

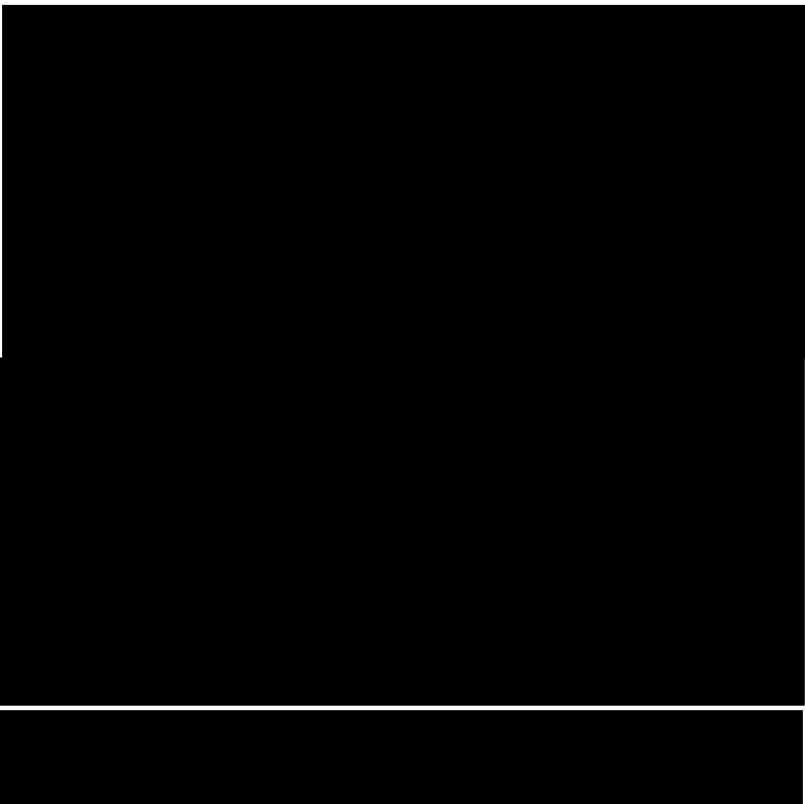
a fair trial. The motion to set aside the verdict presented typical questions of fact for the Presiding Justice to pass upon such as the trial court is constantly called upon to decide. *Wisutskie v. Malouin*, 88 N. H. 242; *Bennett v. Larose*, 82 N. H. 443; *Marshall v. Morin*, 79 N. H. 351; *Moran v. Fox*, 79 N. H. 523; *Bachman v. Insurance Co.*, 78 N. H. 100; *Beckley v. Alexander*, 77 N. H. 255; *Burnham v. Stillings*, 76 N. H. 122; *Manchester v. Duggan*, 75 N. H. 33; *Lee v. Dow*, 73 N. H. 101; *Burnham v. Butler*, 58 N. H. 568. The decision of the Presiding Justice upon such issues will not be reviewed here, and is final if there is evidence to sustain it. The findings of the court in the present instance are amply supported by the evidence that nothing was said to the jury during their deliberations other than a question by Moses as to whether they could agree before supper and by the action of Smith's counsel in disclaiming the charge that Moses used any influence on the jury.

It is unnecessary to consider the exceptions to the denial of the requested findings, since the alleged facts were wholly inconclusive and the findings, if made, could not have affected the result.

Judgments on the verdicts.

Merrimack, }
Oct. 7, 1937. }

STATE v. LEO P. GILBERT.



Willoughby A. Colby, Solicitor (by brief and orally), for the State.

Robert W. Upton and *Laurence I. Duncan* (*Mr. Duncan* orally),
for the defendant.

MARBLE, J. That part of the statute here involved is as follows: "Whoever upon any way operates a vehicle recklessly . . . shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both; and for a second offense he shall be imprisoned not less than one month nor more than one year. If the death of any person results from the reckless operation of a motor vehicle the person convicted of such reckless operation shall, in lieu of any other penalty imposed by this section, be fined not more than one thousand dollars, or imprisoned not more than five years, or both, provided that the provisions of this section shall not be construed to limit or restrict prosecution for manslaughter."

While it is true that recklessness in the operation of a motor vehicle and the resulting death of a person are the sole requirements of the crime of which the defendant is accused, it is equally true that reckless conduct must be inferred from definite overt acts and that no act on which recklessness could be predicated is here alleged. It follows that the indictment, though phrased in the language of the statute, does not contain a fair and full description of the offense charged, within the meaning of Article 15 of the Bill of Rights. *State v. Silverman*, 76 N. H. 309. It differs from the indictment under consideration in the case of *State v. Rousten*, 84 N. H. 140, inasmuch as it does not inform the defendant of the nature and cause of the accusation against him with sufficient definiteness so that he can prepare for trial.

Nor can the defect be cured by permitting the State to file a bill of particulars, for the solicitor may not speak for the grand jury any more than he may amend an indictment. See *State v. Kelley*, 66 N. H. 577, 580, and cases cited.

Furthermore, the material facts which the State seeks to prove at the trial must be substantially the same as those on which the indictment is based, and to hold that the general accusation of recklessness in the operation of a motor vehicle is a sufficient specification of the defendant's behavior at the time of the accident is to open the door to proof of conduct differing in important respects from that on which the grand jury has acted.

The cases of *State v. Andrews*, 108 Conn. 209, and *Commonwealth v. Pentz*, 247 Mass. 500, on which the State relies, deal merely with the validity of the statutes there discussed. The constitutionality of Laws 1931, c. 81, is unquestioned.

The defendant's motion should have been granted.

Indictment quashed.

All concurred.