Lee case did not hold that the time when the offense was committed was material. On the contrary, the opinion of the Court of Errors in the Sing Lee case is based wholly on the fact that the indictment in that case was amended to two dates, to wit: June 1st and 3rd, thereby charging the defendant in the single count with committing two separate offenses.

The State is not as much concerned in the ultimate outcome of the Naujoks case as it is concerned in the question whether an indictment which alleges as here, August 11th, and the proof shows "sometime in the month of June," as charged in the form submitted by Judge Osborne, is ground for reversal. It must be kept in mind that the State did not move to amend the indictment to conform to the fact and that the case was tried on the theory of absolute innocence on the part of the defendant. No motion was made to dismiss the indictment because of the difference between the allegation and the proof was postponed on the ground of surprise. As has been stated, we think the Supreme Court, in the Naujoks case, misconceived the theory of the Sing Lee opinion, and while our main purpose is to attempt to point out to this Court the apparent misconception, we have nevertheless found it necessary to argue the fundamental question as to whether under the form of the indictment as to the date and the proof as to the fact, the Court erred in its instruction to the jury, that the date is immaterial.

Law in other Jurisdictions.

"Time is not a material ingredient in the crime of rape. It is not essential that the indictment should state precisely the date on which the outrage occurred; and evidence may be received of any act on a day other than that alleged in the indictment, provided it is alleged to have been committed within the statutory period."

State v. Hoben, 36 Utah 186, 102 Pac. 1000 (1909);

State v. Colombo, 75 Atl. 616, holds:

"When, however, time and place are material as in prosecution for selling liquor between specified dates or on forbidden days or for transporting liquor, between places, the details and place must be proved precisely as alleged."

State v. Dorr, 19 Atl. 171.

“We say to you that, while a certain day is stated in the indictment upon which the crime is alleged to have been committed by the defendant, such date is not material and it is not necessary that the state should have proved that the crime was committed upon that particular day. If it is shown that the alleged offense was committed by the defendant at any time within three years before the finding of the indictment, that would be sufficient so far as the time is concerned.”

“An indictment for incest must fix a day certain upon which the charge was committed, but this may be done by charging the offense to have occurred on any day within the period of statutory limitation.”

748 Wharton's Criminal Procedure and cases cited.

However, there is a line of cases holding, and this will apply with especial force to assault, it is thought, that the time at which an offense is committed is not material, but it is sufficient if the evidence shows that it occurred within the statute of limitation.

438 Wharton's Criminal Procedure and cases cited.

State v. Magrath, 19 Mo. 678, holds:

“The point about the time is not well taken. It is not important, as to what day is alleged or what day is proved, so that the time in the indictment is within the period prescribed for limiting the prosecution, and the proof is of a day before the filing of the bill of indictment, and within the statute of limitation.”

“Under the statute the necessity of averring time of an assault may be dispensed with.”

State v. Ball, 4 S. E. (Va.) 645.

“An indictment charging larceny must state the time when the property was taken, but time not being of the essence of the offense, except larceny from a dwelling at night, and the like, must be laid and proved—it need not be precisely nor exactly laid, it being sufficient if laid before the filing of the indictment and within the statute of limitation. Proof of the act charged within these time periods will be sufficient.”

Commonwealth v. Seigo, 125 Mass. 210, 57 Atl. 370;

815 Wharton's Criminal Procedure and cases cited.

“In lewdness the date ordinarily is not a material element.”

State v. Kirkpatrick, 19 N. W. 660, 894 Wharton's Criminal Procedure and cases cited.

“In Mayhem time is formal rather than essential.”

963 Wharton's Criminal Procedure and cases cited.

State v. Gibbs, 65 Tenn. 238.

“Time of the offense of rape not being an essential ingredient in crime the indictment is not required to set out the precise date on which the alleged offense was committed, providing that it is within the statutory period. An impossible date and a defectively alleged date have both been held not to vitiate the indictment, but the rulings can scarcely be held to be sound.”

1136 Wharton's Criminal Procedure and cases cited.

State v. Myrberg, 105 Pac. (Wash.) 622.

“A blank date is not subject to a demurrer.”

Cecil v. Territory, 82 Pac. (Okla.) 654.

So, too, in seduction the date is not essential.

State v. Deitrich, 51 Iowa 467, 1 N. W. 732;

1224 Wharton's Criminal Procedure and cases cited:

Price v. State, 61 Law 500.

ARGUMENT.

Much stress has been laid upon the case of *State v. Ham* as the fundamental reason for the opinion in the Sing Lee case. With due deference to that opinion, we feel that the importance of the present situation requires a reconsideration of the point involved for the purpose of effecting a different result. The Ham case contains a very significant statement.

“It will be perceived that the right to direct an amendment of the character specified in the statute is limited to those cases in which the warrant is not material to the merits. In the present case the variance seems to us to be vital. *The sale of liquor is not of itself criminal, it only becomes so when made without a license. * * ** The place of sale as set out in the indictment is therefore of the essence of the crime.”

The point there turned as whether or not it had been upon the amendment of the indictment because the sale of the liquor is not in itself criminal. It only becomes so when made without a license. The crime of abuse is of itself criminal. It is immaterial when or where it occurred, so long as it occurred within the jurisdiction of the Court and within the statute of limitation. This is not so of the sale of liquor, because that was not necessarily a criminal act. Mr. Ham might have had a license to sell liquor in Neptune Township and not in the City of Asbury Park. An indictment, therefore, which charged him with selling liquor without a license in the City of Asbury Park, the license being the material issue, of course, could not

be amended to the Township of Neptune, where he might have had a license. Therefore, it was well said "the place of sale as set out in the indictment, is, therefore, of the essence of the crime." As striking as it may be, there seem to be no other cases in this State which throw light upon the turning point in this case, and we are driven to the text books, and to citation from other states. The early text books, of course, knew of no such crime as assault, battery and abuse, but there are numerous references to cases of rape, which is the nearest kin to a crime of this nature. This is also true of a great many other crimes closely allied to abuse and undoubtedly relate to the private wrongs, that they should be governed by the same fundamental principles.

We have, therefore, set out at some length a number of cases, which clearly indicate that time is not such a material element that it must be stated and proved with certainty.

We cannot conceive that the purpose of the decision of the Supreme Court in this case was to forbid an amendment of date when necessary. If such is the purpose, crimes of this nature will go unpunished. No amount of foresight or caution can prevent discrepancies between the allegation and the proof. This sort of crime is prevalent. The number of such cases, if enumerated, would astound the uninformed, and in this county alone the average is more than fifty every term. The ages of the girls are from four to sixteen. To re-submit the proof to the Grand Jury, when a discrepancy occurs at the trial would mean endless delay, and loss of evidence—retarded justice, and worse—many wrongs would go unpunished. Such would be the inevitable result. Daily contact with trials of indictment for abuse leads us to this conclusion. We regard it as surpassing any other condition with which the State criminal procedure is confronted. It is no reflection upon any person who is in any way responsible for the production of the evidence to the Grand Jury, or the framer of the indictment, or the presentation of the case to the petit jury to assert that discrepancies of this kind have occurred and will occur in the future. It is unavoidable and is inherent in the source from which the only evidence must come—that of the child herself.

So important do we regard the interpretation, which we have been bound to place upon the Supreme Court decision, that we are irresistibly brought to the conclusion that the future is fraught with great danger of the failure of justice in abuse cases. This

can be readily demonstrated. The importance of the case may be judged by the severity of the penalty. The importance is primarily based upon a girl of immature years. She is the one that must give the evidence. Not one in ten remembers the exact date. Not one in ten can recall it specifically when asked to do so upon a trial. During the progress of a trial, one is bound to note the inability of a child to place the exact date. It can only be approximately stated to the Grand Jury and only approximately repeated to the petit jury. Every Trial Judge is cognizant of this situation, if the Sing Lee decision is held to apply to this case, and to preclude the Court from amending an indictment as to date, many abuse cases cannot legally result in indictment and most will fail in the Trial Court, and by the Sing Lee decision is without power to cure it.

If an assault occurred today, November 30, and the facts do not come to light until weeks subsequent, a child of seven, eight, or nine years of age, may not be able to recall the exact date of the offense. She may fix it as in December or as earlier in November, or as is very often the case, at the trial, to say it occurred "several weeks ago, but I don't remember the day or date." Or take the reverse situation, when called before the Grand Jury, she may say that it occurred on November 30th, when she meant to say October 30th. The Naujoks decision states in effect that, after failure of proof as to time on a trial of the first indictment, a new indictment would have to be returned, because it would be improper for the Trial Judge to permit an amendment to the correct date.

Take another instance of the danger fraught by this rule. Six indictments are based upon the testimony of a girl of fourteen years against six different defendants for assault, battery and abuse, where the complaining witness is unable to inform the State of the exact date upon which the different abuses were committed. She knows only the first names of the defendants. Those dates may or may not conform to the dates in the indictment. All the offenses occurred within a period of two months. An observation of the defendants may help the witness to fix specifically the dates and the places. Such observation can only be made at the trial. Suppose by reason of the number of offenses the witness has become confused as to the date; under the Supreme Court opinion new indictments must be found. Then appreciate as a fact (not as a supposition, that nearly a thousand complaints are now actually pending in Essex County for Grand Jury action, and that they ought to take their chron-

ological order. It must be understood that even with the Criminal Courts of Essex County working at high speed, a long period of time must elapse before the cases are brought to trial. Viewed from a different angle, suppose these indictments, by reason of the absence of the defendants could not be brought to trial until after the statutory period had past, six defendants, if the jury believes the story of the complaining witness, must be acquitted by direction of the Court, under the compulsion of the Sing Lee case. All because of an inaccuracy of date. Add to this fact that in the actual case, to which reference is now being made, that the complaining witness is not able to give bail, the State would be obliged to pay the witness detention fee, amounting to \$150 a year for a period of two years, without result. It is not equitable or proper that the State should assume this burden, which it must assume under the dictum of the Sing Lee case. But may it be said that the complaining witness could be paroled. This is true but the parole of a complaining witness is usually a dangerous expedient. In more cases than one it has resulted in the loss of essential evidence.

These are only some of the conditions which we meet with daily. Many others might be presented and still not be fiction or imagination. We have presented these merely to convey some idea of the serious result of the strict application of the rule enunciated in this case, with a single purpose in mind, to try to convince the Court that the Legislature never intended that the element of time was a material issue in the trial of an indictment for abuse.

As far back as Archibald's Summary of Pleading and Practice (6th Ed. by Jervis, 1835), there was a keen realization of the difficulty of fixing the exact date (p. 405).

"Whereas, upon trials for crime of buggery and rape, and of carnally abusing girls under the respective ages hereinbefore mentioned, offenders frequently escaped by reason of the difficulty of the proof which has been required for the completion of those several crimes for remedy thereof be it enacted."

"That it shall not be necessary in all those cases to prove penetration in order to constitute a carnal knowledge, but that carnal knowledge shall be admitted completed upon proof, etc." (p. 407).

A statute for ravishing children under ten years of age, penalty was death, and over ten and under twelve the crime was a misdemeanor. The author says the evidence is the same

as in rape. With this exception, that it is immaterial whether the act was done with or without consent of the female. The same text book holds the evidence for assault, with intent to commit a rape, and sodomy are the same as in rape. Nowhere does it appear that the date of the commission of the offense is material. The age of the girl is material. *R. v. Wedge*, 5 C. & P. 298.

Dealing with quite a similar situation the Supreme Court of Washington (State) said:

“We think it better to allege a specific day, when such allegation is possible; but it doubtless will oftentimes occur, as in this case where the child was of tender years, and had no knowledge or memory of the calendar day; that it would be impossible to fix a specific day. Even though the information did fix a specific day it would not be contended that the commission of the act proved upon any other day within the statute of limitations, would not be a sufficient and proper time under the information. The rule there announced is supported by abundant authority; it being generally held that the day upon which an offense is committed was charged to be committed is immaterial, except in offenses where time is of the essence of the crime or a necessary ingredient in its description.”

State v. Myrberg, 105 Pac. 623;

State v. Barnett, 87 Amer. Dec. 471;

People v. Jackson, 111 N. Y. 362;

Kenney v. State, 5 R. I. 385;

Myers v. State, 121 Ind. 15.

“A variance between averment of such an indictment and indictment for murder, and proof as to the day on which the crime is committed is immaterial, and may be disregarded or the indictment may be amended. It is sufficient that the crime was committed some time prior to the finding of the indictment, and that it can be so understood from its allegation.”

People v. Jackson, 111 N. Y. 362.

To illustrate, the indictment charged the 30th day of January; the evidence showed that the offense was committed on the 29th of January. The Court said “the time was unimportant and properly disregarded it. It is enough that the crime was committed at some time prior to the finding of the indictment, and that it could be so understood from its allegation. The indictment might, indeed, have been amended, but that was not necessary for the preservation of any right of the defendant.”

“It undoubtedly is the law, as is urged by the State, that time is not a material ingredient of such an offense, and that it is not essential that it be precisely stated in the information, and that the evidence of the commission of the offense alleged on a date other than and prior to that alleged is competent and admissible. That is to say, the State is not required, where time is not an essential ingredient, to prove the offense alleged and the transaction out of which it arose, at the particular time stated in the information, but may prove them at any other and prior time, within the statutory period of limitation.”

State v. Hoben, 102 Pac. 1006.

“At the common law, the exact date of the offense had to be set forth, and a failure to do so was fatal to the indictment. This rule, which was often abortive of the ends of justice, has generally been modified by the statutes of several states, and does not prevail, except where time is a material ingredient of the offense charged.”

Cecil v. Territory, 82 Pac. 653.

To meet this situation Oklahoma enacted the following law:

“The precise time at which the offense was committed need not be stated in the indictment, but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material ingredient of the offense.”

Time is now considered essential and material only when the date of the offense is of the essence of the crime as selling liquor on Sunday—or on Election Day—or shooting game out of season, &c.

In fact, with but three or four exceptions, time is not of the essence of the offense. Even in the excepted crimes, whether time is of the essence of the offense depends upon the law of the particular case which is on trial. This rule is elementary in our State. Another illustration is all that is necessary—the sale of liquor to minors. If the indictment alleges the minor is not of age and proof at the trial discloses that he is of age, of course, an amendment may not be made. We desire, however, to make it as clear as language can make it, that our reading and understanding of the Supreme Court decision leads us to the conclusion that the Supreme Court dealt with this case upon the theory that an amendment had been made to the indictment. This is not borne out by the record. We contend that no amendment was necessary, and that if it had been necessary, the present statute adequately authorizes the Trial Judge to permit such an amendment.

Upon the other points which were disposed of by the Supreme Court itself, we rely, without further comment. For these reasons we urge that the judgment of the Supreme Court be reversed and that the judgment of the Quarter Sessions be affirmed.

Respectfully submitted,

J. H. HARRISON,
Prosecutor.

JOHN A. BERNHARD,
Assistant Prosecutor.

November Term, 1920.

1870

R. MONTANA &

© Southern B

Southern B