INDEX.

EXHIBIT S. 14.

SECOND CRIMINAL COURT OF THE CITY OF NEWARK.

PART I.

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

Elizabeth Hefferon, residing at No. 43 Eighth avenue, in the City of Newark, complains of Harry Young, who is to be found, deponent thinks, at large, in said city, and said complainant being duly sworn, on oath doth depose and say, that on the 17th day of March, A. D. 1919, at the City of Newark, the said Harry Young did assault, beat, wound, and ill-treat the said complainant, in the peace of the State then and there being, and did then and there grasp her in and about the throat and her the said complainant in bodily fear and danger of her life, and cash money of the value of $5.20 from the room of complainant, and against her will by force and violence did feloniously rob, steal, take and carry away. Deponent therefore prays that the said Harry Young may be apprehended and held to answer said complaint and dealt with as Law and Justice may require.

ELIZABETH HEFFERON.

Subscribed and Sworn
March 17th, 1919,
Before me,
FRED C. OEHRING,
Dep. Clerk of the Second
Criminal Court of the City of Newark.
211.

PART I.
SECOND CRIMINAL COURT
of the
CITY OF NEWARK.
Elizabeth Hefferon,
Complainant.
THE STATE
vs.
Harry Young
March 17th, 1919.
Assault and Battery and Robbery.

Exhibit S. 15.

EXHIBIT S. 15.

PART I.

SECOND CRIMINAL COURT OF THE CITY OF NEWARK.

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

To any Officer or Member of the Police Force of the City of Newark, or any Constable in the County of Essex.

WHEREAS, Elizabeth Hefferon, residing at No. 43 Eighth Ave., hath this day made complaint on oath, before me, that on the 17th day of March, 1919, at the City of Newark, Harry Young did assault, beat, wound and ill-treat the said complainant, in the peace of the State, then and there being, and did then and there grasp her in and about the throat, and her the said Complainant in bodily fear and danger of her life and cash money of the value of $5.20 the property of complainant from the room of complainant and against her will by force and violence did feloniously rob steal take and carry away You are therefore commanded to apprehend the said Harry Young if to be found in your City, and him forthwith bring before the Second Criminal Court of the City of Newark, or before some other Criminal Court of the City of Newark, in said County, to answer said complaint. Hereof fail not.

Witness, J. Victor D'Aloia, Esquire, Judge of said Court, this 17th day of March A. D., one thousand nine hundred and nineteen.

FRED C. OEHRING,
Dep. Clerk.

State Warrant—Assault and Battery.

PART I.
SECOND CRIMINAL COURT
OF THE CITY OF NEWARK.
STATE WARRANT
against
Harry Young
alias
Schilling
March, 1919.
Assault and Battery and Robbery.
Residence, at large.

Exhibit S. 16.

EXHIBIT S. 16.

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 Harry Young, late of the City of Newark, in the said County of Essex on the seventeenth day of March in the year of our Lord one thousand nine hundred and nineteen, with force and arms, at the City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, in and upon one Elizabeth Hefferon, in the peace of God and of this State then and there being, an assault did make, and her, the said Elizabeth, then and there did beat, wound and illtreat, and other wrongs to said Elizabeth then and there did, to the great damage of the said Elizabeth 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.

And the Grand Inquest, upon their oath aforesaid, do further present, that the said Harry Young on the seventeenth day of March in the year of our Lord one thousand nine hundred *hundred* and nineteen at the City aforesaid in the County of Essex aforesaid, and within the jurisdiction of this Court, in and upon one Elizabeth Hefferon in the peace of God and of this State then and there being, a felonious assault did make, her and the said Elizabeth in bodily fear, then and there did put and one pocket book of the value of one dollar, money to the value of five dollars and twenty cents, in all of the value of six dollars and twenty cents, the property of the said Elizabeth, from the person and against the will of her, the said Elizabeth, then and there feloniously, violently and forcibly did rob, steal, take and carry away—to the great damage of the said Elizabeth 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.

Exhibit S. 16.

ESSEX OYER AND TERMINER,
April Term A. D. 1919
Indictment,
for
Assault and Battery and Robbery
The State
vs.
Harry Young
J. H. Harrison
Prosecutor of the Pleas.
A True Bill.
J. W. Howe
Foreman.

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

The State of New Jersey, To the Sheriff of the County aforesaid, or any Constable thereof, Greeting:

These are to Charge and Command you to take Harry Young and bring him forthwith, before the Justice of the Court of General Quarter Sessions, in and for the County aforesaid, to answer to a certain indictment found against him for A & B & Rob and have you then and there this Precept, with your return thereon, how you have executed the same. Hereof fail not at your peril.

Witness, Hon. William S. Gummere, William P. Martin and Harry V. Osborne, Esquires, Justices of the Court, at Newark, in the County aforesaid, the 29th day of April in the year of our Lord one thousand nine hundred and nineteen

JOHN H. SCOTT Clerk.

Exhibit S. 16.

No. 211
General Quarter Sessions
April Term, 1919

The State
vs.
Harry Young } Capias

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

I, John H. Scott, Clerk of Common Pleas and Court of Quarter Sessions holden at Newark, in and for the County of Essex, do hereby certify that the foregoing is a true and correct copy of an Indictment and Capias in the matter of The State vs Harry Young for Assault and Battery and Robbery as taken from and compared with the original, and as the same now remains on the files of my office.

In Testimony Whereof, I have hereto set my hand and affixed my official seal and the seal of said (SEAL) Courts and County, at Newark, in said County, this thirtieth day of April A. D., 1919

JOHN H. SCOTT
Clerk.

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

I, Harry V. Osborne, President Judge of the Court of Quarter Sessions and Presiding Judge of the Court of Common Pleas, holden at Newark in the County of Essex, aforesaid, in conformity with the laws of the United States of America, in such case made and provided, do certify that the attestation of John H. Scott, to the foregoing certificate, is the attestation of the Clerk of said Courts and County, that the seal affixed thereto is his official Seal, and that said attestation is in due form of law.

Given under my hand, at Newark, this thirtieth day of April A .D., 1919

President and Presiding Judge.

Exhibit S. 17.

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

I, John H. Scott, Clerk of the County of Essex, and Clerk of the Courts of Quarter Sessions and Common Pleas, of said County, do hereby certify that said Courts are Courts of record; that Harry V. Osborne, whose name is subscribed to the foregoing certificate, was at the time of making the same President and Presiding Judge of said Courts duly Commissioned and sworn and qualified to act as such; that I am well acquainted with the handwriting of such President and Presiding Judge of said Courts and verily believe his signature to the same is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Courts and County at Newark, this thirtieth day of April A. D., 1919

(SEAL)

JOHN H. SCOTT,
Clerk.

EXHIBIT S. 17.

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 Harry Young late of the City of Newark in the said County of Essex on the seventeenth day of March in the year of our Lord one thousand nine hundred and nineteen with force and arms, at the City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, in and upon one Elizabeth Hefferon in the peace of God and of this State then and there being, an assault did make, and her the said Elizabeth then and there did beat, wound and illtreat, and other wrongs to said Elizabeth then and there did, to the great damage of the said Elizabeth contrary to the form of the Statute in such cases made and provided and against the peace of this State, the government and dignity of the same.

And the Grand Inquest aforesaid, do further upon their oath present, That the said Harry Young, on the seventeenth day of March in the year of our Lord one thousand nine hundred nineteen at the City aforesaid, in the County of Essex aforesaid, and within the jurisdiction of this Court, in and upon one Elizabeth

Exhibit S. 17.

Hefferon in the peace of God and of this State then and there being, a felonious assault did make, and her the said Elizabeth in bodily fear, then and there did put, and one pocket book—of the value of one dollar, money to the value of five dollars and twenty cents, in all of the value of six dollars and twenty cents, the property of the said Elizabeth, from the person and against the will of her the said Elizabeth, then and there feloniously, violently and forcibly did rob, steal, take and carry away—to the great damage of the said Elizabeth 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.

ESSEX OYER AND TERMINER
April Term A. D. 1919
Indictment
for
Assault and Battery and Robbery
The State
vs.
Harry Young
J. H. Harrison
Prosecutor of the Pleas.
J. Moore
Foreman.

ESSEX COUNTY CLERK'S OFFICE

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

I, John H. Scott, Clerk of the Court of Common Pleas, in and for the County of Essex in the State of New Jersey Do hereby Certify That the foregoing is a true and correct copy of the record of an indictment in the Case of the State vs Harry Young for Assault and Battery and Robbery, and the same is taken from and compared with original indictment on file in my office and as the same now remains on the files of said Office

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said Court & County at Newark, N. J., this Third day of June, A. D., 1920.

(SEAL)

JOHN H. SCOTT
Clerk.

by leave of Court.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* PHILIP SCHILLING, *Plaintiff-in-Error.*	*On Indictment for Murder.*

STATE'S REPLY BRIEF.

The following mistakes appear in the State's brief:

On page 6, for p. 94, l. 15, read p. 95. ll 15; for p. 94, l. 22, read p. 94, l. 34; for p. 95, l. 30, read p. 95, l. 20.

State *v.* Brown, p. 24, read 33 L. 666, instead of 32 L. 666.

State *v.* Valentina, p. 21, read 71 L. 552, instead of 71 L. 42.

State *v.* Rombolo, p. 20, read 89 L. 565, instead of 85 L. 565.

State *v.* Diamond, p. 19, read 86 Atl. 58, instead of 86 L. 58.

People *v.* Silver, p. 13, should read 73 N. E. 980.

P. 16, l. 11, we stated, "To be more specific the Court said, 'didn't you try to escape from Newark by the ordinary method of travel?' Of course, the Court did not ask any such question, and the phrase should have read, 'did not try to escape from Newark by the ordinary method of travel.'"

During the oral argument, counsel for Schilling observed that the State's brief was not served until the day before the argument. The three printed briefs of the defendant-in-error, however, were not served until Friday preceding the Tuesday upon which the Court convened. About two weeks prior to that date a typewritten draft of the defendant's tentative brief was served, but the State did not feel justified in entirely relying upon that and had, therefore, to wait for the printed brief before the final completion of its own argument. This left no time to check the references to testimony and citations and explains these mistakes.

23 & 24.

In addition to what we have already said it may be noted that no requests to charge were made by the defendant to cover the points now raised.

15, 16, 17 & 18.

We rely upon our original brief and merely desire to add that counsel is entirely mistaken in his reassertion that a reference to the printed case does not support the quoted evidence. The citations in the original brief completely indicate the contrary.

A recent decision in point is the case *State* v. *Herbert, et als.*, 92 L. 360. One of the grounds there urged for reversal was that the Court instructed the jury that the "defendants on trial and Helen Knittel *all testified before the Master in support of the good faith of the divorce.*"

For the State is was conceded that this statement of facts was inaccurate so far as defendant, *Weinberg, was concerned.* He was not a witness and did not so testify in the divorce case. It was insisted that this mis-statement of a fact was cured by what the Court said in other parts of its charge in which to remind the jury that they were to rely upon their recollection and not upon the recollection of the Court, and in which it also told the jury: "There are some facts which seem to have been established by the evidence—I do not state that they are—it is for you to determine whether or not they are."

In reaching the conclusion that this instruction was prejudicial error the Court stated, "The statement made by the Court had no foundation in fact, and was harmful, being a material factor in the case to be weighed by the jury as to Weinberg's connection with the unlawful agreement, and, hence, bearing materially on his guilt or innocence."

Here, all the essential elements were founded on "facts."

It may be noted in passing that the Trial Judge, in *State* v. *Martin,* 92 L. 446, stated that "if the contention of the State were adopted the case was one of the most cold-blooded, atrocious, wicked and depraved murders in the first degree that can be conceived of" * * *. This language is much stronger and more forcible than any part of the charge in the present case, yet Mr. Justice Bergen, in writing the Martin opinion, said *"it is not legally objectionable for a Trial Judge in a criminal case to state to the jury what the prosecution claims the proof shows with reference to a material fact, and these last-mentioned statements were not an assertion by the Judge as to the acts and purposes of the defendant, but left the question to be decided by the jury from the evidence; it was a statement of the contention of the*

State with reference to the facts, and not an opinion of the Judge as to what the facts were, and, therefore, was not objectionable.''

19, 20.

With the exception of the question referred to at the outset, which inadvertently was a misprint from the draft, and was not discovered until our attention was called to it, we rely upon our main brief.

21, 22, 23.

We have nothing to add to our original argument, other than to respectfully insist that the two statements made by Schilling clearly and conclusively prove that he had ''specific knowledge of the facts,'' which were the words used by Judge Martin, to which exception was taken by the defendant and argued at length before this Court, and that he could have become a witness in his own behalf.

25, 31, 42, 43, 49.

We rely upon our original brief.

50.

We do not see how it can be said that the State did not submit authorities for the principle that ''our law strictly recognizes no condition of the mind as an excuse for homicide, other than insanity.'' It was so held in *Graves* v. *State,* 45 Law, 347, and in other jurisdictions where the question of ''bad habits, low mentality and arrested development'' were presented in evidence, it was held the rule is to the same effect.

Commonwealth v. *McClure,* 81 Kentucky 451;
Fitzpatrick v. *Commonwealth,* 81 Kentucky 360;
United States v. *Cornell,* 25 Federal Cases 657;
Wortena v. *State,* 5 N. E. 23.

In 46 Barbour, Supreme Court, N. Y., 633, it was held that ''the law recognizes no standard of unaccountability, less than that which he offered (to show the mental grade and capacity of the defendant) disclaimed any attempt to establish. If a low order of intellect, and great ignorance, arising either from slowness of apprehension, or a neglected education, are to excuse homicide, we shall have a rule which will give far greater impunity to crime than it now possesses.''

Argument on reference to Court of Pardons.

The first Martin case was decided, after re-argument, on March 3, 1919, while the 1916 act was still effective.

The second Martin case tried after the 1919 act was passed and was decided in March Term, 1920. It was in this case that the Trial Court included in his charge the reference to the power of the Court of Pardons to nullify their verdict, if the jury should recommend life imprisonment. The Schilling case was tried before the decision in the last Martin case was filed, so that the Trial Judge could not have had before him the decision in the second Martin case, which held to the effect that the reference to the Court of Pardons was "unfortunate."

The Carrigan case, 108 Atl. 315, argued at the June Term, 1919, and decided November Term, 1919, and upon a similar objection to the language of the Trial Court, it was held to come within the rule in *State* v. *Rombolo.*

In the Rombolo case, the Court said, "We see no reason why they (jury) should not be informed of the power of the Court of Pardons if they so desire, and, as a necessary consequence, we see no impropriety in the Trial Court, either at the request of the jury or without such a request, apprising that body with relation to the power of supervision by the pardoning tribunal." This decision was filed November 20, 1916. The statute permitting a recommendation was enacted to become effective March 29, 1916.

We, therefore, have this situation, i. e.: Under the 1916 act such a reference was held to be harmless—*State* v. *Rombolo, supra; State* v. *Carrigan, supra*—while under the 1919 act, which reads, "Upon and after consideration of all the *evidence* recommend imprisonment at hard labor for life," we have the Martin (2) decision, which held the remark to be "unfortunate," but not prejudicial to the extent of a reversal. How, then, can it work for a reversal here when a situation identical with that of the Martin (2) case is presented?

Since the oral argument I have not been able to find any cases holding that the term "evidence" justifies a reference to the statute or constitution, but I have found some cases which hold that an instruction similar to the one under discussion is harmless.

> "While it is at the trial on indictment for assault with intent to murder, the duty of the Judge to instruct the jury that it is within their power, in the event they find the accused guilty, to recommend that he be punished, as for a misdemeanor, he should not, in the same connection,

also instruct them that 'it is within the discretion of the Court to punish him as for a misdemeanor, with or without your recommendation.' That the Judge has and may exercise such power is not proper matter for consideration by the jury. An error of this kind, is not, however, in view of previous adjudications by this Court, cause for a new trial."

Cunningham v. *State,* 29 S. E. (Ga.) 926.

"Upon an indictment for murder, the Court instructed the jury that the legal effect of a verdict of 'guilty' 'would be that the defendant would be deprived of his life, unless the Court should see fit to commute it; for in cases of circumstantial evidence, the law of our State first allows the jury, if they should find the accused guilty, to reduce the penalty to imprisonment in the penitentiary for life; and even if the jury should say that the defendant ought to hang, if such should be their verdict, the Court can, if he sees proper, change that verdict, and spare the man's life, by imprisoning him in the penitentiary for life. That is a question, however, entirely for the Court, and does not rise, unless your verdict should be as just stated.' Held, that the instruction was to be condemned, but that it was not such error as would justify a reversal."

Blackman v. *State,* 3 S. E. (Ga.) 418.

"You have heard the evidence offered on both sides of the case. From that evidence you learned what the facts are. Attorneys have had a wide range of discussion. They have had complete freedom of argument before you upon all questions of fact. It is their privilege in the argument to criticise the evidence, those for the State to criticise the conduct of the prisoner; those for him to criticise the conduct of the witnesses against him, to impugn their motives if the evidence justifies it, and to assault the credibility of the witnesses. Counsel for the State have called your attention to the children of the deceased and have intimated that because of your sympathy for their fatherless condition, you should punish the defendant. Counsel for the defendant have pointed out to you the horrors of the penitentiary, and the death upon the gallows, and have made appeals to you for mercy. Now, I desire to impress upon you that you have nothing to do with the question of mercy. You are ministers of justice. *The administration of mercy is a power that is vested in the executive department of the State, in the exercise of its authority to pardon.* It is absolutely necessary and essential to the preservation of society that the laws should be enforced, especially where acts of violence have been done. If we would preserve society and rights of individuals, the law

must be obeyed, and the violator of the law punished; and you as jurors would be faithless to your trust if you should return a verdict of acquittal in this case when the facts demand a conviction. And upon all it is important that innocence should not be punished. You are not impaneled for vengeance; but to subserve the ends of public justice; and you would be disloyal to your obligation if you should find the prisoner guilty when the evidence required his acquittal. I have said this to impress you with the sense of responsibility which you owe to your conscience, and the oaths, that your verdict should be honest, intelligent, and in conformity to the evidence and the law. Do your duty honestly, conscientiously, courageously and justly as you see it under the evidence and the law of this case."

Dinsmore v. *State,* 85 N. W. (Neb.) 452.

The Reviewing Court said:

"It is urged that the Court erred in informing the jury that they had nothing to do with the questions of mercy. Manifestly, this is the law, though the statute confers upon upon the jury the right to fix the penalty in determining the punishment, they have no right to be actuated by considerations of mercy, but should be guided by the evidence —the facts and circumstances disclosed by the record— under the instructions of the Court. If the evidence reveals a case in which the death penalty should be fixed, the jury have no right to be deterred from discharging their sworn duty through any sympathy for the accused. Mercy lies solely within the province of the executive in his exercise of his pardoning power."

In *Miller* v. *Commonwealth,* 21 S. E. 499, it was held:

"The Court may read to the jury the law fixing the punishment provided for the crime."

See *Duthey* v. *State,* 111 N. W. 222, which seems to shed some light upon the subject.

We contend, therefore, that no harmful error was committed at the trial and that the judgment should be affirmed.

June Term, 1920.

Respectfully submitted,

J. H. HARRISON,
Prosecutor of the Pleas.

JOHN A. BERNHARD,
Assistant Prosecutor.

N. B.—Italics have been used by State for emphasis.