

1-1-1956

## Criminal Law—Charging Lower Counts

Howard L. Meyer II

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Criminal Procedure Commons](#)

---

### Recommended Citation

Howard L. Meyer II, *Criminal Law—Charging Lower Counts*, 5 Buff. L. Rev. 192 (1956).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol5/iss2/28>

This The Court of Appeals Term is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact [lawscholar@buffalo.edu](mailto:lawscholar@buffalo.edu).

of the grand jury minutes at the trial, then if defense counsel seeks them for cross-examination he may examine them only if the court, upon inspection, has found that they contain material at variance with the testimony given by the particular witness on the stand.<sup>97</sup> The rule as to disclosure of statements in the custody of the district attorney, for purposes of cross examination, is similar to that applying to grand jury minutes.<sup>98</sup>

In *People v. Lee*<sup>99</sup> the Court deal with a decision of the Appellate Division<sup>1</sup> which reversed the convictions of two defendants (Sarra and McCarthy) for admitted error in the admission of evidence, and dismissed the indictment as to the third (Lee) on the ground that the complainant's identification of him as a participant in an alleged robbery and assault was insufficient to go to the jury. On appeal Sarra and McCarthy claimed that the lower court erred in not dismissing the indictment as to them, because complainant had a criminal record and was not to be believed. On cross appeal the State argued, as to Lee, that the Appellate Division lacked the power to dismiss his indictment. The court held that the questions of fact were for the jury in both cases.

The court reindorsed the well entrenched principle that pollution of the source of testimony does not automatically brand it as mendacious,<sup>2</sup> but due to the admitted error a new trial was ordered. The court found error in the dismissal of Lee's indictment by the Appellate Division because there was sufficient evidence upon which the jury could base its decision.

### *Charging Lower Counts*

The common law rule has been incorporated into statute<sup>3</sup> that, if a defendant could be found guilty of a lesser degree of any crime charged in the indictment, the trial judge must submit such lower offense<sup>4</sup> unless no conceivable view of the evidence would allow the jury to find the defendant innocent of the higher crime

97. See, e.g., *People v. Boniello*, 303 N. Y. 619, 101 N. E. 2d 488 (1951).

98. *People v. Walsh*, 262 N. Y. 140, 186 N. E. 422 (1933).

99. 308 N. Y. 302, 125 N. E. 2d 580 (1955).

1. 283 App. Div. 876, 129 N. Y. S. 2d 201 (2d Dep't 1955).

2. *People v. Landers*, 264 N. Y. 119, 190 N. E. 204 (1934); *People v. Arata*, 255 N. Y. 374, 174 N. E. 758 (1931).

3. N. Y. CODE CRIM. PROC. §444; "Upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the crime . . ."

§445 provides, "In all other (than §444) cases, the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment."

4. *People v. Lapolte*, 253 N. Y. 573, 171 N. E. 788 (1930); *People v. Seiler*, 246 N. Y. 262, 158 N. E. 615 (1927).

yet guilty of the lower.<sup>5</sup> In *People v. Mussenden*<sup>6</sup> the court found such a situation, where three of defendant's confederates accosted complainant (while defendant waited in their car), assaulted him, and unsuccessfully attempted to take his wallet. In their defense they alleged that complainant's entire story was mendacious, that they had merely asked him for directions when he became excited and created a scene. The Grand Jury charged in separate counts (1) Attempted Robbery, first degree; (2) Attempted Grand Larceny, first degree; (3) Assault, second degree. The trial judge submitted only the first count to the jury, which the Court of Appeals held to be proper.

The dissent argued that the jury would have been warranted in viewing defendant's conduct as not amounting to an attempt,<sup>7</sup> or merely as second degree Assault, if they chose to disregard that part of complainant's story relating to his wallet.<sup>8</sup> Therefore defendant's rights were substantially prejudiced when the jury was placed in the dilemma of either acquitting or convicting on the maximum count. Since the defendant chose to stand or fall on his version of the facts, it does not appear that his rights were substantially prejudiced when the trial judge refused to charge crimes of which defendant could have been guilty only on highly conjectural views of the testimony which were not even urged by defendant during trial.

### Sentencing

The case of *People v. Tower*<sup>9</sup> presented the anomaly of a defendant's contending that his prior record proved he was beyond redemption,<sup>10</sup> and hence the sentencing judge erred in placing him in a correctional institution (maximum term: three years);<sup>11</sup> if sentence of a punitive nature had been pronounced, only one year could have been imposed for his unlawful entry.<sup>12</sup> Defendant also contended that the trial judge's recommendation that defendant not be released until he had served the maximum term was error. The court held the sentencing court was free to conclude that defendant was not incapable of rehabilitation even

5. *People v. Moran*, 246 N. Y. 100, 102-3; 158 N. E. 35, 36 (1927); *People v. Schleiman*, 197 N. Y. 383, 390; 90 N. E. 950, 953 (1910).

6. 308 N. Y. 558, 127 N. E. 2d 551 (1955).

7. *People v. Rizzo*, 246 N. Y. 334, 158 N. E. 888 (1927); *People v. Werblow*, 241 N. Y. 55, 148 N. E. 786 (1925).

8. That this is within the province of the jury, see *People v. Rytel*, 284 N. Y. 242, 245; 30 N. E. 2d 578, 580 (1940).

9. 308 N. Y. 123, 123 N. E. 805 (1954).

10. N. Y. CORRECTION LAW §203 (e) provides "This article shall not apply to any person who is . . . (3) Insane, or mentally or physically incapable of being substantially benefitted by being committed to a correctional or reformatory institution."

11. *Id.*, §203 (b): "The court in imposing sentence shall not fix or limit the term of imprisonment of any person sentenced to any such penitentiary. The term of such imprisonment . . . shall not exceed three years."

12. N. Y. PENAL LAW §§405, 1937.