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Criminal Law - Trial - Duty of Judge to Instruct on Lesser and Included Crimes

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CRIMINAL LAW—TRIAL—DUTY OF JUDGE TO INSTRUCT ON LESSER AND INCLUDED CRIMES—Appellant was one of four defendants who were charged in three separate counts of an indictment with the crimes of attempted robbery in the first degree, attempted grand larceny in the first degree, and assault in the second degree with intent to commit robbery and grand larceny. After all the evidence had been entered, the trial judge submitted only the count of attempted robbery to the jury, instructing them that they return a verdict of guilty or not guilty of that crime. The defense excepted to the court's refusal to submit the other counts charged in the indictment. The defendant was found guilty of attempted robbery, and the verdict was affirmed by the appellate division.[1] On appeal to the New York Court of Appeals, *held,* affirmed, three judges dissenting. The court is required only to instruct on a lesser or included crime when there is some basis in the evidence for finding the accused innocent of the larger crime and guilty of the lesser one. *People v. Mussenden,* 308 N. Y. 558, 127 N.E. (2d) 551 (1955).

[1] People v. Mussenden, 284 App. Div. 479, 131 N.Y.S. (2d) 701 (1954).

Since the majority of courts hold that the trial judge must charge on lesser and included offenses only when he finds some evidence which would allow a jury to find the defendant guilty of the lesser crime,[2] most challenges of the judge's instructions are in cases where the jury has convicted of the major crime without being given the alternative of lesser counts.[3] However, often a defendant convicted on a lesser crime will appeal, alleging that he should be found guilty of the major crime or completely innocent.[4] The latter cases are most common in the minority of jurisdictions which provide that instructions must always be given on lesser and included crimes.[5] New York statutes allow a defendant to be convicted of any lesser and included crimes,[6] but since the judge instructs the jury on the law[7] the jury's power to so convict exists only when the judge finds some evidence of the lesser crime. The minority view, by requiring instructions on all counts, leaves the matter entirely to the jury.[8] Either rule may violate the principle that the jury should try the facts and the judge prescribe the law. The minority risks the danger that a jury, although it finds facts sufficient to prove the defendant guilty of the major crime, will nevertheless convict him of a lesser offense.[9] Although this tendency can probably never be eliminated entirely, the majority view reflects a desire to discourage it by refusing to charge concerning lesser crimes when there seems to be no view of the facts which would warrant such a verdict.[10] The difficulty with the majority

[2] E.g.: State v. McCall, 245 Iowa 991, 63 N.W. (2d) 874 (1954); State v. Mele, 140 Conn. 398, 100 A. (2d) 570 (1953). See 21 A.L.R. 603 (1922).

[3] See People v. Martens, 272 App. Div. 1022, 73 N.Y.S. (2d) 604 (1947); State v. Brown, (Mo. 1952) 245 S.W. (2d) 866.

[4] See Sanders v. Commonwealth, (Ky. App. 1954) 269 S.W. (2d) 208; Laury v. State, 187 Tenn. 391, 215 S.W. (2d) 797 (1948).

[5] Laury v. State, note 4 supra; State v. Broussard, 217 La. 90, 46 S. (2d) 48 (1950). La. Rev. Stat. (1950; Supp. 1954) tit. 15, §386, specifies the included offenses for each crime and states that the court must charge on these included offenses when the greater crime is charged in the indictment. An interesting history of two unsuccessful attempts to amend this statute and the reasons for their defeat is given in Bennett, "Criminal Law and Procedure: Work of the Louisiana Supreme Court for the 1945-1946 Term," 7 LA. L. REV. 288 at 311 (1946). For another statute of this same type, see Tenn. Code Ann. (Williams, 1934) §11751.

[6] Section 444 of the New York Code of Criminal Procedure states that, upon an indictment for a crime which has different degrees, the jury may convict of any degree or of any attempt to commit the crime. Section 445 states that in all other cases a jury may convict of any crime necessarily included in the crime charged in the indictment. 66 N.Y. Consol. Laws (McKinney, 1944) §§444, 445. In the principal case, the majority and minority disagreed as to whether the other counts charged in the indictment were "necessarily included" offenses within the meaning of section 445. Principal case at 561, 568.

[7] See People v. Murch, 263 N.Y. 285, 189 N.E. 220 (1934).

[8] The Supreme Court of Louisiana has reversed a conviction of first degree murder because of the trial judge's refusal to charge the jury on attempted murder and attempted manslaughter. State v. Brown, 214 La. 18, 36 S. (2d) 624 (1948).

[9] These reasons can work against the defendant as well as for him. Although the jury will often convict a defendant of a lesser count because of sympathy, etc., it is also true that a jury which has some doubt as to the guilt of the defendant charged with a major crime may compromise and sentence him on a lesser and included crime instead of acquitting him.

[10] In People v. Rytel, 284 N.Y. 242, 30 N.E. (2d) 578 (1940), the court spoke of the power of the jury to reject uncontradicted evidence and extend mercy to the accused. Certainly the majority view detracts from this power.

view is that in virtually every case there is some view of the facts which would legally warrant a conviction of a lesser crime.[11] Although there would be little support for a rule allowing a judge to instruct the jury that they could not acquit the defendant, the difference between such a situation and the majority view is only one of degree. Essentially both require the judge to withdraw one possible factual situation from the deliberation of the jury on the ground that the judge's findings show no evidence which he feels would allow the jury to arrive at that particular factual determination. If allowing the judge to limit the jury's choice of verdicts assures a greater degree of justice in most cases, this preemption of jury power should not be hidden behind vague distinctions between questions of law and questions of fact. Further, the courts should, on general principles, use extreme care in restricting this fact finding power of the jury.[12] In the principal case, the New York courts decided a factual question—whether or not there was sufficient evidence to allow a jury to find the defendant innocent of the major crime and guilty of a lesser one. By a four-to-three decision the highest court in the state decided that there could not be any view of the facts which would allow conviction of the lesser crime. It would appear that when this court disagrees four to three as to the conclusiveness of the evidence, that in itself is sufficient indication that the evidence is not so conclusive as to justify the trial court in refusing to submit the lesser crimes to the jury.

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11 Application of the felony-murder rule, for example, illustrates a fact situation which would legally justify a jury in convicting of a lower degree than first degree murder: *X*, without deliberation or premeditation, feloniously assaults *Y* and *Z*'s death results. A charge to the jury that they should either find *X* innocent of the assault or guilty of first degree murder is inappropriate. If the jury finds that *X* assaulted *Y* without intent to kill, they should convict him of first degree murder under the felony-murder rule. However, if they find that *X* assaulted *Y* with intent to kill then the statute prescribes a conviction of second degree murder as a result of the transferred intent. REPORT OF THE NEW YORK LAW REVISION COMMISSION 683 (1937).

12 See People v. Schleiman, 197 N.Y. 383, 90 N.E. 950 (1910), where the court points out that only exceptional conditions warrant a refusal to instruct the jury on their power to convict of a lesser degree of the crime charged, and that such an instruction should be given unless there is no possible view of the facts which would allow any choice except a conviction of the major crime or an acquittal.