TERRITORY V. CARRERA, 1892-NMSC-023, 6 N.M. 594, 30 P. 872 (S. Ct. 1892)

TERRITORY OF NEW MEXICO, Appellant,
vs.
PEDRO CARRERA, Appellee

No. 513

SUPREME COURT OF NEW MEXICO

1892-NMSC-023, 6 N.M. 594, 30 P. 872

August 24, 1892

Appeal, from a judgment for defendant sustaining a motion to quash an indictment for assault with intent to kill, from the Third Judicial District Court, Dona Ana County.

The case is stated in the opinion of the court.

COUNSEL

S. B. Newcomb and Edward L. Bartlett, solicitor general, for appellant.

JUDGES

Seeds, J. Freeman, O'Brien, and Lee, JJ., concur.

AUTHOR: SEEDS

OPINION

*{*594}* **{1}** This was a criminal prosecution, wherein the defendant was indicted for an assault with intent to commit murder. He moved to quash the indictment upon the grounds that it was indefinite and uncertain, and because it did not set forth whether the alleged assault was committed by means of poison, or by the use of a deadly weapon, or some hard instrument; nor did it set forth the manner in which said assault was committed. The court quashed the indictment, and from that decision the territory appeals.

{2} The material portion of the indictment is as follows: "That Pedro Carrera, * * * with force and arms, * * * with malice aforethought, and unlawfully, feloniously, deliberately, willfully, and premeditatedly, did make an assault with *{*595}* intent then and there and thereby him, the said * * *, to kill and murder, against the form of the statute," etc. It may be premised that it is not now necessary to charge the commission of a crime with that fullness and particularity of verbiage which was essential under the strict rules of the old

common law. At the same time the rebound from the often technical absurdities of that magnificent system is not so pronounced as to be equally absurd in the laxity by which the facts may be set out. The essential averments of facts, as distinct from legal conclusions, must be set out with such exactness as to fully apprise the defendant of what crime he is charged. In an indictment for an assault with intent to commit murder such allegations of facts should be made as would show, at least generally, that the crime would have been murder if the acts involved in the pleaded facts had not stopped short of their full effect. 1 Whar. Crim. Law, sec. 641. At common law the indictment is sufficient if the use of a deadly weapon be averred, and the intent be specifically stated. 1 Whar. Crim. Law, sec. 644. This clearly implies that the means or instrument of committing the assault should be stated. We are aware that some states hold that it is not necessary to state the instrument or means employed in an indictment for an assault with intent to commit murder. Martin v. State, 40 Tex. 19; Bittick v. State, 40 Tex. 117; State v. Seamons, 1 Greene 418; Harrison v. State, 42 Tenn. 232, 2 Cold. 232. But in those states they seem to have parted company entirely from the common law. We have not done so here, as by statute, section 1823, it is made the rule of decision and practice, where not specifically changed. We think the judgment of the lower court was correct, and it will be affirmed.