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IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

JOE GUYNN

vs.

COMMONWEALTH.

Brief on Behalf of the Commonwealth

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The accused was indicted, tried, convicted and sentenced to three years in the State penitentiary on the charge of the murder of one Protch Marshall.

THE INDICTMENT UPON WHICH THE ACCUSED WAS TRIED

The accused on the first page of his petition assigns as error the refusal of the court to quash the indictment.

From Bill of Exceptions No. 1 (R. p. 9), we judge that the indictment (R. pp. 9, 10) originally came from

the grand jury without the words "against the peace and dignity of the Commonwealth of Virginia," found at the end of the first paragraph of the indictment as printed in the record. We say "we judge" because the inference to be drawn from the motion to quash is that the motion raised the question whether it was proper to indict in one and the same count the accused as a principal in the first degree and Ed Guynn as a principal in the second degree.

It is not necessary for us to discuss whether this was proper, for the Commonwealth's attorney moved that there be added the words, "against the peace and dignity of the Commonwealth of Virginia," at the end of the first paragraph of the indictment as printed; these words, it appears, were already at the conclusion of the indictment. The accused objected to the addition of these words, but the court permitted the amendment and overruled the motion to quash.

If reference be made to the order entered by the court on the first day of the trial (R. p. 7), it will be seen that all this took place prior to arraignment and plea. Beyond peradventure of doubt, if the action of the court in permitting the amendment was correct, the motion to quash should have been overruled. And beyond peradventure of doubt the action of the court certainly was not incorrect, for section 4877 of the Code provides that, before the defendant pleads, a defective indictment for a felony may be amended before the trial is had, provided the amendment does not change the character of the offense charged. That section also provides that, after such amendment is made, the defendant shall be

arraigned on the indictment as amended, and that the trial shall proceed as if no amendment had been made; but, if by such amendment the defendant is taken by surprise, he is entitled to a continuance. Indeed, our statute law goes further, for in section 4878 of the Code it is provided that, even after the defendant pleads, the court may permit an amendment that does not change the nature of the offense charged.

The amendment that the court permitted in no sense changed the offense charged; it merely converted an indictment formerly of one count into two counts, and whatever defect, if any, there may have been was cured in that method and was properly cured.

However, the accused says that the court had no right, in view of section 106 of the Constitution, which provides that every indictment shall conclude with the words "against the peace and dignity of the Commonwealth," and in view of a number of decisions saying that each count of an indictment must so conclude, to permit this amendment.

On page 2 of the petition there are cited a number of cases under catch sections taken from Michie's Digest of Virginia and West Virginia Reports.

The accused fails to note that the distinction between the Virginia cases which he there cites and this case. Here the accused did not go to trial upon an indictment, or upon a count in an indictment, which did not conclude in the constitutional fashion. Prior to the time he was arraigned, a formal defect was cured, and it was the indictment, as amended, on which he was tried. The grand jury found an indictment in one count charging

the accused as principal in the first degree and his brother as principal in the second degree and concluding as required by the constitutional mandate. The amendment was a purely formal one, split the indictment into two counts and permitted the constitutional conclusion to be written in at the end of the first count. This is an entirely different situation from that which occurred in the cases cited.

In *Commonwealth* v. *Carney,* 4 Gratt. 546, a motion was made to quash the first count of the indictment because it did not conclude as required by the Constitution. The court held that this motion should have been granted.

In *Thompson* v. *Commonwealth,* 20 Gratt. 724, the first count of the indictment did not have the constitutional conclusion. A demurrer thereto was interposed and the demurrer was overruled; there was no effort to amend the indictment. The court held that the demurrer should have been sustained.

The accused refers in his petition to *Brown* v. *Commonwealth,* 82 Va. 466, 10 S. E. 745. That case has nothing whatsoever to do with the situation here involved.

In *Early* v. *Commonwealth,* 86 Va. 921, one of the counts did not conclude in the constitutional fashion. A demurrer was there interposed and the demurrer was overruled. The court held that the demurrer should have been sustained.

THE CROSS-EXAMINATION OF JOHN MONTGOMERY

John Montgomery was called as a witness for the prosecution (R. p. 20). He was questioned on direct and on cross-examination, on re-direct and on re-cross-examination and on re-re-direct examination. Subsequently, he was called as a witness for the defense. On direct examination by the defense he was asked (R. p. 32) whether he had had a conversation with Harvey Boyd immediately after the shooting, in which he had told Boyd that, if the accused and his brother had not separated the fight which was taking place between him and the deceased, he would have given the deceased a good beating. To this question the witness replied that he had had a conversation with Boyd, but that that was not the nature of it. Immediately following this conversation the accused was taken by the Commonwealth on cross-examination, and the Commonwealth asked him what was the nature of the conversation he had had with Boyd. The defense objected and the objection was overruled. It subsequently developed, on re-re-examination, that the accused had not been present when the conversation took place.

It is to be noted that, when it became known the accused had not been present, no motion was made to strike the conversation from the evidence.

The accused assigns as error the action of the court in overruling its objection mentioned above made during the cross-examination.

When Montgomery was introduced by the defense as

its witness, and when the defense on direct examination asked him about a conversation he had had with Harvey Boyd, the Commonwealth certainly, on cross-examination, had a right to ask him about the conversation which had been injected into the case by the defense. This alone is sufficient to sustain the ruling of the court. In the next place the court certainly had a right to assume that the defense would not ask the witness about a conversation had with a third party unless the accused had been present, and at the time the objection was made no one had asked the witness whether the accused was present. The objection was, therefore, properly overruled at the time it was made. If the defense had thought there was any merit to its position, it should, on re-re-direct examination, have moved to strike. This it failed to do.

THE SUFFICIENCY OF THE EVIDENCE

The real question in this case is whether the evidence for the Commonwealth is sufficient to sustain a conviction.

It appears that in the neighborhood of the shooting, and in the neighborhood where all the parties concerned lived, there had been in the afternoon a shooting-match at which a number of people had engaged in shooting at targets. Marshall, the deceased, Montgomery, the accused and Ed Guynn, a brother of the accused, had all been present at this shooting-match. All the witnesses testified there had been no trouble during the shooting-match. All the witnesses also testified that everybody

connected with this matter had been drinking. After the shooting-match was over, the accused and his brother, Ed, went to the home of another brother. The deceased and Montgomery went first to the home of Montgomery and were proceeding back along a ridge towards the home of the deceased. As they went along the ridge, they were singing, and they could be heard by the persons standing in the yard of Daniel Guynn (Daniel being a brother of the accused to whose home he and Ed Guynn had gone). The accused and his brother were among those people standing in the yard who could hear the two men up on the ridge. Another brother, Levi, was also present, and the accused turned to him and said, "come on, let's go settle the thing" (R. p. 18). Levi replied that he had nothing to do with the matter; whereupon, the accused turned to his brother, Ed, and said, "get your gun and let's go settle it."

Ed Guynn and the accused left Daniel's home and, according to their testimony, started to their own home (R. p. 39). It is apparent from the evidence that the shortest way from the home of Daniel Guynn to that of the accused and his brother was by a path and not along the road which ran on the ridge. Nevertheless, the accused and his brother took the road up in the direction where the deceased and Montgomery had been heard singing. When they came upon the deceased and Montgomery, they found them in a fight (R. pp. 22, 39 and 43). According to Montgomery, the accused and Ed Guynn asked the two men what they were doing. As Montgomery got up, Ed Guynn hit him across his wrist

with his shotgun and, as Montgomery stepped back, Ed stepped forward. It is to be noted that neither Montgomery nor the deceased was armed, and that both the accused and Ed Guynn were armed. As Montgomery stepped back and as Ed Guynn stepped forward, the deceased cried out, "What are you doing," and closed in a scuffle with the accused. In this scuffle the gun went off and Marshall was fatally wounded. It is also to be noted that neither the accused nor Ed Guynn attempted to render any assistance, nor did they go for a doctor; indeed, they went on to their own home (R. pp. 22, 45, 50). Montgomery went for a doctor (R. p. 22). After he had brought the doctor back to the scene, he went at once to the house of the accused and the accused came back up to the scene of the shooting.

The testimony of the accused and Ed Guynn is to the effect that they came upon the fight; that they told the men who were fighting to stop it; that Montgomery started towards Ed Guynn and Ed pushed him back; that the deceased demanded of the accused that he turn over his gun to him, which he refused to do, and that during the scuffle which ensued, in which the deceased was trying to take the gun away from the accused, the gun accidentally fired and the deceased was mortally wounded.

This is another one of those innumerable cases wherein, if the evidence for the Commonwealth is to be believed, a conviction should be had; wherein, if the evidence for the defense is to be believed, the accused is as white as the driven snow. We need not cite any authori-

ties to sustain the proposition that a question of this kind is one for the jury.

Respectfully submitted,

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