

v. *Zerbst, supra*. The failure of the evidence produced by the State to show the defendant was advised of his constitutional right to appointed counsel if indigent requires the granting of the defendant's motion.

We recognize the problems of the State in producing evidence after a lapse of seventeen years but it is well settled that lapse of time is not a bar to asserting a constitutional right. *Palmer v. Ashe*, 342 U. S. 134. It may be noted in passing that the present Superior Court practice of making a stenographic record of an arraignment and filing a transcript with the case file was started shortly after the date of this case and that in the future the State will no longer be faced with a "silent record."

Remanded.

All concurred.

Strafford,
No. 5652.

STATE

v.

JOHN W. WICKEY.

Argued October 3, 1967.

Decided November 30, 1967.

George S. Pappagianis, Attorney General and Henry F. Spaloss, Assistant Attorney General (Mr. Spaloss orally), for the State.

Cooper, Hall & Walker (Mr. Fred W. Hall, Jr. orally), for the defendant.

PER CURIAM. RSA 579:9 proscribes "any unnatural and lascivious act with another person." The defendant's primary contention is that this felony is distinct from "gross lewdness or lascivious behavior" a misdemeanor (see RSA 579:3; *State v. Smith*, 98 N. H. 149, 150); and that the offense with which he is charged is not sodomy or a "crime against nature" in violation of RSA 579:9, *supra*. In essence he argues that the offense charged does not involve "sexual relations . . . in an *unnatural* manner" as required by section 9.

A similar contention was made, although with respect to different facts, in *State v. Vredenburg*, 91 N. H. 372. It was there pointed out that the statute (then P. L., c. 386, s. 9) is "construed to be more comprehensive than the common law in the scope of the conduct prohibited." See also, *State v. Desilets*, 96 N. H. 245.

In the cases last cited, the perverted sex conduct complained of was deemed to be within the purview of the statute. The conduct with which this defendant is charged, was doubtless a misdemeanor under the statute prohibiting gross lewdness or lascivious behavior, RSA 579:3 (*State v. Lizotte*, 101 N. H. 494) and "in deviation of accepted customs and manners." *Jacquith v. Commonwealth*, 331 Mass. 439, 442. However it does not fall within the class of offenses charged in *Vredenburg* and *Desilets*, *supra* (see Briefs & Cases, Nos. 3237 and 3915), and was not within the statutory term of an "unnatural . . . act," or the common-law definition of the crime against nature. See



2 Wharton's, Criminal Law and Procedure (12th ed.), ss. 751, 752; 3 Burdick, Law of Crime, ss. 876-878.

It follows that the motion to quash should be granted.

Remanded.

GRIMES, J., did not sit.



Public Utilities Commission,
No. 5663.

NEW IPSWICH ELECTRIC LIGHTING DEPARTMENT

v.

GREENVILLE ELECTRIC LIGHTING Co. & a.

Argued September 8, 1967.

Decided November 30, 1967.

