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Writ of Error.

WRIT OF ERROR.

Filed Nov. 20, 1919.

New Jersey Court of Errors and Appeals

NEW JERSEY, ss.

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THE STATE OF NEW JERSEY, to our Justices of
of our Supreme Court, GREETING:

(SEAL)

Because in the record and proceedings and also
in the giving of the judgment upon a certain in-
dictment which was in our said Supreme Court
before you, between the State, defendant-in-error, and Fred
Jayson, plaintiff-in-error, on a writ of error, issued out of the
Supreme Court, to the Judges constituting the Court of Quarter
Sessions in and for the County of Essex, as is said, manifest
error hath intervened to the great damage of the said Fred
Jayson, as from his complaint we have received information, we
being willing in this behalf to correct the error, in due manner, if
any there shall be, and that speedy justice be done to him, if the
said Fred Jayson, do command you that if judgment be given,
then you send distinctly and openly, under your seal, the entire
record, proceedings and indictment aforesaid, with all things
touching and concerning the same, to our Court of Errors and
Appeals before the Judges thereof on the 9th day of Dec. next,
and this writ, and that the record and proceedings aforesaid be-
ing inspected, we may cause to be further done what of right and
according to law ought to be done.

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WITNESS, EDWIN R. WALKER, Chancellor and President Judge
of our said Court of Errors, at Trenton, aforesaid the 20th day
of November, in the year of our Lord, one thousand, nine hun-
dred and nineteen.

(s) THOS. F. MARTIN,
Clerk.

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(s) EDWARD SCHOEN,
Attorney.

Return to Writ.

RETURN.

The answer of the Justices of the Supreme Court of the State of New Jersey, within named.

10 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 the said State in a certain schedule to this writ annexed as within we are commanded.

WILLIAM S. GUMMERE,

(L. S.)

C. J.

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Writ of Certiorari.

Writ of Certiorari.

Filed.

New Jersey Supreme Court

NEW JERSEY, SS.

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The State of New Jersey, to our judges of the Court of L. S. Oyer and Terminer (Quarter Sessions), in and for the County of Essex, 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 Fred Jayson, for atrocious assault and battery in the City of Newark, County of Essex and State of New Jersey, 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 Fred Jayson, as from his complaint we have received information, we being willing in this behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said Fred Jayson, do command you that if judgment be thereupon given that you do then 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 him before our Supreme Court of Judicature, at Trenton, on the twenty-seventh day of January inst., that, inspecting the record 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.

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Witness, William S. Gummere, Chief Justice of our Supreme Court, at Trenton, the seventh day of January, in the year of Our Lord one thousand nine hundred and nineteen.

EDWARD SCHOEN,
Attorney.

ENOCH L. JOHNSON,
Clerk.

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Return to Writ.

Endorsed:

No. 21. Dec., 1918.

NEW JERSEY SUPREME COURT.

10 THE STATE
vs.
FRED JAYSON.

Sur
Conviction

WRIT OF ERROR TO ESSEX QUARTER
SESSIONS COURT.

EDWARD SCHOEN,
207 Market Street,
Newark, N. J.

20: *Attorney for Defendant.*

Presented in Open Court this Eighth
day of January, A. D. 1919.

WM. P. MARTIN,
Judge of the Essex County
Court of Common Pleas and
Quarter Sessions Court.

Bail fixed at \$4,000.

W. P. M.,
P. J.

30:

Return.

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

I, William P. Martin, Judge of the Court of the Quarter Ses-
sions Court 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 and all
things touching and concerning the same as by the within Writ to
40 me directed, I am commanded.

In Witness Whereof I have hereunto set my hand
L. S. and affixed the seal of said Court and County this
Twelfth day of May, A. D. 1919.

WM. P. MARTIN,
Judge.

Indictment.

Indictment.

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

Be it remembered that at a Court of Oyer and Terminer, holden at Newark in and for the County of Essex, on the third Tuesday in September, 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 Elvord C. Chamberlain, Ralph M. Smith, Joseph Torrens, George J. Ferry, Jr., William Provost, W. Nelson Knapp, J. Harry Connor, James B. Chalmers, James M. Beldon, Fred Strebinger, Oscar J. Wirtz, William Tries, Jr., Charles P. Schmidt, Frank J. Bock, Joseph Byrnes, Frederick W. Crempien, Frank Pannick, Thomas B. Cryer, William M. Bayles, James S. Throckmorton, Daniel Cronin, George H. Vanderhoof, Dr. Frank A. Caruso, 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:

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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 Fred Jayson, late of the City of Newark, in the said County of Essex, on the nineteenth day of June, 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 Frank Scheel in the peace of God and of this State then and there being, an assault did make, and him the said Frank then and there did beat, wound and ill treat, and other wrongs to said Frank then and there did, to the great damage of the said Frank, 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.

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And the Grand Inquest, upon their oath aforesaid, do further Present, That the said Fred Jayson on the nineteenth day of June, 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 Frank Scheel, in the peace of God and of this State then and there being an atrocious

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Plea.

assault did make, and him the said Frank then and there did beat, wound and illtreat and did then and there commit an atrocious assault and battery, in and upon him, the said Frank, by then and there maiming and wounding him, the said Frank, in and upon the body of him, the said Frank, by then and there cutting him, the said Frank, in and upon the body of him, the said Frank, with some instrument to the Grand Inquest aforesaid unknown, to the great damage of the said Frank, 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.

J. H. HARRISON,
Prosecutor of the Pleas.

And on the first day of October, A. D. Nineteen Hundred and Eighteen, 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 delivered to the said Clerk of the Court of General Quarter Sessions, in and for said County of Essex, and then and there the said Indictment was duly filed by the Clerk of said Court and an entry of such order and delivery and filing 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.

Plea.

And afterwards, that is to say, on the third day of October, A. D. nineteen hundred and eighteen, at a Court of General Quarter Sessions, holden at Newark, in and for the County of Essex, before the Hon. William P. Martin, Presiding Judge of the Court of Common Pleas, Fred Jayson, in the custody of John R. Flavell, Sheriff of the County of Essex aforesaid, and the said Fred Jayson 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, says that he is Not Guilty thereof, and therefore for good and evil he puts himself upon the country, &c., and J. Henry Harrison, Prosecutor of the Pleas of said State, for said County of Essex, in this behalf doth the like.

Therefore, let a Jury thereupon come before the Court of General Quarter Sessions to be holden at Newark, in and for the County

Postea.

of Essex, on the seventeenth day of December A. D. nineteen hundred and eighteen, 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 Fred Jayson, to recognize upon their oath, whether the said Fred Jayson is Guilty of the premises in the said indictment specified or Not Guilty, because the said J. Henry Harrison, Esquire, Prosecutor, &c., as the said Fred Jayson puts himself upon the jury and the same time is given to the parties aforesaid at the same place.

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And afterwards, that is to say, seventeenth of October A. D. nineteen hundred and eighteen, at the same General Quarter Sessions, holden before the Honorable William P. Martin, Judge of the Court of Common Pleas, comes the said J. Henry Harrison, who prosecutes as aforesaid, and the said Fred Jayson and the jury, of whom mention is before made, and by 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: The State five and the Defendant four; William S. Campbell, Alexander H. McCabe, George W. Palmer, LeRoy M. Lavake, Frank H. Stevens, George Butterworth, Walter R. Lund, Arthur Crater, Isaac S. Allwin, Elvino D. Trippe, Joseph Karl, Louis Gissen, being called, come and were sworn on 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 eighteenth day of December, A. D. nineteen hundred and eighteen.

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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 Fred Jayson and Court do say upon their oath that they find the said defendant, Fred Jayson, Guilty of Assault and Battery, and so they say all.

Whereupon, all and singular, the premises being seen and by the Court now here fully understood, it is on this sixth day of January, A. D. nineteen hundred and nineteen, ORDERED and adjudged that the said Fred Jayson be committed to the New Jersey Reformatory and pay costs of Seventy-four dollars and fifteen cents and stand committed until the costs are paid, and the said Defendant be in Mercy, &c.

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Judgment signed January 6, 1919.

WM. P. MARTIN,
Judge.

*Charge to Jury.***Charge to Jury.**

MARTIN, J.

10 Gentlemen of the Jury: The function of the Court is to instruct the jury in relation to the principles of law which govern the case and the principles of law as stated by the Court should be accepted as a correct statement of law. The jury, however, are the sole judges of the facts, the weight of the testimony, the credibility of the witnesses, the inferences to be drawn from the evidence and the ultimate conclusions to be reached upon all the facts. If the Court errs in its statement of any of the evidence or attempts to suggest that there may be some matters in the evidence that are not actually before the jury, the jury are to rely upon their recollection and not upon the recollection of the Court. A defendant in a criminal case is presumed to be innocent and this presumption of innocence can be overcome only by evidence showing beyond a reasonable doubt 20 that the defendant is guilty, and the burden of proving the guilt of the defendant beyond a reasonable doubt is on the State and does not shift from the State throughout the whole case.

30 "Reasonable doubt is a term often used, probably pretty well understood, but not easily defined. It is not a mere possible doubt, because everything relating to human affairs and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

40 This defendant is presented upon an indictment found by the Grand Jury which contains two different counts, or rather two separate counts. The first is the charge of the commission of the offense known as simple assault and battery—that Fred Jayson did, on the nineteenth day of June, make an assault upon Frank Scheel, and did then and there beat, wound and illtreat him. There are two elements to assault and battery which you must find before you can find the guilt of the defendant. The first is that there is some unlawful corporal hurt or physical injury, and second, that there is the intent to inflict the injury. It makes no difference how great or how slight the injury may be. The second count of the indictment is that an assault and battery was made by this defendant and that in the commission of the assault and battery there was a maiming and wounding, so that it has become what in the law is known as atrocious assault and battery.

Charge to Jury.

In this case it has been presented to you that the acts of the defendant were fully justified upon the ground of self-defense. The burden of proof is on the accused of proving to the satisfaction of the jury a situation and circumstances under which the right of self-defense might be lawfully exercised, but the accused is entitled to the benefit of the doubt upon the whole case. The rule of law is that a person may protect himself when that act is or reasonably appears to be necessary in order to protect himself from bodily harm. There must be some reasonable grounds for his belief, and if he defends himself beyond what is necessary or what reasonably appears to him to be so, then he loses his right of self-defense and is himself the aggressor and is responsible for any results of his aggression. It is not the law that a man can make himself the judge of his own situation. The jury is to determine whether or not he was in danger of receiving bodily harm or had reasonable ground for believing that he was in danger of bodily harm.

The State, in support of the indictment, has presented certain evidence to you and it is the contention of the State that Mr. Scheel, evidently hearing that his wife was with this defendant in the neighborhood of Springfield avenue and High street, went there early on the morning of June 19th, about 12 o'clock or shortly after, and he saw this defendant and his wife there; that he went up to the defendant and asked him a question—I think it was, "Were you with my wife," or something of that sort. I have forgotten the exact question—whereupon Scheel says that this defendant struck him twice and knocked him down; that they rolled over and tusselled, as he expressed it, and that after the affair was over that he was informed that his back was bleeding and that he went to the City Hospital after he had been to Petty's Drug Store, and at the City Hospital he remained for some five days. The witness, Mrs. Scheel, testified that the defendant struck Scheel—that is to say, the defendant struck Scheel first. From this evidence the State contends that you should infer that this defendant unlawfully set upon Scheel and inflicted a corporal hurt or physical injury with the intention so to do and that, therefore, he is guilty of atrocious assault and battery.

The defense of the defendant is a denial of the commission of the offense, in that whatever he did was fully justified. The defendant says that Scheel came to the place and was accompanied by three or four other men and that they set upon him and that he did all in his power to defend himself; that he used no knife; that if this Mr.

Defendant's Requests to Charge.

10 Scheel was cut at all that it must have been done by some means other than by this defendant, but that whatever he did was because he believed that he was going to receive bodily harm, in accordance with the principles stated by the Court with reference to the law of self-defense. The defendant also says that Scheel was the aggressor; that Scheel evidently came to the place for the purpose of doing bodily injury to the man who might be with Scheel's wife. In these circumstances the defendant asks that you justify his conduct by the principles of law relating to self-defense, or that at all events, upon the whole case, the State has failed to prove his guilt beyond a reasonable doubt.

20 Gentlemen, it is for you to search through the evidence and ascertain where the truth is. If you arrive at the conclusion that this defendant is guilty of atrocious assault and battery your verdict should be guilty. If you do not arrive at such a conclusion then you may consider whether or not the defendant is guilty of assault and battery and if you arrive at the conclusion that the defendant is guilty of assault and battery your verdict should be guilty of assault and battery. Otherwise, of course, your verdict must be not guilty.

The requests of the defendant have been substantially charged and therefore the requests are refused.

Defendant's counsel prays a general exception to the charge of the Court, the same is allowed and it is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

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DEFENDANT'S REQUESTS TO CHARGE.

1. If defendant had reasonable ground to believe that he was in grave bodily danger, he was justified in using so much force as was necessary to protect himself.

40 Defendant's counsel prays an exception to the refusal of the Court to charge as requested, the same is allowed and it is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

Defendant's Requests to Charge.

2. If the defendant was in such danger of receiving great bodily harm that it was necessary for him to strike Scheel, he would be justified, and your verdict should be not guilty.

Defendant's counsel prays an exception to the refusal of the Court to charge as requested, the same is allowed and it is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

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3. If the defendant, from the acts and conduct of Scheel, had reason to believe he was in great peril of hurt or great bodily injury, the defendant had a right to defend himself even to the taking of the life of the man assaulting him, and your verdict should be not guilty.

Defendant's counsel prays an exception to the refusal of the Court to charge as requested, the same is allowed and it is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

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4. If you find that Scheel prepared for and provoked the affray, and that the defendant acted in self-defense, your verdict should be not guilty.

Defendant's counsel prays an exception to the refusal of the Court to charge as requested, the same is allowed and it is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

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5. In protecting oneself against assault one need not wait until struck by an impending blow, but if the danger be imminent, he may protect himself by striking the first blow for the purpose of repelling the attempted injury, the opposing force to be reasonably proportionate to the requirements of the occasion.

Defendant's counsel prays an exception to the refusal of the Court to charge as requested, the same is allowed and it is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

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6. The jury return a verdict of not guilty because there is no evidence to sustain the charge in the indictment.

Defendant's Requests to Charge.

Defendant's counsel prays an exception to the refusal of the Court to charge as requested, the same is allowed and it is signed and sealed accordingly.

7. That the jury return a verdict of not guilty because there is no evidence tending to establish the guilt of the defendant.

10 Defendant's counsel prays an exception to the refusal of the Court to charge as requested, the same is allowed and it is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

8. That the jury return a verdict of not guilty of atrocious assault and battery because there is no evidence of the use of a weapon by the defendant.

26 Defendant's counsel prays an exception to the refusal of the Court to charge as directed, the same is allowed and it is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

9. That the jury return a verdict of not guilty of atrocious assault and battery because there is no evidence that the alleged wound was inflicted by the defendant.

30 Defendant's counsel prays an exception to the refusal of the Court to charge as requested, the same is allowed and it is signed and sealed accordingly.

WM. P. MARTIN,
Judge.

*Assignments of Error.***Assignments of Error.**

Filed.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY,
Defendant in Error,

vs.

FRED JAYSON,
Plaintiff in Error.

*On Indictment
 for Assault and
 Battery.*

*Assignments
 of Error.*

19

Afterwards, to wit, on the return day of the Writ of Error issued in this cause, comes the said Fred Jayson by Edward Schoen, his attorney, and says that in the record and proceedings aforesaid, and also in the giving of judgment aforesaid, there is manifest error, in this, to wit:

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1. Because the court erroneously refused to charge the defendant's first request as follows:

"(1) If defendant had reasonable ground to believe that he was in grave bodily danger, he was justified in using so much force as was necessary to protect himself."

2. Because the court erroneously refused to charge the defendant's second request as follows:

"(2) If the defendant was in such danger of receiving great bodily harm that it was necessary for him to strike Schell, he would be justified, and your verdict should be not guilty."

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3. Because the court erroneously refused to charge the defendant's third request as follows:

"(3) If the defendant, from the acts and conduct of Schell, had reason to believe he was in great peril of hurt or great bodily injury, the defendant had a right to defend himself even to the taking of the life of the man assaulting him, and your verdict should be not guilty."

4. Because the court erroneously refused to charge the defendant's fourth request as follows:

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"(4) If you find that Schell prepared for and provoked the affray, and that the defendant acted in self-defense, your verdict should be not guilty."

Assignments of Error.

5. Because the court erroneously refused to charge the defendant's fifth request as follows:

10 01 “(5) In protecting oneself against assault one need not wait until struck by an impending blow, but if the danger be imminent, he may protect himself by striking the first blow for the purpose of repelling the attempted injury, the opposing force to be reasonably proportionate to the requirements of the occasion.”

6. Because the court erroneously refused to charge the defendant's sixth request as follows:

“(6) The jury return a verdict of not guilty because there is no evidence to sustain the charge in the indictment.”

7. Because the court erroneously refused to charge the defendant's seventh request as follows:

20 “(7) That the jury return a verdict of not guilty because there is no evidence tending to establish the guilt of the defendant.”

8. Because the court erroneously charged the jury as follows:

“It is not the law that a man can make himself the judge of his own situation.”

9. Because the court erroneously charged the jury as follows:

“In these circumstances the defendant asks that you justify his conduct by the principles of law relating to self-defense.”

10. Because the court erroneously charged the jury as follows:

30 00 “If you arrive at the conclusion that this defendant is guilty of atrocious assault and battery, your verdict should be guilty.”

11. Because the court erroneously charged the jury as follows:

“And if you arrive at the conclusion that the defendant is guilty of assault and battery, your verdict should be guilty of assault and battery.”

12. Because the court erroneously charged the jury as follows:

40 00 “The rule of law is that a person may protect himself when that act is or reasonably appears to be necessary in order to protect himself from bodily harm.”

Therefore, the said plaintiff in error, Fred Jayson, prays that the judgment and sentence aforesaid, by reason of the aforesaid errors and all other errors appearing in the record and proceedings aforesaid and upon the giving of judgment and passing of sentence

Assignments of Error.

aforesaid, be reversed, cancelled and held for nothing and that the said Fred Jayson may be restored to all things by him lost on occasion thereof.

EDWARD SCHOEN,
Attorney for Plaintiff in Error.

Service of a copy of the within Assignment of Error is hereby acknowledged this 15th day of May, 1919, *nun pro tunc.*

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

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Opinion of Supreme Court.

OPINION OF SUPREME COURT.

NEW JERSEY SUPREME COURT.

JUNE TERM, 1919.

THE STATE,

Plaintiff-in-Error,

vs.

FREDERICK JAYSON,

Defendant-in-Error.

10

Submitted, June Term, 1919; decided, November Term, 1919.

For plaintiff-in-error, Edward Schoen.

For defendant-in-error,

20

Argued before the Chief Justice Minturn and Black, *JJ.*

Per Curiam:

The Grand Jury of Essex County, found an indictment against the defendant, containing two counts, one charging him with simple assault and battery upon Frank Scheel, and the other was atrocious assault and battery on the same person.

He was convicted of simple assault and battery.

The record shows that the defendant and Scheel's wife were standing at the corner of Springfield avenue and High street about midnight, waiting for a car. Scheel found them there and a fight occurred. The issue before the Jury was as to who was the aggressor. The Jury found the defendant the aggressor, and in the absence of the testimony in the case, we are in no position even if it were our province to question that finding.

30

The first assignment is that the court improperly denied defendant's requests to charge. These requests, in the main relate to the law of self-defense. The court having properly charged the law on this point, was not legally obliged to charge again in the language of the requests, and upon that ground the court properly refused to reiterate them.

40

It is further contended that the court erred in charging the jury as follows: "If you arrive at the conclusion that this de-

Opinion of Supreme Court.

fendant is guilty of atrocious assault and battery, your verdict should be guilty.”

The contention being that this instruction does not point out the elements of the crime. Conceding this to be so the defendant is in no position to complain, since he was found guilty only of simple assault and battery.

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The conviction will be affirmed.

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*Remittitur.***REMITTITUR.**

Filed Nov. 14, 1919.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY,

*Plaintiff-in-Error,**vs.*

FREDERICK JAYSON,

Defendant-in-Error.

10

*On Error.**Remittitur.*

The above stated cause having been duly submitted on brief at the November term, 1919, in the New Jersey Supreme Court, by J. Henry Harrison, Esq., attorney for the defendant-in-error, and Edward Schoen, attorney of the plaintiff-in-error, and the court having considered the matter and finding no 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 in this cause, be affirmed in all things with costs; and that the record be removed to the Essex County Court of Quarter Sessions to be proceeded with according to law and the practice of the said Court.

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Entered November 14, 1919, on motion of J. H. Harrison, Prosecutor of the Pleas.

I Enoch L. Johnson, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the rule entered in the minutes of the court in the above-stated cause.

In testimony whereof I have hereunto set my hand and the seal of said court this 14th day of November, 1919.

ENOCH L. JOHNSON.

40

Assignments of Error.

ASSIGNMENTS OF ERROR.

Filed Dec. 8, 1919.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	STATE OF NEW JERSEY,	}	<i>Defendant-in-Error,</i>	<i>On Error.</i>
	<i>vs.</i>			<i>Assignments</i>
	FREDERICK JAYSON,		<i>Plaintiff-in-Error.</i>	<i>of Error.</i>

20 Afterwards on the return day of the writ of error issued in this case in the Court of Errors and Appeals, in the last resort in all causes of the State of New Jersey, comes the said Fred Jayson, by Edward Schoen, his attorney, and says that:

In the record and proceedings aforesaid and also in the matters recited and contained in said bill of exceptions and also in the giving of the verdict and judgment aforesaid there is manifest error in this, to wit:

1. Because the Supreme Court affirmed the verdict and judgment aforesaid, whereas the said judgment should have been reversed.

30 2. Because the court erroneously refused to charge the defendant's first request as follows:

“(1) If the defendant had reasonable ground to believe that he was in grave bodily danger, he was justified in using so much force as was necessary to protect himself.”

3. Because the court erroneously refused to charge the defendant's second request as follows:

40 “(2) If the defendant was in such danger of receiving great bodily harm that it was necessary for him to strike Schell, he would be justified, and your verdict should be not guilty.”

4. Because the court erroneously refused to charge the defendant's third request as follows:

“(3) If the defendant, from the acts and conduct of Schell, had reason to believe he was in great peril of hurt

Assignments of Error.

or great bodily injury, the defendant had a right to defend himself, even to the taking of the life of the man assaulting him, and your verdict should be not guilty."

5. Because the court erroneously refused to charge the defendant's fourth request as follows:

"(4) If you find that Schell prepared for and provoked the affray, and that the defendant acted in self-defense, your verdict should be not guilty." 10

6. Because the court erroneously refused to charge the defendant's fifth request as follows:

"(5) In protecting oneself against assault one need not wait until struck by an impending blow, but if the danger be imminent, he may protect himself by striking the first blow for the purpose of repelling the attempted injury, the opposing force to be reasonably proportionate to the requirements of the occasion."

7. Because the court erroneously refused to charge the defendant's sixth request as follows: 20

"(6) That the jury return a verdict of not guilty because there is no evidence to sustain the charge in the indictment."

8. Because the court erroneously refused to charge the defendant's seventh request as follows:

"(7) That the jury return a verdict of not guilty because there is no evidence tending to establish the guilt of the defendant."

9. Because the court erroneously charged the jury as follows: 30

"It is not the law that a man can make himself the judge of his own situation."

10. Because the court erroneously charged the jury as follows:

"In these circumstances the defendant asks that you justify his conduct by the principles of law relating to self-defense."

11. Because the court erroneously charged the jury as follows:

"If you arrive at the conclusion that this defendant is guilty of atrocious assault and battery, your verdict should be guilty." 40

Assignments of Error.

12. Because the court erroneously charged the jury as follows:

“And if you arrive at the conclusion that the defendant is guilty of assault and battery, your verdict should be guilty of assault and battery.”

10 13. Because the court erroneously charged the jury as follows:

“The rule of law is that a person may protect himself when that act is or reasonably appears to be necessary in order to protect himself from bodily harm.”

20 Therefore, the said plaintiff-in-error, Fred Jayson, prays that the judgment and sentence aforesaid, by reason of the aforesaid errors and all other errors appearing in the record and proceedings aforesaid and upon the giving of judgment and passing of sentence aforesaid, be reversed, cancelled and held for nothing and that the said Fred Jayson may be restored to all things by him lost on occasion thereof.

EDWARD SCHOEN,
Of Counsel with Plaintiff-in-Error.

Service of a copy of the within assignments of error hereby acknowledged this 6th day of December, 1919.

/s/ J. H. HARRISON,
Prosecutor.

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New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,

Defendant-in-Error,

vs.

FRED JAYSON,

Plaintiff-in-Error.

*On Error to
Essex County
Court of
Quarter Sessions.*

*On Indictment for
Atrocious
Assault.*

BRIEF OF PLAINTIFF-IN-ERROR.

Facts.

Only two questions are raised on this appeal to wit:

(a) That the Court erred in refusing to charge the requests of the defendant.

(b) That the Court improperly charged the jury.

The testimony has not been printed because the Trial Court raised no question of the applicability of the requests of the defendant to the testimony, and because the charge of the Court contains a substantial summary of the testimony and the plaintiff-in-error is willing to be bound by the Court's summary of the evidence in lieu of a transcript of the same.

Plaintiff-in-error, a boy of twenty, was indicted and convicted of assault and battery, and sentenced to the reformatory.

"It is the contention of the state that Mr. Scheel, evidently hearing that his wife was with this defendant, in the neighborhood of Springfield avenue and High street, went there early in the morning of June 19, about 12 o'clock or shortly after, and he saw this defendant and his wife there; that he went up to the defendant and asked him a question * * * whereupon Scheel says that this defendant struck him twice and knocked him down; that they rolled over and tussled."

The defense of the defendant is a denial of the commission of the offense, in that whatever he did was fully justified. The defendant says that Scheel came to the place and was accompanied by three or four other men, and that they set upon him, and that he did all in his power to defend himself; that whatever he did was because he believed he was going to receive bodily harm * * * The defendant also says that Scheel was the aggressor;

that Scheel evidently came to the place with the intent of doing bodily injury to the man who might be with Scheel's wife. (Case, page 7, fol. 20, 30 & 40, p. 8, fol. 10.)

These facts presented a case in which both sides claim that an actual assault was committed and each side charged the other with being the aggressor. In this situation, if the defendant's version of the affray, as recited by the Court in the charge, which substantially summarized the testimony, was believed by the jury, what were the rights of the defendant in defending himself, and to *what extent* could he go in defending himself? Could he oppose force with force? Could he strike the first blow to avoid an impending one? These are questions of law applicable to the case, and the defendant requested the Trial Judge to charge the jury specifically on these points. The Trial Judge refused to charge any of the requests on the ground that "the requests of the defendant have been substantially charged, and *therefore*, the requests are refused." (Case, page 8, fol. 20.) This statement by the Court is a recognition that the requests properly stated the rules of law touching the right of self-defence, and were applicable to the case. The ground stated by the Trial Judge for his refusal to charge as requested raised no question of the correctness of the requests in point of law, nor of the applicability of the requests to the testimony, but only the question, were the requests substantially charged? This makes it pertinent to examine the entire charge and the conviction must fall if the requests were not substantially charged, since the Trial Judge based his refusal entirely and solely upon that ground.

It is respectfully contended that the requests were not substantially charged. The charge is devoid of any reference to the right of the defendant to strike an assailant and to oppose force with force. It is also devoid of all reference to *the extent* to which one may go in defense of one's self. The Court charged the jury in a general way, only, that a person may *protect* himself, but *how* and *to what extent* he may do so was not stated.

Specification of Errors Relied Upon.

- (a) Refusal of the Court to charge the requests of the defendant.
- (b) The Court improperly charged the jury.

POINT I.

The Court erred in denying the defendant's requests to charge.

The defense, as summarized by the Court in the charge, presented a case of an actual, sudden, unprovoked attack upon the defendant by the complaining witness, and three or four other men, who set upon him and attacked him, threw him upon the ground and struck him and rolled and tussled upon the ground. The case before the jury presented for their determination, the question of the right of a man under attack, to strike an assailant under circumstances where it was actually necessary to do so to save himself from grave bodily harm. "Danger of grave bodily harm stands upon the same plane as danger to life itself." *State v. Mount*, 73 L. 585. The defendant's requests dealt with the law of the case and presented the appropriate doctrine as laid down in *State v. Jones*, 71 L. 543; *State v. Mellillo*, 77 L. 505; *State v. Bonofiglio*, 67 L., 239; *State v. Brooks*, 84 Atl., p. 225, at p. 228 (18).

It is a fact admitted by the State (see judge's charge) that the defendant was standing at the corner of Springfield avenue and High street, a public highway, and that the complaining witness Scheel, went there and accosted the defendant. The defendant contended that the complaining witness was accompanied by three or four other men and that they made an unprovoked assault upon him. The request to charge stated the law applicable to the facts of the defense as summarized by the Court in the charge. They were matters upon which the defendant admittedly had a right to have the jury instructed. This applies particularly to the second request, which was as follows:

"If the defendant was in such danger of receiving great bodily harm that it was necessary for him to strike Scheel, he would be justified, and your verdict should be not guilty."

The principle embodied in this request is established by *State v. Jones*, 71 L., p. 547, and *State v. Bonofiglio*, 67 L., p. 245.

This request to charge was especially applicable to the defense as summarized by the Court in that it emphasized the right of the defendant to *strike* if he was in such danger of receiving great bodily harm that it was necessary to strike. In other words, the request sought to obtain from the Court a clear instruction to the jury of the *extent* to which the defendant may go in defense of himself. The word "*strike*" was used in this request because the defendant admitted he had gone to this extent

in defense of himself. He denied the use of a knife (Case, page 7, fol. 40). The verdict of the jury of simple assault and battery establishes as a fact that no weapon was used by the defendant; that there was no maiming or wounding, and no artocious assault and battery. It establishes as a fact that there was a mere *striking* as admitted by the defendant. This verdict emphasizes the importance of this request to charge which embraced within it the circumstances under which a person may strike.

So also with the fourth request which was as follows:

“If you find that Scheel prepared for and provoked the affray, and that the defendant acted in self-defense, your verdict should be not guilty.”

If the jury believed that Scheel was the aggressor, as was contended by the defendant, this request was proper, and should have been charged, the principle embodied therein being also established by *State v. Jones* 71 Law, at 547. The Judge's charge in no way refers to the rights of the defendant if Scheel prepared for or provoked the affray. The facts as stated in the charge of the Court are, that Scheel went to the scene of the affray, having heard that his wife was there, and that he went up to the defendant to ask him a question. The fact that the complaining witness admitted having come to the scene of the affray, having heard that his wife was there, and that he went up to the defendant to ask him a question, was to a certain extent corroboration of the defendant's statement. At least, up to the point where the two parties met, it is undisputed that the complaining witness came toward the defendant. Under these circumstances, and with the defendant's contention that the complaining witness did more than merely approach him, but in fact, attacked him without warning, the defendant was entitled to have the Court charge the law as requested by him in the fourth request, if the jury believed that Scheel prepared for and provoked the affray.

The third request was as follows:

“If the defendant, from the acts and conduct of Scheel, had reason to believe that he was in great peril of hurt or great bodily injury, defendant had a right to defend himself, even to the taking of the life of the man assaulting him, and your verdict should be not guilty.”

This request was not substantially charged by the Trial Judge, and it was important to the defendant that it should be charged

as requested, because it included a statement of the extent to which a person assaulted may go in defense of himself, viz: "even to the taking of the life of the man assaulting him." The rule of law embraced in this request is laid down as the settled law of this State, in *State v. Bonofiglio*, 67 L., p. 245, and defendant was entitled to have the benefit of it.

The fifth request to charge was as follows:

"In protecting oneself against assault one need not wait until struck by an impending blow, but if the danger be imminent, he may protect himself by striking the first blow for the purpose of repelling the attempted injury, the opposing force to be reasonably proportionate to the requirements of the occasion."

State v. Jones, supra, at p. 547, established the right of and the extent to which a person first attacked, may go in his defense, and affirms the principle of this request. Moreover, the defendant was entitled to have this request charged in view of the following portion of the Judge's charge:

"The witness, Mrs. Scheel, testified that the defendant struck Scheel—that is to say, the defendant struck Scheel first. From this evidence the state contends that you should infer that this defendant unlawfully set upon Scheel and inflicted a corporal hurt or physical injury and that therefore he is guilty of atrocious assault and battery."

The test of guilt is not whose blow struck first, nor is it a conclusive inference that a defendant unlawfully set upon a complaining witness from the mere fact that the defendant's blow was the first to find its mark. *State v. Brooks*, 84 Atl., at p. 228 (18), states the law in almost the exact words of the request:

"The law accords to everyone the right to protect his person from assault and injury by opposing force to force, and he is not obliged to wait until he is struck by an impending blow. If * * * the danger of personal violence be imminent, the party in such imminent danger may protect himself by striking the first blow, for the purpose of repelling and preventing the attempted injury."

This request was not substantially charged by the Court, but, on the contrary, the instruction of the Trial Judge was to the effect that the jury could draw the inference that an unlawful attack was made by the defendant, from the mere fact that he struck Scheel first. The right of the defendant to strike first to avoid an impending blow was nowhere touched upon by the Trial Judge in his charge. The defendant had a right to have the jury instructed that if he struck Scheel first to avoid an

impending blow that he would be justified in so doing. The charge of the Court unqualifiedly instructed the jury to draw an inference of guilt from the mere fact that Scheel was struck first, as contended by the State, and said nothing about the fact that if the defendant struck first to avoid an impending blow, that he would be justified.

Every request of the defendant in this case was denied in *toto*, notwithstanding the fact that the Trial Judge raised no question concerning the correctness of the statement of law embodied in the requests, their applicability to the testimony, or their materiality to the defendant's case. He refused to charge each and every one of them, upon the sole ground (case, p. 8) that the requests were substantially charged. It is respectfully contended that the requests were not substantially charged and that in refusing to do so the Trial Judge denied to the defendant one of his most important rights.

Justice Bergen, in *State v. DeGeralmo*, 83 L., at p. 138, speaking on the importance of requests to charge, said:

“One of the most important duties of the Court is to declare the law applicable to a case to the jury when requested so to do. This should be done in such a way as not to leave room for misapprehension or mistake.”

POINT II.

The Court improperly charged the jury.

Error is assigned because the Trial Judge in his charge said:

“If you arrive at the conclusion that this defendant is guilty of atrocious assault and battery, your verdict should be guilty.”

This instruction does not point out to the jury the elements of the crime alleged and was particularly prejudicial to the defendant, because it was almost immediately preceded by the following erroneous instruction, in which the Trial Judge erroneously defined atrocious assault and battery:

“From this evidence the state contends that you should infer that this defendant unlawfully set upon Scheel and inflicted a corporal hurt or physical injury with the intention so to do, and that therefore, he is guilty of atrocious assault and battery.”

Mere corporal hurt or physical injury does not constitute atrocious assault and battery. The Trial Judge, in a general way,

at the beginning of the charge, properly defines the crime, but the specific instructions which followed erroneously defined it. This presents a situation which was dealt with by the Supreme Court in *State v. Tapack*, 78 L., p. 208, in an opinion by Justice Parker:

“The probability would seem to be that they (jury) paid heed rather to the specific instructions which were erroneous, than to the general ones which were correct. The rule is well settled that an erroneous instruction followed or accompanied by a correct one is not cured by the later unless it is also expressly withdrawn, as the jury is left at liberty to adopt either, and it cannot be said which one was in fact adopted.”

The law restricts the right of a jury to find a verdict of guilty only in those cases in which it is satisfied beyond a reasonable doubt, from the evidence, that all the elements of the crime charged have been proven. An instruction that the verdict of the jury should be guilty “if you arrive at the conclusion that this defendant is guilty of atrocious assault and battery,” eliminates the restrictions imposed by the doctrine of reasonable doubt and fails to point out to the jury the elements of the crime charged. Nor is it a sufficient answer that although this instruction was erroneous it was not harmful to the defendant because he was not convicted of atrocious assault and battery. It is within the realm of possibility and entirely probable that the verdict of simple assault and battery was a compromised verdict arrived at in view of the erroneous instruction which in effect declared that the defendant could be held for atrocious assault and battery.

Had the Court properly instructed the jury upon the elements of atrocious assault and battery, and eliminated that count of the indictment from the case, and by clear and specific instruction directed the jury to consider only the count for simple assault and battery, the jury would not have had before it the graver crime of atrocious assault and battery with which to force a possible compromised verdict. It cannot be said that the defendant suffered no injury from an erroneous definition of the crime with which he stands charged whether he is found guilty of that crime or a lesser one.

Error is also assigned because the Court erroneously charged the jury as follows:

“If you arrive at the conclusion that the defendant is guilty of assault and battery, your verdict should be guilty of assault and battery.”

The same objection stated above is applicable to this portion of the charge also.

The next assignment of error is because the Court erroneously charged the jury as follows:

“The rule of law is that a person may protect himself when that act is or reasonably appears to be necessary in order to protect himself from bodily harm.”

This portion of the Judge's charge is taken almost verbatim from *State v. Bonofiglio*, 67 Law, p. 239, at 245, but with an important omission. The rule laid down by the learned Chief Justice Gummere in *State v. Bonofiglio* is as follows:

“Here a man may protect himself, *even to the extent of taking the life of his adversary*, when that act is or reasonably appears to be necessary in order to preserve his own life or to protect himself from serious bodily harm.”

The words italicized above are the words omitted from the portion of the Judge's charge upon which the defendant assigns error. A mere reading of the rule of law laid down by the Trial Judge, with the italicized words omitted, makes the infirmity immediately apparent. As charged by the Trial Judge, the rule is “that a person may protect himself * * * in order to protect himself from bodily harm.” What acts of protection he may resort to and the extent to which he may go, are omitted. The law of the Bonofiglio case gives to a person the right to protect himself, even to the extent of taking the life of his adversary. This specifically sanctions the right of the defendant to use so much force as is necessary for his protection. The Trial Judge left out these important words, notwithstanding the fact that, upon the authority of the Bonofiglio case, and other cases to the same effect, the defendant specifically requested the Court to so charge in the third request. The law does not restrict a man, when he is attacked, to merely defensive measures for his protection. It accords him the right to protect his person from assault and injury by opposing force to force. The rule as laid down by the Trial Judge in the portion of the charge complained of in this case is robbed of its substance by the omission of any words describing the acts to which a defendant may resort and the extent to which he may use force.

The defendant had a right to have the jury clearly charged that in defense of himself, the law permitted him to strike a blow if necessary and that he had a right to strike a blow to avoid an impending one. An instruction that a defendant may protect

himself, without adding the words of the Bonofiglio case, "even to the extent of taking the life of his adversary," or other words *descriptive of the acts of protection to which he may resort*, carries an inference that only a defensive attitude of protection may be assumed by a defendant. In this case, the defendant, in the second and fifth requests, requested only that the jury be specifically instructed that he had a right to *strike* his adversary in self-defense, and even these requests, which greatly modified the extent of the acts of defense sanctioned by the Bonofiglio case, were denied.

The next assignment of error is because the Court erroneously charged the jury as follows:

"It is not the law that a man can make himself the judge of his own situation."

The crux of the inquiry in a plea of self-defense is the defendant's state of mind at the time and place of the commission of the act for which he is on trial.

Reasonable apprehension of imminent personal injury creates a right to defend oneself, even to the taking of the life of the man assaulting one. *State v. Mount*, 73 L., at p. 585. This rule of law does make a man the judge of his own situation, and any act committed by him under a reasonable apprehension of imminent personal injury is to be judged by the state of his mind at the time and place and the circumstances under which the act was committed. He should not be held accountable for a mistake of judgment if he honestly believed that he was in imminent danger of grave bodily harm. The question for the jury is, "Did the defendant reasonably believe that he was in danger of grave bodily harm," not, "Should he have believed it." The jury is to test the defendant's justification, not only in the light of the actual situation as it is disclosed upon the trial, but also in the light of what the situation may reasonably have appeared to be to the defendant." *State v. Mellillo*, 77 L., at 510. To this extent a man can make himself the judge of his own situation and be protected from the consequences of his act, if he acted in a bona fide and honest belief that he was in danger of bodily harm.

Another objection to the Judge's charge is made to the following portion thereof:

"The burden of proof is on the accused of proving to the satisfaction of the jury a situation and circumstances under which the right of self-defense might be lawfully exercised, but the accused is entitled to the benefit of the doubt upon the whole case."

This instruction did not point out to the jury with sufficient clearness the doctrine laid down in *State v. Jones*, 71 L., at p. 547, that "if there is a reasonable doubt whether the defense was made out, the defendant was entitled to the benefit of that doubt."

For these reasons, it is respectfully submitted that the verdict and judgment in this cause should be reversed.

Respectfully submitted,

EDWARD SCHOEN,
Attorney for Plaintiff-in-Error.

New Jersey Court of Errors and Appeals

THE STATE,

vs.

FRED JAYSON,

Defendant-in-Error,

Plaintiff-in-Error.

*On Writ of
Error to
Supreme Court.*

BRIEF FOR DEFENDANT-IN-ERROR.

The record in this case shows (page 3) that the indictment contained two counts.

The first count charged the defendant with committing an assault and battery upon one Frank Scheel.

The second count charged the defendant with committing an atrocious assault and battery upon one Frank Scheel, "by then and there maiming and wounding him, the said Frank, in and upon the body of him, the said Frank, by then and there cutting him, the said Frank, in and upon the body of him, the said Frank, with some instrument to the grand inquest aforesaid unknown." *The defendant was convicted of assault and battery.*

The evidence taken at the trial is not returned with the writ of error, and is not printed in the state of the case.

Counsel for the plaintiff-in-error opens his brief with a statement of alleged facts, and throughout his brief he repeatedly makes statements as to what the facts were, or what the evidence showed. But, inasmuch as the evidence is not before the Court, we fail to see how the Court can examine or consider these statements, because they refer to matters which are entirely outside the record before the Court.

It is true that in his charge the Trial Judge makes some reference to the testimony, but he does not pretend to state the whole of it. Whether or not the Trial Judge correctly recited the evidence, either in whole or in part, this Court has no way of determining.

At the end of his recital of the alleged facts, counsel for the plaintiff-in-error in his brief says:

“If the defendant’s version of the affair was believed by the jury, what were the rights of the defendant as to defending himself, and to what extent could he go in defending himself? Could he oppose force with force? Could he strike the first blow to avoid an impending one? *These were questions of law applicable to the case*, and the defendant requested the Trial Judge to charge the jury specifically on these points.”

How is this Court going to determine that “*these were questions of law applicable to the case*,” when the evidence is not before the Court?

In the *Reynolds* case this Court says:

“The remaining assignments ascribed to the charge of the Court certain inaccuracies and misleading references to the testimony. As this testimony is not before us, either by bill of exceptions or by certification, we can perform no function with respect to these assignments.”

State v. Reynolds, 59 Atl., 5.

“The burden of proof of self-defense is upon the prisoner. He must show to the satisfaction of the jury a situation and circumstance under which that right may be lawfully exercised; and before his defense is complete, those facts and circumstances must appear to bring the act done by the prisoner within the prescribed limits.”

“The accused is justified in using force to defend his person *only when force is necessary to accomplish that end. If the injury apprehended could be otherwise avoided, the prisoner was obliged to avoid the danger without resorting to violence.* Even if the circumstances be such as to require the use of force to repel the assault, he will be inexcusable if he carries his defense beyond the bounds of necessity. The danger must be immediate, and must be actual, or else apprehended on reasonable grounds, of which the jury is to judge.”

Brown v. State, 33 Vr. 666, at 702.

POINT I.

There were five requests to charge which were refused. We will take up these requests in their order.

REQUEST No. 1.

“If the defendant had reasonable grounds to believe that he was in grave bodily danger, he was justified in using so much force as was necessary to protect himself.”

The Court charged (page 7, line 10) as follows:

“The rule of law is that a person may protect himself when that act is, or reasonably appears to be, necessary to protect himself from bodily harm.”

We respectfully submit that this request is not an accurate statement of the principle of law involved, because it omits the element of necessity on which the right to use force in defense of one's person is always based. *If the injury apprehended could be otherwise avoided, he was obliged to avoid the danger without resorting to violence.*

We respectfully submit that the Court accurately charged the principle of law involved.

REQUEST No. 2.

“If the defendant was in such danger of receiving great bodily harm that it was necessary to *strike* Scheel, he would be justified, *and your verdict should not be guilty.*”

It does not follow, as a matter of law, that if the defendant had a right to *strike* Scheel he had a right to use a knife and cut him, as charged in the second count, and therefore, it does not follow that, if the defendant had a right to *strike* Scheel, the verdict should be not guilty. Assuming that the defendant had a right to strike Scheel, it was for the jury to say whether the act of *cutting* did not involve the use of more force than was necessary, and if the jury so found, the defendant would be guilty under the second count of the indictment. Therefore the words in this request, to wit, “and your verdict should be not guilty,” rendered the whole request bad.

REQUEST No. 3.

“If the defendant, from the acts and conduct of Scheel, had reason to believe that he was in great peril of *hurt* or great bodily injury, he had a right to defend himself, even to taking the life of the man assaulting him, and your verdict should be not guilty.”

It will be observed that in the alternative expression “in great peril of hurt or great bodily injury,” the word “hurt” is unqualified.

This request is unsound because it extends the right to take life to cases in which the defendant had reason to believe that he was in great peril of “hurt,” whereas such right is limited to apprehension of serious hurt.

In the *Mellillo* case the Court says:

“This instruction, viewed as a comprehensive definition, is faulty in two respects. First, in that it extends the right to take life to cases in which the defendant’s apprehension is that he may be *harmed*, whereas such right is limited to apprehension of *serious harm*.”

State v. Mellilo, 48 Vr. 505 at 509.

REQUEST No. 4.

“If you find that Scheel prepared for and provoked the affray, and that the defendant acted in self-defense, your verdict should be not guilty.”

Whether the verdict should be guilty or not guilty depended upon the manner in which the defendant exercised the right of self-defense, if he had such a right; and whether, although acting in self-defense, he used more force than was necessary. In other words, from the mere fact that the defendant may have acted in self-defense when he *struck* Scheel, as charged in the first count, it does not follow that he was acting in self-defense when he *cut* him, as charged in the second count. The jury had a right to determine whether he defended himself beyond what was necessary, or what reasonably appeared to be necessary. If he did so defend himself, he lost his right of self-defense and became the aggressor, and therefore, this request is bad, because in that case the verdict should not be not guilty.

REQUEST No. 5.

“In protecting one’s self against assault one need not wait until struck by an impending blow, but if the danger is imminent, he may protect himself by striking the first blow for the purpose of repelling the attempted injury, the opposing force to be reasonably proportionate to the requirements of the occasion.”

This request is bad because it utterly ignores the principle that self-defense rests on necessity.

The doctrine of this request is the doctrine of “free fight.”

“If the injury apprehended could be otherwise avoided, the prisoner was bound to avoid the danger without resorting to violence, and even if the circumstances be such as to require the use of force to repel the assault, he will be inexcusable if he carried his defense beyond the bounds of necessity.”

State v. Brown, supra.

“Although the obligation of retreat, when this can be done safely, is not expressly declared in the opinion in the *Wells* case, it is, we think, necessarily implied in the declaration that a homicide is not justified or excusable unless the necessity for taking life is apparent as the *only means* by which the slayer can avoid his own destruction or some great bodily injury.”

State v. Di Maria, 88 N. J., 416.

POINT II.

ASSIGNMENTS Nos. 8, 9, 10, 11 and 12.

These assignments allege error in certain portions of the charge of the Court.

We will take these assignments up in their order:

ASSIGNMENT No. 8.

This assignment alleges that the Court erroneously charged the jury as follows:

“It is not the law that a man can make himself the judge of his own situation.”

The charge of the Court, with the pertinent context, was as follows: (Page 7, line 10.)

“The rule of law is that a person may protect himself when that act is, or reasonably appears to be necessary in order to protect himself from bodily harm. There must be some reasonable grounds for his belief, and if he defends himself beyond what is necessary, or what reasonably appears to him to be so, then he loses his right of self-defense and is himself the aggressor and is responsible for any results of his aggression. *It is not the law that a man can make himself the judge of his own situation.* The jury is to determine whether or not he was in danger of receiving bodily harm or had reasonable grounds for believing he was in danger of bodily harm.”

We respectfully submit that there is no error in the portion of the charge of the Court dealt with by this assignment, when read in connection with the context.

State v. Brown, 33 Vr. at page 702.

State v. Mellillo, 48 Vr., at page 509.

ASSIGNMENT No. 9.

This assignment alleges error in that portion of the charge wherein the Court says: (Page 8, line 11.)

“In these circumstances the defendant asks that you justify his conduct by the principles of law relating to self-defense.”

It will be observed by a reference to the record, that this comment of the Court was made at the conclusion of the recital of what the defense was. The full comment was as follows: (Page 8, line 11.)

“In these circumstances the defendant ask that you justify his conduct by the principles of law relating to self-defense (which had already been charged), or that at all events, upon the whole case the State has failed to prove its case beyond a reasonable doubt.”

We respectfully submit that there is no error in this portion of the charge.

ASSIGNMENTS 10 and 11.

These assignments are as follows:

“10. If you arrive at the conclusion that the defendant is guilty of atrocious assault and battery, your verdict should be guilty of atrocious assault and battery.”

“11. If you arrive at the conclusion that the defendant is guilty of assault and battery, your verdict should be guilty of assault and battery.”

In the opening part of his charge, the Court charged presumption of innocence and the doctrine of reasonable doubt.

As to Assignment No. 10, it is sufficient to say that the defendant was not convicted of atrocious assault and battery.

Counsel criticizes in his brief the following language used by the Court in its charge. (Page 7, line 35.)

“From this evidence the State contends that you should infer that this defendant unlawfully set upon Scheel and inflicted a corporal or physical injury, with an intention so to do, and that therefore he is guilty of atrocious assault and battery.”

The Court is not here declaring any principle of law, but is simply reciting what the State contends that the jury should infer.

In a previous portion of his charge, page 6, line 42, the Court said:

“The second count of the indictment is that an assault and battery was made by this defendant, and that in the commission of the assault and battery there was a maiming and wounding, so that it has become what in the law is known as atrocious assault and battery.”

Whether or not the definition thus given of the charge in the second count of the indictment, to wit: an atrocious assault and battery, is altogether accurate, is entirely academic, because the defendant was not convicted of atrocious assault and battery, but was convicted only of assault and battery.

We respectfully insist that there is no reversible error under either of these assignments.

ASSIGNMENT No. 12.

This assignment is based on the following portion of the charge: (Page 7, line 10.)

“The rule of law is that a person may protect himself when that act is or reasonably appears to be necessary in order to protect himself from bodily harm.”

The Court was here charging the law of the case. The indictment does not charge the defendant with taking life. Counsel, however, insists that there is error in this portion of the charge, citing the *Bonofiglio* case, 38 Vr., at page 245, where the Court says:

“Here a man may protect himself, even to the extent of taking the life of his adversary, when that act is or reasonably appears to be necessary in order to preserve his own life or to protect himself from serious bodily harm.”

The specific error alleged is, that in the case at bar the Court omitted from its charge the words “Even to the extent of taking the life of his adversary.”

Inasmuch as there was no charge in the indictment that life had been taken, the Court was justified in omitting these words from its charge, because they had no relation or application to the issue raised on the trial of the indictment, and therefore we respectfully insist that there was no error in this portion of the charge.

The foregoing are the only portions of the charge on which error was assigned.

At or near the conclusion of his brief, counsel for the plaintiff-in-error says:

“Another objection to the Judge’s charge is made to the following portion thereof.”

“The burden of proof is on the accused of proving to the satisfaction of the jury a situation and circumstance under which the right of self-defense might be lawfully exercised, but the accused is entitled to the benefit of the doubt upon the whole case.”

“This instruction did not point out to the jury with sufficient clearness the doctrine laid down in *State v. Jones*, 71 L., at page 547, that ‘if there is reasonable doubt whether the defense was made out, the defendant was entitled to the benefit of that doubt.’ ”

As to this criticism of the charge, we respectfully insist that there is no error in the portion of the charge here quoted.

The Court expressly charged the jury in this connection that "the accused is entitled to the benefit of the doubt upon the whole case," and that is all the defendant was entitled to.

There is, however, no assignment of error on this portion of the charge, and therefore this portion of the charge is not before the Court and cannot be reviewed by the Court. The case comes up on a strict bill of exception, and this Court has repeatedly held that when a case comes before it on a strict bill of exception, nothing can be considered by the Court that is not raised by an assignment of error.

Inasmuch as the evidence is not before the Court, the rule pointed out by Mr. Justice Garrison in the *Rambolo* case, would seem to control this case, to wit:

"A further remark is that the correctness of an instruction to a jury is to be tested by its practical application to the facts of the case in hand, and not by its abstract inerrancy."

State v. Rambolo, 103 Atl., at page 205.

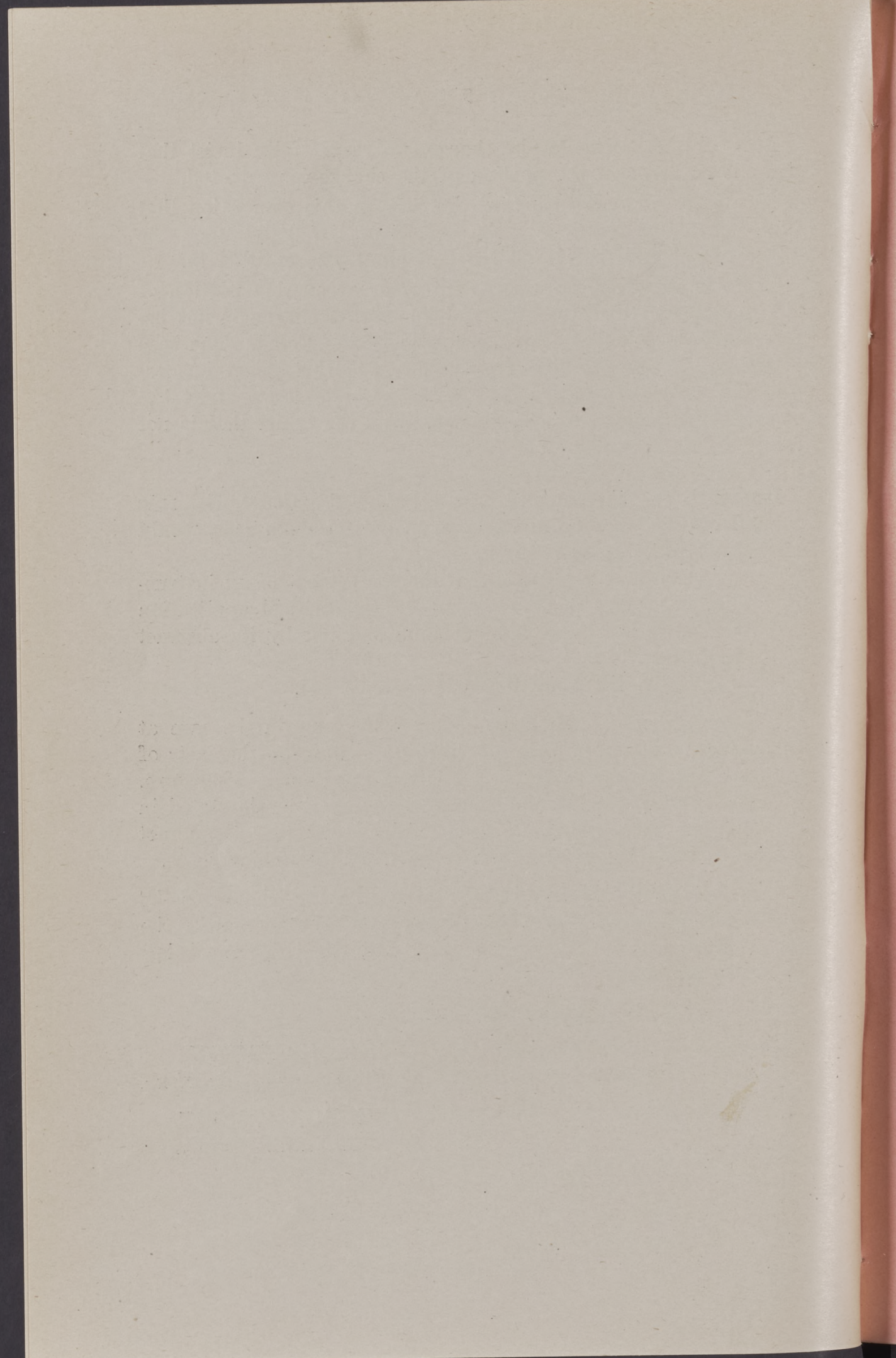
The correctness of the instructions to the jury in the case at bar cannot be tested by their practical application to the facts of the case, because the facts are not before the Court. Therefore, as this Court cannot test these instructions by the rule stated in the *Rambolo* case, *supra*, we respectfully insist that the Court has no function to perform with respect to these assignments.

The State therefore respectfully insists that the charge of the Court was a correct statement of the law of the case on the facts before the Court and the jury, and the judgment below should be affirmed.

Respectfully submitted,

J. H. HARRISON,
Prosecutor of the Pleas.

WILBUR A. MOTT,
Assistant Prosecutor.



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