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STATE OF MICHIGAN,

SUPREME COURT.

THE PEOPLE,
vs.
ORIN J. FREY.

EXCEPTIONS FROM CALHOUN.

BRIEF FOR RESPONDENT.

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BATTLE CREEK:
BURNHAM PRINTING COMPANY.
1897.

STATE OF MICHIGAN.

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STATEMENT.

Two respondents, the above named and another, were informed against (information, Record, page 47.) under Section 9093, which reads as follows,—

"If any person shall, either verbally or by any written or printed communication, maliciously threaten to accuse another of any crime or offense, or shall by any written or printed communication maliciously threaten any injury to the person or property of another, with intent thereby to extort money, or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against his will, he shall be punished by imprisonment in the State Prison or in the county jail,

not more than two years, or by fine not exceeding one thousand dollars."

Separate trial was demanded, and respondent Frey was first tried.

The trial resulted in a conviction.

A motion for new trial was made (p. 34—37), and denied by the Court. (p, 37—40).

Formal exceptions were taken (p. 40—42), and the case brought to this Court on assignments of error, pursuant to the statute (p. 42—46).

ASSIGNMENTS ONE, TWO, THREE AND FOUR.

We take up these assignments together.

It will be noticed that the information alleges simply the unlawful and malicious threatening to accuse of a crime, to-wit,—the crime of sodomy and bestiality, with the intention then and there to extort money from the complaining witness (p. 47), there is no allegation in the information which directly or indirectly suggests that the accusation was threatened to be in any judicial tribunal, or by setting in motion any of the criminal machinery of the State.

Record, page 2, lines 24 and 25 show what the complaining witness testified respondent charged him with doing or having done.

This charge in itself does not in any way include the idea of an accusation in a judicial tribunal or the setting in motion of any of the criminal machinery of the State.

Complaining witness further testified, (p. 2,) at the bottom of the page, that "respondents told him that the punishment for said offense was twenty-five years in States Prison, and that they would swear him there."

This falls short of a threat *to prefer charges themselves*

in some Court, *and that they themselves would set in motion the criminal machinery of the State.*

It is merely a menace, but not a menace that they themselves would make complaint against him, and that they themselves would cause proceedings to be taken where the "swearing" would be of avail, to-wit: in some Court.

This question has been up but once in this State, in the quite early case of People vs. Braman, 30 Mich. 459, when the Court evenly divided, Judges Cooley and Christiancy on one side, and Graves and Campbell on the other. It has never been up since.

It will be noticed that while the Court divided equally with respect to the application of the principle to the case then on trial, there is no difference between the effect of two opinions, so far as related to the point now under discussion.

Judge Cooley's opinion, it is true, uses language dissenting from the view of Judge Graves in this particular; but the case did not demand this dissent, and his judgment thereon was distinctly placed upon other grounds, which did not necessitate the use of the doctrine which Judge Cooley there suggests. The opposing opinion supports the contention of Judge Graves by way of authority, which seems to be conclusive. And that Judge Cooley, himself, had a doubt in his mind, is shown by the language on page 464, where he suggests amendment of the statute.

In 25 Am. & Eng. Enc'y. foot p. 1070, the text says, "Whether or not, in letters threatening to accuse of crime, the threatened accusation must be in a judicial tribunal, does not seem to be well settled, *but the weight of authority appears to be in the affirmative.*

The cases are collected and cited by Judge Graves on

page 469 of 30 Mich., and are also given in the encyclopædia above cited.

We do not elaborate this further, but simply submit that the question is now here for practical consideration by this Court.

It will be noted that the Court, in his last words to the Jury, before they retired, record page 23, totally ignores the element which we contend should be given to the Jury, that is that the threatening must be in a judicial tribunal, or a threat to set the criminal machinery of the State in motion. The Court says (p. 28,) "Do you understand, gentlemen, what you were asking about in regard to the information? The information charged Mr. Frey with having maliciously threatened to accuse Mr. Doubleday of sodomy and bestiality, with the intent to extort money from him, Doubleday. Now, if he did that, then he is guilty; if he did not, he is not guilty of the offense as charged."

ASSIGNMENT FIVE.

The Court charged the Jury, foot 27—top 28, "If you believe his position to be true, that they came upon him there, said to him what he said they did say, why, conviction would possibly follow, probably follow."

We submit that this is going too far. Too much in the nature of a direction to the Jury what to do, to be permitted in a criminal case,

ASSIGNMENT SIX AND SEVEN.

We submit that the charge of the Court with regard to reasonable doubt, is open to the objection that its language would warrant the Jury in believing that a doubt must exist when all of the elements were taken together, and that particular strength in one portion or the force of

a particular element might make good the weakness of proof in other directions. This is clearly not the law, and if the charge should be interpreted by the Jury in that way, it would be prejudicial error.

A careful examination of the charge, referring to this, will show that while the Court rightfully charged them in one portion of the charge, that this doctrine extended to every element of the case, yet the whole charge taken together, removes this impression, and leaves the jury to find that the case as a whole, is what they are considering. This language of the Court, and in such connection as to make it almost absolutely certain that the jury must have honestly thought the case was not to be judged by its separate elements, but as an entirety, was, we submit, very much to prejudice of the respondent.

People vs. Aikin, 66 Mich. at 481–483.

ASSIGNMENT EIGHT.

We submit that here again, the trial Judge went too far in influencing the jury.

ASSIGNMENT NINE.

The definition which the Court gave of the offense of sodomy and bestiality, Record p. 22, is not correct, in that it omits an essential element of the offense.

People vs. Hodskins, 94 Mich. 27.

ASSIGNMENTS TEN AND ELEVEN.

The County of Calhoun, from which the case comes, is in the Fifth Judicial Circuit.

The provisions of the Statute in regard to stenographer's minutes and transcripts are in 3 Howell, Sections 6522 c. 9. to 6522 d. 7. The statute provides that the stenographer shall be deemed an officer of the Court; that he

shall take full stenographic minutes of the testimony and proceedings, and says, foot Sec. 6522 d. 2. that in any criminal case, the stenographer may be ordered to make a transcript, and that when so made, "such transcript will be deemed the official record of the Court."

Upon the trial of this case the regular stenographer of the Court was absent, and a substitute, a young man from Detroit, acted in his place. Counsel for defendant asked the stenographer in the usual way, for a copy of the Judge's charge, and when it came, it was in the language shown by the Record, pp. 10—19.

It was obvious to respondent's Counsel, upon reading over the charge received from the stenographer, that he was most incompetent, and had taken the minutes of the charge in such a way that a material part of his transcript was the purest guess work, instead of the absolute accuracy, which stenography permits of and is designed for.

Respondent's Counsel sent this charge to the trial Judge, who corrected it by interlineation with his own pen. *No printed record can approximately do justice to the condition of affairs disclosed by the typewritten charge furnished by the stenographer, and the condition of that paper when it returned again from the hands of the trial Judge.*

We ask the Court to take the original record from the Clerk's office and examine it. It will be self-convincing. The reason why the stenographer's transcript was sent to the trial Judge, was because it was so grossly and in many cases ludicrously inaccurate, that as a matter of professional honesty and honor, it was imperative that the attention of the Judge should be called to the matter.

The Judge returned the charge to respondent's Counsel, and with it a letter, which is in the original record, and a copy of which is printed in the printed record, p. 30 and 31.

In it the Judge says in so many words, "I cannot be certain that this is correct as I gave it to the jury, as I find the charge was largely oral. * * * * the remainder of the charge is corrected from memory."

Here then, we have this situation. The statute says that the transcript furnished by the stenographer is the "official record of the court." And the trial Judge, himself, says that the transcript is a farce, grossly inaccurate, part of it left out entirely, that the stenographer was incompetent, that he, the trial Judge, did not write out the charge, when he gave it, he was correcting it from "memory, and cannot be sure that he remembers it correctly." It is to be noted also, that this case was tried in the early part of October, 1895, and the letter of the trial Judge bears date Jan. 11, 1896, *showing that he is undertaking to correct a charge, largely oral, three months after he made it, practically entirely from memory, and frankly admits that he cannot remember what he said.*

We submit that it is to plain for argument that the absence of an intelligible transcript of the oral proceedings at the trial must be detrimental to the respondent. As a matter of law, he was not aware, nor can he be made aware of the situation of the case. No intelligent review can be had under such circumstances. With us the official stenographer is a part of the Court. There is no obligation on the part of attorneys or parties to perpetuate proceedings when an official branch of the Court is specially created and existing for that identical purpose. Every element has a right to rely upon this part of the Court work as they do its other branches. And any error which effects the rights of the parties, ought to be, and in law is, capable of redress, the same as though the Court or Counsel had erred in their part of the proceedings.

It is manifestly to respondent's disadvantage to be un-

able to ascertain, for the purpose of review, the correct proceedings of the trial Court, and no part of that proceeding is of more importance than the charge of the Court to the Jury; and in no proceeding which is brought into Court is this of as much importance as in a criminal case, which involves the life or liberty of a person.

The statement of the trial Judge is conclusive that he is obliged to *guess*, after an interval of three months, at most all of what he said three months before, and that we are not obliged to take that *guess work* in place of the absolute accuracy contemplated by our stenographic system, seems to us too patent to require argument.

See Vincent vs. the State, 56 N. W. 320.

Curran vs. Wilcox, 6 N. W. 762.

ASSIGNMENT TWELVE.

Upon the trial three witnesses, Thomas, Nixon and Wood were introduced to testify generally as to good character of respondent. Against the protests and objections of respondent's Counsel, each one of those witnesses was questioned on his cross examination as to whether or no they had ever heard of the respondent attempting to commit suicide. The plan of the prosecution evidently was to impress the jury with the idea that no one but a man who was capable of crime, or who had a guilty conscience would attempt to take his own life—that respondent's reputation was not good *because* he had at some time in his life done something so bad that he wanted to end his miserable existence, and put himself out of the world.

We submit that this is radically wrong in law and logic. At common law suicide is a felony.

2 Blackstone, Chap. 4 p. 187.

And the suicide was punished by an ignominious burial in the highway, with a stake driven through his

body, stone piled over his grave, and his hand which committed the act cut off, and his goods and chattels were forfeited to the King. This was upon the theory that as no pain or punishment could be inflicted upon the dead body, all the punishment which the circumstances were capable of would be imposed.

But suicide is not a felony in Michigan.

2 Howell, Sec. 9430.

An attempt to commit suicide was a misdemeanor at common law, but it is not even a misdemeanor in Michigan.

Howell, Sec. 9423.

Commonwealth vs. Dennis, 105 Mass. 162.

Our own Court, in Life Insurance Co. vs. Moore, 34 Mich. at 45, holds that a finding of suicide, without also a finding that it was voluntary, would not conflict with a general verdict in favor of the plaintiff in the Insurance Policy, under the language of the policy, that it would be void, if the "party died by his own hand," because suicide committed by a man *non-compos* was neither a crime, a misdemeanor or a moral wrong. The burden of proof would be upon the Insurance Company to show that it was voluntary, that is by a man in his sound senses. And surely, from the criminal stand-point, as no man is presumed to have commited a crime, the burden of proof would much more be considered to be upon the people. In other words there is nothing necessary criminal, or necessarly even immoral in suicide, or in an attempt. It depends upon the mental condition of the person.

The prosecution's theory was to impress the jury that respondent was a despicable fellow, and had committed some criminal act, on account of which he wanted to put himself out of the world.

Now we need not go to encyclopædias, statistics, or

learned articles for information upon this subject. Our own knowledge in every day life contradicts the theory of the prosecution. Everyone knows from his own daily reading of the newspapers and worldly knowledge, that a very great majority of the actual or attempted suicides are for causes other than that of crime. Occasionally we read of Bank cashiers, presidents or trusted clerks who have speculated with trust funds mismanaged or lost them, and in remorse or cowardice, commit suicide, but the vast majority of suicides and attempts are from such causes as disease, insomnia, loss of wife, husband, child, dear friend, great grief or despondency, or sudden and unexpected loss of fortune or business reverses. Often times from mere over prosperity in business, by one whose wearied, worried brain cannot stand up longer under the strain upon it.

An editorial in the Chicago Tribune only a few days since, in speaking of the suicidal mania among physicians, says, among other things, "The records of suicides for the year 1896 does not show any abnormal spread of the mania. The total number, 6520, maintaining only the usual ratio of increase."

A discussion of the matter was had within the last few months in one of the Detroit papers, in which the opinions of several physicians and specialists were asked. Dr. F. W. Mann, Dr. David Ingliss, Dr. Justin E. Emerson. The prevaling causes of suicide were given by these experts as "abundance of food" and nothing in particular to occupy one's mind." "Nervous diseases." "Emotionalism incident to particular ages in both sexes, religion, love, ambition"—these in addition to the causes we have suggested above.

Again the respondent's questions to the witnesses were all aimed at their *general* accquaintance, and the character and good standing of the respondent in the vicin-

ity in which he resided. The rebutting proof must be *general* under such circumstances as these, and particular instances cannot be given.

Brownell vs. the People, 38, Mich. at 736.

People vs. McLane, 71 Mich., 309.

Commonwealth vs. O'Brien, 119 Mass., 342.

The fact that the second suicide proof is unobjected to, does not waive its inadmissibility.

Where evidence of a wrongful character has been once objected to, that is enough.

McKinnon vs. Gates, 102 Mich. at 622,

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