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Writ of Error and Return.

(Filed April 25/45.)

New Jersey Supreme Court

State of New Jersey, ss.

10

The State of New Jersey to Hon.
Richard Hartshorne, Judge of the
(L.S.) Court of Quarter Sessions in and for
the County of Essex, Greeting:

Because in the record and proceedings, as also
in the rendition of judgment on a certain indictment for abortion against Horace L. Dillingham,
late of the City of Newark, County of Essex, 20
State of New Jersey, said indictment charging
that the said Horace L. Dillingham did on the
27th day of March 1944 at the City of Newark,
in the County of Essex aforesaid, maliciously and
without lawful justification and with intent to
cause and procure the miscarriage of Emma Whittington, a woman then pregnant with child, did
use in and upon the said Emma Whittington
divers instruments and means to the grand jurors 30
aforesaid unknown, in consequence whereof the
said Emma Whittington died, *pro ut* the said indictment whereof, before you, the said Horace L.
Dillingham has been indicted and convicted by a
certain jury of the county taken between the
State of New Jersey and the said Horace L. Dillingham, as it is said, manifest error has intervened,
to the great damage of the said Horace L. Dillingham, as from his complaint we have 40
received information, we are willing, in his be-

Writ of Error and Return.

half, to correct the error, if any there shall be,
 in due manner. Therefore, that full and speedy
 justice be done to him, the said Horace L. Dilling-
 ham, we command you, if judgment be therein
 10 given, that you distinctly and openly send, under
 your seal, the record and proceedings aforesaid,
 with all things touching and concerning the same,
 including the entire record of the proceedings had
 upon the trial, to the Justices of our Supreme
 Court, on the 1st day of May next, together with
 this writ, that the record and proceedings afore-
 said being inspected, we may cause further to be
 done therein, to correct that error, what of right
 and according to the laws and customs of the
 20 State of New Jersey, should be done.

WITNESS, Hon. Thomas J. Brogan, Chief
 Justice of the New Jersey Supreme Court of
 Judicature, at Trenton, this 11th day of April
 A. D., one thousand nine hundred and forty-five.

JAMES J. GAVIN,
Clerk.

BENJAMIN M. RATNER,
 30 *Attorney for Horace L. Dillingham,*
Plaintiff in Error.

Writ served in open court this 11th day of
 April, A. D. one thousand nine hundred and forty-
 five.

RICHARD HARTSHORNE,
Judge of the Court of Quarter Sessions
in and for the County of Essex.

A true copy.

40

JAMES J. GAVIN,
Clerk.

Writ of Error and Return.

ESSEX COUNTY QUARTER SESSIONS.

217

THE STATE,

vs.

HORACE L. DILLINGHAM.

No. 82 December 1944.

Sur Indictment
for Abortion.

10

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, Nineteen Hundred and Forty-four, by the Honorable Charles W. Parker, 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 James F. McTague, Foreman, L. Thomas Asche, Russell Hart-
ranft, August H. Lange, Mrs. Bertha L. Bann-
wart, Charles C. Wheat, Frank R. Grove, Mrs.
Rae Roessler, James J. Colt, William J. Lee, Her-
bert A. Conroy, Henry K. Barton, William A.
Costigan, Clifford H. Baker, Mrs. Florence W.
Braun, Robert W. Winters, Percival R. Dey, Frank B. Heller, Harry J. Axt, Mrs. Marie L.
Hinds, Peter J. Egan, George Zabriskie, Jr. and
Walter A. Hughes, 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 man-
ner and form following, to wit:

20

30

40

Writ of Error and Return.

ESSEX COUNTY, TO WIT:

The Grand Jurors of the State of New Jersey,
 for the County of Essex, upon their oath present
 that Horace Dillingham, on the twenty-seventh
 10 day of March, in the year of our Lord one thou-
 sand nine hundred and forty-four, at the City of
 Newark, in the County of Essex aforesaid, mali-
 ciously and without lawful justification, with in-
 tent to cause and procure the miscarriage of
 Emma Whittington, a woman then pregnant with
 child, did use in and upon the said Emma Whit-
 tington divers instruments and means, to the
 Grand Jurors aforesaid unknown, in consequence
 20 whereof the said Emma Whittington died, con-
 trary 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.

WILLIAM A. WACHENFELD,
Prosecutor of the Pleas.

On the ninth day of October, nineteen hundred
 and forty-four, said indictment was presented by
 the Grand Jury aforesaid, to the said Court of
 30 Oyer and Terminer and the said Justice did then
 and there order the said indictment to be handed
 down to the Court of Quarter Sessions, and to be
 delivered to the Clerk of the Court of Quarter
 Sessions, in and for the said County of Essex, and
 then and there was duly filed by the Clerk of said
 Court and an entry of such order then and there
 made in the minutes of said Court, pursuant to
 the Statute in such case made and provided.

40

Writ of Error and Return.

And afterwards, that is to say on the twenty-third day of October, nineteen hundred and forty-four, at a Court of Quarter Sessions, holden at Newark in and for the County of Essex, before the Honorable Dallas Flannagan, Presiding Judge of the Court of Common Pleas, Horace Dillingham, in the custody of George H. Becker, Sheriff of the County of Essex aforesaid, 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 County, &c, and William A. Wachenfeld, Prosecutor of the Pleas of the said State for said County of Essex in this behalf doth the like. 10 20

And afterwards, on the twenty-sixth day of February, nineteen hundred and forty-five, trial was moved before the Honorable Richard Hartshorne, Judge of the Court of Common Pleas, and the following jury was called; the State challenging seven, and the defendant six: 30

1. Harry B. Oakes, 2. Walter Herbert Orth, 3. Stanton B. Leland, 4. Joseph A. Long, 5. Michael Mullarkey, 6. Samuel J. Marshall, 7. John L. Pollock, 8. Donald T. Magowan, 9. Patrick McComb, 10. George E. Moser, 11. Carl W. Oswald, 12. Herman J. Merz.

At this stage of the proceedings, Benjamin M. Ratner, Esq., attorney for the defendant, Horace Dillingham, made a motion for a directed verdict 40

Writ of Error and Return.

of Acquittal, which motion the Court denied and order the trial to continue.

And Afterwards, the evidence continued.

At this stage of the proceedings, Benjamin M.
 10 Ratner, Esq., attorney for the defendant, renewed his motion for a directed verdict of Acquittal, which motion the Court denied, and thereupon order a continuance until February twenty-seventh, nineteen hundred and forty-five.

And afterwards, on the twenty-seventh day of February, nineteen hundred and forty-five, the jury in the presence of the said prosecutor, defendant and the Court, do say upon their oath
 20 and by their foreman, "We find the defendant, Horace Dillingham, Guilty in the manner and form as is set forth in the indictment and so they say all. By request of counsel for the defendant the jury was polled, and when the roll was called each juror, for himself answered, "Guilty."

WHEREUPON ALL AND
 SINGULAR, the premises being seen and by the Court now
 30 APRIL 11, 1945 here fully understood, it is on this eleventh day of April, nineteen hundred and forty-five, ordered and adjudged that the above named defendant, Horace Dillingham, be imprisoned in the Penitentiary of this County for a term of Eighteen Months at hard labor upon this conviction, without costs.

40 April 17, 1945.

Writ of Error and Return.

State of New Jersey, }
 County of Essex. } ss.:

I, RICHARD HARTSHORNE, Judge of the Court of Common Pleas, in and for the County of Essex, of New Jersey, and RUSSELL C. GATES, Clerk of the Court of Common Pleas in and for Essex County, N. J. do hereby certify and return to the Supreme Court of the Judicature of the State of New Jersey, the Indictment, records and entire record proceedings in the matter of the State vs. Horace Dillingham, and upon which indictment he was convicted; together with all things touching and concerning the same as by the within Writ to us directed and as commanded. 20

IN WITNESS WHEREOF, we have hereunto set our hands and official seal the seventeenth day of April, nineteen hundred and forty-five.

RICHARD HARTSHORNE,
Judge of the Court of Common Pleas,

Essex County *Essex County, New Jersey.* 30

Seal RUSSELL C. GATES,
 New Jersey *Clerk of the Court of Common Pleas,*
 Essex County, New Jersey.

Assignments of Error.

(Filed May 5/45.)

NEW JERSEY SUPREME COURT

10 20	THE STATE OF NEW JERSEY, <i>Defendant in Error,</i> vs. HORACE L. DILLINGHAM, <i>Plaintiff in Error.</i>	} On Writ of Error. Assignments of Error.
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Afterwards to wit: On the return date of the Writ of Error before the Justices of our Supreme Court of Judicature comes the said Horace L. Dillingham by Benjamin M. Ratner, as counsel, and says that in the record and proceedings aforesaid, also in the matters recited and contained in said bill of exceptions and also in giving the judgment aforesaid, there is manifest error in this, to wit:

1. That the said Court before whom, etc. had and upon the trial of the said issue so joined between the State of New Jersey and the said Horace L. Dillingham, the Court allowed the following questions to be asked of Mrs. Vetter and the answers thereto and refused to strike it from the record, to which refusal exception was taken and prayed for and allowed:

Q. "Now Mrs. Vetter did you do anything on Saturday?" A. "Yes. I made a telephone call."

Q. "To whom did you make the telephone call?" A. "Dr. Dillingham."

2. That the said Court before whom etc. and upon the trial of the said issue so joined between

Assignments of Error.

the State of New Jersey and the said Horace L. Dillingham the Court allowed the following questions to be asked of Mrs. Vetter and the answers thereto and overruled counsel's objection to which an exception was prayed and allowed and refused to strike the testimony from the record: 10

Q. "Whose number did you dial when you telephoned?" A. "I looked it up in the telephone book. Dr. Horace Dillingham, 69 Park Place, and I called that number."

Q. "When there was a response on the other end, what did you say and what did the voice on the other end say?"

Mr. Ratner: "I object, your Honor, unless it is shown that the person on the other end was Dr. Dillingham." 20

The Court: "Objection overruled for the present. Proceed."

Mr. Ratner: "An exception."

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. "What was said when the phone was answered?" A. "I said, 'Is this Dr. Dillingham?'" 30

Q. "What did the voice say?" A. "Yes."

Mr. Ratner: "I object to that."

Q. "What did the voice on the other end say?" A. "Yes."

By the Court:

Q. "Was it a male voice or a female voice?" A. "A male voice." 40

Assignments of Error.

By Mr. McKenna:

Q. "What did you then say when he said, 'Yes'?" A. "I asked him if—it's kind of hard for me to say it. I asked him if he was still interested in doing a—I just said a job for somebody that I knew. I told him first of all I was Mrs. Vetter and then I asked him if he would be interested in doing a job for someone I knew. And he said, 'yes.' I said 'When would it be all right to send the party up?' And he said, 'Send her up right away.' "

Mr. Ratner: "I understand that your Honor is reserving my right to strike all this testimony."

The Court: "Yes."

3. That the said Court before whom etc. and upon the trial of the said issue so joined between the State of New Jersey and the said Horace L. Dillingham, the Court allowed the following questions to be asked of William H. Whittington and the answers thereto and overruled counsel's objection, to which exceptions were prayed and allowed:

Q. "What was your wife's condition in so far as pregnancy was concerned during the month of March, 1944?" A. "I judge 3½ months."

Q. "Whom did you call?" A. "Dr. Dillingham."

Q. "Where did you call him?"

Mr. Ratner: "I move that that be stricken out on the grounds I gave before. There has

Assignments of Error.

been no evidence to indicate that the call was to Dr. Dillingham and that he answered the call."

The Court: "Motion denied."

Q. "Whom did you call?" A. "Dr. Dillingham." 10

Q. "Where did you call him?"

Mr. Ratner: "I move that that be stricken out on the same grounds I gave before. There has been no evidence to indicate that the call was to Dr. Dillingham and that he answered the call."

The Court: "Motion denied."

Mr. Ratner: "I take an exception."

Defendant's counsel prays an exception to this ruling of the Court. 20

Exception noted as ground of appeal.

Q. "What did you do when you went to the phone? How did you know whom to call?" A. "I had a book of matches."

Q. "Where did you get the book of matches?" A. "I got them from my wife's pocket-book."

Q. "What was on that book of matches?" 30
A. "A telephone number."

Q. "Of whom?" A. "Of his home address and of his office address."

Q. "Where was his office address on the book of matches?" A. "It was Lincoln Park."

Q. "Where was it? On the outside or on the inside?" A. "I believe it was on the inside but I'm not sure." 40

Assignments of Error.

Q. "Do you remember where his home was?" A. "Orange; I know that. It has stuck out in my mind."

10 Q. "You called the Newark number or the Orange number at that hour. Do you remember?" A. "I don't remember which I called. I know I got him."

Q. "What did you say when you got the number you were dialing?" A. "I asked for Dr. Dillingham."

Q. "What did the voice on the other end of the phone respond?" A. "I told him I had called the ambulance and he says—"

20 Q. "What did the voice on the other end say when you called Dr. Dillingham?"

Mr. Ratner: "I object on the ground that there has been no connection yet to identify the voice on the other end as the voice of Dr. Dillingham."

The Court: "Your motion is premature."

Mr. Ratner: "An exception."

Defendant's counsel prays an exception to this ruling of the Court.

30 Exception noted as ground of appeal.

Q. "What did you say when you got the response on the other end of the phone?" A. "I told him my wife was in bad condition."

Q. "Did you ask, 'Who is this?'" A. "Naturally I said, 'Who is this?'"

Q. "We have to know that. What was said" A. "Who is this? Dr. Dillingham?"

40 Q. "You asked, 'Who is this? Dr. Dillingham?'" A. "Yes."

Assignments of Error.

Q. "What did the voice on the other end say?" A. "He asked, 'Is anything wrong?'"

"And I said, 'Yes.'"

Q. "Did you say who you were?" A. "No, not that I remember of."

Q. "What did you say to him?" A. "I believe he asked me who I was."

Mr. Ratner: "I object."

The Court: "Objection overruled."

Mr. Ratner: "An exception."

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

4. That the said Court before whom etc. had and upon the trial of the said issue so joined between the State of New Jersey and the said Horace L. Dillingham, the Court refused to strike from the record the testimony of William H. Whittington previously given, although the following question and answer was allowed in evidence in cross examination by Mr. Ratner:

Q. "The telephone conversation that you had with the alleged Dr. Dillingham was the first you ever had with Dr. Dillingham?" A. "Yes."

The Court: "Of course, it is quite possible that some third party may have fitted right into the picture unwittingly; on the other hand, it is quite possible not. The jury must say."

Mr. Ratner: "An exception."

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Assignments of Error.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

10 Q. "You thought that number represented the telephone number of Dr. Dillingham?" A. "She told me it did."

5. That the said Court before whom etc. had and upon the trial of the said issue so joined between the State of New Jersey and the said Horace L. Dillingham, the Court allowed the following questions to be asked by Lydia Maguire and the answers thereto and overruled counsel's objection, to which an exception was prayed and allowed:
20

Q. "What did you do at the telephone?"

A. "I had the book of matches. I dialed Dr. Dillingham's number."

Q. "Where?" A. "60 Park Place."

Q. "Was there a response to the telephone call?" A. "Yes."

Q. "What did you say and what was said in the response?"

30 Mr. Ratner: "I object, your Honor, on the ground that there has been no identification that the person she was speaking to was Dr. Dillingham."

6. That the said Court before whom etc. had and upon the trial of the said issue so joined between the State of New Jersey and the said Horace L. Dillingham, the Court denied the defense motion for an acquittal at the close of the State's case and permitted the State to re-open its case
40

Assignments of Error.

and offer further evidence against the defendant prejudicial to his rights in the trial of this cause:

The Court: "You may re-open your case."

7. That the said Court before whom etc. had and upon the trial of the said issue so joined between the State of New Jersey and the said Horace L. Dillingham the Court allowed the witness, Shirley Vetter, who had been recalled at the close of the State's case, to testify as to an abortion having been performed upon her two years prior to the date that the crime for which the defendant was charged in this indictment: 10

Q. "Did you at any time previous go to Dr. Dillingham and have anything done by Dr. Dillingham?" 20

Mr. Ratner: "I object to the question."

The Court: "Objection overruled."

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. "Did you have anything done by Dr. Dillingham?" A. "Yes."

Q. "What did you have done by Dr. Dillingham?" A. "An abortion." 30

Q. "When was that?" A. "Two years ago."

That the said Court before whom etc. and upon the trial of the said issue so joined between the State of New Jersey and the said Horace L. Dillingham, the Court denied the defense motion which was renewed for a direction of an acquittal:

Mr. Ratner: "I renew my application for a direction of an acquittal on the grounds outlined to your Honor previously." 40

Assignments of Error.

The Court: "Motion denied."

Mr. Ratner: "An exception."

Defendant's counsel prays an exception to this ruling of the Court.

10 Exception noted as ground of appeal.

8. That the said Court before whom etc. had and upon the trial of the said issue so joined between the State of New Jersey and the said Horace L. Dillingham, the Court denied the defendant's motion for a direction of a verdict at the close of the defendant's case, to which an exception was prayed and allowed:

20 Mr. Ratner: "For the same reasons advanced on the previous motion I again reiterate that we are entitled to a direction of acquittal by the Court and I respectfully request that the Court so direct."

The Court: "Your motion is denied and an exception will be granted."

Mr. Ratner: "Exception."

Defendant's counsel prays an exception to this ruling of the Court.

30 Exception noted as ground of appeal.

9. That the said Court before whom etc. had and upon the trial of the said issue so joined between the State of New Jersey and the said Horace L. Dillingham, the Court erroneously charged the jury as follows:

40 "Then, the statute goes on: 'With intent to cause or procure the miscarriage of a woman then pregnant with child.' There is no claim by anybody that this attempt to cause the abortion was justified. We are

Assignments of Error.

concerned with the question of whether, if the defendant did it, he had the intent to cause the miscarriage. Now, an intent is an act of the mind. You cannot take an X-ray to read what goes on in a skull. There is no way of doing that except by substantially applying the common sense maxim that actions speak louder than words. You judge what a person thinks by what he does as a result of what he thinks. 10

Here, that common sense maxim—because law is but a refinement of common sense, after all—here that is exactly what you do. It is even more necessary in this case than perhaps it is in the ordinary case, because the only eye witnesses to the insertion of this admittedly existing catheter in that woman's womb was the dead woman, perchance, the defendant, under the evidence. Those are the only two people, perchance, who could tell us how it got there. Therefore, we must judge what happened by what evidence there is before us. 20

So, the final point is: Did the defendant himself use this catheter, insert it in the woman's womb or did it get there, as is intimated, by the hand of the dead woman herself? 30

What is the evidence? Of course, I shall not attempt to go into it in any detail. I have already alluded to the fact that here, unfortunately, we must rely largely upon the general circumstances, because of the fact that the mouth of one eye witness is sealed and 40

Assignments of Error.

the mouth of the other, of course, has reasons for not convicting himself if, in fact, he did it. The question is, in your final conclusion, who did it? She or the defendant?

10 Now, what is the proof as to the defendant? The testimony, denied by him, is that he had performed an abortion on Mrs. Vetter a couple of years ago and Mrs. Vetter called him up and asked, 'Are you still interested in doing a job?' It is for you to say what that meant to this man. Whether toe nails or the same sort of a job that he did on Mrs. Vetter. If it meant to him an abortion then you have the intent if he undertook it; and he did undertake to see Mrs. Whittington. What happened in the office we don't know for obvious reasons."

20

10. That the said Court before whom etc. had and upon the trial of the said issue so joined between the State of New Jersey and the said Horace L. Dillingham, the said Court refused to charge the jury as to the following requests on behalf of the defendant:

30 "1. The defendant in every criminal case is presumed to be innocent until he is proven guilty beyond a reasonable doubt. (Request is made that the Court define reasonable doubt.)

2. Before you can find the defendant guilty you must be satisfied beyond a reasonable doubt as I defined it to you that the decedent, Emma Whittington, was pregnant; that the defendant knew that she was preg-

40

Assignments of Error.

nant or that he had suspicion of her pregnancy and that the defendant did thereupon maliciously and with evil intent use the rubber catheter offered in evidence in this case, in the uterus of the decedent for the express purpose of causing an abortion. In other words, each and every element must be present, to wit: (1) pregnancy, (2) knowledge or suspicion that the decedent was pregnant and (3) that the defendant caused or intended to cause the abortion, all of which must be present, and you must be so satisfied beyond a reasonable doubt, for if any one of these elements are not present, or if you are not satisfied beyond a reasonable doubt that all of these elements are present, then you must bring in a verdict of acquittal. 10 20

3. The fact that the defendant went to visit at the apartment of the decedent on Tuesday, March 28, 1944 and again as the State alleges, on Wednesday, the early morning of that day, is not sufficient evidence that he performed the abortion charged in the indictment in this case and you must acquit him. 30

4. The fact that the defendant is alleged to have performed an abortion 2 years prior on Shirley Vetter is no proof that he performed the alleged abortion upon the decedent in this case. It may be a matter which you may consider in determining whether or not the defendant did commit the abortion in this case, but you must be satisfied beyond a reasonable doubt that he did perform such 40

Assignments of Error.

an abortion. Or else you must acquit the defendant.

10 5. I charge you further that you should consider the testimony of the county physician wherein he testified that the abortion could have been self-inflicted and that the infection which was the cause of her death was the failure to properly sterilize the catheter and if you believe that she may have caused the abortion herself or procured others to do it and not the defendant, then you must acquit the defendant.

20 6. I charge you further that you must consider seriously the failure of the State to contradict the evidence of the defendant that the decedent came to him for the treatment of an infected toenail and that the State's failure to contradict it is presumptive evidence that such a condition did exist and that she was there for such treatment.

30 7. I charge you further that the outburst of the defendant at the trial and evidence of excitement and rage is not to be considered by you in your deliberations on the question of the guilt or innocence of the defendant, because this is a matter with which only the Court is concerned and not the jury as triers of the fact."

40 11. That the said Court before whom etc. had and upon the trial of the said issue so joined between the State of New Jersey and the said Horace L. Dillingham, the Court erred in submitting the question of the guilt or innocence of the defendant because the verdict was contrary to law and against the weight of the evidence.

Specification of Causes for Reversal.

Wherefore, the said Horace L. Dillingham, prays that the said judgment and sentence may be reversed and annulled and altogether held for nothing and that he may be restored to all which he has lost by occasion thereof.

BENJAMIN M. RATNER,
of Counsel with Plaintiff in Error.

10

Specification of Causes for Reversal.

(Filed May 10, 1945.)

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY,

Defendant in error,

vs.

HORACE L. DILLINGHAM,
Plaintiff in error.

On Writ of
Error.

Specification
of Causes for
Reversal.

20

And now comes the said Horace L. Dillingham by Benjamin M. Ratner, as counsel, 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 giving the verdict and judgment aforesaid, there is manifest error and the said Horace L. Dillingham says that the said judgment should be reversed and assigns the following reasons or causes for reversal:

30

1. Because the Court allowed the following questions to be asked of Mrs. Vetter and the answers thereto in the State's attempt to identify

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Specification of Causes for Reversal.

the telephone conversation as having taken place with Horace L. Dillingham, plaintiff in error, and the Court refused on counsel's objection to said testimony to strike it from the record:

10 Q. "Now Mrs. Vetter did you do anything on Saturday"? A. "Yes. I made a telephone call."

Q. "To whom did you make the telephone call?" A. "Dr. Dillingham."

Q. "Whose number did you dial when you telephoned?" A. "I looked it up in the telephone book. Dr. Horace Dillingham, 60 Park Place and I called that number."

20 Q. "When there was a response on the other end, what did you say and what did the voice on the other end say?"

Mr. Ratner: "I object, your Honor, unless it is shown that the person on the other end was Dr. Dillingham."

The Court: "Objection overruled for the present. Proceed."

Mr. Ratner: "An exception."

30 Q. "What was said when the phone was answered?" A. "I said, 'Is this Dr. Dillingham'?"

Q. "What did the voice say?" A. "Yes."

Mr. Ratner: "I object to that."

Q. "What did the voice on the other end say?" A. "Yes."

By the Court:

40 Q. "Was it a male voice or a female voice?" A. "A male voice."

Specification of Causes for Reversal.

By Mr. McKenna:

Q. "What did you then say when he said, 'Yes?'" A. "I asked him if—it's kind of hard for me to say it. I asked him if he was still interested in doing a—I just said a job for somebody that I knew. I told him first of all I was Mrs. Vetter and then I asked him if he would be interested in doing a job for someone I knew. And he said 'yes'. I said, 'When would it be all right to send the party up?' And he said, 'Send her up right away.'"

Mr. Ratner: "I understand that your Honor is reserving my right to strike all this testimony."

The Court: "Yes."

2. Because the Court allowed the following questions to be asked of William H. Whittington and the answers thereto in the State's attempt to identify the telephone conversation as having taken place with Horace L. Dillingham, plaintiff in error, and the Court Refused on counsel's objection to said testimony to strike it from the record:

Q. "What was your wife's condition insofar as pregnancy was concerned during the month of March, 1944?" A. "I judge 3½ months."

Q. "Whom did you call?" A. "Dr. Dillingham."

Q. "Where did you call him?"

Mr. Ratner: "I move that that be stricken out on the grounds I gave before. There

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has been no evidence to indicate that the call was to Dr. Dillingham and that he answered the call."

The Court: "Motion denied."

10

Q. "Whom did you call?" A. "Dr. Dillingham."

Q. "Where did you call him?"

Mr. Ratner: "I move that that be stricken out on the same grounds I gave before. There has been no evidence to indicate that the call was to Dr. Dillingham and that he answered the call."

The Court: "Motion denied."

20

Mr. Ratner: "I take an exception."

Q. "What did you do when you went to the phone? How did you know whom to call?" A. "I had a book of matches."

Q. "Where did you get the book of matches?" A. "I got them from my wife's pocketbook."

Q. "What was on that book of matches?" A. "A telephone number."

30

Q. "Of whom?" A. "Of his home address and of his office address."

Q. "Where was his office address on the book of matches?" A. "It was Lincoln Park."

Q. "Where was it? On the outside or on the inside?" A. "I believe it was on the inside but I'm not sure."

40

Q. "Do you remember where his home was?" A. "Orange; I know that. It has stuck out in my mind".

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Q. "You called the Newark number or the Orange number at that hour. Do you remember?" A. "I don't remember which I called. I know I got him."

Q. "What did you say when you got the number you were dialing?" A. "I asked for Dr. Dillingham." 10

Q. "What did the voice on the other end of the phone respond?" A. "I told him I had called the ambulance and he says—"

Q. "What did the voice on the other end say when you called Dr. Dillingham?"

Mr. Ratner: "I object on the ground that there has been no connection yet to identify the voice on the other end as the voice of Dr. Dillingham." 20

The Court: "Your motion is premature."

Mr. Ratner: "An exception."

Q. "What did you say when you got the response on the other end of the phone?"

A. "I told him my wife was in bad condition."

Q. "Did you ask 'Who is this?'" A. "Naturally I said, 'Who is this?'" 30

Q. "We have to know that. What was said?" A. "Who is this? Dr. Dillingham?"

Q. "You asked, 'Who is this? Dr. Dillingham?'" A. "Yes."

Q. "What did the voice on the other end say?" A. "He asked, 'Is anything wrong?' And I said, 'Yes.'"

Q. "Did you say who you were?" A. 40
"No, not that I remember of."

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Q. "What did you say to him?" A. "I believe he asked me who I was."

Mr. Ratner: "I object."

The Court: "Objection overruled."

10 Mr. Ratner: "An exception."

Q. "The telephone conversation that you had with the alleged Dr. Dillingham was the first you ever had with Dr. Dillingham?" A. "Yes."

The Court: "Of course, it is quite possible that some third party may have fitted right into the picture unwittingly; on the other hand, it is quite possible not. The jury must say."

20 Mr. Ratner: "An exception."

Q. "You thought that number represented the telephone number of Dr. Dillingham?"

A. "She told me it did."

3. Because the Court allowed the following questions to be asked of Lydia Maguire and the answers thereto in the State's attempt to identify the telephone conversation as having taken place with Horace L. Dillingham, plaintiff in error, and the Court refused on counsel's objection to said testimony to strike it from the record:

30 Q. "What did you do at the telephone?"

A. "I had the book of matches. I dialed Dr. Dillingham's number."

Q. "Where?" A. "60 Park Place."

Q. "Was there a response to the telephone call?" A. "Yes."

40 Q. "What did you say and what was said in the response?"

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Mr. Ratner: "I object, your Honor, on the ground that there has been no identification that the person she was speaking to was Dr. Dillingham."

4. Because the trial Court denied the defense motion for an acquittal at the close of the State's case and permitted the State to re-open its case and offer further evidence against Horace L. Dillingham, plaintiff in error, prejudicial to his rights in the trial of this cause: 10

The Court: "You may re-open your case."

5. Because the trial Court permitted the witness, Shirley Vetter, to be recalled to the stand at the close of the State's case and to testify as to an abortion having been performed upon her two years prior to the date of the crime, for which the plaintiff in error was presently indicted and tried, over objections by counsel for Horace L. Dillingham, plaintiff in error: 20

Q. "Did you at any time previous go to Dr. Dillingham and have anything done by Dr. Dillingham?" 30

Mr. Ratner: "I object to the question."

The Court: "Objection overruled."

Q. "Did you have anything done by Dr. Dillingham?" A. "Yes."

Q. "What did you have done by Dr. Dillingham?" A. "An abortion."

"Q. When was that?" A. "Two years ago."

6. Because the trial Court refused to direct a verdict of acquittal at the close of the State's 40

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case upon application for that purpose made by counsel for plaintiff in error:

Mr. Ratner: "I renew my application for a direction of an acquittal on the grounds outlined to your Honor previously."

10

The Court: "Motion denied."

Mr. Ratner: "An exception."

7. Because the trial Court refused to direct a verdict of acquittal at the close of the defense offered by Horace L. Dillingham, plaintiff in error;

Mr. Ratner: "For the same reason advanced on the previous motion I again re-iterate that we are entitled to a direction of acquittal by the Court and I respectfully request that the Court so direct."

20

The Court: "Your motion is denied and an exception will be granted."

Mr. Ratner: "Exception."

8. Because the trial Court erroneously charged the jury as follows:

"Then, the statute goes on: 'With intent to cause or procure the miscarriage of a woman then pregnant with child.' There is no claim by anybody that this attempt to cause the abortion was justified. We are concerned with the question of whether, if the defendant did it, he had the intent to cause the miscarriage. Now, an intent is an act of the mind. You cannot take an X-ray to read what goes on in a skull. There is no way of doing that except by substantially applying

30

40

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the common sense maxim that actions speak louder than words. You judge what a person thinks by what he does as a result of what he thinks.

Here, that common sense maxim—because
law is but refinement of common sense, after
all—here that is exactly what you do. It is
even more necessary in this case than per-
haps it is in the ordinary case, because the
only eye witnesses to the insertion of this
admittedly existing catheter in that woman's
womb was the dead woman, and, perchance,
the defendant, under the evidence. Those
are the only two people, perchance, who
could tell us how it got there. Therefore,
we must judge what happened by what evi-
dence there is before us.

So, the final point is: Did the defendant
himself use this catheter, insert it in the wo-
man's womb or did it get there, as is inti-
mated, by the hand of the dead woman her-
self?

What is the evidence? Of course, I shall
not attempt to go into it in any detail. I
have already alluded to the fact that here,
unfortunately, we must rely largely upon the
general circumstances, because of the fact
that the mouth of one eye witness is sealed
and the mouth of the other, of course, has
reasons for not convicting himself if, in fact,
he did it. The question is, in your final con-
clusion, who did it? She or the defendant?

Now, what is the proof as to the defendant?

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10 The testimony, denied by him, is that he had performed an abortion on Mrs. Vetter a couple of years ago and Mrs. Vetter called him up and asked, 'Are you still interested in doing a job?' It is for you to say what that meant to this man. Whether toenails or the same sort of a job that he did on Mrs. Vetter. If it meant to him an abortion then you have the intent if he undertook it; and he did undertake to see Mrs. Whittington. What happened in the office we don't know for obvious reasons."

20 9. Because the trial Court refused to charge the following requests on behalf of Horace L. Dillingham, plaintiff in error:

"1. The defendant in every criminal case is presumed to be innocent until he is proven guilty beyond a reasonable doubt. (Request is made that the Court define reasonable doubt.)

30 2. Before you can find the defendant guilty you must be satisfied beyond a reasonable doubt as I defined it to you that the decedent, Emma Whitting, was pregnant; that the defendant knew that she was pregnant or that he had suspicion of her pregnancy and that the defendant did thereupon maliciously and with evil intent use the rubber catheter offered in evidence in this case, in the uterus of the decedent for the express purpose of causing an abortion. In other words, each and every element must
40 be present, to wit (1) pregnancy (2) knowl-

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edge or suspicion that the decedent was pregnant and (3) that the defendant caused or intended to cause the abortion, all of which must be present, and you must be so satisfied beyond a reasonable doubt, for if any one of these elements are not present, or if you are not satisfied beyond a reasonable doubt that all of these elements are present, then you must bring in a verdict of acquittal. 10

3. The fact that the defendant went to visit at the apartment of the decedent on Tuesday, March 28, 1944 and again as the State alleges, on Wednesday, the early morning of that day, is not sufficient evidence that he performed the abortion charged in the indictment in this case and you must acquit him. 20

4. The fact that the defendant is alleged to have performed an abortion 2 years prior on Shirley Vetter is no proof that he performed the alleged abortion upon the decedent in this case. It may be a matter which you may consider in determining whether or not the defendant did commit the abortion in this case, but you must be satisfied beyond a reasonable doubt that he did perform such an abortion, or else you must acquit the defendant. 30

5. I charge you further that you should consider the testimony of the county physician wherein he testified that the abortion could have been self-inflicted and that the infection which was the cause of her death 40

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was the failure to properly sterilize the catheter and if you believe that she may have caused the abortion herself or procured others to do it and not the defendant, then you must acquit the defendant.

10

6. I charge you further that you must consider seriously the failure of the State to contradict the evidence of the defendant that the decedent came to him for the treatment of an infected toenail and that the State's failure to contradict it is presumptive evidence that such a condition did exist and that she was there for such treatment.

20

7. I charge you further that the outburst of the defendant at the trial and evidence of excitement and rage is not to be considered by you in your deliberations on the question of the guilt or innocence of the defendant, because this is a matter with which only the Court is concerned and not the jury as triers of the fact."

30

10. Because the verdict was contrary to law and against the weight of the evidence.

Wherefore, because of the aforesaid reasons or some of them constitute error prejudicial to the said Horace L. Dillingham, the plaintiff in error, he prays that the said judgment and sentence be reversed and annulled and altogether held for nothing, and that he may be restored to all things which he has lost by occasion thereof.

40

BENJAMIN M. RATNER,
Of Counsel with Plaintiff-in-Error.

*Judge's Certification of Record.***Certificate of Stenographer.**

(Filed May 5, 1945.)

**ESSEX COUNTY COURT OF QUARTER
SESSIONS.**

STATE OF NEW JERSEY,

vs.

HORACE DILLINGHAM.

On Indictment
No. 82 for De-
cember 1944
term for Abor-
tion.Certificate of
Stenographer.

10

I, George A. Flammer, certify that I attended
the trial of the above named case and reported
stenographically the proceedings had therein,
and that the foregoing is a true copy of my steno-
graphic notes so taken.

20

GEORGE A. FLAMMER.

Judge's Certification of Record.

(Filed May 5, 1945.)

**ESSEX COUNTY COURT OF QUARTER
SESSIONS.**

30

STATE OF NEW JERSEY,

vs.

HORACE DILLINGHAM.

On Indictment
No. 82
December 1944
term, for Abor-
tion.Judge's Certifi-
cation of Record.

I, Richard Hartshorne, presiding in the Essex
County Court of Quarter Sessions, and the
Judge who presided over the aforesaid cause,

40

Testimony.

10 certify that I have examined the entire record of
the proceedings had upon the trial of the said
cause, and that the same is returned by the
plaintiff in error therein with the writ of error
bringing up the bill of exceptions signed and
sealed in this cause.

RICHARD HARTSHORNE,
Judge.

Testimony.

ESSEX COUNTY COURT OF QUARTER
SESSIONS.

20 Monday, February 26, 1945.

THE STATE OF NEW JERSEY,

vs.

HORACE DILLINGHAM.

On Indictment No. 82,
December 1944 Term,
for Abortion.

Before Honorable Richard Hartshorne, Judge,
and a jury.

30 Appearances:

James L. McKenna, Assistant Prosecutor of
the Pleas, for the State.

Benjamin M. Ratner, for the defendant.

(A jury is duly impaneled and sworn.)

George A. Flammer,

Certified Shorthand Reporter.

40 Mr. McKenna: If your Honor please, I would
like to have all except the witnesses excluded from
the court room.

Testimony.

The Court: All except the parties and the witnesses in the case of State v. Dillingham will leave the room.

(Mr. McKenna makes an opening statement to the jury on behalf of the State.)

Mr. Ratner: If your Honor please, and gentlemen of the jury. All that the Prosecutor stated in his opening is not evidence. He intends to prove those things, you understand. The burden of proof is on the state.

10

Now, we definitely deny that we had anything to do with any abortion as laid in this indictment, and that's our answer to this charge. We hope to be able to prove to you that we had nothing to do in this case.

20

Mr. McKenna: If your Honor please, I don't like to do this but do I understand from his opening that counsel contends that Dr. Dillingham did not go down to Orchard Street?

Mr. Ratner: Dr. Dillingham did not commit any abortion as laid against him in the indictment.

The Court: To be more specific, the Prosecutor wants to know whether the defense is that the doctor neither visited the apartment nor did the woman visit Dr. Dillingham's office or whether it is a denial that what occurred during these visits was an attempt to procure an abortion.

30

Mr. Ratner: He isn't entitled to that under the law, your Honor. He's entitled to an answer to the indictment and that's all.

The Court: The jury will understand that the defense does not state its defense fully. The case will proceed.

40

C. Berardinelli, for State, Direct.

CARMINE BERARDINELLI called as a witness on behalf of the State, being duly sworn, testifies as follows:

Direct Examination by Mr. McKenna:

10 Dr. Berardinelli, you are the Deputy Medical Examiner of the County of Essex. Is that correct? A. Yes, I am.

Q. On March 29 last year did you perform an autopsy upon the body of one Emma Whittington? A. I did.

Q. Where did you perform that autopsy? A. O'Mara's Morgue.

20 Q. Where is that located? A. 702 High Street.

Q. What time of the day did you perform the autopsy? A. On the 29th day of March 1944 at 10:25 a. m.

Q. Will you tell the Court and jury in your own words what your autopsy disclosed? A. Yes, a criminal abortion.

Q. A criminal abortion? A. Yes, by another person by insertion of a rubber catheter in the womb.

30 Q. A rubber catheter in the womb? A. Yes, and hemorrhagic endometritis.

By the Court:

Q. Hemorrhagic means bleeding? A. Yes.

Q. What is endometritis? A. The endometrium is the lining of the cavity of the womb.

Q. In other words, there was a hemorrhage in the lining of the cavity of the womb? A. Yes.

C. Berardinelli, for State, Direct.

By Mr. McKenna:

Q. What did you say that was caused by, Doctor?
A. By the insertion of the catheter in the womb.

Q. Have you the catheter, Doctor? A. Yes, 10
I have everything here.

Q. Will you take that out and show us?

Mr. Ratner: He asked for the catheter.

A. It's in the womb.

Mr. Ratner: I object to that. Do you mind putting it away, Doctor?

The Court: The question is whether he has the catheter and he says yes. Produce it.

Q. Have you the womb, Doctor? A. Yes, I 20
have.

Q. What you have in your hand is the womb in a glass case? A. Yes.

By the Court:

Q. It's the womb taken out of this woman?

A. Yes.

By Mr. McKenna:

Q. That was taken out by you on the day you 30
performed your autopsy? A. Yes.

Q. Will you explain it to the jury? A. This is the entire womb. This is the cervix.

Q. Will you tell us what the cervix is? A. That's the first part of the womb which comes in the vagina. This is the back of the womb which is in the abdominal cavity and from here down to here is the cervix, the part which rests in the vagina. This is the fetus. Can you see?

Q. The fetus? A. Yes. And those are the 40

C. Berardinelli, for State, Direct.

membrana. This is the catheter which was found completely coiled around the fetus.

Q. What you are indicating with your finger is the fetus? A. Yes.

10 Q. That would be a child eventually? A. Yes.

Q. What is the development there?

Mr. Ratner: I don't think that makes any difference, your Honor. I object.

The Court: Objection overruled.

Mr. Ratner: An exception, please.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

20 A. About six inches.

By the Court:

Q. In length? A. Six inches.

Q. In length? A. In length, yes, which indicated the fourth month of pregnancy.

By Mr. McKenna:

Q. So, Doctor, we have there around in the uterus— A. It's coiled around in there.

30 Q. We call that placental tissue? A. After-birth, after the baby is born. This is the fetus.

Q. How did that catheter get there? A. Through the cervix, through the opening of the cervix.

Q. First of all, through the vagina and then through the cervix? A. Yes.

40 Q. How wide is that opening? A. The opening of the cervix according to the condition of the women in the vaginal womb is very little. In women who have given birth to a few children it's wider.

C. Berardinelli, for State, Direct.

Q. It dilates? A. Yes. It's easy. Sometimes dilation is by instrument. It was wound around the fetus inside the membrana.

Q. What would that do when you put that into the uterus of a woman? A. The first thing it would do is produce a hemorrhage and then an infection. 10

Q. Does it always produce an infection, Doctor? A. Well, if the catheter is not well sterilized it produces an infection.

By the Court:

Q. Was there an infection here or not? A. Yes.

By Mr. McKenna: 20

Q. When it is inserted what happens? Is there a contraction in the uterus?

Mr. Ratner: Your Honor, I can't see how this is material to the issue when the issue is a question of pregnancy, the knowledge or suspicion of pregnancy. This only gives the case a little color for the benefit of the jury. This man is charged with this offense and should be given the benefit of every consideration. This is not material. 30

The Court: Objection overruled.

Mr. Ratner: An exception.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Doctor, what happens when a catheter or a foreign substance is inserted into the cervix?

A. It lacerates the membrane. 40

C. Berardinelli, for State, Cross.

Q. What happens? A. A hemorrhage, which starts an infection.

Q. What happens to what is in the uterus at the time, as, for instance, a fetus or afterbirth?

10 A. If there is an infection and the contraction sets in, the fetus will be expelled. In this case it wasn't expelled because an infection set in right away.

Q. Had it gone its regular course with a catheter in there it would have been expelled?

A. I think so.

Mr. McKenna: That's all. You may cross examine.

CROSS EXAMINATION by Mr. Ratner:

20 Q. Doctor, when you testified on direct examination you were looking at some typewritten report, is that right? A. Yes.

Q. What was that report? A. Which report?

Q. What is that? A. Criminal abortion.

Q. It's the autopsy report? A. Yes.

Q. Where are your original notes in this case? A. My original notes were typewritten.

30 Q. Where are they? A. They were destroyed; my handwriting was destroyed. We don't keep the handwriting.

Q. You didn't dictate from the original notes on this sheet, did you? A. Yes, from the original notes.

Q. Did you compare the original notes with that sheet before you signed it? A. Yes, sir, I did.

40 Mr. Ratner: I move that the testimony of the doctor be stricken out, your Honor,

C. Berardinelli, for State, Cross.

on the ground that the original notes have not been produced, which are the best evidence.

The Court: Motion denied.

Mr. Ratner: I ask for an exception. Did you offer it in evidence, Mr. McKenna? 10

Mr. McKenna: No.

Mr. Ratner: Do you want to offer it?

Mr. McKenna: I don't think it's evidential. The doctor has testified to it.

Q. I presume that this autopsy report takes in the various parts of the anatomy? Is that so?

A. Yes.

Q. Does it take in the foot and the leg? A. No, sir. 20

Q. It doesn't? A. No.

Q. In performing this autopsy you didn't interest yourself in the condition of the foot or leg because that was not-- A. That was not injured.

Q. You were not concerned with that? A. No.

Q. So, as I understand you, Doctor, there was no examination made of the foot or leg at the time the autopsy was performed? A. That's so. 30

By the Court:

Q. You said there were no injuries? A. There was no condition, no pathological condition on the foot or leg. We examined first the body.

By Mr. Ratner:

Q. Didn't you tell me a moment ago when I asked you the question that you did not examine 40

C. Berardinelli, for State, Cross.

the foot or leg? A. No, I didn't examine the foot or leg; no.

Mr. Ratner: That's all, Doctor.

The Witness: It had nothing to do with this.

10 Mr. Ratner: I move that it be stricken out, if your Honor please.

The Court: Don't volunteer. Strike it out.

Q. You didn't examine the foot or leg? A. No, sir.

Mr. Ratner: That's all.

20 Mr. McKenna: If your Honor please, I offer the exhibit of the fetus, produced by the doctor, in evidence.

Mr. Ratner: I have no objection.

(The fetus, contained in a glass jar, is received in evidence and marked Exhibit S-1.)

I have a few more questions, your Honor.

Q. Doctor, this rubber hose which you called a catheter could be self-inflicted by the victim herself? The woman could have done it herself? A. Maybe, probably.

30 Q. You, as a physician of long standing, know that women have done this time and time again. That is, they have self-inflicted themselves with a catheter? A. That's true.

Q. And where a woman does not exercise care to the point where she does not sterilize this rubber hose known as a catheter, because she doesn't know any better, and inserts it into the uterus, an infection will set in? A. Certainly.

40 Q. That's true, isn't it? A. Yes.

S. Vetter, for State, Direct.

Q. It is very possible and very probable—

Mr. McKenna: I object to that.

Q. Couldn't this woman have inserted this catheter herself? A. Probably.

Mr. Ratner: No further questions.

10

SHIRLEY VETTER called as a witness on behalf of the State, being duly sworn, testifies as follows:

Direct Examination by Mr. McKenna:

Q. Mrs. Vetter, where do you live? A. 29 Pennington Street, Newark.

Q. That's on the corner of Orchard Street. 20 Is that correct? A. Yes.

Q. You live in an apartment on the third floor? A. On the second floor.

Q. And your mother's name is Mrs. Sternberg? A. Yes.

Q. She is the superintendent of the apartment? A. Yes.

Q. She has an apartment on the basement floor? A. Yes.

Q. Do you know where Mrs. Maguire lives? 30 A. Yes, she lives on the other side of the basement.

Q. Mrs. Maguire lived there in the middle of March 1944, is that right? A. Yes.

Q. You frequently go to your mother's apartment on the basement floor? A. I eat with her.

Q. Your husband is in service. Is that correct? A. Yes.

Mr. Ratner: I object to that.

40

S. Vetter, for State, Direct.

Mr. McKenna: It's information for the jury.

The Court: Strike out the fact that the husband is in service.

10 Q. You had a conversation on Friday or Saturday, March 24 or March 25 of last year, with Mrs. Maguire and Mrs. Whittington? A. Well--

Mr. Ratner: Wait a minute.

Q. You knew Mrs. Whittington, did you not?

A. Yes.

Q. Where was she living at the time? A. She was visiting Mrs. Maguire.

20 Q. Did you have a conversation with Mrs. Whittington and Mrs. Maguire on Friday night?

A. Yes.

Q. What was it about?

Mr. Ratner: That's objected to.

The Court: You can't give the conversation, Mr. Prosecutor.

Mr. McKenna: May I ask what it was about?

The Court: No.

30 Q. Don't tell us the details. Where was that conversation held? A. In Mrs. Maguire's apartment.

Q. About what time of night was that? A. About eight o'clock.

Q. How long did you stay there? A. I must have talked about an hour with her.

Q. Where did you go after you left? A. Home, upstairs.

40 Q. Did you do anything about the conversation that day? A. No.

S. Vetter, for State, Direct.

Mr. Ratner: I object to that on the ground it's speculative.

By the Court:

Q. Following the conversation did you do anything? A. No.

10

By Mr. McKenna:

Q. Did you do anything following that conversation on Saturday? A. Yes.

Q. What did you do?

Mr. Ratner: I object to that on the ground that the answer must connect the defendant directly or indirectly with the charge laid against him in this indictment.

Mr. McKenna: That's what I intend to do. 20

The Court: Of course, it's immaterial—

The Defendant: Your Honor, it's putting words in the witness' mouth.

Mr. Ratner: I will have to withdraw from the case if you embarrass me. Now, your Honor, I object on the ground that the question will not connect this defendant directly or indirectly with the charge laid against him in this indictment. 30

The Court: Do you know that it won't?

Mr. Ratner: I say, as the question has been put.

The Court: You have to wait, Mr. Ratner.

Mr. Ratner: Then I make my objection subject to its being stricken out if it is not connected up.

40

The Court: Yes.

S. Vetter, for State, Direct.

Q. Now, Mrs. Vetter did you do anything on Saturday? A. Yes, I made a telephone call.

Q. To whom did you make the telephone call?

A. Dr. Dillingham.

Mr. Ratner: I object.

10

The Court: I couldn't hear what she said.

A. I said Dr. Dillingham.

Mr. Ratner: I move that the answer be stricken out on the ground that no foundation has been laid. There is no indication or evidence to indicate that the phone call was with Dr. Dillingham.

20

The Court: All right. You cannot prove a case all at once.

Mr. Ratner: I move that the answer be stricken out.

The Court: Motion denied.

Mr. Ratner: Exception.

Q. Whose number did you dial when you telephoned? A. I looked it up in the telephone book, Dr. Horace Dillingham, 60 Park Place and I called that number.

30

Q. When there was a response on the other end what did you say and what did the voice on the other end say?

Mr. Ratner: I object, your Honor, unless it is shown that the person on the other end was Dr. Dillingham.

The Court: Objection overruled for the present. Proceed.

Mr. Ratner: An exception.

40

S. Vetter, for State, Direct.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. What was said when the phone was answered? A. I said, "Is this Dr. Dillingham"?

Q. What did the voice say? A. "Yes".

10

Mr. Ratner: I object to that.

Q. What did the voice on the other end say?

A. "Yes."

By the Court:

Q. Was it a male voice or a female voice? A. A male voice.

By Mr. McKenna:

Q. What did you then say when he said, "Yes"? A. I asked him—if it's kind of hard for me to say it. I asked him if he was still interested in doing a—I just said a job for somebody that I knew. I told him first of all I was Mrs. Vetter and then I asked him if he would be interested in doing a job for someone I knew. And he said yes.

20

I said, "When would it be all right to send the party up?"

And he said, "Send her up right away."

30

Mr. Ratner: I understand that your Honor is reserving my right to strike all this testimony,

The Court: Yes.

A. And I said that the party couldn't make it, right away. She had arrangements to be made; that the earliest opportunity would be early Monday morning.

40

S. Vetter, for State, Direct.

He said that was perfectly all right and he asked the name and I said the name was Mrs. Whittington. He said all right, and I hung up.

Q. That was all? A. That's all that was said.

10 Q. Did you know Dr. Dillingham? A. Yes.

Q. Did you see Mrs. Whittington after you had that conversation with Dr. Dillingham? A. Yes.

Q. What did you say to her? A. I worked until twelve o'clock that Saturday and I went home and informed her that the arrangements had been made.

20 Q. Don't tell us the conversation. You told her you talked to him? A. Yes, and she was to go there at nine o'clock.

Mr. Ratner: I object.

Q. You told her the result of your conversation with Dr. Dillingham. Is that correct? A. Yes.

Q. But don't tell us what it was. How long did you talk with her? A. At that time?

Q. Yes. A. Just a few minutes.

30 Q. Did you see her again that day or on Sunday? A. No.

Q. Did you see her on Monday? A. No.

Q. Did you see her on Tuesday? A. Yes.

Q. Where did you see her on Tuesday? A. I dropped in to see her at Mrs. Maguire's apartment.

Q. Where was she at the time? A. In bed.

Q. Could you tell what her condition was?

Mr. Ratner: I object, your Honor.

S. Vetter, for State, Cross.

The Court: You mean, was she in pain or something like that?

A. She said she was.

Mr. Ratner: I object to that.

The Court: Strike it out.

Q. How long did you stay with her? A. 10
Just a few minutes.

Q. Did you see her again? A. No, that was
the last I saw her.

Mr. McKenna: That's all. You may
cross-examine.

CROSS EXAMINATION by Mr. Ratner:

Q. When did you first talk to Dr. Dillingham?

A. On Saturday morning.

Q. How many years prior to that alleged tele- 20
phone call? A. Two years.

Q. How long was that conversation two years
ago with Dr. Dillingham? A. I'm afraid if I
say the wrong thing. It was twenty minutes to a
half hour.

Q. You talked to him two years ago on the
phone? A. No, in person.

Q. Since that time you never spoke to Dr. 30
Dillingham? A. No.

Q. (Continuing). Except for the fact that the
person who answered at the other end of the wire
said he was Dr. Dillingham. You cannot swear un-
der oath here and now that you were speaking
to Dr. Dillingham. Isn't that true? A. Yes.

Q. You can't swear under oath that you really
dialed the number you intended to dial. Isn't that
true? You could have made a mistake in dialing?

A. No, I know who I called. 40

S. Vetter, for State, Cross.

Q. Don't you ever make a mistake in dialing?
A. Everybody does.

Q. Then you could have made a mistake on this occasion? A. I don't know. I didn't make a mistake.

10 Q. Because the man who answered the phone on the other end said he was Dr. Dillingham when you made the inquiry, is the only reason you now testify under oath that the man you talked to is Dr. Dillingham. Isn't that true? A. Yes.

Q. You may have been mistaken? A. Yes.

Q. It may have been someone else? A. It might have been.

20 Q. Now, you testified on direct examination that the person to whom you talked on the telephone made the appointment for a Monday, is that right? A. That's right.

Q. But you don't know whether Mrs. Emma Whittington went there on a Monday, do you?
A. No. Only when I saw—

Q. You don't know, do you? Answer yes or no. A. I did know, yes.

Q. Did you go with her? A. No.

30 Q. Then you don't know.

Mr. MeeKna: If your Honor please, since counsel has asked the question she should be allowed to answer. She says she does know.

Mr. Ratner: That's not the question.

40 Q. The question is: Do you know of your own personal knowledge whether or not, in view of the appointment you made, Mrs. Whittington went to Dr. Dillingham's office? Do you know of your own personal knowledge? A. Do I know? Yes.

S. Vetter, for State, Cross.

Q. You made the appointment, did you not?

A. Yes.

Q. But you didn't take her down to 60 Park Place? A. No.

Q. You don't know whether she went there except from what somebody told you? A. She told me. 10

Mr. Ratner: I move that that be stricken out as not responsive.

Mr. McKenna: I object to its being stricken out, your Honor.

The Court: Read the question and answer.

(The reporter reads as follows: "Question: You don't know whether she went there except from what somebody told you? Answer: She told me.") 20

"Except what somebody told you."

Mr. Ratner: I move that it be stricken out.

The Court: Motion granted.

Q. You didn't take the lady down to any office at 60 Park Place? A. No.

Q. You didn't take the lady anywhere on a Monday, did you? A. No. 30

Q. Therefore isn't it true that you don't know

—
Mr. McKenna: I object to it, if your Honor please, as argumentative.

The Court: Isn't it argumentative?

Mr. Ratner: I want to get the answer that you don't know anything about this lady's going down there. 40

S. Vetter, for State, Cross.

The Court: I understood from her testimony that she said personally from her own knowledge she didn't know.

Mr. Ratner: All right, no further questions.

10

Mr. McKenna: Mr. Whittington.

20

Mr. Ratner: Your Honor, before this witness is sworn at this time I move to strike out the testimony of Mrs. Vetter on the ground that it does not directly or indirectly connect the conversation, which she alleges she had on the telephone, with this defendant; and, for the further reason, that the conversation which she had on Saturday in March 1944 was too remote from the original conversation she had two years prior, so as to give this Court the right to say that the person to whom she was speaking was the defendant.

30

Furthermore, the fact that she testified on cross-examination that it may have been somebody else other than the person she intended to talk to is sufficient ground in this important case to strike out the testimony because it has not been properly connected with the defendant.

40

The Court: If I recall the sum and substance of the testimony here she said this: "I called his office and a man's voice answered." Now I don't think she said in so many words that "I recognized him as Dr. Dillingham." But she said, "Having talked to Dr. Dillingham two years ago,

S. Vetter, for State, Cross.

having called his office, I then went on and talked with a man whom I believed, and now believe, to be Dr. Dillingham."

Mr. Ratner: That's not enough, your Honor, because—

The Court: Then it becomes a question for the jury as to whether or not it was Dr. Dillingham. 10

Mr. Ratner: I think it becomes a matter of law to say whether that testimony, based upon the proofs where the first conversation took place two years ago and no conversation took place after that and the first one was for only twenty minutes, is sufficient in itself to raise even the question of fact to be submitted to the jury. I respectfully submit that it can't be unless she said, "I recognize that voice to be the same voice that I spoke to for twenty minutes two years ago." 20

The Court: Isn't that substantially what she said?

Mr. Ratner: That's the point, your Honor; she did not. 30

The Court: I thought that was the whole purport of the testimony.

Mr. McKenna: Yes.

Mr. Ratner: She didn't say that.
(Witness recalled.)

By the Court:

Q. Now, bearing in mind the fact that you had talked with him for some twenty minutes two years ago and that you called his number did you 40

W. H. Whittington, for State, Direct.

or did you not—and do you now or do you not—recognize that the voice that you then talked with was that of the defendant, Dr. Dillingham? A. Yes.

10 By Mr. Ratner:

Q. What makes you so positive now and in March 1944 that the voice you spoke with on that occasion in March 1944 was the same man you spoke to two years prior? A. I can answer that —

Q. What makes you so positive?

Mr. McKenna: If your Honor please, that calls for—

20 Mr. Ratner: I only asked her what makes her so positive.

Q. Did you recognize it then? A. Yes.

Q. Would you swear that it was the same man you spoke to two years ago? A. Yes.

Mr. Ratner: That's all.

By Mr. McKenna:

Q. Two years ago where did you talk to that man? A. In his office.

30 Q. You were there talking to him for twenty minutes? A. Yes.

Mr. McKenna: That's all.

WILLIAM H. WHITTINGTON called as a witness on behalf of the State, being duly sworn, testifies as follows:

Direct Examination by Mr. McKenna:

40 Q. Mr. Whittington, where do you live? A. I live at 410 Langford Street, Asbury Park, New Jersey.

W. H. Whittington, for State, Direct.

Q. In March of last year you were married to Emma Whittington. Is that correct? A. That's right.

Q. In the month of March 1944 how many children did you have? A. Three.

Mr. Ratner: I object to that.

10

The Court: Is that material?

Mr. McKenna: No.

Q. What was your wife's condition in so far as pregnancy was concerned during the month of March 1944?

Mr. Ratner: I object to that on the ground that it calls for a medical conclusion.

The Court: Objection overruled.

20

Mr. Ratner: An exception.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. What was your wife's condition as to pregnancy in the month of March 1944? A. You mean how many months she was?

Q. Yes. A. I judge three and a half months.

Q. During the month of March did you come to the City of Newark? A. Yes.

30

Q. Do you remember when it was that you came to Newark? A. Approximately the 22nd.

Q. Where did you go to live? A. At Mrs. Maguire's.

Q. That was on the 22nd of March? A. I'm not definite on that but that's the approximate date.

Q. Where did you go to live? A. At Mrs.

40

W. H. Whittington, for State, Direct.

Maguire's at Pennington and Orchard, on the corner.

Q. On Friday or Saturday of that week did you have a conversation with your wife as to her condition? A. No, I didn't, sir.

10 Q. On Saturday morning did you have a conversation with your wife about her condition? A. No, sir.

Q. Did you have a conversation with your wife on Sunday? A. On Sunday evening.

Q. March 25? A. March 25.

Q. Did you discuss your wife's condition? A. All I know she said she was—

20 Q. Don't tell us any conversation. Did you discuss your wife's condition? A. I did.

Q. That was on Sunday, the 26th? A. Yes, sir.

Q. On Monday morning, the 27th, did you discuss your wife's condition? A. Yes.

Q. What time in the morning did you discuss it? A. About eight o'clock.

Q. What did your wife do that morning?

Mr. Ratner: If he knows.

30 Q. Yes, if you know. A. She said she was going—

The Court: You are giving us the conversation.

Q. We don't want the conversation. That's not allowed. You talked to your wife on Monday morning around eight o'clock? A. Yes.

Q. After you talked to her where did she go or what did she do?

40 Mr. Ratner: I object.

W. H. Whittington, for State, Direct.

By the Court:

Q. What did she do? Did she stay in the house or go out of the house? A. She went out of the house.

By Mr. McKenna:

10

Q. What time did she go out of the house? A. At half-past eight.

Q. How long was she gone? A. Two hours.

Q. You didn't go with her? A. No.

Q. You didn't follow her? A. No.

Q. Then she came back at 10:30? A. Yes.

Q. Did you talk to her about where she had been? A. Yes.

Q. She told you? A. Yes.

20

Q. What happened after that? A. I took care of her from then on.

Q. That was about what time on Monday? Eleven or 11:30? A. Yes.

Q. What did she do on Monday afternoon or Sunday evening?

Mr. Ratner: I must object to this line of questioning, your Honor.

The Court: He is asking you what you saw but not the conversation.

30

Q. What did you see your wife do Monday afternoon? A. Iron.

Q. What time did she go to bed? A. Around half-past nine.

Q. Did you go to bed with her? A. Yes.

Q. Did you sleep with her? A. Yes.

Q. What was her condition during the night?

Mr. Ratner: What condition?

40

W. H. Whittington, for State, Direct.

Q. What was her physical condition? A. Well, she seemed to be all right; she didn't complain.

10 Q. At what time did she get up on the following morning, Tuesday? A. Half-past ten or eleven o'clock.

Q. Did anything happen Tuesday morning? A. Around 9:30 Mr. Dillingham came in.

Q. You say Mr. Dillingham. Do you see Mr. Dillingham in court? A. I do, sir.

Q. Will you point him out? A. Right there, sir.

Mr. McKenna: The witness indicates the defendant.

20 Mr. Ratner: Admitted.

Q. He came about what time? A. About half-past nine.

Q. Who was there at the time he came? A. Mrs. Maguire.

Q. What did Dillingham say?

Mr. Ratner: I object to it on the ground it is a leading question.

The Court: If anything.

30 Mr. McKenna: "What did Dillingham say" is leading?

Mr. Ratner: Yes.

Q. Did Dillingham say anything? A. He took his hat and tilted it to the side of his head so I couldn't see him.

Mr. Ratner: I object to that, your Honor.

40 Q. He tilted his hat to the side of his head. What did he do? A. He talked to Mrs. Maguire.

W. H. Whittington, for State, Direct.

Q. Where did he go? A. Into the bedroom.

Q. Did you go into the bedroom with him? A. I asked him if I could and he said no.

Q. What did he do? A. He went into the bedroom and closed the door.

Q. How long was he in the bedroom? A. 10
Five or ten minutes.

Q. What happened when he came out? A. "Everything is going to plan."

Q. Everything is going as planned? A. Yes.

Q. Is that all he said, everything is going as planned? A. That's all.

Q. How long did he stay after that? A. He left.

Q. Did he say when he would come back or did 20
you see him after that? A. He said he would be back later on this afternoon.

Q. Did you see him later on that afternoon?
A. At 5:30.

Q. What did he do when he came in at 5:30?
A. The same as he did previously.

Q. What did he say or do? A. He went into the room and I asked him if I could go in with him and he said no. So, I stayed on the outside 30
and what went on I don't know.

Q. What went on when he came out? A. "Everything is going as planned."

Q. Then what happened? A. Well, I was taking care of the wife during the night.

Q. You were taking care of your wife during the night. A. She asked me around three—

Mr. Ratner: I object.

Q. Did anything happen during the night? 40

W. H. Whittington, for State, Direct.

Mr. Ratner: I object to that unless the defendant was present.

The Court: Objection overruled.

Q. What happened during the night? A.

10 Well, I started to tell you but I'm choked off.

The Court: The point is, Mr. Whittington, we don't want conversations between you and your wife.

The Witness: There was no conversation.

By the Court:

Q. What did you physically see or do or hear in the way of an involuntary explanation on the part of your wife? A. Well, she said she had—

20

Mr. Ratner: I object.

Q. You are giving conversation, you see. Did she cry out in pain? A. She didn't cry out in pain, no.

Q. What did happen? A. But I can't say what she asked. Is that it?

By Mr. McKenna:

Q. No, you can't say what she said. The defendant was not there and that's hearsay. A. I was watching over her the best I knew how. I should have called a doctor myself. I know that. She was bleeding.

30

Q. She was bleeding? A. Yes.

Q. Where was she bleeding from? A. From the womb.

Q. All right, go ahead. A. I didn't know what to do, whether you want to call it ignorance to the facts. So I did the best I knew how to do.

40

W. H. Whittington, for State, Direct.

Q. What was that?

Mr. Ratner: I object to that.

Q. What did you do?

Mr. Ratner: I object to it, your Honor.

The Court: Objection overruled.

Defendant's counsel prays an exception
to this ruling of the Court. 10

Exception noted as ground of appeal.

A. I didn't do anything to harm her in any way. I had disinfectant in the room and sterilization should be kept at any place whether sickness or what. But outside of that I didn't know what to do.

Q. What happened in the early morning? A.
I took her to the bathroom and was about ready
to sit her down and she passed out in my arms. 20

Q. What did you do after she passed out? A.
I carried her back to the bed a little panicky, I
suppose, and I went to rubbing her and I didn't
know what was wrong. So, we called Dr. Dilling-
ham.

Q. Who called Dr. Dillingham? A. My sis-
ter-in-law called him first.

By the Court: 30

Q. How did your sister-in-law come to call
him? Did you talk to your sister-in-law? A.
I told her to call him.

By Mr. McKenna:

Q. She went out and came back and what hap-
pened? A. I went out and called.

Q. What did you do when you went out? A.
I called Dr. Dillingham. 40

W. H. Whittington, for State, Direct.

Q. Where did you call from? A. From the apartment.

Q. The superintendent's apartment in the basement? A. Yes.

10 Q. Whom did you call? A. Dr. Dillingham.

Q. Where did you call him?

Mr. Ratner: I move that that be stricken out on the same grounds I gave before. There has been no evidence to indicate that the call was to Dr. Dillingham and that he answered the call.

The Court: Motion denied.

Mr. Ratner: I take an exception.

20 Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. What did you do when you went to the phone? How did you know whom to call? A. I had a book of matches.

Q. Where did you get the book of matches? A. I got them from my wife's pocketbook.

Q. What was on that book of matches? A. A telephone number.

30 Q. Of whom? A. Of his home address and of his office address.

Q. Where was his office address on the book of matches? A. It was Lincoln Park.

Q. Where was it? On the outside or on the inside? A. I believe it was on the inside but I'm not sure.

40 Q. Do you remember where his home was? A. Orange; I know that. It has stuck out in my mind.

W. H. Whittington, for State, Direct.

Q. You called the Newark number or the Orange number at that hour. Do you remember?

A. I don't remember which I called. I know I got him.

Q. What did you say when you got the number you were dialing? A. I asked for Dr. Dillingham. 10

Q. What did the voice on the other end of the phone respond? A. I told him I had called the ambulance and he says—

Q. What did the voice on the other end say when you called Dr. Dillingham?

Mr. Ratner: I object on the ground that there has been no connection yet to identify the voice on the other end as the voice of Dr. Dillingham. 20

The Court: Your motion is premature.

Mr. Ratner: An exception.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. What did you say when you got the response on the other end of the phone? A. I told him my wife was in bad condition. 30

Q. Did you ask, "Who is this?" A. Naturally I said, "Who is this?"

Q. We have to know that. What was said?

A. "Who is this? Dr. Dillingham?"

Q. You asked, "Who is this? Dr. Dillingham?" A. Yes.

Q. What did the voice on the other end say?

A. He asked, "Is anything wrong?" And I said, "Yes." 40

W. H. Whittington, for State, Cross.

Q. Did you say who you were? A. No, not that I remember of.

Q. What did you say to him? A. I believe he asked me who I was.

10 Mr. Ratner: I object.

The Court: Objection overruled.

Mr. Ratner: An exception.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. You believe he asked you what? A. "Who is it?" And I replied.

20 Q. What did you reply? A. "Mr. Whittington. My wife is in bad shape. Will you come over right away, please?"

Q. What did he say? A. When I said I called the ambulance he said, "You won't need me any more." So, I didn't see him after that.

Q. Did the ambulance come? A. Yes.

Q. To where was your wife taken? A. To the hospital; I really don't recall the name of it. At that time anybody would have been upside down.

30 Q. That's the last you saw her alive? A. That's right.

Mr. McKenna: That's all. You may cross-examine.

CROSS EXAMINATION by Mr. Ratner:

Q. The telephone conversation that you had with the alleged Dr. Dillingham was the first you ever had with Dr. Dillingham? A. Yes.

40 Mr. Ratner: If your Honor please, I move to strike out his testimony on the ground that—

W. H. Whittington, for State, Cross.

Mr. McKenna: I object, your Honor. I don't think it should be stricken out. It is for the jury themselves to evaluate.

Mr. Ratner: I move to strike out his testimony on the ground that the witness testified the first time he spoke to the alleged Dr. Dillingham was when he called him on the telephone. It cannot be said by any stretch of the imagination that it was the defendant because we must first have a prior conversation, so the jury might infer that it was the same voice the second time as it was the first time. That's common logic. 10

The Court: We must still exercise our reasoning in admitting evidence. Here was an individual on the receiving end who recognized the situation. He could not have recognized that situation had he been an entire stranger to it. 20

Mr. Ratner: There was nothing unusual about the situation. There could have been another Dillingham who could have been a doctor. 30

The Court: Yes, but that other doctor and that other Dillingham would not have recognized the situation.

Mr. Ratner: There was nothing, your Honor, about the testimony to make any specific situation.

Mr. McKenna: May I interject, your Honor? That's why I asked counsel after he opened to the jury for a fuller opening. 40

W. H. Whittington, for State, Cross.

10 Mr. Ratner: I didn't have to do that under the law. I object to it on the ground that there has been no identification of the defendant in the conversation which this witness said he had on the occasion when he made the phone call at 3:30 in the morning on that day, whatever day it was.

The Court: Of course, it is quite possible that some third party may have fitted right into the picture unwittingly; on the other hand, it is quite possible not. The jury must say.

Mr. Ratner: An exception.

20 Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Now, Mr. Whittington, how do you know that you came to Newark on March 22, 1944? A. I only drove the car up here to get here.

Q. How do you remember it was the 22nd? A. I don't remember exactly.

30 Q. And you don't remember that it was the 27th either. Isn't that so? A. I do remember that.

Q. How do you remember it was the 27th? A. I happened to be there.

Q. Where? A. At Mrs. Maguire's home.

Q. When did you first come there? A. I said approximately the 22nd.

40 Q. You don't know and you cannot testify under oath, can you, that on Monday the 27th your wife left your home around eight or 8:30 in the morning to go somewhere? A. Yes, I can.

W. H. Whittington, for State, Cross.

Q. You can definitely fix it as the 27th? A. Yes.

Q. Did you look at a calendar or is that your best recollection that it was the 27th? A. That's what I know.

Q. What? A. That's what I know. 10

Q. You know that. When she came back from her journey there isn't any question that she started to do some ironing? A. Yes.

Q. She was perfectly all right, wasn't she? A. She seemed to be.

Q. How long did she iron that day? A. An hour, I guess.

Q. She still felt all right, didn't she? A. She sat down and didn't complain. 20

Q. Now, let us pass over some of the immaterial things. Where is the match box from which you called the doctor? A. I laid that match box down and it was mysteriously taken.

Mr. Ratner: I move to strike out the statement that it was mysteriously taken.

The Court: Strike out the word mysteriously.

Q. You had the match box, didn't you? A. Yes. 30

Q. What kind of a match box was it? Can you describe it? A. It had a picture of sort of a house on the outside, orange and different colors on it.

Q. You say the match box had a number on it? A. It had two numbers.

Q. You didn't know what that number represented when you got the match box, did you? A. I was told, yes. 40

W. H. Whittington, for State, Cross.

Q. By your wife? A. Yes.

Q. Was it in your wife's handwriting or don't you know? A. There was no handwriting; it was printed.

- 10 Q. Was the number printed, too? A. Yes.
Q. Are you sure of that? A. Yes.
Q. You are positive?

By the Court:

Q. By printed do you mean by a machine or a typewriter or by hand or what? A. It was factory cigarettes or match boxes, rather. I imagine it was more or less for advertising.

By Mr. Ratner:

- 20 Q. Was the number printed? A. Yes.
Q. The number was printed? A. Yes.
Q. The same as newspaper print? A. Capital print.

Q. What about the telephone number? Was that in pencil or in ink? A. No.

Q. Do you recall that number now? A. No, I don't.

- 30 Q. How many more match boxes were there in this pocketbook belonging to your wife? A. One of that particular type.

Q. There were others, too? A. No, she didn't smoke.

Q. So, there was only one match box of that particular type? A. Yes.

Q. You thought that number represented the telephone number of Dr. Dillingham? A. She told me it did.

- 40 Q. And you knew that that was a very important number to hold? A. Why, certainly.

W. H. Whittington, for State, Cross.

Q. Why did you let it out of your possession if you knew it was so important to keep? You have no answer for that. A. It had to be a doctor, didn't it?

Q. You knew that your wife was seriously ill and you knew that the phone number on that match box was very important. Why didn't you keep it? A. Why didn't I keep it? 10

Q. Yes. A. I went back for that match box but it didn't happen to be where I laid it.

Q. What? A. I was refused to have it returned to me. I asked for it at the person's house where I happened to leave it lay through excitement.

Q. Whose house was it Mrs. Maguire's? A. 20
No.

Q. Whose house was it? A. Her landlady.

Q. What was her name? A. I don't know.

Q. What were you doing in this landlady's house? A. I don't know her name, Mrs. Maguire.

Q. It was Mrs. Maguire's landlady's house? A. Yes.

Q. What time was that? 3:30 in the morning? A. Yes. 30

Q. Do you mean to say you woke up your neighbor at 3:30 in the morning? A. I would have woke up hell itself if I thought I could do anything about it.

Q. You mean to say you left the match box there? A. Yes.

Q. You mean to say that your friend, your landlady— A. I didn't know her.

Q. But her daughter testified here this morning? A. Did she? 40

W. H. Whittington, for State, Cross.

Q. You remember the young lady who testified here. Her mother's name was Sternberg. Do you mean to say that that lady refused to give you your match box? A. I didn't have the match box.

10 Q. You testified that you left that match box in the landlady's house. A. Through excitement I did.

Q. And she refused to give it to you. Is that what you said? A. That's what I said.

Q. That's not so, is it? A. Yes.

Q. Why did they refuse to give it back to you? A. Why? I don't know.

Q. They were your friends, weren't they? 20 Now, let me show you a card, sir. Do you recognize that kind of card? A. No.

Q. You are sure that your wife didn't have that card in her purse? A. No, I'm not sure if she did or not.

Q. What? A. I say I'm not sure.

Q. You didn't find that card that had the phone numbers on it: Horace Lynn Dillingham, D. S. C., surgeon chiropodist? A. No.

30 Q. You don't remember that card? A. No.

Mr. Ratner: I ask that it be marked for identification.

(The card bearing the name Horace Lynn Dillingham, D. S. C., was marked Exhibit D-1 for identification.)

Mr. McKenna: What is the purpose of having it marked for identification?

Mr. Ratner: I am offering it.

40 Mr. McKenna: What is the defense?

W. H. Whittington, for State, Cross.

Mr. Ratner: You will find out when I put it in.

The Court: He may mark it.

Q. Did you make a statement to the police department after your wife died, Mr. Whittington? A. That's correct. 10

Q. Do you swear now under oath that when you were examined by the police officer in the Police Department you told him that the match box was laid in the apartment of Sternberg and that you asked Sternberg for it and they refused to give it to you?

Mr. McKenna: I object to the question.

Mr. Ratner: It is for the purpose of attacking the credibility of this witness to find out where the truth lies. 20

The Court: He may ask the question.

Mr. McKenna: He isn't laying any foundation but is arguing with the witness.

The Court: He may ask the question.

Q. You were examined by the police, weren't you? A. I was.

Q. At police headquarters? A. Yes, sir.

Q. No one threatened you? A. No. 30

Q. They were decent and considerate? A. Yes.

Q. They asked if you wanted to make a statement or words to that effect? A. Yes, sir.

Q. And you said you would? A. Yes.

Q. Then, willingly, intelligently and voluntarily you made a statement, didn't you? A. Yes.

Q. And in that statement you spoke about a match box? A. Yes. 40

W. H. Whittington, for State, Cross.

Q. But in that statement you didn't tell them that you left that match box in the home or the apartment of Sternberg, did you? A. Yes, sir.

Q. Are you positive of that? A. Yes, sir.

10 Q. Did you tell them that they would not give it back to you? A. Yes.

Mr. Ratner: I call for the statement.

Mr. McKenna: I object to it. I don't think counsel is entitled to any statement.

Mr. Ratner: All right. If your Honor will permit me I will serve a subpoena for it and give the usual fee.

The Court: The statement may be produced.

20 Mr. Ratner: So there will be no question about the statement I am directing my question with respect to the statement which he made to the police and nothing more. I want him to point out where he told the police about the match box.

Mr. McKenna: If your Honor please, I will submit the statement to your Honor.

30 Mr. Ratner: I'm not offering the statement, your Honor.

The Court: It will have to go in evidence.

40 Mr. Ratner: If your Honor please, I am going to ask him to point out in this statement that portion only where he told the police that he had mislaid the match box or that it was placed in Sternberg's apartment and they refused to give it to him, and nothing more. He has a right to point it out to me and the statement does not have to go in evidence *in toto*.

W. H. Whittington, for State, Cross.

The Court: That may or may not be so.

Mr. Ratner: I'm entitled to a ruling on that.

The Court: I have not had an opportunity to read the statement or to hear under what circumstances it was given. I repeat it may or may not go in. 10

Mr. Ratner: I haven't seen the statement or read it, your Honor.

Q. Point out the paragraph in the statement where you told them about the match box. Will that refresh your memory? A. It don't need to be refreshed.

Q. I show you the statement and ask you to point out where you told them about the match box. A. It's right here. 20

Q. Read that part of it where you say you left it in Sternberg's apartment.

Mr. McKenna: You didn't see the statement?

Mr. Ratner: No, I didn't see the statement.

Mr. McKenna: You're telling him to read that part of the statement when you haven't read the statement yourself. 30

Q. Point out in that statement where you told them about Sternberg's apartment.

The Court: Answer the question.

Q. Are you through, sir? A. You can have it.

Q. I don't want to read it. I am taking a chance with you. Show me in that statement 40

W. H. Whittington, for State, Cross.

any words with respect to your leaving a match box in an apartment belonging to Sternberg and your asking for it and Sternberg refused to give it back to you. A. There's the match there.

10 Q. Read me Sternberg's story in that statement. A. Sternberg didn't have any story on it.

Q. You said you went into Sternberg's apartment, woke them up, left the match box in there, lost it in there and they refused to give it back to you. If the jury had the match box it would indicate the telephone number, wouldn't it? Is there anything in there about the Sternberg apartment? A. "My wife told me there was a box of
20 matches in her pocket book with the name of the doctor and his address and phone number that she got at the doctor's office."

Mr. McKenna: If your Honor please, I have no objection to this statement going into evidence.

Mr. Ratner: I haven't read it. I can't let it go in. I just asked this witness about that match box.

30 A. Here it is, right here.

The Court: Read it.

Q. Read the entire statement pertaining to the match box. A. "On Tuesday, my wife told me there was a box of matches in her pocketbook with the name of the doctor and his address and phone number that she got at the doctor's office. Before the doctor came I called this doctor on the phone at 188 Tremont Avenue, Orange. I told
40 him my wife was very sick and would he come to my house right away. He stuttered and I told

L. Maguire, for State, Direct.

him the ambulance was coming, and he said, 'Well, you don't need me if the ambulance is coming,' ' which is correct, sir.

Q. There is nothing about Sternberg in there?

A. I don't see anything there.

Q. There is nothing about leaving a match box in Sternberg's house? A. Nothing at all. 10

Q. There is nothing about their refusal to give you the match box back? A. Nothing that I see.

Q. Do you now recall the card? A. No.

Q. Would you say there wasn't a card in your wife's pocketbook from which you called Dillingham? A. That's right. I say there wasn't because I didn't see a card.

Q. Is Mrs. Sternberg here in court? A. Only her daughter. 20

Q. Was her daughter there when you asked for the match box? A. I don't know if she was or not.

Q. You didn't go with your wife on that Monday? A. No, I didn't, sir.

Mr. Ratner: No further questions.

(The Court declares a recess from one to two p. m.) 30

Afternoon session.

LYDIA MAGUIRE called as a witness on behalf of the State, being duly sworn, testifies as follows:

Direct Examination by Mr. McKenna:

Q. Mrs. Maguire, where do you live? A. 141 Orchard Street. 40

L. Maguire, for State, Direct.

Q. You lived there during the month of March in 1944? A. Yes.

Q. Did you have a sister by the name of Emma Whittington? A. Yes.

10 Q. She was married to William Whittington, the last witness on the stand? A. That's right.

Q. When did she come to live with you at the Newark address? A. On March 22.

Q. Did you have a conversation with her after she came about her condition? A. Yes, I did.

Q. When did you have that conversation? A. On Friday night.

20 Q. After talking about her condition what did you do about it? A. I went over to the superintendent's apartment.

Q. That is, Mrs. Sternberg? A. Yes.

Q. Whom did you see there? A. Mrs. Vetter.

Q. Did you have a talk with Mrs. Vetter? A. Yes.

Q. After you had finished your talk with Mrs. Vetter, what did Mrs. Vetter do and what did you do? A. I brought her over to my apartment and asked her to talk to my sister.

30 Q. Did she talk to your sister? A. Yes.

Q. How long did she talk to her? A. About an hour.

Q. After that conversation she went out. Did you see her again the following day? A. Yes, she was back in my apartment.

Q. She talked to your sister? A. Yes.

Q. You heard the conversation? A. Yes.

40 Q. Did your sister stay at your house on Sunday? A. Yes.

L. Maguire, for State, Direct.

Q. Did you see your sister on Monday? A. Yes.

Q. What did she do on Monday? A. About 8:30 she went out of the house and she said she was going—

Mr. Ratner: I object, your Honor. 10

Q. Don't tell us what she said. She went out of the house at 8:30? A. Yes.

Q. You had a conversation with her prior to her leaving? A. Yes.

Q. How long was she gone? A. About two hours.

Q. When she came back did you talk to her? A. Yes.

Q. She told you certain things. Is that correct? A. Yes. 20

Q. What did she do during the day about the house? A. She did my wash and my ironing.

Q. What time did she go to bed? A. Around ten or 10:30.

Q. Did you see her during the night? A. No.

Q. On the following morning did you talk to her or did you have a conversation with her? A. Yes. 30

Q. What time of the morning was it? A. About 9:30, I would say, or nine o'clock, I guess.

Q. What? A. About nine.

Q. After you talked to her did you do anything? A. She said she wasn't feeling well.

Mr. Ratner: I object.

Q. What did you do after you talked to her? A. She asked me to call the doctor.

Q. Where did you go? A. Into Mrs. Stern- 40
berg's apartment.

L. Maguire, for State, Direct.

Q. What did you do at the telephone? A. I had the book of matches. I dialed Dr. Dillingham's number.

Q. Where? A. At 60 Park Place.

10 Q. Was there a response to the telephone call?
A. Yes.

Q. What did you say and what was said in the response?

Mr. Ratner: I object, your Honor, on the ground that there has been no identification that the person she was speaking to was Dr. Dillingham.

The Court: Your objection is prompt but premature.

20 Mr. Ratner: May I reserve my objection until later?

The Court: Yes.

Q. What was said? A. I said, "Is this Dr. Dillingham?" And he said, "Yes." I said, "I'm calling for my sister, Mrs. Whittington. She isn't feeling well. She would like you to come down and look at her." He said, "All right, I will."

30 Q. Was anything else said? A. Yes.

Q. How soon afterward did you see him? A. A half hour later.

Q. Who came in later? A. Dr. Dillingham.

Q. Do you see Dr. Dillingham in court? A. Yes.

Mr. McKenna: The witness indicates the defendant, Horace Dillingham.

Mr. Ratner: Admitted.

40 Q. What did he do? A. He went into the bedroom and shut the door.

L. Maguire, for State, Direct.

Q. Did he say anything to you? A. No, I went to the store.

Q. Did you see him when he came out? A. No.

Q. Did you see him again? A. Yes, about 5:30. 10

Q. What happened at that time? A. He went into the bedroom and shut the door; and he came out after five or ten minutes and he said everything was going according to plan and that she would be all right in the morning; that there was nothing to worry about.

Q. What happened then? A. She went to bed and I went to bed and at a quarter to three she called me. 20

Q. What did you do? Did you go to her? A. I went in the room and she asked me for a glass of—

Mr. Ratner: I object.

Q. What did you do? A. I went in to get my baby who was crying and she asked me for a glass of water.

Q. Did you give her a glass of water? A. Yes.

Q. What else happened? 30

The Court: Do not give us conversation.

A. I asked her if she wanted anything else. Is that all right?

The Court: No.

Q. Did she make any exclamations? A. No.

Q. Can you describe her condition? A. No.

Mr. Ratner: I object to that as calling for a conclusion. 40

L. Maguire, for State, Direct.

The Court: Not necessarily.

Mr. Ratner: The question is objectionable, your Honor, on the ground that it's too broad in its scope.

10 By the Court:

Q. Did she appear in normal condition or not? A. No, she was in great pain.

By Mr. McKenna:

Q. She was in great pain. What happened after that? A. I went back to bed and about three-quarters of an hour later my brother-in-law called me and he said—

20 Q. Don't tell us what he said. He called you and— A. And asked me to get an ambulance.

Mr. Ratner: I object to that.

Q. After he said something to you what did you do? A. I went into Mrs. Sternberg's apartment.

Q. Whom did you see? A. Mrs. Sternberg and I called Dr. Dillingham's office address, but I didn't get no answer.

30 Q. What did you do then? A. At that time my brother-in-law had come in and we were looking in the phone book for his home address and he said, "Here it is on the inside cover of the book match."

Mr. Ratner: I move that that be stricken out on the ground that it is hearsay.

The Court: Strike out what he said.

40 Q. What did you see? A. I saw it on the inside cover of the matches and then we called that number.

L. Maguire, for State, Direct.

Q. Who did? A. I did.

Q. When you dialed the number what number was it? A. It was an Orange number but I can't remember it.

Q. When you dialed that number was there a response on the other end? A. Yes. 10

Q. What was said on the other end and what did you say? A. I asked, "Is this Dr. Dillingham?" And he said "yes." I said, "Mrs. Whittington has collapsed in the bathroom and is blue and you had better come right away." He said, "I think you are just a little bit excited but I will be down in about an hour." I still was excited and I said, "I think you had better come before that." And he said, "All right, I will come as soon as I can." Then, my brother-in-law called him and he says— 20

Mr. Ratner: I object.

Q. Your brother-in-law called him also? A. Yes.

Q. You were still there? A. Yes.

Q. Was another call made any place that you know of? A. No.

Q. Not to your knowledge? A. What do you mean? 30

Mr. Ratner: She said no.

Q. What happened after those calls? Did anybody come to the place? A. Yes.

Q. (Continuing) To see your sister? A. Yes.

Q. Who came? A. Dr. Dillingham.

Q. Before that was your sister there at the time? A. No. 40

L. Maguire, for State, Direct.

Q. Where was your sister at that time? A. She had been taken to the hospital in an ambulance.

10 Q. About what time was that? A. 4:30 or a quarter to five.

Q. You were still at the house? A. Yes.

Q. Where was Mr. Whittington, her husband?
A. He had gone in the ambulance with my sister.

By the Court:

Q. Did Dr. Dillingham come to the house after—

Mr. McKenna: I will develop that, your Honor.

20 By Mr. McKenna:

Q. Now, after the ambulance had gone you went into Mrs. Sternberg's apartment, is that right? A. Yes.

Q. Whom did you see there? A. I saw her and Dr. Dillingham.

Q. This man here? A. Yes.

Q. What time was that? A. About five o'clock.

30 By the Court:

Q. In the morning? A. Yes.

By Mr. McKenna:

Q. Did he come into your apartment? A. Yes.

Q. How long were you in the Sternberg apartment? A. Just a few minutes. I went over to tell her that she had died.

40 Q. And he was there? A. He was there.

L. Maguire, for State, Direct.

Q. How long was he there while you were there? A. Well, I was there about five minutes.

Q. He was talking to Mrs. Sternberg. Is that correct? A. Yes.

Q. Did you tell Mr. Whittington about Dr. Dillingham's being there? 10

Mr. Ratner: I object to the question as entirely leading.

Q. Was Mr. Whittington there at the time? A. No, he wasn't.

Q. So far as you know he didn't see Dr. Dillingham? A. No, he didn't see him.

Q. Did you have any conversation with Dr. Dillingham that morning? A. No, I didn't.

Q. Mrs. Sternberg had the conversation? A. 20 Yes.

Mr. McKenna: That's all. You may cross examine.

Mr. Ratner: No questions. Now, if your Honor please, I move to strike out the testimony of this witness, having reserved the right to do so, on the ground that the testimony given by this witness concerning any telephone conversation she had 30 with the presumed person by the name of Dillingham on the other end of the wire did not in any way indicate that the person on the other end of the wire was the defendant in this case. On that ground there has been no proper identification that the person with whom she spoke was the defendant. Her testimony is of no value in these proceedings and I ask that it be stricken 40 from the record.

R. Sternberg, for State, Direct.

The Court: He was asked to come and he came.

Mr. Ratner: That doesn't prove that he came because of the telephone conversation.

10

The Court: It is only evidence for the jury.

Mr. Ratner: Your Honor overrules my objection?

The Court: Yes.

Mr. Ratner: May I have an exception?

The Court: Granted.

Defendant's counsel prays an exception to this ruling of the Court.

20

Exception noted as ground of appeal.

RACHAEL STERNBERG, called as a witness on behalf of the State, being duly sworn, testifies as follows:

Direct Examination by Mr. McKenna:

Q. Mrs. Sternberg, where do you live? A.
30 29 Pennington Street, Newark.

Q. You are the superintendent of the apartment house? A. I am.

Q. In March 1944 did a family by the name of Maguire live on the basement floor? A. Yes.

Q. As a matter of fact they still live there, don't they? A. Yes.

Q. During the month of March did a family by the name of Whittington come to live with the Maguires? A. Yes.
40

R. Sternberg, for State, Direct.

Q. Please keep your voice up. Do you remember when that was or don't you? A. I couldn't say definitely. I know it wasn't warm weather at the time.

Q. You have a daughter by the name of Mrs. Vetter? A. I do. 10

Q. She lives on the second floor? A. Yes.

Q. She takes her meals with you? A. Yes.

Q. Were you present on Friday night when Mrs. Maguire or Mr. Whittington came to the apartment? A. No.

Q. You were not there. Were you present on Saturday when your daughter had a conversation? A. No.

Q. Or on Sunday? A. No. 20

Q. Nor did you see Mrs. Whittington on Monday? A. No.

Q. Now, coming to Wednesday morning, the 29th, did anybody come to your apartment in the early morning? A. Mrs. Maguire and her brother-in-law came about four o'clock and woke me up.

Q. What did they do when they came to your apartment and woke you up? A. She told me— 30

Q. No. What did they do in your apartment? A. They asked to use the telephone.

Q. Did they use the telephone? A. They did.

Q. Do you know from the conversation whom they called?

Mr. Ratner: I object to that.

Q. Was there a call? A. Yes, they made two calls.

Q. Then, do you know whether any automobile 40

R. Sternberg, for State, Direct.

or anybody came to the house? Did the ambulance come? A. He made a call; he made one call. He took up the receiver and called the operator, I think, and he told her what was the matter. He said that his wife was sick.

10 Q. The ambulance came after he talked to the operator. Is that correct? A. That's right.

Q. Then, after that did anyone else come into your apartment later on? A. Well, after they called I called.

Q. Whom did you call? A. I called the number that was on the matches that were laying there.

20 Q. Who left the matches, Mrs. Sternberg?
A. The husband had this package of matches and he laid it down there. And after they left I called this doctor on the phone.

Q. From what number, Mrs. Sternberg? A. From the number that was inside the match cover.

Q. When you got the telephone call what was the conversation? What did you say? A. I asked if he was Dr. Dillingham and he said yes. And all I said—

30 Mr. Ratner: I make the same objection to this testimony as I did to the testimony of Mrs. Lydia Maguire on the ground that the testimony about to be given does not in any way connect the conversation with the defendant. It may be any Dr. Dillingham unless the Prosecutor is prepared to say—

Mr. McKenna: I am.

40 Mr. Ratner: (Continuing) That it was

R. Sternberg, for State, Direct.

this particular doctor with whom she had the conversation. I think it is objectionable and I so state.

Mr. McKenna: I am.

The Court: Reserve your motion.

Q. You talked to a man who said he was Dr. Dillingham. What did you say to him? A. I told him that the woman was very bad and he had better come down and see what he could do. 10

Q. What did he say? A. He said he would come down.

Q. Did he come down? A. Yes, he did.

Q. How soon after? A. I couldn't say definitely; not long. Maybe ten or fifteen minutes.

Q. Where did he come to when he came down? A. He rang the bell and came into my apartment. 20

Q. Did you see him? A. Yes.

Q. Who was the man who came to your door? Look around the court room to see if you see him. Do you see him? A. Yes, I do.

Q. What? A. I do.

Q. Will you point him out, please?

Mr. Ratner: We admit that this is the defendant. 30

Q. Is that the man you saw whom counsel indicates? A. It looks like the man.

Q. Is that the man? A. I would say it was the man.

The Court: It is admitted.

Q. Did you know him? A. Yes, I knew him.

Q. How long did you know him? A. I don't know, a year or two. 40

R. Sternberg, for State, Direct.

Q. Had you ever seen him before? A. Yes, I had seen him before.

Q. Where had you see him? A. I saw him when he came to see my daughter.

10 Q. Did you have a conversation with Dr. Dillingham when he came in that morning? What did you say to him? A. The same as I said on the telephone—no, I said the woman was gone to the hospital and he said there was nothing he could do.

Q. What else happened? A. And Mrs. Maguire came to the door and said she was dead.

20 Q. Mrs. Maguire came there while he was there? A. To my door and came in and she said she was dead; the woman was dead.

Q. What did Dr. Dillingham say?

Mr. Ratner: I object to the question on the ground it is leading.

The Court: Objection overruled.

Q. What did Dr. Dillingham say after she said she was dead? A. He didn't say anything.

Mr. Ratner: Exception.

30 Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. What else happened? A. This package of matches was laying there and I said to him, "These are yours. You had better take them with you and get out."

Q. And you gave them to him? A. Yes.

Q. Did he get out? A. He left.

40 Q. Did Mr. Whittington ask you for these matches? A. He did, and I couldn't give them

R. Sternberg, for State, Cross.

to him because I didn't have them. I had already given them away.

Mr. McKenna: That's all.

CROSS EXAMINATION by Mr. Ratner:

Q. Did you make a statement to the police, 10
Mrs. Sternberg? A. No.

Q. Didn't you make a statement to the police about his case?

By the Court:

Q. Did you make a statement to the police?

A. Yes, I think I did.

By Mr. Ratner:

Q. Don't you know? A. I did, yes. 20

Q. In the statement that you made to the police did you say that you gave the package of matches to Dr. Dillingham? A. No, I didn't.

Q. Where were you between one and two o'clock? A. I was home.

Q. You were down in the Prosecutor's office, weren't you? A. I was home.

Q. Were you in the Prosecutor's office? A. I was home; at half-past one I left home.

Q. At what time were you in the Prosecutor's 30
office? A. About twenty minutes of two.

Q. Did you have a conversation with someone? A. My daughter was there.

Q. Did you talk to someone from the Prosecutor's office? A. I did.

Q. You talked about this case? A. Yes.

Q. You were not in court this morning when Mr. Whittington testified, were you? A. No.

Q. You didn't hear the testimony about Mr. 40

R. Sternberg, for State, Re-direct.

Whittington leaving the matches in your apartment, did you? A. I know—

Q. Wait a minute. A. I didn't hear the testimony, no.

10 Q. The conversation in the Prosecutor's office was whether or not you remembered the testimony that Mr. Whittington gave about leaving matches in your apartment. That's true, isn't it? A. Yes.

Mr. Ratner: That's all.

RE-DIRECT EXAMINATION by Mr. McKenna:

20 Q. Mrs. Sternberg, didn't you tell me this story after your daughter had told you—

Mr. Ratner: I object to that. This is not proper re-direct examination.

The Court: Counsel, you have sought to leave the impression that the Prosecutor put the story in her mouth, haven't you?

Mr. Ratner: The Prosecutor didn't do anything.

30 The Court: Sit down and listen to the re-direct examination.

Mr. Ratner: I take an exception to your Honor's ruling.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Mrs. Sternberg, did I ask you anything other than what happened there that morning?

A. That's all.

40 Q. Is that right? A. That's right.

R. Sternberg, for State, Re-cross.

Q. I had talked this case over with you previously. Had you ever told me about these matches before? A. I never mentioned it.

Q. I asked you whether there was anything else you wanted to tell. A. That's right.

Q. You told me for the first time about Dillingham coming there at five o'clock? A. Yes. 10

Q. Is that the truth? A. That's the truth.

Mr. McKenna: That's all.

RE-CROSS EXAMINATION by Mr. Ratner:

Q. My dear lady, you didn't know who owned those matches, did you?

Mr. McKenna: That's a broad question, if your Honor please. 20

Mr. Ratner: You tried to explain your presence with this woman. Let's see what she knew about matches.

Q. You don't know where these matches, about which you talk, came from? That's true, isn't it? A. No, it isn't true. I knew where they came from.

Q. Did you see those matches passed to somebody? A. Those matches were—

Q. Just a minute. Answer my question. A. 30
The matches were brought in my house.

Q. Did you see those matches passed to anybody before they reached your apartment? A. No.

By the Court:

Q. How do you know where they came from?
A. Because her husband brought them in when he came to telephone. He had the matches with him. 40

T. J. Bermingham, for State, Direct.

By Mr. Ratner:

Q. That's all you know about it. Isn't that right, Mrs. Sternberg? A. That's right.

Q. You gave the matches to Dr. Dillingham even though you knew the husband brought them
10 into the apartment? A. That's right.

Q. Did you at any time refuse to give the matches back to Mr. Whittington? A. I did; I didn't have them.

Q. You didn't refuse them, did you? A. I didn't refuse them; I didn't have them.

Mr. Ratner: That's all.

20 THOMAS J. BERMINGHAM, called as a witness on behalf of the State, being duly sworn, testifies as follows:

Direct Examination by Mr. McKenna:

Q. Lieutenant Bermingham, you are a member of the Newark Police Department? A. Yes.

Q. You are the lieutenant in charge of the Casualty Division at Newark Headquarters? A. Yes.

30 Q. Lieutenant, do you know where Dr. Dillingham had his office on March 27, last year? A. Yes.

Mr. Ratner: I object to it on the ground that it is immaterial.

Q. Do you know of your own knowledge? A. Of my own knowledge.

40 Mr. Ratner: Just a minute. It has nothing to do with the indictment laid against this defendant.

Motions.

The Court: Objection overruled.

Mr. Ratner: I ask for an exception.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Where was his place of business? A. 10
In the Military Park Building.

Q. What was his business there? A. He
was a chiropodist.

Q. Do you know where he lived in the month
of March 1944? A. On Tremont Avenue.

Q. Where? A. In Orange, I believe.

Q. You made the arrest in this matter, Lieutenant? A. Yes.

Mr. McKenna: That's all. 20

Mr. Ratner: No questions.

(Discussion between Court and counsel.)

The Court: The jury will kindly retire
to the jury room.

(The jury retires to the jury room.)

Mr. Ratner: If your Honor please, this
is a motion for acquittal. In this indictment
it is charged substantially that on
the 27th day of March 1944 the defendant 30
maliciously and without lawful justification,
with intent to cause and procure the miscarriage
of Emma Whittington, a woman then pregnant
with child did use in and upon the said Emma
Whittington divers instruments and means, to the
grand jurors aforesaid unknown, in consequence
whereof the said Emma Whittington died
contrary to the form of the statute and so 40
forth.

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10 Now, I don't have to tell your Honor what the law is in this state. You have listened and determined more cases than I will probably try at the bar. But I owe a duty to the defendant which I am obligated to perform. My own opinions do not count. My duty to the defendant is important. The law is well settled in this state that before you, as the presiding judge, can send this serious allegation to the jury you must have *prima facie* proof that this defendant, one, performed the unlawful act of abortion maliciously with unlawful intent and that the person upon
20 whom it was performed was pregnant and that he knew or had suspicion that she was pregnant.

I ask your Honor to search your mind on the proofs. Where is there any proof, assuming the proofs are clear, that this lady was pregnant four and a half months? Where is there any proof in the case, which you can send to the jury, which is by inference—I will even go that far—sufficient in itself to send to the jury, or by positive evidence that the defendant knew, one, that he did the act; and assuming for the sake of the motion that he did, two, that he knew she was pregnant; and, three, that there was suspicion in his mind that she was pregnant and did thereupon maliciously and unlawfully intend to use a catheter on this lady. The answer is that there is no
30
40 proof.

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All we have to tie this man with this crime is a telephone call to his home, for the sake of the motion, and his coming down there and looking at the woman. There is no proof that he looked at her uterus or any part of the body where the abortion could have been performed or intended to be performed; and said it was going according to plan, stayed for five or ten minutes and then left. The ingredient is not there. 10

Who said that the lady, one, came to Dillingham's office or to his home or anywhere where Dillingham was present and could have performed this unlawful operation? The answer is no one. Who said the woman had it done by Dillingham? No one. Who said Dillingham said she was pregnant? No one. Who said he had a suspicion that she was pregnant? No one. The ingredient to the crime is lacking. He is entitled to an acquittal at the direction of this Court. 20

In support of that, I give you the case of *State v. Loomis*, 89 N. J. L. 8, affirmed by the Court of Errors and Appeals, 90 N. J. L. 216. 30

The Court: You are pointing out the Court of Errors and Appeals opinion?

Mr. Ratner: No, the Supreme Court opinion.

The Court: What is the particular principle which is pertinent here?

Mr. Ratner: That you have to show he did the abortion and that when he did it 40

Motions.

10 he knew or had suspicion that she was pregnant. But that's not in this case. Unfortunately, the Prosecutor did not show it, and the defendant is entitled to the weakness of the State's case. Another very important point probably overlooked by the Prosecutor is that in this kind of case you have to fix definitely the date when the unlawful act took place. You can't speculate that maybe it happened on the 27th, before or after. He has to show by positive proof—

The Court: Are you sure about that?

20 Mr. Ratner: I will show your Honor the case. It is *State v. Shapiro*, 89 N. J. L. 319. (Counsel argues.)

The Court: Well, you can't call a dead person to the stand and you can't compel the defendant to take the stand. That's the first fact that stares us in the face.

Mr. Ratner: It's just one of those unfortunate cases.

30 The Court: I think I have been the one at fault here. Both of you came up here and talked to me after this testimony went in about one of the witnesses, Mrs. Vetter, I think, talking to the doctor and saying: "Can you do another job like that you did for me," or words to that effect.

Mr. Ratner: That's what she said.

40 The Court: The Prosecutor then asked me whether that did not open up the situation two years ago. I said I think it opens up your right to go into how you recognized

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his voice from what occurred two years ago and that's all. Now, at the time I certainly did not have in mind what you apparently did, Mr. Ratner, namely this question of suspicion and so on. Therefore, if I did unduly restrict the Prosecutor I must take it back now. 10

(Counsel argues.)

Mr. Ratner: I move for an acquittal on the grounds stated. I respectfully submit that the defendant is entitled to a direction of acquittal at the hands of this Court.

Mr. McKenna: If your Honor please, I feel that the words: "Are you still in business for a job," are susceptible of the jury's evaluation. If your Honor feels that I can go forward after having asked your Honor, I ask leave to reopen my case and ask her what she meant by a job. But personally I don't think it's necessary. I think it calls for the defendant to offer an explanation. That's why I asked him what his defense was in this case. 20

The Court: You may reopen your case. 30

Mr. Ratner: I would like to note an exception to your Honor's ruling that the State may reopen its case and that the testimony about to be given is definitely prejudicial to the rights of the defendant. I think your Honor ought to rule on the motion for acquittal first, because I think we are entitled to an acquittal in view of this testimony. 40

(The jury returns to the court room.)

S. Vetter, re-called for State, Direct.

SHIRLEY VETTER, re-called as a witness on behalf of the State, testifies further as follows:

Direct Examination by Mr. McKenna:

10 Q. Mrs. Vetter, you have already testified that you called Dr. Dillingham on the telephone on Saturday morning. What were your words? You asked him whether he could what? A. If he was interested in another job.

Q. What did you mean when you said "interested in another job?" A. An abortion.

Q. Why do you say another job?

Mr. Ratner: I object, your Honor. Her answer is in.

20 Q. Another abortion. Is that correct? A. Another abortion, yes.

Q. He then made the reply: "Send her over today" and you said you couldn't? A. Yes.

Mr. McKenna: That's all.

Mr. Ratner: I think I made my objection to the form of the question the Prosecutor intended to ask.

30 The Court: The point is not what this woman had in mind but what that man had in mind. Therefore, the background of how this "another job" had a meaning to him is the important thing.

Q. Did you at any time previous go to Dr. Dillingham and have anything done by Dr. Dillingham?

Mr. Ratner: I object to the question.

The Court: Objection overruled.

40

H. L. Dillingham, for Deft., Direct.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Did you have anything done by Dr. Dillingham? A. Yes.

Q. What did you have done by Dr. Dillingham? A. An abortion. 10

Q. When was that? A. Two years ago.

Q. Where was it performed? A. In his office.

Q. Where? A. At 60 Park Place.

Mr. McKenna: That's all.

Mr. Ratner: No questions. Does the State rest now?

Mr. McKenna: Yes. 20

Mr. Ratner: I renew my application for the direction of an acquittal on the grounds outlined to your Honor previously.

The Court: Motion denied.

Mr. Ratner: An exception.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 30

HORACE L. DILLINGHAM, the defendant, called as a witness on his own behalf, being duly sworn, testifies as follows:

Direct Examination by Mr. Ratner:

Q. Dr. Dillingham, how old are you? A. I'm forty-three.

Q. Are you married, sir? A. For twenty-four years. 40

H. L. Dillingham, for Deft., Direct.

Q. Where do you reside? A. 188 Tremont Avenue, Orange, New Jersey.

Q. How long have you lived in New Jersey? A. Twenty odd years.

10 Q. Are you a professional man, Doctor? A. Yes.

Q. What is your profession? A. I'm a chiropodist; I treat the feet.

Q. How long have you been engaged in that business? A. Since November, 1924.

Q. What school did you attend? A. Illinois School of Chiropody in Chicago.

Q. How long did you study there? A. Two years.

20 Q. You received a diploma from the State of New Jersey? A. I received a diploma from the college and I received a license from the State of New Jersey, the State Board of Medical Examiners, licensing me to practice chiropody.

Q. Since what year? A. October or November, 1924.

Q. You continued to engage strictly in this particular work? A. Foot work, yes.

30 Q. You maintained an office for twenty years? A. I have been in the Military Park Building since May 1st, 1926, eighteen years.

Q. At 60 Park Place? A. Yes.

Q. Your place is advertised? A. Yes, I'm listed in the 'phone book.

Q. You also advertise in the ethical way by business cards and by word of mouth? A. Yes.

40 Q. Doctor, did you know or remember a lady by the name of Emma Whittington? A. I believe

H. L. Dillingham, for Deft., Direct.

so. I have heard it a dozen times today. Yes, I guess I do.

Q. Doctor, just how do you conduct your business?

Mr. McKenna: That's objected to, if your Honor please. 10

Mr. Ratner: I am leading up to a very important—

Mr. McKenna: I object.

Q. What is your procedure?

The Court: A procedure which you claim was followed in this case?

Mr. Ratner: In every case where the patients come to him.

The Court: We want to know what was done in this case. 20

Q. Do you recall this lady? A. Yes, I do.

Q. You recall her? A. Yes.

Q. Did she come in unsolicited or did she come in as the result of a 'phone call appointment? A. She came in unsolicited.

Q. When she came in unsolicited where, if any place, did you note that appointment or her coming in? A. I have a diary on my desk next to my telephone. I make appointments and I don't make appointments. It depends on the way the situation presents itself. I write the name down, nine-thirty, ten, twelve, one or two. 30

Q. When do you do it? A. Immediately when I have a telephone call.

Q. I show you a diary for 1944 and ask you whether that diary is kept in your handwriting? A. Correct. 40

H. L. Dillingham, for Deft., Direct.

Q. What diary is that, Doctor? How is it associated with your business? A. It's on my desk.

Q. On Saturday, March 25 do you have the name of—

10 Mr. McKenna: I object to any reference to the diary. It is a self-serving declaration. It is prepared by the doctor and is a self-serving declaration.

Mr. Ratner: In the ordinary course of business?

The Court: It isn't a trade book.

Mr. Ratner: It's in the nature of a trade book. It's for the jury to say whether this lady was not there on another day. That is
20 part of our defense.

Mr. McKenna: I didn't hear what the defense was.

Mr. Ratner: You're hearing it now.

The Court: Objection sustained.

Mr. Ratner: An exception.

The Court: Granted.

Defendant's counsel prays an exception to this ruling of the Court.

30 Exception noted as ground of appeal.

Q. Do you remember when she came in? A. Yes, I think so. She came in the afternoon and this happened to be about two-thirty.

Mr. McKenna: I object.

Q. Can you remember it without refreshing your memory from the diary? A. This happened a year ago, counsellor, and I see one person a day or twenty people a day.

40

H. L. Dillingham, for Deft., Direct.

Mr. McKenna: I object and ask that it be stricken out.

The Court: You may use it as a memorandum to refresh his memory if his memory is not clear without it.

Q. Can you remember the date truthfully without referring to your record? A. No. It happened in March. 10

Q. On the 25th day of March, 1944 did Emma Whittington come in? A. That's my handwriting and there she was.

Mr. McKenna: I object. Mr. Ratner knows that that's an improper question.

Q. Doctor, look at the diary for the purpose of refreshing your memory and tell me whether or not on the 25th day of March, 1944 a party by the name of Emma Whittington came into your office. A. Mrs. Whittington came at two-thirty in the afternoon. Now, it might have been two-fifteen; it might have been two-forty. This diary is divided into half hours. I have it down for two-thirty. She may have come at 2:35. 20

Q. On what date? A. March 25, Saturday.

Q. Look at March 27th and see if an Emma Whittington was there. 30

Mr. McKenna: That is objected to. He can ask the witness if she was there on a certain date.

A. I have no recollection of Mrs. Whittington ever coming to my office again. That's Saturday. Sunday is a blank. Monday, I have rain here. I list sometimes snow or rain to account for a poor business day or a good business day. On Monday 40

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there are three calls in the afternoon: Liebowitz, Lynch and Goldstrom.

Q. But she wasn't there on Monday? A. She wasn't there on Sunday or Monday.

10 Q. What do you do as a general practice—
Mr. McKenna: I object to the question.

Q. The lady came in, did she not? A. Yes.

Q. That was on the 25th? A. Yes, that was on the 25th; correct.

Q. Now, what do you do when a new patient comes in?

By the Court:

20 Q. What did you do when this patient came in?
A. My procedure with this patient, as every other patient, I say, "How do you do? Step into my treatment room." I have a waiting room and a treatment room. The door is open; it isn't closed. There is nothing secret about it—feet.

I suggested to her that she sit down and remove her stockings and to take off her shoes while I was washing my hands. It saves a woman embarrassment. So, I gave her a couple of minutes' notice
30 while I washed my hands. And I came back and found an infected ingrown nail.

By Mr. Ratner:

Q. Doctor, do you recall the treatment and the reason for the treatment? A. I remember the ingrown nail very much.

Q. Do you record it on anything? A. I keep a little card record, yes.

40 Q. I show you a card record and ask you what

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that card record represents. A. I remember that, of course.

Mr. McKenna: I object to that.

The Witness: Here's the name—

Mr. McKenna: That's objected to, your Honor, as a self-serving declaration. 10

Mr. Ratner: It shows the system that this man used.

The Court: The jury is not interested in system. What they want to know is what happened.

Mr. Ratner: It's what this woman was suffering from when she came there.

Q. Without looking at the card referred to by you, can you definitely tell this Court and jury truthfully for what reason she was there? A. She came because she had great pain in an ingrown nail. That's my line of business, the foot. I'm a chiropodist. 20

Q. When you find a condition do you record it anywhere? A. Yes.

Q. On what? A. I make a little card out and I make a little notation, and I think I made a notation here. 30

Q. Is this the kind of card you make out? A. Yes, sure. I buy them by the thousands.

Mr. Ratner: I offer the card to show for what purpose the woman was there on the 25th of March according to the record that this man kept.

Mr. McKenna: If your Honor please, I object on purely legal grounds that it is a self-serving declaration and we know that it could be prepared at any time. 40

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10 Mr. Ratner: The point is that the jury has a right to take into consideration the manner in which this man conducts his business: what he did on this occasion, what the lady was suffering from and what he did in view of her ailment.

The Court: Do you want to cross-examine him on the making out of this card?

Mr. McKenna: No.

The Court: You attack the purpose of the visit, I presume.

Mr. McKenna: I do.

20 The Court: When you do that on re-direct examination he immediately offers the card and it goes into evidence. What is the difference?

Mr. McKenna: Your Honor rules that it can go in?

The Court: Unless you desire to cross-examine first.

Mr. Ratner: You object to the card. Are you afraid of it?

30 The Court: He does not desire to cross-examine.

The Witness: May I say one word?

The Court: It may go in.

Mr. Ratner: I offer the card in evidence.

(The card referred to was received in evidence and marked Exhibit D-2.)

40 The Court: Sooner or later if your case attacks the veracity of this statement it must go in. So, why not save time.

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Mr. McKenna: I am only objecting on the ground that it is a self-serving declaration and was made by this defendant himself.

Q. Now, looking at this card tell the Court and jury what the card states with respect to this woman's name and other information. 10

Mr. McKenna: If your Honor please—

Mr. Ratner: The card is in evidence.

The Court: He doesn't have to read it.

The jury can read.

Q. Doctor, do you recall seeing her after this visit on Friday? A. Sure.

Q. Where did you see her, Doctor? A. I saw her at her home or her friend's home where she lived. 20

Q. Before she left did you say or give her anything? A. She had a very bad ingrown nail.

Q. Before she left did you say or give her anything? A. I gave her a sample bottle. I'm on a physician's mailing list and I get bottles from big drug houses free of charge to be given to patients. I gave her a bottle that's called ST 31.

Q. 31 or 37? A. 31 or 37. 30

Q. Did you indicate it on the card? A. Yes.

Q. Before she left your office did you give her anything? A. I put a wet dressing on her foot and suggested that she stay off her feet. I said to be very quiet and that if she had a little infection there it would subside.

Q. Did you give her anything in case she needed you again? A. I gave her a card and told her to stop back in a day or two or three. 40

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Q. I show you Exhibit D-1 for identification and ask you if that's the kind of card you gave her. A. Yes.

Mr. Ratner: I offer it now in evidence.

10 (The card formerly marked Exhibit D-1 for identification is received in evidence and marked Exhibit D-1.)

The Witness: Do you want to know what I did with this toe?

The Court: Look here, Doctor. We don't want to waste time with your volunteered remarks.

Q. After the lady left you, did you hear from her again? A. Yes.

20 Q. When was that, if you remember? A. I had a 'phone call on a Tuesday, I believe.

Q. On what date would that be? A. The last of March.

Q. The 27th? A. Yes, or the 29th.

Q. Tuesday of the next week? A. Yes. She saw me on Saturday and she came and called on Tuesday.

30 Mr. Ratner: The Court will take judicial notice that the 28th of March was on a Tuesday.

Mr. McKenna: We say she was there on a Tuesday.

Q. Was it a man or woman who called? A. A woman, I believe.

40 Q. Do you recall the conversation? A. Oh, slightly. I think that this individual, man or woman—I believe it was a woman—said that her foot was worse.

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Q. What time did the call come through? A. Sometime late in the morning. And I said, "Why don't you come up to my office and I will look at your foot?" And she said she couldn't walk. It was worse.

10

By Mr. McKenna:

Q. With whom was this conversation? A. I believe with the deceased. It might be her sister or her husband. I have forgotten. That's a year ago or ten months ago. It's all fresh in your mind because you have everything in front of you but it isn't fresh in my mind.

By Mr. Ratner:

Q. What time do you say that call was, if you remember? A. Say, eleven o'clock in the morning; maybe eleven-thirty.

20

Q. Did you do anything with reference to that call? A. I suggested to the individual to return to the office and let me look at this bad foot and they said she couldn't come because it's too painful. I said, "All right, I will go out on my noon time to see you," which I did.

Q. Do you remember whether you made a notation of this particular call? A. Yes. The appointment book is by the 'phone on the desk.

30

Q. I ask you to look at this book on March 28, Tuesday, 1944 to see if that particular name Whittington appears in the book. Yes or no? A. Yes, surely, twelve-thirty it says.

Q. Does it say anything else? A. "House call, Whittington, Orchard Street, 141," or something.

Q. Did you make the call? A. Yes.

40

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10 Q. What did you do when you got there? A. I knocked at the door and a man came to the door. I said, "I'm the foot doctor. I believe it's your wife who has a bad foot" or something like that. I don't remember exactly the conversation. I said, "I'm the foot doctor. Where is your wife?" or "where is the patient?" or some similar conversation. So, I walked in and looked at her foot. She was lying in bed and the bandage I put on was all dried out and I told her specifically to keep the foot wet. Evaporation of the liquid draws out the infection. She said, "I have been on my feet a good deal." And I said, "You should keep off your foot."

20 Q. How long did you stay there, Doctor? A. A minute or two minutes or five minutes.

Q. After that did you get another call? A. No.

Q. Did you get a call on Monday morning around three-thirty in the morning? A. Yes.

30 Q. What was that conversation, if you remember? A. It was another case of someone being ill, someone being sick. "Come down right away." And so on and so forth. I'm a little confused about that.

Q. Do you recall who it concerned? A. I imagine the name was mentioned, Whittington.

Q. Did you go down to Whittington's? A. Yes.

Q. When you got down there was she there? A. No.

Q. Did you at any time perform any—

H. L. Dillingham, for Deft., Cross.

By the Court:

Q. At what time did you go down? A. Oh, it was very early in the morning, four or five o'clock; maybe three o'clock.

Q. For a foot? A. Well, I understood it was in very bad condition. 10

By Mr. Ratner:

Q. How bad was it, Doctor? A. The foot was all right.

Q. What was it that seemed to be the trouble? A. The woman complained of pain the day before at noon hour, pain in her foot. But in my opinion it had made an improvement from the time of her visit from Saturday to Monday; and I think because she was on her feet a little more she thought her foot was bad. I had accomplished what I had set out to do. 20

Q. It is charged by the State that you on March 27 performed an abortion on this lady, knowing at the time that she was pregnant or that you suspected her to be pregnant. A. That's untrue; that's not my business.

Mr. Ratner: That's all. 30

CROSS EXAMINATION by Mr. McKenna:

Q. You say it isn't your business? A. No. I have been educated as a chiropodist and for twenty years, roughly, that has been my profession. That's what I have followed and done. I know everything about the feet as well as the next fellow. I can always learn, of course.

Q. You say that this woman was not in your office on Monday morning? A. No. She was there on a Saturday morning. 40

H. L. Dillingham, for Deft., Cross.

Q. On Saturday morning at what time? A. No, it was in an afternoon.

Q. Was it a morning or an afternoon? A. No, it was in an afternoon.

Q. About what time do you fix that as? A. 10 Two o'clock; maybe it was two-fifteen and maybe it was two-ten.

Q. Are you sure about that? A. I have my appointment book and I put it down at two-thirty but sometimes it takes five minutes with a patient and sometimes it takes three-quarters of an hour with a patient. So, it might have been two-forty or two-ten; but I'll say it is two-thirty.

Q. Aside from what is in that book you say 20 you know she was there on Saturday? A. Yes, Saturday afternoon. I said in the morning but I misspoke myself. I'm a trifle nervous. You can appreciate that, can't you?

Q. No, not you. When for the first time did you go down to that place? A. I think it was Tuesday; in fact I'm sure it's Tuesday if you want to be so fussy.

Q. What makes you sure? A. Because I 30 don't close the office and run out and make house calls. I only go out on an emergency like this. The woman called and she said she can't come down.

Q. This was an emergency? A. Well, I presume so.

Q. Was your talk with the sister or with the deceased? A. How do I know? Do you?

The Court: You are here to answer 40 questions.

The Witness: I talked with a woman.

H. L. Dillingham, for Deft., Cross.

Q. With whom did you talk? A. How do I know?

Q. Did you talk with Mrs. Maguire or the sister who is dead? A. How do I know?

The Court: Sit up and take notice. Answer the questions. 10

The Witness: I talked with a woman.

Q. Did you ask her who it was? A. I don't remember exactly whether I did or not.

Q. What did she say to you? A. Something was said about a painful nail. That's all. It could be the deceased or her sister or any of the witnesses you have here.

Q. So, you went down to the address on Orchard Street? A. Correct. 20

Q. That couldn't have been around nine-thirty in the morning? A. It was in the noon hour.

Q. You are sure it was not nine-thirty? A. No, it was noon hour.

Q. Did you see Mr. Whittington when you got there? A. A man opened the door.

Q. You remember saying to them, "I'm the foot doctor"? A. Correct.

Q. You are sure about that? A. That's natural. I'm not selling Fuller brushes. 30

Q. You didn't pull your hat down? A. No. Why should I? I took my hat off.

Q. You did go into the room where Mrs. Whittington was reclining? A. Yes.

Q. Did anybody go into the room with you? A. I don't remember. I looked at her foot. I don't remember whether her sister or husband was present or who was present. I walked in and looked at her foot and I said the dressing 40

H. L. Dillingham, for Deft., Cross.

was dry. That was my suggestion. "I gave you a bottle. You should have stayed off your feet." And she said, "I have been washing clothes and have been on my feet." I said, "I told you not to do that. I said to take it easy." I gave her a
10 little advice and I put more of this solution on and walked out satisfied that her foot had made an improvement.

Q. You didn't go back there at five o'clock that afternoon? A. No.

Q. Are you sure about that? A. Certainly.

Q. You didn't see her husband there at five o'clock and you didn't see Mrs. Maguire? A. No.

20 Q. You are sure of that? A. Yes.

Q. You heard them both testify that you were there? A. I heard their testimony.

Q. When was the next time you saw her? A. I never saw her again.

Q. Didn't you say you saw her at three-thirty in the morning? A. No.

Mr. Ratner: I object to that. The testimony is to the contrary.

30 Q. When did you next see her? A. I never saw her.

Q. You never saw her again? A. No.

Q. So, you made the one visit at noon time? A. That's correct.

By the Court:

Q. You made another visit, didn't you? A. I made another visit but I didn't see the woman. She was in the hospital, I understand.

H. L. Dillingham, for Deft., Cross.

By Mr. McKenna:

Q. On direct examination didn't you say that you also treated her on another visit here just a little while ago? A. No, I didn't say that and you know I didn't.

Q. You didn't say that? A. No. 10

Q. But you did go back at three-thirty in the morning or later than that? A. I received a call and went down there to see if an infection started with blood poisoning and the woman was going to lose her leg.

Q. The foot injury which had made an improvement on your last visit? A. Yes. President Coolidge lost his son because of a blister on his heel with the cream of the medical profession. 20

Q. You went there of your own accord at that hour or was there a call? A. We just said there was a call.

Q. Who called you? A. I don't know. A woman called me.

Q. Did a man call you also? A. Not that I remember; maybe.

Q. Well, did he or did he not? A. You're talking about something that happened a year ago, almost. I received a call in the small hours of the morning. It startled me. The woman was very sick. "This is Whittington calling. Come down right away." They said, "Come down right away." And I said all right. 30

By the Court:

Q. A man or woman? A. It could have been a man.

Q. That woman died? A. Yes. 40

H. L. Dillingham, for Deft., Cross.

Q. That rather fixed the circumstances in your memory? A. Yes.

Q. Doesn't that help you to recall the circumstances? A. I could say it was a man and I could say it was a woman but why tell a falsehood. I'm not certain. I think it was a woman.

By Mr. McKenna:

Q. When you got down there did you go to the Maguire apartment where you had been before? A. No.

Q. Where did you go? A. I went to the superintendent of the building's apartment.

Q. Why did you go there? A. I rang the bell and knocked on the door of this Whittington's apartment and wasn't admitted. It was locked up. I went around to the entrance in the lobby and I pushed the superintendent's bell and I said I would find out. I went down and the woman janitor admitted me and she said, "The woman has been taken to the hospital." I said, "That's too bad." I said, "What's the trouble?" She said, "There's something very serious, probably." I said, "Is that so?" I said, "I thought her ingrown nail was coming along fine." She said she didn't know anything about that; she didn't know anything about an ingrown nail. She said there was something more serious with the woman.

Q. What did she say was the trouble? A. That has been presented to the Court for the last two or three hours.

Q. What did she say? A. I don't recall.

Q. What did she say? A. I don't recall.

H. L. Dillingham, for Deft., Cross.

By the Court:

Q. You say it has been presented to the Court. When it was presented did it refresh your memory? A. Well, the word abortion has been coming up since ten o'clock in the morning.

Q. Did the woman say abortion or didn't she? 10

A. I don't know whether she said abortion or not. That's a bad word. I don't know whether she said that.

Q. She may have? A. Yes.

By Mr. McKenna:

Q. You knew Mrs. Sternberg before? A. No.

Q. You never saw her before? A. No.

Q. Did you hear her testify that she knew you? 20

A. Yes.

Q. And that two years ago you treated her daughter?

Mr. Ratner: I object.

Mr. McKenna: Mrs. Sternberg testified that she knew him.

The Court: I don't think she said in what specific connection.

Q. How did you know Mrs. Sternberg two years ago? By treating her daughter for abortion? A. No. 30

Q. Didn't you perform an abortion on her daughter? A. No.

Q. Didn't you go down there two years ago and look after her there? A. No.

Q. But you did go to the apartment that morning and saw Mrs. Sternberg and the word abortion was mentioned? A. Perhaps. You're putting words in my mouth. 40

Motion.

Q. I don't think I have to put them in your mouth. Was it mentioned or wasn't it mentioned?

Mr. Ratner: He answered that before. He said it may have been or may not have been.

10 A. I'm only entitled to say yes or no. Is that it? I can't make any statements? You can make all the statements in the world but I can't? Is that it?

Q. How about the matches? Did you see your matches there that morning? A. Matches? What are you talking about?

Q. Did you have any matches with your number on? A. No.

20 Q. Did Mrs. Sternberg give you your matches? A. That's ridiculous. I have cards printed and I have five thousand made at a time. Why should I give out matches?

Q. Did Mrs. Sternberg give you your matches there that morning? Yes or no. A. I don't know anything about any matches.

Q. Did Mrs. Sternberg give you your matches? Yes or no. A. No.

30 Q. Did you see Mrs. Maguire there that morning in the apartment house? A. No, not that I remember.

Mr. McKenna: That's all.

Mr. Ratner: That's all. We rest, your Honor.

Mr. McKenna: We rest, too.

Mr. Ratner: For the same reasons advanced on the previous motion I again reiterate that we are entitled to a direction

Proceedings of February 27, 1945.

of acquittal by the Court and I respectfully request that the Court so direct.

The Court: Your motion is denied and an exception will be granted.

Mr. Ratner: Exception.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(An adjournment is taken at four o'clock P. M.)

10

Tuesday, February 27, 1945.

Second Day.

Before Honorable Richard Hartshorne, Judge and a Jury.

20

Appearances:

Same as at Previous Hearing.

(Mr. Ratner makes a closing statement to the jury on behalf of the defendant.)

The Court: Mr. Ratner, that is the third time you have alluded to the penalty in this case incorrectly, because, as well, the defendant may be put on probation. You failed to mention it three separate times and, finally, it has no place in the trial of this case. It is purely a function of the Court.

30

Mr. Ratner: I think I have a right to comment on the law, your Honor.

The Court: You did it twice and I said nothing about it. But when you do it three times that's too much.

40

Court's Charge to Jury.

(Counsel continues his closing remarks to the jury.)

(Mr. McKenna makes a closing statement to the jury on behalf of the State.)

10

(The Court charges the jury as follows:)

Court's Charge to Jury.

HARTSHORNE, J.:

Gentlemen of the jury.

20 The principles of law that apply to this situation are well set forth, in part at least, in the statute enacted by our representatives, the Legislature, which fixes the public policy of this state in that regard. And, so far as pertinent, I will read it to you:

30 "Any person who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a woman then pregnant with child, shall use any instrument or means whatever shall be guilty. If, as a consequence thereof, the woman or child shall die," (as in this case, I think there is no dispute that the woman died because of an attempt to commit an abortion by somebody) "the person committing the offense shall be punished. * * *"

40 Now, I won't go into the penalty because we have already dealt with that. I think it is quite clear that what you are to do is to determine what happened in fact on a certain day or days over

Court's Charge to Jury.

this week-end, so to speak, in March 1944 and whether or not the defendant is guilty of the offense contained in this statute. The purpose of this statute is, I think, quite clear: To protect at least the life and health of our women. That is the underlying purpose of the Legislature in prohibiting this sort of action.

10

Now, I will call your attention to the elements. "Any person who maliciously or without lawful justification." Of course, there may be circumstances where it is justifiable to cause a miscarriage to save the life of a woman. We are not concerned with that here. The defense here is, "I had nothing to do with it."

20

Then, the statute goes on: "With intent to cause or procure the miscarriage of a woman then pregnant with child." There is no claim by anybody that this attempt to cause the abortion was justified. We are concerned with the question of whether, if the defendant did it, he had the intent to cause the miscarriage. Now, an intent is an act of the mind. You cannot take an X-ray to read what goes on inside a skull. There is no way of doing that except by substantially applying the common sense maxim that actions speak louder than words. You judge what a person thinks by what he does as a result of what he thinks.

30

Here, that common sense maxim—because law is but a refinement of common sense, after all—here that is exactly what you do. It is even more necessary in this case than perhaps it is in the

40

Court's Charge to Jury.

ordinary case, because the only two eye witnesses
to the insertion of this admittedly existing
catheter in that woman's womb was the dead
woman and, perchance, the defendant, under the
evidence. Those are the only two people, per-
chance, who could tell us how it got there. There-
fore, we must judge what happened by what evi-
dence there is before us.

That the woman was pregnant, I think, no one
disputes. Here is the uterus with the fetus in evi-
dence. The fact that the fetus was not expelled is
not material. It is the attempt to cause the fetus
to be expelled which is the real essence. If all
those things are so, that the woman was pregnant,
that there was an intent to expel and that there
was no justification, if, under those circumstances,
a person used any instrument or means whatever,
then that person is guilty.

So, the final point is: Did the defendant him-
self use this catheter, insert it in the woman's
womb or did it get there, as is intimated, by the
hand of the dead woman herself? Now, I don't
recall anything more than a suggestion that it
was possible for her to do it. Whether or not
the evidence convinces you that the defendant did
it is the thing, largely, that is in your hands.

Now, on the question of whether or not the de-
fendant did it, whether or not any defendant com-
mitted any criminal act with which he is charged,
the law throws about him this well established
cloak of protection to the effect that the person is
presumed to be innocent until proven guilty; and

Court's Charge to Jury.

this presumption continues as a presumption throughout the entire case until overcome by the State by proof establishing his guilt beyond a reasonable doubt. What is meant by that is that the State will have met this burden of establishing its case beyond a reasonable doubt only if, after you have considered the entire case, you feel an abiding conviction to a moral certainty of the truth of the State's charge. Now that does not mean that there may be no possible doubt in your mind. There is a possible doubt about everything under the sun. It means that there should be no doubt founded upon a rational basis in your mind. 10

What is the evidence? Of course, I shall not attempt to go into it in any detail. I have already alluded to the fact that here, unfortunately, we must rely largely upon the general circumstances, because of the fact that the mouth of one eye witness is sealed and the mouth of the other, of course, has reasons for not convicting himself if, in fact, he did it. Here, the whole case is in your hands and you are not to take what I say as to the facts as gospel. Indeed, if you think that I have fallen into error in alluding to the facts or if you think I unduly stress a certain fact and omit another fact, disregard it entirely because it is you and not I who pass on the facts. But it would seem that we had clearly before us an attempt to commit an abortion on this woman by the use of a catheter, the woman being pregnant. As the State doctor said, it is quite possible that the woman may have done it. It is open for you to find that the woman did it. The question is, 20 30 40

Court's Charge to Jury.

in your final conclusion, who did it? She or the defendant?

Now, what is the proof as to the defendant? The testimony, denied by him, is that he had performed an abortion on Mrs. Vetter a couple of years ago and Mrs. Vetter called him up and asked, "Are you still interested in doing a job?" It is for you to say what that meant to this man. Whether toe nails or the same sort of a job that he did on Mrs. Vetter. If it meant to him an abortion then you have the intent if he undertook it; and he did undertake to see Mrs. Whittington. You have the intent and the knowledge that she was pregnant or a suspicion that she was pregnant, and the use of the means.

Did he actually use the means? Well, there was a visit to the office. What happened in the office we don't know for obvious reasons. What happened at these two visits to the house, one, as I recall it, on Monday, late afternoon, or Tuesday perhaps, and another in the early hours of the morning? Whether it was for the treatment of a foot or taking care of an infection resulting from the insertion of the catheter we don't know. It was behind closed doors. There is only one person who can answer with certainty. What he says and the veracity of what he says you alone must pass upon. He says an ingrown toe nail. He says there was no abortion, no abortion on Mrs. Vetter even. There the sole pertinency of that testimony, of course, is on the question of his intent to commit the same sort of job on Mrs.

Court's Charge to Jury.

Whittington that he committed perchance on Mrs. Vetter. He says there were no matches.

You have these four other witnesses who, in this aspect and in that, contradict. After all, it comes down to a question of credibility: Who is telling the truth? What happened in fact? And, according as you find that fact in the light of the principles of the law to which I have alluded, you will bring in your verdict either of guilty or not guilty. 10

Mr. Ratner: Will your Honor pass on my requests to charge?

The Court: They are denied except as covered by the charge. 20

Mr. Ratner: An exception, sir.

The Court: Granted.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Ratner: I will make my objections to your Honor's charge after the jury has retired.

(The jury retires.)

Mr. Ratner: Your Honor, I desire to take specific exceptions to your Honor's charge wherein substantially you stated that if the decedent was pregnant and that fact is not disputed and the defendant inserted the catheter in the uterus of this decedent with intent to procure an abortion, that under the law he would be guilty. I except to that portion of the charge because that is not the law. The law is, as I understand it, that the jury must first find not only that she was pregnant but that he knew she was pregnant or had suspicion 30 40

Court's Charge to Jury.

10 of her pregnancy and inserted the instrument, the catheter in this case, with the intent to procure an abortion. If any of the elements were lacking, the knowledge or the suspicion of her pregnancy, even though he inserted the catheter into the uterus of the decedent, the jury must still acquit the defendant.

The Court: Isn't my recollection correct, Mr. Prosecutor, that I charged that?

Mr. McKenna: Yes. He is taking a certain part by itself.

20 Mr. Ratner: I say you didn't charge it that way. I say the statement which your Honor made to the jury, that when Mrs. Vetter called and asked, "Are you interested in another job?" and he is supposed to have said he would take it, as I recall your Honor stated to the jury that that statement is some evidence of the intent to perform an abortion upon the decedent. As a matter of law I say that is not so because under the Raymond case the only value that the evidence in that regard would have would be as to the question of the credibility of the testimony of the defendant, because he denied that he had performed any
30 abortion on Mrs. Vetter. That's as far as it could go and not as your Honor directed the jury that it would carry with it the evil intent which the jury might find in this particular case.

I desire to take a general exception to your Honor's charge.

The Court: Not only general but specific.

40 Mr. Ratner: I took specific exceptions, which were two, and a general exception to the charge that your Honor gave in this case.

Defendant's Requests to Charge.

1. The defendant in every criminal case is presumed to be innocent until he is proven guilty beyond a reasonable doubt. (Request is made that the Court define reasonable doubt.)

2. Before you can find the defendant guilty 10
you must be satisfied beyond a reasonable doubt as I defined it to you that the decedent, Emma Whittington, was pregnant; that the defendant knew that she was pregnant or that he had suspicion of her pregnancy and that the defendant did thereupon maliciously and with evil intent use the rubber catheter offered in evidence in this case, in the uterus of the decedent for the express purpose of causing an abortion. In other words, 20
each and every element must be present, to-wit: (1) pregnancy, (2) knowledge or suspicion that the decedent was pregnant and (3) that the defendant caused or intended to cause the abortion, all of which must be present, and you must be so satisfied beyond a reasonable doubt, for if any one of these elements are not present, or if you are not satisfied beyond a reasonable doubt that all of these elements are present, then you must bring 30
in a verdict of acquittal.

3. The fact that the defendant went to visit at the apartment of the decedent on Tuesday, March 28, 1944 and again as the State alleges, on Wednesday, the early morning of that day, is not sufficient evidence that he performed the abortion charged in the indictment in this case and you must acquit him.

4. The fact that the defendant is alleged to 40
have performed an abortion 2 years prior on Shir-

Defendant's Requests to Charge.

10 ley Vetter is no proof that he performed the alleged abortion upon the decedent in this case. It may be a matter which you may consider in determining whether or not the defendant did commit the abortion in this case, but you must be satisfied beyond a reasonable doubt that he did perform such an abortion. Or else you must acquit the defendant.

20 5. I charge you further that you should consider the testimony of the county physician where-in he testified that the abortion could have been self-inflicted and that the infection which was the cause of her death was the failure to properly sterilize the catheter and if you believe that she may have caused the abortion herself or procured others to do it and not the defendant, then you must acquit the defendant.

30 6. I charge you further that you must consider seriously the failure of the State to contradict the evidence of the defendant that the decedent came to him for the treatment of an infected toe nail and that the State's failure to contradict it is presumptive evidence that such a condition did exist and that she was there for such treatment.

40 7. I charge you further that the outbursts of the defendant at the trial and evidence of excitement and rage is not to be considered by you in your deliberations on the question of the guilt or innocence of the defendant, because this is a matter with which only the Court is concerned and not the jury as triers of the fact.

Opinion of Supreme Court.

(Filed Nov. 7, 1945.)

NEW JERSEY SUPREME COURT.

No. 4 October Term 1945.

THE STATE,

Defendant in Error,

VS.

HORACE L. DILLINGHAM,

Plaintiff in Error.

10

(Submitted at October Term, 1945: decided November 6, 1945).

(Not to be printed in any report).

20

Error to Essex Quarter Sessions.

Before Brogan, Chief Justice, and Justices Parker and Oliphant.

For the plaintiff in error, Benjamin M. Ratner.

For the State, William A. Wachenfeld, Prosecutor of the Pleas.

The opinion of the Court was delivered by 30

PARKER, J. The plaintiff in error was convicted of the crime of abortion, and brings this writ of error. The pregnant woman died. The case is before us both on strict bill of exceptions, and on causes for reversal based on certificate of the entire record, pursuant to the statute, formerly section 136 of the Criminal Procedure Act, now R. S. 2:195-16; and is submitted on briefs without oral argument. Seven points are made, but we find no substantial merit in any of them. 40

Opinion of Supreme Court.

10 The first point challenges the admission of testimony of the witness Mrs. Vetter about a telephone conversation with defendant, on the ground of lack of identification of defendant as the person with whom she conversed. This is disposed of by her testimony that she recognized his voice after she had rung up his telephone number.

The second point charges error in refusal to direct acquittal when the State rested. Our examination of the evidence leads to the conclusion that a case for the jury had been presented at that stage.

20 The third is a further challenge to other testimony of Mrs. Vetter. A sufficient answer seems to be that no ground of objection was stated.

The fourth point asserts error in a refusal of the Court to direct acquittal at the conclusion of the testimony. The refusal was proper, as a case for the jury still remained at that stage.

Point V deals with several passages of the charge which should be considered separately.

30 (a) The "common sense" instruction, which was in effect and in language a use of the adage that actions speak louder than words. We can discern no legal error in that comment.

(b) (c) The alternative between the insertion of the catheter by defendant or by the deceased. The suggestion is that some third person or persons might have done it: and it is claimed in the brief that such a situation was inferable from the evidence. That evidence is not pointed
40

Opinion of Supreme Court.

out, and we do not observe it on a reading of the testimony.

The complaint seems to be that the court confined the inquiry to the dead woman or the defendant as the perpetrator although some third party may have committed the crime. But as already noted, there is nothing in the case to support any inference of a third party. 10

Point VI alleges error in the "refusal to charge the defendant's requests." The point is merely stated and not argued; and no particular requests are specified. We fail to discern any substantial merit in this point.

The seventh and last point is that "the verdict is contrary to the greater weight of evidence and the Court should have directed an acquittal." We repeat that a case for the jury was presented, and our examination of the evidence satisfies us that the verdict was not contrary to the weight of evidence. 20

The judgment is affirmed.

A true copy.

30

JAMES J. GAVIN,
Clerk.

40

**Remittitur to the Essex County Court of
Quarter Sessions.**

(Filed Nov. 14, 1945.)

NEW JERSEY SUPREME COURT.

No. 4, October Term, 1945.

10

<u>THE STATE OF NEW JERSEY,</u> <i>Defendant-in-Error,</i> vs. <u>HORACE L. DILLINGHAM,</u> <i>Plaintiff-in-Error.</i>	}	On Writ of Error. Remittitur.
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This cause having been duly submitted on Briefs at the October, 1945 Term of this Court by Benjamin M. Ratner, Esq., Attorney for the Plaintiff-in-Error, and William A. Wechenfeld, Esq., Attorney for the Defendant-in-Error and Prosecutor of the Pleas; and the Court having considered the same and finding no error in the record and proceedings in the Essex County Court of Quarter Sessions.

3008

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 remitted to the Essex County Court of Quarter Sessions to be proceeded with according to law, this judgment and the practice of said Court.

Entered November 14, 1945.

On Motion of

4004

/s/ WILLIAM A. WACHENFELD,
*Prosecutor of the Pleas and Attorney
 for Defendant-in-Error.*

Writ of Error to the Supreme Court.

(Filed Nov. 26, 1945.)

State of New Jersey, ss.:

The State of New Jersey to the Chief
L. S. Justice and other Justices of the Supreme
Court of Judicature of the State of New
Jersey. 10

GREETING:

Because in the record and proceedings, and also in the rendition of judgment in our Supreme Court of Judicature before you, between the State of New Jersey, defendant in error, and Horace L. Dillingham, plaintiff in error, affirming a judgment entered in the Court of Quarter Sessions in and for the County of Essex, on conviction of the said Horace L. Dillingham upon a certain indictment for abortion, as it is said, manifest error has intervened, to the great damage of the said Horace L. Dillingham, as from his complaint we have received information, we are willing, in this behalf, to correct the error, if any there shall be, in due manner. Therefore, that full and speedy justice be done to him, the said Horace L. Dillingham, we command you, if judgment be therein given, that you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching and concerning the same, to the Judges of our Court of Errors and Appeals in the last resort in all causes, on the 15th day of December next, together with this writ, that the record and proceedings aforesaid being inspected, we may cause further to be done therein, to correct that error, 20
30
40

Assignment of Error.

what of right, and according to the laws and customs of New Jersey, should be done.

10 WITNESS, Honorable Luther A. Campbell,
our Chancellor and President Judge of the Court
of Errors and Appeals in the last resort in all
causes, at Trenton, the 26th day of November, in
the year of our Lord one thousand nine hundred
and forty-five.

J. A. BROPHY,
Clerk.

20 BENJAMIN M. RATNER,
Attorney for and of Counsel
with Horace L Dillingham,
Plaintiff in Error.

Assignment of Error.

(Filed Nov. 30, 1945.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

30	THE STATE OF NEW JERSEY, <i>Defendant in Error,</i> vs. HORACE L. DILLINGHAM, <i>Plaintiff in Error.</i>	} On Writ of Error. Assignment of Error.
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40 Afterwards, and within thirty days after the
return of the Writ of Error issued in this cause
before the Judges of the Court of Errors and

Assignment of Error.

Appeals in the last resort in all causes of the State of New Jersey, comes the said Horace L. Dillingham, the Plaintiff in Error, by Benjamin M. Ratner, his attorney and says there is manifest error in this, that the Supreme Court of Judicature of the State of New Jersey erred in affirming instead of reversing the judgment of the Court of Quarter Sessions in and for the County of Essex. 10

Plaintiff in Error prays that the judgment of conviction may be reversed, set aside and held for nothing for the aforesaid reason.

BENJAMIN M. RATNER,
Attorney for and of Counsel 20
with Plaintiff in Error.

Service of the within Assignment of Error is hereby acknowledged this 29th day of November, 1945.

WILLIAM A. WACHENFELD,
Prosecutor of the Pleas. 30

Joinder in Error.

(Filed December 3, 1945.)

**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

10

THE STATE OF NEW JERSEY,
Defendant-in-Error,

VS.

HORACE L. DILLINGHAM,
*Plaintiff-in-Error.*On Writ of
Error.Joinder in
Error.

20

And thereupon, afterwards, to wit, on the first day of December, 1945, the said State of New Jersey, by William A. Wachenfeld, Esq., Prosecutor of the Pleas in and for the County of Essex, comes into Court and says that there is no error either in the record and proceedings aforesaid or in giving the judgment aforesaid, and he prays that the Court may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error and that the judgment aforesaid, in manner aforesaid given may in all things be affirmed, etc.

30

WILLIAM A. WACHENFELD,
Prosecutor of the Pleas and At-
torney for Defendant-in-Error.

40

Return to Writ.

(Filed December 6, 1945.)

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, <i>Defendant in Error,</i> vs. HORACE L. DILLINGHAM, <i>Plaintiff in Error.</i>	10 On Writ of Error, Return to the Writ.
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The answer of the Justices of the Supreme Court of the State of New Jersey within named.

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

THOMAS J. BROGAN,
Chief Justice.

30

40

Return to Will

Filed December 1, 1915

IN THE SUPREME COURT

State of New Jersey	vs.	Horace L. Harrison
Defendant in Error		
On Writ of Habeas Corpus		
Return to the Writ		

The answer of the Justice of the Supreme Court of the State of New Jersey within entered

The record and proceedings within entered is within reach with all things touching and concerning the same, we do certify to the Court in return and appear of said State in a certain schedule to this with answer as within we are

THOMAS J. BRIDGES

Chief Justice

CLARENCE A. WALLACE

Attorney General

Very respectfully

23 FEB T.1946

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

HORACE L. DILLINGHAM,
Plaintiff-in-Error.

On Indict-
ment for
Abortion.

On Appeal
from Su-
preme Court

On Writ of
Error.

BRIEF IN BEHALF OF PLAINTIFF- IN-ERROR.

Statement of Facts.

This is a Writ of Error to review the conviction of Dr. Horace L. Dillingham, who was indicted the December term 1944 charged with having committed an abortion on the 27th day of March 1944 upon one, Emma Whittington. Afterwards and on the 26th day of February 1945 the trial was moved before the Honorable Richard Hartshorne, Judge of the Court of Quarter Sessions and on the 27th day of February 1945 the jury found the defendant guilty in the manner and form, as set forth in the indictment. Thereupon the Court of Quarter Sessions sentenced the defendant to eighteen months in the Penitentiary of the County of Essex.

A Writ of Error was allowed by the Supreme Court on the 11th day of April 1945. The Supreme Court duly considered the appeal and on November 7th, 1945 affirmed the Court of Quarter Sessions and filed its opinion accordingly. (State of Case, page 129). The defendant thereupon took a Writ of Error to this Court, which was allowed on the 26th day of November 1945 (State of Case, page 133). The defendant seeks to review the affirmance by the Supreme Court, alleging that the Supreme Court erred in affirming the judgment of the Court of Quarter Sessions. The defendant alleges that the Supreme Court erred in the following respects:

1. The Supreme Court found that the telephone conversation had between a witness, Mrs. Vetter, and the defendant was sufficiently identified as being the voice of the defendant.

2. The Supreme Court found that upon examination of the evidence at the close of the State's case the State had presented a question of fact for the jury and the refusal to direct an acquittal was proper.

3. The Supreme Court held that other testimony given by Mrs. Vetter could not be challenged as being inadmissible because no grounds for the objection to the admission of such testimony was stated to the Court below.

4. The Supreme Court erred in holding that it was proper for the Court below at the close of the defendant's case to submit the question of the defendant's guilt or innocence to the jury.

5. The Supreme Court erred in finding that the verdict was not contrary to the weight of the evidence and that a jury question was presented.

POINT I.

The Court erred in allowing telephone conversations to be admitted in evidence over counsel's objections and refused to strike the testimony from the record.

At the trial of the issue the State called as its witness, Mrs. Shirley Vetter, who testified as follows (S. C. Pages 46-47):

“Q. Now, Mrs. Vetter, did you do anything on Saturday? A. Yes, I made a telephone call.

Q. To whom did you make the telephone call? A. Dr. Dillingham.

Mr. Ratner: I object.

The Court: I couldn't hear what she said.

A. I said Dr. Dillingham.

Mr. Ratner: I move that the answer be stricken out on the ground that no foundation has been laid. There is no indication or evidence to indicate that the phone call was with Dr. Dillingham.

The Court: All right. You cannot prove a case all at once.

Mr. Ratner: I move that the answer be stricken out.

The Court: Motion denied.

Mr. Ratner: Exception.

Q. Whose number did you dial when you telephoned? A. I looked it up in the telephone book, Dr. Horace Dillingham, 60 Park Place and I called that number.

Q. When there was a response on the other end what did you say and what did the voice on the other end say?

Mr. Ratner: I object, your Honor, unless it is shown that the person on the other end was Dr. Dillingham.

The Court: Objection overruled for the present. Proceed.

Mr. Ratner: An exception.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. What was said when the phone was answered? A. I said, 'Is this Dr. Dillingham?'

Q. What did the voice say? A. 'Yes.'

Mr. Ratner: I object to that.

Q. What did the voice on the other end say? A. 'Yes'.

By the Court:

Q. Was it a male voice or a female voice?

A. A Male voice.

By Mr. McKenna:

Q. What did you then say when he said 'Yes'? A. I asked him if he was still interested in doing a—I just said a job for somebody that I knew. I told him first of all I was Mrs. Vetter and then I asked him if he would be interested in doing a job for someone I knew. And he said yes. I said 'When would it be all right to send the party up?' and he said, 'Send her up right away.'

Mr. Ratner: I understand that your Honor is reserving my right to strike out this testimony.

The Court: Yes."

On cross examination the witness testified that the first time she spoke to Dr. Dillingham was about two years prior to this conversation and that she had never spoken to him since. The testimony is as follows (State of Case, page 49, lines 18 to 36 inclusive):

"Cross Examination by Mr. Ratner:

Q. When did you first talk to Dr. Dillingham? A. On Saturday morning.

Q. How many years prior to that alleged telephone call? A. Two years.

Q. How long was that conversation two years ago with Dr. Dillingham? A. I'm afraid if I say the wrong thing. I was twenty minutes to a half hour.

Q. You talked to him two years ago on the phone? A. No, in person.

Q. Since that time you never spoke to Dr. Dillingham? A. No.

Q. (Continuing) Except for the fact that the person who answered at the other end of the wire said he was Dr. Dillingham. You cannot swear under oath here and now that you were speaking to Dr. Dillingham. Isn't that true? A. Yes."

Upon further cross examination the witness admitted that she may have been mistaken when she said she spoke to Dr. Dillingham. Her testimony in this regard was as follows (S. C. page 50, lines 1 to 18 inclusive):

"Q. Don't you ever make a mistake in dialing? A. Everybody does.

Q. Then you could have made a mistake on this occasion? A. I don't know. I didn't make a mistake.

Q. Because the man who answered the phone on the other end said he was Dr. Dillingham when you made the inquiry, is the only reason you now testify under oath that the man you talked to is Dr. Dillingham. Isn't that true? A. Yes.

Q. You may have been mistaken? A. Yes.

Q. It may have been someone else? A. It might have been."

It is therefore, apparent that there was no proof in the record to justify the Supreme Court in its conclusion that the testimony given by Mrs. Vetter as to her telephone conversation was suf-

ficient to identify the defendant as being the person with whom she was conversing.

The State then called William H. Whittington, the husband of the deceased, and the Court permitted this witness to testify to a telephone conversation which he was alleged to have had with Dr. Dillingham. The testimony in this regard was as follows (S. C. page 62, lines 9 to 40 inclusive, page 63 and page 64, lines 1 to 32 inclusive):

"Q. Whom did you call? A. Dr. Dillingham.

Q. Where did you call him?

Mr. Ratner: I move that that be stricken out on the same grounds I gave before. There has been no evidence to indicate that the call was to Dr. Dillingham and that he answered the call.

The Court: Motion denied.

Mr. Ratner: I take an exception.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. What did you do when you went to the phone? How did you know whom to call?

A. I had a book of matches.

Q. Where did you get the book of matches?

A. I got them from my wife's pocketbook.

Q. What was on that book of matches?

A. A telephone number.

Q. Of whom? A. Of his home address and of his office address.

Q. Where was his office address on the book of matches? A. It was Lincoln Park.

Q. Where was it? On the outside or on the inside? A. I believe it was on the inside but I'm not sure.

Q. Do you remember where his home was?

A. Orange; I know that. It has stuck out in my mind.

Q. You called the Newark number or the Orange number at that hour. Do you re-

member? A. I don't remember which I called. I know I got him.

Q. What did you say when you got the number you were dialing? A. I asked for Dr. Dillingham.

Q. What did the voice on the other end of the phone respond? A. I told him I had called the ambulance and he says—

Q. What did the voice on the other end say when you called Dr. Dillingham?

Mr. Ratner: I object on the ground that there has been no connection yet to identify the voice on the other end as the voice of Dr. Dillingham.

The Court: Your motion is premature.

Mr. Ratner: An exception.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. What did you say when you got the response on the other end of the phone? A. I told him my wife was in bad condition.

Q. Did you ask, 'Who is this?' A. Naturally I said, 'Who is this'?

Q. We have to know that. What was said? A. 'Who is this? Dr. Dillingham'?

Q. You asked, 'Who is this? Dr. Dillingham'? A. Yes.

Q. What did the voice on the other end say? A. He asked, 'Is anything wrong'? And I said, 'Yes'.

Q. Did you say who you were? A. No, not that I remember of.

Q. What did you say to him? A. I believe he asked me who I was.

Mr. Ratner: I object.

The Court: Objection overruled.

Mr. Ratner: An exception.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. You believe he asked you what? A. 'Who is it'? And I replied.

Q. What did you reply? A. 'Mr. Whittington. My wife is in bad shape. Will you come over right away, please'?

Q. What did he say? A. When I said I called the ambulance he said, 'You won't need me any more.' So, I didn't see him after that.

Q. Did the ambulance come? A. Yes.

Q. To where was your wife taken? A. To the hospital; I really don't recall the name of it. At that time anybody would have been upside down.

Q. That's the last you saw her alive? A. That's right.

Mr. McKenna: That's all. You may cross examine."

It is respectfully submitted that the Supreme Court should have ruled that the Court below should have stricken the entire testimony of Mr. Whittington because it was inadmissible and did not in anywise connect the conversation as having been had with the defendant, for there was lack of identification.

The law is well settled in this State that a telephone conversation in order to be admissible as evidence must show that the voice of the person whose telephonic communication is sought to be proved, was recognized by the other party to the conversation and the probative force of the evidence being for the jury to determine. The burden of proof always rests upon the party introducing the evidence to establish by some proof either direct or circumstantial, the identity of the person speaking. The Court held in *Smarak vs. Segusse*, 91 Law 57, that the telephone conversation in that case was not admissible for the reason that the witness did not recognize the voice. It is respectfully urged that this ruling of the Court supports the defendant's contention that it was

error to admit the testimony of the witnesses, Vetter and Whittington, as to their telephone conversations alleged to have been had with the defendant.

POINT II.

The Court erred in its refusal to grant defendant's motion for an acquittal at the close of the State's case.

The State failed to make out a *prima facie* case to support the charge in the indictment, to wit: That on the 27th day of March, 1944 in the City of Newark, the defendant maliciously and without lawful justification with intent to cause and procure the miscarriage of Emma Whittington, a woman then pregnant with child, did use in and upon the said Emma Whittington, divers instruments and means, etc. with the intent to cause the abortion.

When the State rested its case there was no testimony to show that the decedent, Emma Whittington, went to the office of the defendant for the purpose of having an abortion performed, nor was there any evidence in the State's case to show that the defendant had performed an abortion upon Emma Whittington. This evidence was necessary before the Court could submit the matter to the jury. It is respectfully urged that it was error for the Court to refuse to grant the defendant's motion for an acquittal at this stage of the proceedings.

POINT III.

The Court erred in allowing the testimony of a State's witness to testify as to an abortion having been performed upon her two years prior to the date of the crime charged in the indictment.

When the motion for an acquittal was denied at the close of the State's case, the prosecutor asked leave of the Court to recall Shirley Vetter to the stand to give testimony that two years prior to the date of the crime alleged in the indictment, the defendant had performed an abortion upon her (S. C. pages 98 and 99). Obviously the State realized that it failed to make out a *prima facie* case before it rested and tried to bolster its case by introducing this new evidence over the objection of counsel for the defendant. It is respectfully submitted that the admission of this testimony of Shirley Vetter over the objection of counsel for the defendant was not only erroneous, but prejudicial to the rights of the defendant. The law is well settled in this State that the evidence of a prior crime is not admissible to prove the commission of a like crime for which the defendant is indicted. *Bullock vs. State*, 65 Law 574, in which our Court of Errors and Appeals held, "That on the trial of the accused for a crime it is not competent to prove that he committed other crimes of a like nature for the purpose of showing that the accused would be more likely to commit the crime charged in the indictment. It is not relevant to show that the defendant has committed other similar crimes that are not connected in any way with the one in question;" and

to the same effect, see *State vs. Lederman*, 112 Law 366, *State vs. Snover*, 65 Law 289, *State vs. Raymond*, 53 Law 260. It is respectfully urged on behalf of the defendant that it was further error to admit testimony as to the prior crime alleged to have been committed by the defendant, although denied by him, because the period of time that elapsed between the prior crime and the present crime for which he was indicted, was entirely too remote. *State vs. Jankowski*, 82 L. 229.

The Supreme Court in its opinion held that since there was no ground of objection stated to the Court below for the inadmissibility of the testimony given by Mrs. Vetter, that in itself was sufficient reason not to consider this ground of appeal (S. C. page 130, lines 19 to 21 inclusive).

“The third point is a further challenge to other testimony of Mrs. Vetter. A sufficient answer seems to be that no ground of objection was stated.”

The Supreme Court was in error in this regard because the appeal was taken both on strict bill of exceptions and on causes for reversal based on certificate of the entire record pursuant to the Statute formerly Section 136 of the Criminal Procedure Act, now R. S. 2:195-16. Under said section the law provides: “If it shall appear from such record that the plaintiff-in-error on the trial below suffered manifest wrong or injury, either in the admission or rejection of testimony, *whether objection was made thereto or not*, or in the charge of the court, etc., * * *, the appellate court shall remedy such wrong or injury and give judgment accordingly, and order a new trial.”

It is respectfully argued that by the admission of Mrs. Vetter's testimony manifest wrong and injury was done to the plaintiff-in-error and a new trial should be granted.

POINT IV.

The Court erred in its refusal to direct a verdict of acquittal at the close of the defendant's case.

At the close of the State's case the defendant took the stand in his own behalf and testified that on March 25, 1944 Emma Whittington came to his office unsolicited and he treated and prescribed medication for an infected ingrown toenail. Before she left he gave her his business card and advised her to come back in a few days. On March 27, 1944 the defendant received a telephone call from a woman, who advised him that Mrs. Whittington's foot was worse and he suggested that Mrs. Whittington come to his office, so he could look at the foot, but he was told she could not come down because it was too painful. Whereupon he said he would come to her home around noon.

The record shows that the doctor made a house call at 141 Orchard Street and when he got there he stated that he was the foot doctor and he examined her foot. Mrs. Whittington was lying in bed and the bandage that he had put on the foot was dry, although he specifically told her to keep the foot wet. Testimony further shows that the doctor only stayed there two or five minutes. The doctor further testified that he had received

a call about 3:30 in the morning concerning Mrs. Whittington and he went to see her. When he got there she was not there.

On cross-examination the State failed miserably in its vicious attempt to show that the defendant, Dillingham, had performed an abortion upon Mrs. Whittington and that he had gone to her home in response to a telephone call which was in connection with the alleged abortion, for the cross-examination failed to contradict the doctor's testimony that he was at her home concerning the infected ingrown toenail, for which he had treated her at his office on the Saturday morning of March 25th, 1944.

The Court's attention is respectfully directed to the direct and cross-examination of the defendant that nowhere in the testimony can it be said that there was any evidence that the defendant at any time performed an abortion upon Emma Whittington, nor can such an inference be drawn from which the Court was justified in submitting the issue to the jury. For this reason the Court's refusal to direct a verdict at the conclusion of the defendant's case was error (S. C. pages 99-118).

POINT V.

The verdict is contrary to the greater weight of the evidence and the Court should have directed an acquittal.

It is respectfully contended that the State wholly failed to prove that the defendant committed or attempted to commit an abortion upon Emma

Whittington on the date charged in the indictment and that there was a lack of proof at the close of the State's case to justify the denial of the motion for an acquittal and there was no proof adduced after the defense was presented to justify the Court in refusing to grant the motion for a direction of a verdict at the close of the defendant's case and it was error to submit the issue to the jury for their determination.

Conclusion.

For the various reasons urged, it is respectfully submitted that the verdict of conviction against this defendant for the crime laid in this indictment should be reversed and set aside.

Respectfully submitted,

BENJAMIN M. RATNER,
Attorney for Plaintiff-in-Error.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

F. W. BAKER, NEW JERSEY REPRESENTATIVE.
11 COMMERCE ST., NEWARK, N. J. PHONE MA-RKET 2-2007

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

HORACE L. DILLINGHAM,
Plaintiff-in-Error.

On Writ of
Error, &c., to
the New Jersey
Supreme Court.

On Conviction
for Abortion.

BRIEF FOR THE STATE.

Statement.

The plaintiff-in-error, Horace L. Dillingham, hereinafter referred to as the defendant, was convicted on February 27, 1945 before the Honorable Richard Hartshorne and a jury in the Essex County Court of Quarter Sessions of the crime of abortion alleged to have been committed upon one Emma Whittington, as the result of which the woman died.

After conviction, on April 11, 1945, the defendant was sentenced to imprisonment in the Essex County Penitentiary for a term of 18 months at hard labor.

On appeal, the entire record of the proceedings was taken up on writ or error to our Supreme Court, which affirmed the conviction in Quarter Sessions. (The opinion appears on page 129 of the State of Case, and is not to be printed in any report.)

The defendant by this writ of error seeks to review the judgment of our Supreme Court.

Defendant presents 11 Assignments of Error and 10 Specifications of Cause for Reversal, only

a portion of which are argued in his Brief; involving the trial judge's refusal to direct an acquittal both at the end of the State's case and at the conclusion of the entire case, and the admission of certain evidence.

Under Point V (Specification No. 10), it is urged that the verdict is contrary to the "greater" weight of the evidence.

In order to acquaint the Court with the facts in the case, we shall argue this point first.

ARGUMENT.

POINT V.

The verdict was not against the weight of the evidence.

(Specification of Cause No. 10.)

The indictment was founded upon the statute, *N. J. S. A. 2:105-1*, providing that:

"Any person who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a woman then pregnant with child, shall:

"b. Use any instrument or means whatever—

"Shall be guilty of a high misdemeanor.

"If as a consequence thereof, the woman or child shall die, the person committing the offense shall be punished by a fine" etc., "or by imprisonment at hard labor not exceeding fifteen years, or both."

The indictment charged that the defendant on March 27, 1944, "maliciously and without lawful justification, with intent to cause and procure the miscarriage of Emma Whittington, a woman then pregnant with child, did use in and upon the said

Emma Whittington divers instruments and means, to the Grand Jurors aforesaid unknown, in consequence whereof the said Emma Whittington died," etc.

The State produced the following witnesses who testified to the following facts.

Dr. Carmine Berardinelli, Deputy County Medical Examiner, testified that on March 29, 1944 he performed an autopsy upon the body of Mrs. Emma Whittington and found that a "criminal abortion" had been committed "by another person" by insertion into the womb of a rubber catherer (C., p. 36, l. 25), causing a hemorrhage in the lining of the cavity and resulting in an infection (C., p. 39, l. 18). He produced the womb in a glass case together with the catherer, which he said he found "coiled around the fetus," (C., p. 38, l. 6). The glass case containing the fetus was received in evidence (C., p. 42, l. 23, Exhibit S-1).

Shirley Vetter lived on the second floor of the apartment house at 29 Pennington Street, Newark, at the corner of Orchard Street. She was the daughter of the apartment-house superintendent, Mrs. Rachael Sternberg, who occupied rooms in the basement. A sister of the deceased, a Mrs. Lydia Maguire, also lived in the same apartment-house, occupying another apartment in the basement. This witness testified that on the evening of Friday, March 24th, 1944, at about 8 o'clock, she talked with the deceased in the apartment of Mrs. Maguire (C., p. 44, l. 34). The following morning, March 25th, 1944, she called the defendant on the telephone, after looking up his number in the phone book, at his office at 60 Park Place, Newark. This was her testimony (C., p. 47, l. 8):

"Q. What was said when the phone was answered? A. I said, 'Is this Dr. Dillingham?'"

Q. What did the voice say? A. 'Yes'.

Mr. Ratner: I object to that.

Q. What did the voice on the other end say?

A. 'Yes.'

By the Court:

Q. Was it a male voice or a female voice?

A. A male voice."

By Mr. McKenna:

"What did you then say when he said, 'Yes'? A. I asked him—if it's kind of hard for me to say it. I asked him if he was still interested in doing a—I just said a job for somebody I knew. I told him first of all I was Mrs. Vetter and then I asked him if he would be interested in doing a job for someone I knew. And he said yes.

I said, 'When would it be all right to send the party up?'

And he said, 'Send her up right away.'

And I said that the party couldn't make it right away. She had arrangements to be made; that the earliest possible opportunity would be early Monday morning.

He said that was perfectly all right and he asked the name and I said the name was Mrs. Whittington. He said all right, and I hung up."

She testified that she knew the defendant, and that she informed Mrs. Whittington of her conversation with defendant the following day (Saturday, March 25), when she told her that "the arrangements had been made" (C., p. 48, l. 17). She saw Mrs. Whittington again the following Tuesday (March 28), in bed.

In cross examination, she testified that she had talked with defendant about "two years ago" in person (C., p. 49, l. 21); and that in her conversation with him by telephone on Saturday, March 25, she arranged for an appointment for the deceased with defendant for "early Monday morning" (C., p. 47, l. 38), at defendant's office at 60

Park Place, Newark (C., p. 51, l. 5); and that Mrs. Whittington "was to go there at nine o'clock" (C., p. 48, l. 20).

William H. Whittington, husband of the deceased, testified that in March, 1944, his wife was pregnant three and a half months (C., p. 55, l. 29); that he and his wife went to live with his wife's sister, Mrs. Maguire, at the Pennington Street address; that on Sunday, March 26, he discussed his wife's condition with her; that on Monday morning, March 27, at 8:30, she left the house and was gone for two hours; that on her return she told him where she had been (C., p. 57, l. 18); that from then on he "took care of her," and about 9:30 P. M. he retired with her.

He further testified that the defendant came to his apartment the following morning, Tuesday, March 28, at 9:30 while Mrs. Maguire was present (C., p. 58); that defendant "took his hat and tilted it to the side of his head so I couldn't see him" (C., p. 58, l. 33); that Mrs. Maguire spoke to him; that defendant went into his bedroom to see his wife and closed the door behind him and would not permit the husband to enter the room with him (C., p. 59); that defendant was in the bedroom about 5 minutes and when he came out he said, "everything is going as planned" (C., p. 59, l. 15); and that upon leaving defendant said "he would be back later on this afternoon" (C., p. 59, l. 21).

This witness again saw the defendant at 5:30 the same afternoon at his apartment; defendant again entered his wife's bedroom alone, and when he came out he again repeated, "everything is going as planned" (C., p. 59, l. 32); he testified that during that night his wife "was bleeding from the womb" (C., p. 60, l. 33), and he took her to the bathroom and "she passed out in my arms" (C., p. 61, l. 21); that at his request, Mrs. Maguire

first called defendant on the telephone, and then he went out and called the defendant (C., p. 61) from the apartment of the superintendent, Mrs. Sternberg, all of which took place about 3:30 A. M. (Wednesday, March 29).

He telephoned the defendant at his home in Orange, after procuring the number from the inside of a book of matches which he had taken from his wife's pocketbook (C., p. 62). This was his testimony with respect to his telephone conversation with defendant (C., p. 63, l. 28):

“Q. What did you say when you got the response on the other end of the phone? A. I told him my wife was in bad condition.

Q. Did you ask, ‘Who is this?’ A. Naturally I said, ‘Who is this?’

Q. We have to know that. What was said? A. ‘Who is this? Dr. Dillingham?’

Q. You asked, ‘Who is this? Dr. Dillingham?’ A. Yes.

Q. What did the voice on the other end say? A. He asked, ‘Is anything wrong?’ and I said, ‘Yes.’

Q. Did you say who you were? A. No, not that I remember of.

Q. What did you say to him? A. I believe he asked me who I was.

Q. You believe he asked you what? A. ‘Who is it?’ And I replied.

Q. What did you reply? A. ‘Mr. Whittington. My wife is in bad shape. Will you come over right away, please?’

Q. What did he say? A. When I said I called the ambulance he said, ‘You won’t need me any more.’ So, I didn’t see him after that.”

Shortly thereafter his wife was taken away to the City Hospital in an ambulance and he accompanied her.

Lydia Maguire, sister of deceased, testified for the State that after learning from Mrs. Whit-

tington about her "condition" on Friday night, March 24, she went to see her superintendent Mrs. Sternberg, where she talked with the superintendent's daughter, Mrs. Vetter; that she brought Mrs. Vetter to her own apartment where Mrs. Vetter talked with the deceased for about an hour (C., p. 76); that the following Monday morning, March 27 (the date laid in the indictment), Mrs. Whittington left and was gone about two hours (C., p. 77); that the following morning her sister, the deceased, complained of not feeling well, and at her sister's request she called the defendant on the telephone; that she dialed defendant's number furnished her by her sister from a "book of matches," and this was her testimony as to the telephone conversation (C., p. 78, l. 23).

"Q. What was said? A. I said, 'Is this Dr. Dillingham?' And he said, 'Yes.' I said, 'I'm calling for my sister, Mrs. Whittington. She isn't feeling well. She would like you to come down and look at her.' He said, 'All right, I will.'"

She further testified that the same day, Tuesday, March 28, about a half hour later, the defendant came to the apartment in response to the telephone call; and that he went into her sister's bedroom (C., p. 78, l. 31); that she saw the defendant a second time later the same afternoon, at about 5:30, when defendant called to see her sister; that defendant again went into the bedroom and after 5 or 10 minutes he came out and said, "everything is going according to plan" (C., p. 79, l. 14); that the following morning, at about 3 A. M., Wednesday, March 29, her sister called her, and she "was in great pain" (C., p. 80, l. 12); that she went to the superintendent's apartment and called defendant on the phone by dialing the number of his home in Orange, the number

being given her by her sister and taken from a book of matches. This was her testimony as to her telephone conversation with defendant (C., p. 81, l. 12):

“Q. What was said on the other end and what did you say? A. I asked, ‘Is this Dr. Dillingham?’ And he said, ‘Yes.’ I said, ‘Mrs. Whittington has collapsed in the bath-room and is blue and you had better come right away.’ He said, ‘I think you are just a little bit excited but I will be down in about an hour.’ I still was excited and I said, ‘I think you had better come before that.’ And he said, ‘All right, I will come as soon as I can.’ ”

She further testified that her brother-in-law, Mr. Whittington, also called the defendant on the telephone while she was there; that in response to these calls the defendant appeared at about 4.30 or 4.45 A. M., (C., p. 82, l. 8); that when defendant arrived, her sister, Mrs. Whittington, already had been taken to the hospital in an ambulance accompanied by Mr. Whittington; that she saw the defendant in the superintendent’s apartment, and he also came into her apartment, (C., p. 82, l. 34); that she informed the superintendent, Mrs. Sternberg, of Mrs. Whittington’s death in defendant’s presence, (C., p. 82, l. 37).

Mrs. Rachael Sternberg, the superintendent, corroborated Mrs. Maguire and Mr. Whittington as to the use of her telephone early the morning of the 29th when the defendant was being summoned in the emergency before Mrs. Whittington’s removal to the hospital; she testified that she called the defendant by using the number on the book of matches that Mrs. Whittington had; that on the telephone she talked to a man “who said he was Dr. Dillingham,” and she “told him that the woman was very bad and he had better

come down," and that defendant appeared in response to the call within "ten or fifteen minutes." She identified the defendant as the man who had come to her apartment, (C., p. 87); that she had known him "a year or two," (C., p. 78, l. 39), when he came to see her daughter Mrs. Vetter, (C., p. 88, l. 8); that she told defendant that Mrs. Whittington had been taken to the hospital, and that he replied, "there was nothing he could do," (C., p. 88, l. 12); that while defendant was in her apartment Mrs. Maguire entered and said that Mrs. Whittington had died, (C., p. 88, l. 20), to which the defendant said nothing, (C., p. 88, l. 27).

She further testified that she gave the defendant the package of matches with his telephone numbers on it, and he left, (C., p. 88, l. 32).

Detective Lieutenant *Thomas J. Bermingham*, of Newark Police Headquarters, testified that on March 27, 1944 he knew the defendant as a chiropodist with offices in the Military Park Building (60 Park Place, Newark) and his home on Tremont Avenue, Orange.

Mrs. Vetter, recalled by the State to the stand, testified that what she meant by "another job" in the course of her conversation with defendant the morning of Saturday, March 25, was an abortion the defendant had performed upon her at his office at 60 Park Place, Newark, about "two years ago," (C., p. 98, l. 34, *et seq.*).

The defendant, Horace L. Dillingham, testified in his own behalf that he was a chiropodist for more than 20 years; that he maintained an office at 60 Park Place, Newark, and resided at 188 Tremont Avenue, Orange; that he was listed in the phone book. He knew the deceased, Mrs. Whittington, for the first time when she came to his office on Saturday, March 25, 1944; that she had a painful ingrown toe nail; that he dressed

her foot and advised her to stay off her feet, and told her to return in a day or two. He admitted going to see her at her apartment the following day after getting a telephone call in her behalf. He stated that he treated her at her apartment for the foot ailment; and that thereafter, at about 3.30 o'clock one morning, in response to a telephone call, he made a personal call at her address as an "emergency."

On cross examination as to who made the telephone call, this was his pertinent testimony (C., p. 115, l. 21):

"Q. You went there of your own accord at that hour or was there a call? A. We just said there was a call.

Q. Did a man call you also? A. Not that I remember; maybe.

Q. Well, did he or did he not? A. You're talking about something that happened a year ago, almost. I received a call in the small hours of the morning. It startled me. The woman was very sick. 'This is Whittington calling. Come down right away.' They said, 'Come down right away.' And I said all right.

Q. A man or woman? A. It could have been a man."

Defendant further testified that when he got to the premises in response to the telephone call he first tried to gain admission to the Maguire apartment to see Mrs. Whittington, and when he failed he went to the apartment of the superintendent, from whom he learned that Mrs. Whittington had been taken to a hospital as the result of an abortion.

We submit there was ample evidence from which the jury could draw a legitimate inference that defendant committed the offense as charged in the indictment.

It is well established that to justify the setting aside of a verdict as against the weight of the evidence that fact must be so clear as to give rise to the inference that the verdict was the result of mistake, passion, prejudice or partiality.

State vs. Treficanto, 106 N. J. L. 344.

We submit Mr. Justice Parker, for our Supreme Court, properly made the following significant statement on this point (C., p. 131, l. 20):

“The seventh and last point is that ‘the verdict is contray to the greater weight of evidence and the Court should have directed an acquittal.’ We repeat that a case for the jury was presented, and our examination of the evidence satisfies us that the verdict was not contrary to the weight of evidence.”

POINTS II AND IV.

The Court properly refused to direct an acquittal at the end of the State’s case, and at the conclusion of the entire case.

(Assignments 6 and 8; Specifications 6 and 7.)

To avoid repetition, we shall argue both of these points together.

At the end of the State’s case, briefly, the posture of the evidence was as follows:

As to Pregnancy.

There was ample proof of Mrs. Whittington’s pregnancy. Her husband testified that in the month of March, 1944, she was 3½ months pregnant (C., p. 55, l. 26).

Dr. Berardinelli, in his autopsy, found a fetus six inches long in development, indicating “the fourth month of pregnancy” (C., p. 38, l. 25).

As to use of Instrument by Defendant.

Dr. Berardinelli, in his autopsy, found a rubber catheter in the womb which had been inserted "by another person" (C., p. 36, l. 28), and "coiled around in there" (C., p. 38, l. 29); and it was "wound around the fetus inside the membrana" (C., p. 39, l. 6).

There was proof by Mrs. Vetter that after talking to Mrs. Whittington on Friday night, March 24, she called the defendant on the telephone the next morning at his office; she asked defendant if he was still interested in "doing a job" for someone she knew (C., p. 47, l. 21); that he said he was; and she arranged with him to have Mrs. Whittington call at his office the following Monday (C., p. 47, l. 36 to p. 45, l. 7). When recalled, she explained that by "doing a job" she meant an abortion, which she said defendant had performed on her two years before (C., pp. 98-99).

There was proof by Mr. Whittington, the husband, that on Monday morning, March 27, his wife left the apartment and did not return till two hours later; that the following day, Tuesday, March 28, he saw the defendant at his apartment on two occasions when defendant called to see the wife; that on his visits the defendant had his hat tilted to the side of his head "so I couldn't see him" (C., p. 58, l. 33); that on both occasions the defendant entered the bedroom alone, closing the door behind him, and he would not permit the husband to enter at the same time; and that on each occasion, after coming out of the bedroom he said, "Everything is going as planned" or "to plan," (C., p. 59, l. 33; p. 59, l. 15). He testified that he called the defendant on the telephone at his home in Orange early Wednesday morning, March 29, after his wife collapsed in his arms in the bathroom; and that he got the telephone number from

the inside of a package of matches that his wife had.

Mrs. Maguire corroborated Mr. Whittington as to defendant's actions at the apartment when he came to see Mrs. Whittington. She and Mr. Whittington called the defendant on the telephone early Wednesday morning from the superintendent's apartment after Mrs. Whittington had collapsed.

Mrs. Sternberg, the superintendent, corroborated Mr. Whittington and Mrs. Maguire as to the "emergency" telephone call early Wednesday morning; and that the defendant responded to the call. She gave the defendant the book of matches from which his telephone number had been procured. When defendant was informed of Mrs. Whittington's death and removal to the hospital, "he didn't say anything," (C., p. 88, l. 27).

As to Intent.

When defendant called to see Mrs. Whittington on two occasions on Tuesday, March 28, he "kept his hat tilted to the side of his head" so Mr. Whittington "couldn't see him;"

He went into the bed room alone to see Mrs. Whittington, closing the door behind him, and he would not permit Mr. Whittington to enter with him; on coming out he said, "Everything is going as planned."

In spite of the fact that he was an avowed chiropodist, he responded to the "emergency" call early Wednesday morning.

He kept his telephone numbers on the inside of a package of matches.

He performed another abortion on Mrs. Vetter two years before.

Although there was no direct evidence that defendant used the catheter, there was abundant

proof of facts, at the end of the State's case, from which the jury could draw a legitimate inference that it was the defendant who inserted it into Mrs. Whittington's womb, with intent to commit the abortion.

The rule of law has been well established that a verdict of acquittal should not be directed at the end of the State's case where there is circumstantial evidence of guilt, which, if believed by the jury, would justify them in returning a guilty verdict.

State v. Sgro, 108 N. J. L. 528.

Our Supreme Court has stated the recognized rule as follows:

"... if there is any legal evidence before the jury from which an inference of guilt can be legitimately drawn, the direction of acquittal would be improper."

State v. Cammarata, 12 N. J. Misc. R. 115, p. 117.

At the conclusion of the entire case, the posture of the evidence was the same as it was at the end of the State's case, except that the defendant had taken the witness stand in his own behalf, and denied committing the abortion.

His testimony was that he had been a chiropodist for more than 20 years with offices at 60 Park Place, Newark, and resided at 188 Tremont Avenue, Orange; and that he was listed in the telephone book. He admitted knowing Mrs. Whittington, stating she had been to his office complaining of a painful ingrown toe-nail; that he dressed her foot, and advised her to remain off her feet, and told her to return in a day or two. He admitted that in response to a telephone call he saw the lady at her apartment where he treated her foot, and that thereafter at about 3.30 one

morning, in response to another telephone call, he made another personal call at the premises, when he learned Mrs. Whittington already had been removed to the hospital.

It was for the jury to believe or disbelieve his testimony; and to weigh and appraise it, in view of all the other facts and circumstances. The testimony on both sides was such that it was for the jury to appraise it as to its weight and credibility.

We submit that at the conclusion of the entire case there was ample evidence upon which to found a legitimate inference that defendant committed the abortion and that he was guilty of the crime charged.

State v. Bricker, 99 N. J. L. 521.

Mr. Justice Parker, for our Supreme Court, properly disposed of the point respecting the trial judge's refusal to direct an acquittal at the close of the State's case, as follows, (C., p. 130, l. 14):

" . . . Our examination of the evidence leads to the conclusion that a case for the jury had been presented at that stage."

As to the point respecting the Court's refusal to direct an acquittal at the conclusion of the entire case, Mr. Justice Parker, for our Supreme Court, made the following proper disposition, (C., p. 130, l. 23):

"The fourth point asserts error in a refusal of the Court to direct acquittal at the conclusion of the testimony. The refusal was proper, as a case for the jury still remained at that stage."

POINT I.

The Court's ruling in permitting in evidence certain telephone conversations, and its refusal to strike such testimony from the record was not error.

(Assignments and Specifications 1 and 2.)

Under this point, defendant complains of the Court's rulings in permitting in evidence the testimony of Mrs. Vetter and Mr. Whittington relating to certain telephone conversations had by them with the defendant, claiming there was a failure of identification of defendant's voice.

As to Mrs. Vetter, she testified that after talking with Mrs. Whittington on Friday night, she called the defendant on the telephone the following morning at his office, and she made the appointment with the defendant to have Mrs. Whittington call at his office the following Monday. Her testimony as to her conversation with defendant, to which objection is here made, appears in State of Case, page 46, line 5 to page 47, line 36 (Brief, pp. 4-6).

We submit that the testimony of her telephone conversation with defendant was properly admitted, and there was no error in refusing to strike it from the record.

It is to be noted that immediately following the testimony referred to, she testified (C., p. 48, l. 10):

"Did you know Dr. Dillingham? A. Yes."

And on cross examination, she testified as follows (C., p. 49, l. 18):

"Q. When did you first talk to Dr. Dillingham? A. On Saturday morning.

Q. How many years prior to that telephone call? A. Two years.

Q. How long was that conversation two years ago with Dr. Dillingham? A. I'm afraid if I say the wrong thing. It was twenty minutes to a half hour.

Q. You talked to him two years ago on the phone? A. No, in person."

And further, she testified (C., p. 53, l. 37):

"By the Court:

Q. Now, bearing in mind the fact that you had talked with him for some twenty minutes two years ago and that you called his number did you or did you not—and do you now or do you not—recognize that the voice that you then talked with was that of the defendant, Dr. Dillingham? A. Yes.

By Mr. Ratner:

Q. What makes you so positive now and in March 1944 that the voice you spoke with on that occasion in March 1944 was the same man you spoke to two years prior? A. I can answer that—

Q. What makes you so positive?

Mr. McKenna: If your Honor please, that calls for—

Mr. Ratner: I only asked her what makes her so positive.

Q. Did you recognize it then? A. Yes.

Q. Would you swear that it was the same man you spoke to two years ago? A. Yes.

Mr. Ratner: That's all.

By Mr. McKenna:

Q. Two years ago when did you talk to that man? A. In his office.

Q. You were there talking to him for twenty minutes? A. Yes.

Mr. McKenna: That's all."

As to Mrs. Vetter, we submit that her testimony that she knew the defendant because she spoke to

him in person two years before for a period of from 20 minutes to a half hour constituted *direct* proof of identity of the defendant speaking on the telephone; and the Court properly left it to the jury to determine the probative force to be given her testimony.

The evidence was properly admitted under the rule laid down in *Smarak v. Segusse*, 91 N. J. L. 57, p. 60 that:

“* * * where the voice of the person whose telephonic communication is sought to be proved was recognized by the other party to the conversation, the latter may testify to such communication, the probative force of the evidence being for the jury to determine. *Murphey-Hardy Lumber Co. v. Roder*, 83 N. J. L. 34.”

As to Mr. Whittington, the substance of his testimony was that about 3.30 in the morning (Wednesday, March 29), after his wife had collapsed, he called the defendant on the telephone at his home in Orange after getting the phone number from the inside of a package of matches taken by him from his wife's pocketbook. When he got the number, he testified, “I asked for Dr. Dillingham,” (C., p. 63, l. 11). His testimony went on as follows, (C., p. 63, l. 31):

“Q. Did you ask, ‘Who is this?’ A. Naturally, I said, ‘Who is this?’

Q. We have to know that. What was said? A. ‘Who is this? Dr. Dillingham?’

Q. You asked, ‘Who is this? Dr. Dillingham?’ A. Yes.

Q. What did the voice on the other end say?

A. He asked, ‘Is anything wrong?’ and I said, ‘Yes.’

Q. Did you say who you were? A. No, not that I remember of.

Q. What did you say to him? A. I believe he asked me who I was.

Q. You believe he asked you what? A. 'Who is it?' And I replied.

Q. What did you reply? A. 'Mr. Whittington. My wife is in bad shape. Will you come over right away, please?'

Q. What did he say? A. When I said I called the ambulance he said, 'You won't need me any more.' So I didn't see him after that."

The defendant, in his own behalf, admitted he got a telephone call at his home at 3:39 in the morning in reference to Mrs. Whittington, and that in response he went to the Whittington apartment.

This was his direct testimony (C., p. 110, l. 24):

"Q. Did you get a call on Monday morning around three-thirty in the morning? A. Yes.

Q. What was that conversation, if you remember? A. It was another case of someone being ill, someone being sick. 'Come down right away.' And so on and so forth. I'm a little confused about that.

Q. Do you recall who it concerned? A. I imagine the name was mentioned, Whittington.

Q. Did you go down to Whittington's? A. Yes.

Q. When you got down there was she there? A. No.

By the Court:

Q. At what time did you go down? A. Oh, it was very early in the morning, four or five o'clock; maybe three o'clock."

And on cross examination, he testified (C., p. 115, l. 21):

"Q. You went there of your own accord at that hour or was there a call? A. We just said there was a call.

Q. Who called you? A. I don't know. A woman called me.

Q. Did a man call you also? A. Not that I remember; maybe.

Q. Well, did he or did he not? A. You're talking about something that happened a year ago, almost. I received a call in the small hours of the morning. It startled me. The woman was very sick. 'This is Whittington calling. Come down right away.' They said, 'Come down right away.' And I said all right.

By the Court:

Q. A man or woman? A. It could have been a man."

When he got to Whittington's apartment and found it locked he tried and gained admission to the apartment of the superintendent, Mrs. Sternberg, who informed him that Mrs. Whittington had been removed to the hospital as the result of an abortion (C., p. 116, l. 18).

It is the State's contention that the facts and circumstances in the case satisfactorily establish the identity of the defendant, and Whittington's testimony concerning his telephone conversation with defendant was properly submitted to the jury for their appraisal as to its weight and credibility.

Under the rule, as laid down in *Smarak v. Segusse, supra*, it is not necessary that identity be established by direct evidence alone. Proof of facts and circumstances, or, as stated by the Court, "circumstantial proof" will serve the same purpose. This is what appears in the opinion:

"The burden of proof always rests upon the party introducing evidence of what was said over a telephone to establish by some proof, *either direct or circumstantial*, the identity of the person speaking * * * (italics ours.)

Smarak v. Segusse, supra, p. 61.

Wharton's Crim. Evid. (11th Ed.), Vol. 1, p. 601, sec. 379, says:

"Identification may be proved either by direct evidence, or by facts and circumstances * * *"

In *31 C. J. S. 910*, sec. 188, after stating the general rule that identity of the person with whom the witness was speaking must be satisfactorily established, the following appears:

"* * * The generally accepted view, however, is that the identity of the speaker may be established by means other than the recognition of his voice.

"The rule requiring the identity of the speaker to be established is subject to a well recognized exception to the effect that, where the witness called the listed telephone number of a party, such as his business office, testimony as to a conversation had with a person answering the telephone and purporting to be the person called is competent, although the witness did not recognize the voice of the person who spoke and is unable to identify the speaker, provided the conversation is such as might properly be made to a person answering the call. This exception is recognized for the reason that one who answers a telephone call from the place of business of the person called for, is presumed to be the person called, but such proof of identity is merely *prima facie* and is subject to rebuttal. Conversely, it has been held that a witness who is called on the telephone may testify as to who the speaker stated he was and what he said, although the speaker was unknown to the witness."

Whittington testified that prior to his telephone call he had seen the defendant at his apartment on two occasions on the same day, when defendant went into his wife's bedroom alone and came out saying everything was going as planned. He

called the defendant at his home in Orange at 3:30 in the morning; he asked the party answering if he was Dr. Dillingham, and the party said, "Is anything wrong?" and Whittington said, "Yes;" that in reply to the party's question, "Who is it?" the witness said, "Mr. Whittington. My wife is in bad shape. Will you come over right away, please."

On the witness stand, on direct examination, the defendant admitted receiving the telephone call "around three-thirty in the morning" (C., p. 110, l. 24); that he "imagined" the caller mentioned his name as Whittington", and that he did go to Whittington's" (C., p. 110, l. 32), "very early in the morning, four or five o'clock" (C., p. 111, l. 6).

On cross examination, with reference to the telephone conversation, he quoted the caller as saying, "* * * This is Whittington calling. Come down right away", to which he replied "all right", (C., p. 115, l. 33). When asked by the Court if the caller was a man or woman, he replied, "It could have been a man." (C., p. 115, l. 38).

In *Manzueto v. Fackler*, 109 N. J. L. 374, E. & A., the defendant testified he called plaintiff's place of business on the telephone requesting the plaintiff to come down and take the merchandise contracted for, and that when plaintiff did come down he admitted the telephone message, but gave some excuse for his delay. At the trial the plaintiff denied receiving the call and his admission. It was held that the trial judge properly left it to the jury whether the telephone message was transmitted and received.

In the instant case, the defendant admitted on the witness stand not only that he received the telephone call at his home early in the morning, but he admitted that it came from Whittington;

and that it was about Whittington's wife; and that he immediately responded to the call by going to Whittington's apartment.

We submit that proof of these facts and circumstances sufficiently established the defendant's identity as the person with whom Whittington had the telephone conversation; and that the trial judge properly received in evidence Whittington's testimony of such conversation and allowed it to stand over objection.

Mr. Justice Parker, for our Supreme Court, properly made the following significant statement in disposing of this point, (C., p. 130, l. 5):

"The first point challenges the admission of testimony of the witness Mrs. Vetter about a telephone conversation with the defendant, on the ground of lack of identification of defendant as the person with whom she conversed. This is disposed of by her testimony that she recognized his voice after she had rung up his telephone number."

No error is shown here.

POINT III.

The Court's ruling in receiving in evidence Mrs. Vetter's testimony regarding an abortion committed upon her by the defendant was not error.

(Assignment No. 7 and Specification No. 5)

Defendant here complains against the admission of certain testimony of State witness Mrs. Vetter regarding another abortion she said the defendant committed upon her some two years before.

Mrs. Vetter had testified that after talking with Mrs. Whittington on a Friday night she called

the defendant on the telephone the following morning and arranged with defendant to have Mrs. Whittington call at his office the following Monday morning; and that in her conversation with defendant she asked him if he was "still interested in doing * * * a job" for someone she knew, (C., p. 47, l. 21).

The record indicates that immediately following the testimony of the police officer, Lt. Birmingham, there followed a discussion between Court and counsel, (C., p. 93, l. 23). There is nothing to indicate that the Assistant Prosecutor had actually closed his case up to that point, when defense counsel began addressing his motion for a direction of acquittal.

Before any ruling was made on the motion, the Court, at the request of the Assistant-Prosecutor, permitted the case to be "reopened" and Mrs. Vetter was recalled to the stand. Defense counsel renewed his application for a direction of acquittal at the close of her testimony, (C., p. 99, l. 22).

Upon her recall, Mrs. Vetter testified that defendant had performed an abortion upon her "two years ago," which seems to be the object of the complaint.

This was the testimony (C., p. 98, l. 34):

"Q. Did you at any time previous go to Dr. Dillingham and have anything done by Dr. Dillingham?

Mr. Ratner: I object to the question.

The Court: Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court.

(Exception noted as ground of appeal.)

Q. Did you have anything done by Dr. Dillingham? A. Yes.

Q. What did you have done by Dr. Dillingham? A. An abortion.

Q. When was that? A. Two years ago.

Q. Where was it performed? A. In his office.

Q. Where? A. At 60 Park Place."

It is to be noted that nowhere in the record does it appear that defense counsel made objection to this particular testimony; nor did he move the Court to strike it out and instruct the jury to disregard it.

Just before Mrs. Vetter was recalled to the stand, defense counsel made this statement (C., p. 97, l. 32):

"Mr. Ratner: I would like to note an exception to your Honor's ruling that the State may reopen its case and that the testimony about to be given is definitely prejudicial to the rights of the defendant. I think your Honor ought to rule on the motion for acquittal first, because I think we are entitled to an acquittal in view of this testimony."

After Mrs. Vetter completed her testimony, the State rested its case and defense counsel said (C., p. 99, l. 22):

"Mr. Ratner: I renew my application for the direction of an acquittal on the grounds outlined to your Honor previously."

The motion and exception evidently referred to the motion for direction of acquittal previously argued (C., p. 93, l. 27 to p. 97, l. 18), and not to Mrs. Vetter's testimony here complained against.

There was no judicial ruling upon which to found an assignment of error with respect to Mrs. Vetter's testimony concerning an abortion previously committed upon her, nor was there any request for such a ruling.

On this point, it has been held by this Court that:

"While it is true that under our act concerning Criminal Procedure (section 136, R. S. 2:195-16), a judgment may be reversed because evidence has been accepted or rejected 'whether objection was made thereto or not,' it is also true that there has not been a reception or rejection of evidence in the statutory sense unless the evidence in question has been admitted or rejected under judicial ruling. *State v. Warady*, 77 N. J. L. 348; affirmed, 78 Id. 687; *State v. Sweet*, 81 Id. 250; *State v. Lockman*, 83 Id. 168. Here there was no 'admission' of the testimony in the sense of the statute, *supra*, because in the absence of objection by plaintiff in error the court did not rule on the matter nor was it asked to do so."

State v. Schroeder, 125 N. J. L. 87, on p. 88.

However, it is the State's contention that the evidence of Mrs. Vetter, relative to another abortion alleged to have been committed upon her by the defendant two years before was relevant and competent on the issue of intent, which is an essential ingredient of the crime of abortion for which the defendant was being tried. To complete the crime, there must be an intent on the part of the accused to cause or procure a miscarriage.

The statute, *R. S. 2:105-1*, reads:

"Any person who, etc. * * * *with intent to cause or procure the miscarriage, etc.*"

We respectfully submit that the case comes within one of the exceptions to the general rule forbidding proof of a similar crime other than the one then tried. It falls within the accepted rule that "whenever the defendant's guilt of an extraneous crime tends logically to prove against him *some particular element* of the crime for which he is being tried, such guilt may be shown,"

State v. Fay, 127 N. J. L. 77, 82;

State v. Raymond, 53 N. J. L. 260, 265.

In *State v. Sturchio*, 130 N. J. L. 259, (aff'd in 131 N. J. L. 256), there was a similar situation, where evidence was admitted tending to show that defendant had committed another abortion upon a State witness, wherein this Court held, page 260 of opinion:

“* * * Assuming that the evidence was sufficient to permit the inference that the defendant had performed an abortion of the witness, nevertheless it was admissible. Where, as here, the element of intent is a necessary ingredient of the crime charged, evidence of the performance of abortions, whether prior or subsequent, tend to negative an innocent intent. 2 Wigmore on Evidence, Sec. 359, Cf. 1 C. J. S., p. 336, sec. 28; 1 Am. Jur. tit. ‘Abortion,’ sec. 42; *Clark v. People* (Ill.), 79 N. E. Rep. 841; *Commonwealth v. Blair*, 126 Mass. 40; *State v. Fay*, 127 N. J. L. 77.”

In *State v. Weiss*, 130 N. J. L. 149, (aff'd 131 N. J. L. 228), the defendant, a druggist, was jointly charged with another and tried for abortion by use of an instrument; and evidence showing that on other occasions he sold drugs for a miscarriage was held to be competent. The legality of the evidence was founded not only upon the theory that it tended to prove the essential element of intent, but also “to show a state of mind or course of conduct by the defendant over a period of time.”

This is what this Court said, page 153 of opinion:

“* * * The proof of the sale of drugs by defendant on other occasions was evidential to show intent, which is an essential element for this offense. *State v. Lederman*, 112 N. J. L. 366; 170 Atl. Rep. 652. It is also admissible to show a state of mind or course of conduct by the defendant over a period of time. *State v. Raymond*, 53 N. J. L. 260; 21 Atl. Rep. 328;

State v. Fay, 127 N. J. L. 77; 21 Atl. Rep. (2d) 607; *State v. Steneck*, 118 N. J. L. 268; 192 Atl. Rep. 381 * * *."

In the instant case, the State contends that the defendant committed an abortion, while the defendant contends that he merely treated Mrs. Whittington as a chiropodist for an ingrown toe nail.

Under such circumstances, the State was legally entitled to show that defendant had committed abortions on other occasions, thereby tending to show, not only the necessary element of intent, but also to show a state of mind and course of conduct over a period of time.

We submit no error is shown here.

It is respectfully submitted that no errors having been shown, the judgment of our Supreme Court should be affirmed.

Respectfully submitted,

WILLIAM A. WACHENFEID,
Prosecutor of the Pleas.

C. WILLIAM CARUSO,
Special Assistant Prosecutor,
On the Brief.

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