

fellow over the head with a pistol. I was not doing anything at all. I didn't have a pocket knife or nothing. I just told the white boys to get off. A fight did not start. These white boys did not fight at all; they just ran and tried to get off the train. About five got off the train. I could not tell how many stayed on the train. Some of them went off toward the engine. I don't know where the girls were. I did not see the girls. I never did see the girls. I got off the train when we got to Paint Rock. I got off the train. Five boys got off the train in all. The five were me and Clarence Norris, Oxie Powell, Willie Roberson and that boy back there, Glen Montgomery, that blind boy. I had known these negroes that were with me since we left Atlanta; we left Atlanta together. I did not know the rest until we got on the road. The first time I saw these girls was when we got to Paint Rock. They were getting off the train. They got off the gondola. I wasn't in the gondola they were on. I wasn't in that gondola at all. I had not been in that particular car, not where they were. I did not see the girls until they were getting off the gondola. I don't know how many gondolas were on that train; five or six on that train along in line together; some were, and some on the other side of box cars; a box car was between them. I had nothing to do with the girls at all. If anybody had anything to do with the girls I don't know nothing about it. * * * I wasn't on a gondola. I was on an oil tank. I got over in the gondola down at Stevenson. I walked over the top of the gondola. Some white fellows were in the gondola. There was gravel in that gondola. These white boys were in the car when I got in it at Stevenson. I did not jump off the box car into the gondola. I climbed down and stepped in. The car had steps on the end of it. Haywood Patterson told me to go in there and help throw them white fellows off; if I didn't he was going to shoot me off. That is Patterson (indicating). He told me why he wanted me to go along. He wanted to go in there and help throw the white fellows off. He said he was throwing them off because they had been trying to run over him down in the oil tank. Haywood Patterson had a pistol. I did not have a pistol. I saw his pistol. He went back along the train to call me to help throw the boys off. There were seven white boys on the train. We had come to Stevenson from Chattanooga before we got in there. I could not see all over the gondola and there could not have been anybody hid in there where I could not have seen them. I did not see those two girls in there. The boys were lying right in the center of the gondola car. I did not see the girls at no time until I got to Paint Rock. Five boys were put off. Haywood Patterson hit one; I don't know his name, but he had on a big wide belt, and he hit him across the head with a pistol. When he hit him he did

not catch hold of him. He didn't grab him. This white fellow just jumped off and said 'Yes, we will get off.' He did not fight, because the white fellow got scared of the pistol and climbed down on the side of the car and jumped off. The other fellow jumped off. They all jumped off but one. One little white boy stayed in the car and Patterson said to put him off and he dove put his foot down on the side and another boy had a big knife around his throat. He did not jump off. He begged for mercy and I reached down and pulled him back on the box car. I never saw these girls at all and never had anything to do with them; never had my hands on them. I could tell the girls from the boys. Just because they had on overalls it wouldn't change their looks with me. There wasn't a soul in that car with me and Patterson except these negroes and one white boy. * * * We were all in the gondola when we got to Paint Rock. I never saw no girls in this gondola we were in at all. I first saw the girls when they came totting them through Paint Rock. They had the oldest girl in a chair coming through Paint Rock. She did not get out of the gondola I got out of. I don't know whether she got out of a gondola or not. The first I saw of either one of the girls they were bringing the oldest girl up in a chair."

The defendant Norris testified, among other things: "I was not in the gondola when this fight occurred. I seen two boys on the flat where I was on the cross-ties. I did not have any trouble with them. I did not have a pistol or a knife. I did not leave that car I was riding on. I did not leave it at Paint Rock. I don't know who took me off the train at Paint Rock, there were so many there. I remember getting off. I got off at Paint Rock, I reckon. I did not just leave the train. They threw guns on me, the officers did. I had not been engaged in the fight at all but I seen the fight. The fight took place in the gondola car. Every one of them colored boys was fighting. They were all fighting. That one yonder, Haywood Patterson started the fight. He came across the flat car where I was on the cross-ties; him and the rest of them colored boys come across that car and said he was going over there to run the white boys off and going to have something to do with them white girls. I saw this boy that just testified before me on the stand. They came across where I was sitting down at that time. They knew the girls were on the train and the white boys with the girls on the gondola car. I had not seen the girls. I hadn't seen them till I got off this flat car I was sitting in, and seen these boys fall off the train; after he said he was going to run them off I seen them fall off the train and I asked two white boys what they were getting off the train for and he told me he did not know, and I got up on the train to see if he was putting them

off, and sure enough I got up on the box car and looked where they were and the whole crowd was putting the white boys off. One had a knife around the other's neck and trying to push him off, and he wouldn't get off and the other boy took him and pulled him back up in the car. I did not have anything to do with the girls. I did not have my hands on any of them. I did not hold them or anything of that sort. When I first saw the girls the train was away up the road. When I saw the girls was when I got up on the box car and looked over where he was putting the white boys off. * * * I did not get into that gondola at all. I just looked in. This Weems I was speaking about here is not my friend. I knew him. I saw him over in the gondola and I saw the girls in there, but I did not go in there. I saw that negro in there with those girls. I seen everyone of them have something to do with those girls after they put the white boys off the train. After they put the white boys off I was sitting up on the box car and I saw every one have something to do with those girls. I was sitting on top of the box car. I saw that negro just on the stand, Weems, rape one of those girls. I saw that myself. When the officers searched me they did not find anything on me. They did not find a pearl-handled knife. They did not find a pearl-handled knife on me. I did not have a knife or pistol. I did not go down in the car and I did not have my hands on the girls at all, but I saw that one rape her. They all raped her, every one of them. There wasn't any one holding the girls legs when Weems raped her, as far as I saw. The other boy sitting yonder had a knife around her throat, that one sitting on the end behind the little boy. I don't know what his name is, but he is the one that had the knife. I did not see the little one hold of her legs while this one was raping her. I did not see anybody holding her legs. I don't know who pulled off her overalls. The girls were lying down when I got up on the box car. This big one did not have a knife on her throat. That little boy sitting behind yonder—I don't know his name—is the one that had a knife around her neck, making her lie down while the others raped her. I didn't see any of the negroes take her overalls off. The girls were lying down when I got up on the box car. I saw the overalls lying in the car. I did not see any steps in. I did not get down in the gondola, never did get down in there."

The state offered evidence in rebuttal going to show that the officers, when they arrested Norris, took off his person a knife, which was identified by the witness Victoria Price as her knife, and testified that Norris took the knife from her as well as all the money she had—\$1.50.

For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

[12] Appellants' insistence that the evidence does not support the verdict of guilty, as charged in the indictment, cannot be sustained. The evidence, much of which has been set out above, proves the body of the crime, without dispute, and strongly tends to establish a conspiracy between those who forced the white boys to leave the train, to do the unlawful acts which immediately followed, and that they all aided and abetted therein. 22 R. C. L. 1170, § 6; State v. Burns, 82 Conn. 213, 72 A. 1083, 10 Ann. Cas. 465; State ex rel. Attorney-General v. Tully, Judge, etc., 102 Ala. 23, 15 So. 722.

There is no contention on the part of the defendants, that they had sexual intercourse with the alleged victim by and with her consent, express or implied, and no evidence was adduced to support such contention; therefore evidence alleged to have been newly discovered was not such as would authorize the granting of a new trial. Patterson v. State, supra; Fries v. Acme White Lead & Color Works, 201 Ala. 613, 79 So. 45. There was no error in overruling the motion for a new trial. Patterson v. State, supra.

The record shows that the defendants were represented by counsel who thoroughly cross-examined the state's witnesses, and presented such evidence as was available in their behalf, and no reason appears why the judgment should not be affirmed.

Other questions presented on motion for a new trial were fully considered in the Patterson and Powell Cases, which are here approved, and need not be repeated. There is no reversible error. The judgment of the lower court is therefore affirmed as to each of the defendants, Charlie Weems, alias, etc., and Clarence Norris, alias, etc.

Affirmed.

GARDNER, BOULDIN, BROWN, FOSTER, and KNIGHT, JJ., concur.

ANDERSON, C. J., dissents.

141 So. 185

PATTERSON v. STATE.

3 Div. 329.

Supreme Court of Alabama.

March 24, 1932.

Rehearing Denied April 9, 1932.

1. Indictment and Information $\S$ 19.

Rape indictment in statutory form held sufficient (Code 1923, $\S$ 4556, form 88).

2. Criminal law §134(4).

Testimony of accused and alleged accomplices, who swore to petition for change of venue for public prejudice, held entitled to little weight.

Testimony of accused and his alleged accomplices was entitled to very little weight, since they were confined in jail and were not in a position to ascertain the state of the general public feeling and sentiment of the county.

3. Criminal law §134(4).

In absence of evidence showing to what extent, if any, papers were circulated in county from which jurors were to be drawn, publications held entitled to little weight in determining defendant's right to change of venue for public prejudice.

4. Criminal law §128(1).

That state militia was sent to county to protect defendant, and that militia was present during proceedings, without more, held insufficient to require change of venue for public's prejudice.

5. Criminal law §134(4).

Evidence held insufficient to require change of venue in rape prosecution for public's prejudice.

6. Jury §70(2).

Where two capital cases were set for trial on same day, and court ordered that jury should be composed of regular venire of 75 jurors, and 25 special jurors, defendant in one case held not entitled to another special venire (Code 1923, §§ 8644, 8649).

Defendant was not entitled to a special venire other than the special venire so drawn, since the venire of jurors drawn and summoned constituted the special venire for defendant's trial and was in strict compliance with Code 1923, §§ 8644, 8649.

7. Witnesses §270(2).

In rape prosecution, cross-examination of prosecuting witness as to whether she was divorced held objectionable as calling for immaterial evidence.

8. Rape §40(3).

In rape prosecution, question whether prosecuting witness had practiced prostitution held objectionable as calling for immaterial evidence.

Question was objectionable as calling for immaterial evidence, since there was no evidence showing that defendant had intercourse with witness by and with her consent.

9. Rape §4.

Previous chastity is not essential element of rape.

10. Rape §40(3).

In rape prosecution, objection to question whether witness knew if alleged victim had venereal disease held properly sustained.

11. Criminal law §1150.

Order denying new trial on ground evidence is insufficient to support verdict will not be disturbed, unless preponderance of evidence against verdict convinces court that it is wrong (Gen. Acts 1915, p. 722).

12. Rape §51(1).

Conviction for rape held supported by evidence.

13. Criminal law §1114(1).

Matters occurring during trial in presence of court must be stated in bill of exceptions in order of occurrence, to be reviewable.

14. Criminal law §1028.

Generally, for occurrences during trial to be reviewable, some action of trial court must be invoked.

15. Criminal law §1090(10).

Occurrences during trial in presence of court cannot be preserved by introducing evidence allude on hearing of motion for new trial.

16. Criminal law §1119(1).

Question whether defendant was prejudiced by applause of people in courtroom when jury, in another case involving same transaction and other defendants, returned verdict of guilty, held not presented, where bill of exceptions contained no recital of any disturbance or applause and no question was raised in respect thereto.

17. Criminal law §956(4).

Evidence held insufficient to put court in error for refusing new trial because of commotion or applause in street.

18. Rape §38(2).

Where defendant's sole defense was that he was not present at time rape was committed, evidence regarding specific acts of sexual intercourse between alleged victim and other men and victim's general reputation for chastity held immaterial on question of consent.

19. Criminal law §942(1).

Newly discovered evidence which goes merely to credibility of witnesses does not authorize new trial.

ANDERSON, C. J., dissenting.

For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Appeal from Circuit Court, Jackson County; A. E. Hawkins, Judge.

Henrywood Patterson was convicted of rape, and he appeals.

Affirmed.

George W. Chamlee, Sr., and George W. Chamlee, Jr., both of Chattanooga, Tenn., and Joseph R. Brodsky, Irving Schwab, Allan Tash, Elias M. Schwartzbart, Joseph Tasher, and Sidney Schreiber, all of New York City, for appellant.

The denial of the motion for a change of venue by the trial court was reversible error. *Seams v. State*, 84 Ala. 410, 4 So. 321; *Thompson v. State*, 117 Ala. 67, 23 So. 670; *Downer v. Dunnaway* (U. S. C. C. A. 1931) 53 F.(2d) 589; *State v. Greer*, 22 W. Va. 500; *Moore v. Dempsey*, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543; *People v. Arthur*, 314 Ill. 296, 145 N. E. 413; *Richmond v. State*, 16 Neb. 388, 20 N. W. 282; *Vaughn v. State*, 18 Ala. App. 511, 93 So. 250; *People v. Yeakum*, 33 Cal. 603; *Fountain v. State*, 135 Md. 77, 107 A. 354, 5 A. L. R. 908; *Brown v. Miss.*, 63 Miss. 645, 36 So. 73; *Hussey v. State*, 87 Ala. 121, 6 So. 420; *Code 1923, §§ 5579, 5580*; U. S. Const. Amend. 14; Ala. Const. § 6. It was an abuse of discretion to deny a special venire for trial of this case. The indictment did not apprise the defendant of the charge against him with the certainty required by the Constitution. *Rosen v. U. S.*, 161 U. S. 29, 16 S. Ct. 434, 450, 40 L. Ed. 606; *Hodgson v. Vermont*, 168 U. S. 262, 18 S. Ct. 80, 42 L. Ed. 461. The trial court erred in permitting the prosecuting attorney to lead the witnesses. *Jones on Evl.* (2d Ed.) § 2324. The defendant was denied an opportunity to be properly represented by counsel. Ala. Const. § 6; *Code 1923, § 5567*. The trial court abused its discretion in forcing the defendant to trial without preparation, witnesses, or other assistance. *Graham v. State*, 23 Ala. App. 533, 129 So. 295; *Rogers v. Ala.*, 192 U. S. 226, 24 S. Ct. 237, 48 L. Ed. 417; *Amer. Ry. Ex. Co. v. Leves*, 263 U. S. 19, 44 S. Ct. 11, 68 L. Ed. 140. The arbitrary severance of the trials of defendants was prejudicial to defendants. It was error to permit Ruby Bates to testify as to criminal acts upon her. *Boyd v. U. S.*, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077; *Wickard v. State*, 109 Ala. 43, 19 So. 491; *People v. Buffom*, 214 N. Y. 63, 108 N. E. 184, Ann. Cas. 1916D, 962. The jury was not interrogated as to whether or not they bore any race prejudice to the defendant. *Aldridge v. U. S.*, 263 U. S. 303, 51 S. Ct. 470, 75 L. Ed. 1064, 73 A. L. R. 1203. Mob spirit and hysteria dominated the trial, terrorized the judge, jury, and counsel, and denied to the defendant due process of law. *Frank v. Mangum*, 237 U. S. 303, 35 S. Ct. 582, 59 L. Ed. 969; *Seay v. State*, 207 Ala. 453, 93 So. 403;

Holladay v. State, 30 Ala. App. 70, 101 So. 86; *Clayton v. State*, 23 Ala. App. 160, 123 So. 200; *Collum v. State*, 21 Ala. App. 230, 107 So. 35; *Bradley v. State*, 21 Ala. App. 539, 110 So. 187; *Id.*, 215 Ala. 140, 110 So. 162; *Collier v. State*, 115 Ga. 503, 42 S. E. 229; *State v. Wilcox*, 131 N. C. 707, 42 S. E. 530; *Hamilton v. State*, 38 Tex. Cr. R. 372, 37 S. W. 431; *Vaughan v. State*, 37 Ark. 1, 20 S. W. 588; *Douglas v. State*, 132 Ga. 370, 110 S. E. 168; *Lignon v. State*, 82 Tex. Cr. R. 534, 200 S. W. 530; *State v. Weldon*, 91 S. O. 29, 74 S. E. 43, 39 L. R. A. (N. S.) 607, Ann. Cas. 1913E, 801; *Com. v. Fisher*, 220 Pa. 189, 75 A. 204, 20 L. R. A. (N. S.) 1009, 134 Am. St. Rep. 1027; *People v. Wolf*, 183 N. Y. 472, 76 N. E. 662; *People v. Fleming*, 109 Cal. 357, 136 P. 291, Ann. Cas. 1915B, 881; *Shaw v. State*, 83 Ga. 92, 9 S. E. 768; *Ex parte Riggins* (C. C.) 134 F. 404; *Elliott v. State*, 75 Miss. 322, 22 So. 950, 41 L. R. A. 509; U. S. Const. Amend. 14; Ala. Const. § 6. The verdict of the jury was not sustained by the great preponderance of the evidence, and the guilt of defendant was not proved beyond a reasonable doubt. *Black v. State*, 24 Ala. App. 433, 136 So. 425; *Alberty v. U. S.*, 162 U. S. 499, 16 S. Ct. 894, 40 L. Ed. 1051. Material evidence newly discovered, which the defendant could not have procured and presented at the trial, should move this court to grant a new trial. Ala. Code 1923, §§ 9518, 9588; *Imman v. State*, 22 Ala. App. 344, 115 So. 704; *Huff v. State*, 24 Ala. App. 308, 137 So. 457; *Story v. State*, 178 Ala. 98, 59 So. 480; *Fields v. State*, 47 Ala. 603, 11 Am. Rep. 771; *People v. Pantages* (Cal. Sup.) 297 P. 890; *Houston v. State*, 203 Ala. 261, 82 So. 503. Exclusion of negroes from the jury denied to defendant equal protection of the law. U. S. Const. Amend. 14; *Rogers v. Ala.*, supra; *Carter v. Texas*, 177 U. S. 442, 20 S. Ct. 887, 44 L. Ed. 839; *Strauder v. W. Va.*, 100 U. S. 308, 25 L. Ed. 664; *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567; *Gibson v. Miss.*, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075; *Martin v. Texas*, 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497; *Plessy v. Ferguson*, 163 U. S. 537, 16 S. Ct. 1188, 41 L. Ed. 256; *Bush v. Ky.*, 107 U. S. 110, 1 S. Ct. 625, 27 L. Ed. 354; *Ex parte Virginia*, 100 U. S. 313, 25 L. Ed. 667; *Green v. State*, 73 Ala. 26; *Roberson v. State*, 18 Ala. App. 634, 94 So. 182; *State v. Peoples*, 131 N. C. 784, 42 S. E. 814; *Bonaparte v. State*, 65 Fla. 287, 61 So. 633; *Montgomery v. State*, 65 Fla. 97, 45 So. 879. The court erred in excluding evidence bearing on the character and chastity of complainant, as bearing on her credibility as a witness. *Wigmore on Evl.* (2d Ed.) 279; 52 C. J. 1080; *Griffin v. State*, 155 Ala. 88, 46 So. 481; *McQuirk v. State*, 84 Ala. 435, 4 So. 775, 5 Am. St. Rep. 331; *Boddie v. State*, 32 Ala. 395; *Riley v. State*, 183 Ga. 182, 111 S. E. 729; U. S. v. Tom Teng, 23 P. L. 145; *Johnson v. Johnson*, 14 Wend. (N. Y.) 637.

Thos. E. Knight, Jr., Atty. Gen., and Thomas Key Lawson, Asst. Atty. Gen., for the State.

The indictment is in Code form, and is sufficient. It is not necessary to aver, in an indictment for rape, that the carnal knowledge of the female was against her will. *Leon v. State*, 44 Ala. 110. The mere fact that certain newspaper stories were published about the case does not, of itself, entitle defendant to a change of venue. He must show that the people of that county have been prejudiced thereby. *Malloy v. State*, 209 Ala. 219, 96 So. 57; *Godau v. State*, 179 Ala. 27, 60 So. 908; *McClain v. State*, 183 Ala. 67, 62 So. 241, 342; *Hawes v. State*, 88 Ala. 37, 7 So. 302; *Hiley v. State*, 209 Ala. 505, 96 So. 509. Where two or more capital felonies are set for trial on the same day, the trial judge may draw one jury or venire facias for the trial of all such cases. Code 1923, § 8649. There is no evidence of a demonstration in the trial court occasioned by the verdict in a companion case, except that of the defendants. No action of the trial court was invoked on this point, and the denial of motion for new trial was not an abuse of discretion. *Dempsey v. State*, 15 Ala. App. 199, 72 So. 773; *Hendry v. State*, 215 Ala. 635, 112 So. 212. An application for a continuance is addressed to the trial court's discretion. *Owens v. State*, 215 Ala. 42, 109 So. 109. No point was raised as to exclusion of negroes from the jury. The statute does not exclude negroes from serving on juries. A state can fix qualification of jurors. Code 1923, § 8603; Gen. Acts 1931, p. 59, § 14; *Thomas v. Texas*, 212 U. S. 278, 29 S. Ct. 893, 53 L. Ed. 512; *Ex parte Virginia*, 100 U. S. 315, 25 L. Ed. 957; *Ragland v. State*, 187 Ala. 5, 65 So. 776; *McIntosh v. State*, 9 Okl. Cr. 409, 128 P. 733. There was no error in denying the motion for a new trial on the ground of newly discovered evidence. Evidence of a woman's unchastity is not admissible for the purpose of affecting her credibility as a witness. *Story v. State*, supra; *Houston v. State*, 208 Ala. 600, 95 So. 145. To justify a new trial on ground of newly discovered evidence, it must be shown that due diligence was used before the trial to discover such evidence. *Lowery v. State*, 98 Ala. 45, 13 So. 498; *Hamilton v. State*, 17 Ala. App. 109, 82 So. 537. A new trial will not be granted for newly discovered evidence which would merely impeach or discredit a witness. 16 C. J. 1202. Application for a continuance is a prerequisite to the right to complain of lack of preparation as a ground for a new trial. The record does not disclose a motion for a continuance. *Thomas v. State*, 89 Ga. 479, 15 S. E. 537; *Manning v. State*, 11 Ga. App. 708, 76 S. E. 70; *Tobin v. People*, 101 Ill. 121; *State v. Benton*, 65 Iowa, 482, 22 N. W. 639; *Jones v. State*, 77 Tex. Cr. R. 203, 177 S. W. 971. Where there is sufficient evidence, if believed, to sustain the verdict, there is no

error in overruling motion for new trial. *Martin v. State*, 17 Ala. App. 73, 81 So. 851; *Johnson v. State*, 201 Ala. 437, 78 So. 800. Whether state's witness Victoria Price was divorced was immaterial, and there was no error in sustaining objection to the question calling for such testimony. Supreme Court Rule 45. Objection to the question whether this witness ever practiced prostitution was correctly sustained. In a prosecution for rape and kindred offenses, where nonconsent is an element of the offense, the character of the prosecutrix for chastity may be impeached; but reputation for chastity is not admissible where defendant does not allege consent and where the evidence shows the crime was by force or not at all. *Story v. State*, 178 Ala. 98, 59 So. 480; *People v. Maruyama*, 19 Cal. App. 290, 125 P. 924. The question whether the prosecuting witnesses had a venereal disease called for immaterial testimony, which could have no bearing on the guilt or innocence of the defendant. *Brown v. State*, 72 Miss. 997, 17 So. 278.

BROWN, J.

The appellant was indicted, tried, and convicted of the offense of rape.

[1] No question was raised on the trial as to the sufficiency of the indictment, which is in the form prescribed by the statute, and under the uniform decisions of this court was sufficient to advise the defendant of the nature and cause of the accusation he was called upon to answer. Code 1923, § 4556, form 68; *Myers et al. v. State*, 84 Ala. 11, 4 So. 291; *McQuirk v. State*, 84 Ala. 436, 4 So. 775, 5 Am. St. Rep. 581; *Schwartz v. State*, 37 Ala. 460; *Malloy v. State*, 209 Ala. 219, 96 So. 57; *Doss v. State*, 220 Ala. 30, 123 So. 231, 68 A. L. R. 712.

We cannot, on the record before us, affirm error in the action of the circuit court on appellant's petition for change of venue. The only evidence offered in support of the petition was the oath of the movants; the articles appearing in the three newspapers; the testimony of Wann, the sheriff of the county, and Major Starnes, who was in command of the military company. This falls far short of showing to the reasonable satisfaction of the judicial mind an all-pervading prejudice against the accused in the county of the trial that would prevent him from obtaining a fair and impartial jury for his trial.

[2] The accused and his alleged accomplices, who swore to the petition for change of venue, were confined in jail and were not in a position to ascertain the state of the general public feeling and sentiment of the county, and, as was observed in *Hawes v. State*, 88 Ala. 37, 54, 7 So. 302, their testimony is entitled to very little weight.

The publications in the local paper, the *Scrubbed*, were not inflammatory, and contained no undue assumption of the guilt of the accused, and "nothing appears to have been stated for the purpose of arousing indignation, or tending to create prejudice, except in so far as the publication of the facts and circumstances of the murders as they were developed might have had that effect; and in stating the facts there appears to have been no disposition to suppress whatever was favorable to defendant." *Hawes v. State*, 88 Ala. 54, 7 So. 302, 307.

In fact, these publications were in a sense conciliatory, apparently designed to suppress rather than create an unlawful hostile sentiment against the accused.

[3] As to the publications appearing in the *Montgomery Advertiser* and the *Chattanooga paper*, there was no evidence showing to what extent, if any, said papers were circulated in the county from which the jurors were to be drawn, and in the absence of such proof these publications were entitled to little or no weight. *Malloy v. State*, 209 Ala. 219, 96 So. 57.

The testimony of the witnesses Wann and Starnes, the only witnesses examined who were in a position to ascertain and know the nature of public feeling, goes to show that no threats or hostile demonstrations were expressed or made against the defendant; that the crowds that gathered were not disorderly, and readily dispersed when advised by some of the leading citizens of Scottsboro to do so, and there is nothing in the evidence going to show race prejudice against the accused, or local prejudice in favor of the girls who are alleged to have been mistreated. In fact, neither the defendant nor his alleged victims reside in Jackson county.

In short, the evidence shows nothing more than the gathering of a crowd impelled by curiosity, and not for hostile or punitive purposes.

[4] True, the evidence shows that the sheriff requested the Governor to send a company of the state militia to protect the defendant, and that prompt orders to this end were given and carried out, and that they were present during the proceedings; but this, without more, is not enough to authorize the granting of the motion.

[5] We are, therefore, impelled to hold that the appellant has failed to sustain the allegations of his motion by sufficient evidence, and that the petition was denied without error. *Godau v. State*, 179 Ala. 27, 60 So. 908; *Sears v. State*, 84 Ala. 410, 4 So. 521; *Jones v. State*, 181 Ala. 68, 61 So. 454; *Williams v. State*, 147 Ala. 10, 41 So. 992.

The facts going to show hostile demonstrations and threats toward the prisoner in

Thompson v. State, 117 Ala. 67, 23 So. 679, do not appear in the report of that case, but the record in that case shows that threats of lynching were made, and that a hostile crowd gathered with the purpose of following the sheriff and his prisoner to Huntsville where he was carried for safety, for the purpose of taking the prisoner from the sheriff, and followed as far as Greenbrier, where they met with providential hindrances that caused them to forego their purpose. Moreover, the person abused in that case was a mere child and a resident of Decatur, the county seat of the county where the trial was had.

[6] The only question raised on the trial as to the venire of jurors from which the jury to try the defendant was selected is stated in the bill of exceptions as follows: "Before proceeding to strike the jury in this case, defendant demanded a special venire, in addition to the regular venire, for the trial of this case. The court declined to allow a special venire for this case and required the defendant to strike a jury from the regular venire drawn for the week and the special venire drawn in the case of *The State of Alabama v. Charley Weems and Clarence Norris*, to which action of the court in not allowing him a special venire in this case, and requiring him to select a jury from the regular venire and the special venire drawn in the case of the *State v. Charley Weems and Clarence Norris*, defendant duly and legally reserved an exception."

The case of this appellant, which was numbered 2404 in the circuit court, was argued and submitted on this appeal along with the case of *Charley Weems and Clarence Norris*, which was a joint indictment against this appellant, *Charley Weems, Clarence Norris*, and others, numbered 2402 in the circuit court, and the record in this case, as well as the record in the other case, shows that all of the defendants, including appellant, were duly arraigned on March 31, 1931, in cases numbered 2402 and 2404; that they interposed a plea of not guilty, and both of said cases were set for trial on April 6, 1931; that the court ordered that the jury, to try the cases so set, should consist of one hundred jurors, composed of the regular venire of jurors drawn for the week beginning April 6th, consisting of seventy-five, and twenty-five special jurors, then drawn from the jury box of the county in the presence of the defendant and his counsel, and the sheriff was ordered to summon all of said jurors to be present on the date set for the trial, and to serve each of the defendants with a list of the jurors so drawn and ordered summoned, together with a copy of the indictment, and that said order was duly executed by such service by the sheriff, on April 4, 1931. The venire of jurors so drawn and summoned constituted the special venire for defendant's trial, and was in

strict compliance with the statute. Code of 1923, §§ 8044, 8049.

The section of the Code last above cited, section 8049, provides: "Whenever the judge of any court trying capital felonies shall deem it proper to set two or more capital cases for trial on the same day, said judge may draw and have summoned one jury or one venire facies of petit jurors for the trial of all such cases so set for trial on the same day."

Prior to the enactment of this statute the law required a special venire for each case, whether it was set for trial along with other capital cases or not. Walker v. State, 153 Ala. 31, 45 So. 640; Adams v. State, 133 Ala. 100, 31 So. 851; Cawley v. State, 133 Ala. 128, 32 So. 227; Rambo v. State, 134 Ala. 71, 32 So. 650.

But the quoted statute changed this rule as applied to cases set for trial on the same day. Umble v. State, 207 Ala. 508, 93 So. 651; Stewart v. State, 18 Ala. App. 92, 89 So. 391.

The contention, therefore, of the appellant, that he was entitled to a special venire other than the special venire so drawn and constituted, is without merit.

[7] The state's witness, Victoria Price, the person alleged to have been raped, on cross-examination by the defendant's counsel, testified, *inter alia*, "I have been married; I have been married twice. Both of my husbands are not now living; one of them is dead." Defendant's counsel thereupon asked the witness: "Are you divorced?" This question was objected to by the solicitor, and the court sustained the objection, and properly so, because the question clearly called for immaterial evidence.

[8] This witness was also asked on cross-examination: "Did you ever practice prostitution?" Objection to this question was likewise well sustained. There was no evidence at this time in the case, and, as for that matter, no such evidence was adduced on the trial, going to show that the defendant had intercourse with the witness by and with her consent; therefore, the question elicited immaterial evidence. Griffin v. State, 155 Ala. 83, 46 So. 451; Rice v. State of Florida, 35 Fla. 236, 17 So. 288, 48 Am. St. Rep. 245; Story v. State, 178 Ala. 88, 59 So. 480; 22 R. C. L. 1208, § 42.

[9] Previous chastity is not an essential element of the offense charged in the indictment, and, where this is so, rape may be committed on an unchaste woman, or even a common prostitute. Bailey v. Commonwealth, 82 Va. 107, 3 Am. St. Rep. 87; 22 R. C. L. 1175, § 5.

[10] For like reasons the objection of the solicitor to the question, "Do you know whether

or not these girls had a venereal disease?" was properly sustained. Moreover, to have pursued the investigation proposed by this question would have constituted an unprofitable multiplication of the issues. Southern Railway Co. v. Pott, 131 Ala. 312, 31 So. 83.

The remaining questions relate to the order of the court denying the motion for a new trial.

This invites a review: (1) Of the evidence and its sufficiency to support the verdict; (2) of the proceedings on the trial for errors alleged to have been committed prejudicial to the defendant; and (3) whether or not evidence alleged to have been discovered since the trial is such as requires that a new trial be granted. These questions will be treated in the order stated.

The evidence without dispute proves the corpus delicti, that is, that Victoria Price was forcibly ravished, and the single litigated question was whether or not the defendant was one of the persons guilty of the offense—a question of identity.

The evidence shows that the said Victoria Price, a white woman twenty-one years of age, on the occasion was riding on a fast freight train running between Chattanooga, Tenn., and Huntsville, Ala., in a gondola car partly laden with chert or gravel, with her girl companion, Ruby Bates, white, age seventeen years; that there were seven white boys in the same car. The girls were garbed in overalls; that twelve boys of the negro race attacked the white boys and forced all of them, except one Gilley, the smallest of the white boys, off the train while it was in motion, and then using force stripped the girls of their outer garments, and six of the negroes ravished Victoria Price and six ravished the other girl. The state witnesses identified the defendant as one of the ravishers of Victoria Price. The evidence further shows that, when the train was stopped at Paint Rock, by the deputy sheriff and the posse comitatus, the alleged victim, Victoria Price, was in a state of exhaustion, requiring immediate medical attention; that when the two young women were examined on the afternoon of the same day by Dr. Bridges, a physician at Scottsboro, to quote from his testimony: "I found their vaginas were loaded with male semen, and the young girl was probably a little more used than the other, the other not showing as much. On the body were bruises on the lower part of the groin on each side of Ruby Bates, that is the young one, and there was a bruised spot around the hips, or the lower part of the back, on the other girl, the Price girl, a few scratches, small scratches on the hands and arms, and a blue spot here (indicating) on the neck of

one of them. I think that was Mrs. Price, I will not be sure about that."

The defendant's contention is, and he offered some testimony to sustain this contention, that, while he was on the train he did not go on the car where the girls were, and did not participate in the affray with the white boys, but remained on another part of the train. This was the substance of his own testimony. He testified, however, that one of the white boys walked by where he was before the fight and almost pushed him off the train, and some words passed between him and said white boys.

Roy Wright, one of the defendant's companions traveling with him, who was not on trial, and who was not convicted on his subsequent trial, as was stated in argument at the bar, was offered as a witness by defendant, and testified: "My name is Roy Wright. I know this boy that just left the stand. I was on the train with him. I have a brother here that was on the train. He works in Chattanooga for the Lookout Furniture Company. My mother works there and has been working there a pretty good while. I am fourteen years old. I got on the train with this defendant at Chattanooga. Gene Williams, Andy Wright, the defendant and I all left Chattanooga together. We were intending to go to Memphis. This boy (defendant) did not have anything to do with those girls on that train. He was not down in the car with those girls; he was standing up on top of a box car. I saw a pistol. A long, tall, black fellow with duck overalls on; that is the only pistol I saw. This boy (defendant) did not have a knife. He did not open his mouth to the girls. I saw the girls on the train. They were on an oil car when I saw them. There were nine negroes down there with the girls and all had intercourse with them. I saw all of them have intercourse with them. I saw all of them have intercourse; I saw that with my own eyes. The defendant was not down there; he was never down there with the girls. The boys I left Chattanooga with were named Haywood Patterson, Eugene Williams and Andy Wright."

On cross-examination the witness testified:

"I first saw the girls on the oil tank; that was up in Chattanooga before we left the yards. I was by myself when I saw the girls. They caught the oil tank in front of the car Haywood Patterson, Andy Wright and Eugene Williams were on and I caught a box car and walked over the box car and passed by that car the girls were in and walked on down to the oil car where they were. The girls were not in the gondola car then, but were in the oil car. I walked along the oil car until got to where these boys were. When I got down there, I found three

boys there. The others were away up further; I did not see the other boys until we got to Stevenson.

"The girls rode the oil car down to Stevenson and then got off that car and got in this gondola, and then we boys got on the car together. There were fourteen colored boys on the car together. I had seen the girls in the gondola. I did not tell the fourteen boys the girls were on the train; I did not tell them anything. I saw the girls myself. I do not know whether the other boys saw them, too. We met the other boys in Stevenson. We did not talk about the girls. I did not hear someone say, 'Let's go down there.' The way it was, those white boys, when we were laying back on the oil car, kept walking backward and forward across it and liked to have knocked the defendant off. When we left out of Stevenson coming this way, we were on a cross-tie car; we had gotten off the oil car. This cross-tie car was about three cars from the gondola these girls were in. We started on the cross-tie car from Stevenson. There were fourteen in the car when we started from Stevenson, all of us in the same car. There was nothing said about the girls being down in the gondola; we were talking about men. We knew that the men were down there too. They had been passing by and we had a few little words. Haywood Patterson, Eugene Williams, Andy Wright and I were on the oil car and the white boys kept walking backward and forward and liked to have knocked Haywood Patterson off and Haywood said: 'How come you did not ask me to move,' and so the white man said: 'What do you care?' and Haywood said: 'I care a lot, I don't want to be knocked off,' and the white man said: 'We will settle it when the train stops.' It was the white boy that said that. He was on the train and he went up and got some more white boys and then the train stopped in Stevenson and they got off and went up in the gondola. The boys all got off and went up in the gondola. The white girls went up there with them, I guess, or they were up there. The negroes all got on a cross-tie car and stayed there. I was on the cross-tie car, all fourteen of us on the cross-tie car. The cross-tie car was not the next car to the gondola, but was three cars from it. We all got on the cross-tie car. After the train started off, the first one of the white men came over, the one that had on a big, black belt, and we were telling the other boys about it, that they were intending to put us off, that is that the white boys were intending to put us off, but we over-powered them and put them off; that occurred down in the gondola. We all made it up among ourselves to put them off; we made it up while we were over there on the cross-tie car, and after we all had made it up among ourselves to go over and put the white boys off, we all came along

the cross-tie car and got over the box car and jumped down in the gondola. I did not put any of the white boys off, but the little boy and I saved the life of one of them. They were intending to put him off and every time his foot would hit, it would throw him in between the cars, and we took pity on him and told him we would let him alone, and they reached down and pulled him back up and he got on the gondola and Haywood, Eugene and Andy went back over the top and left the rest in there, and I was sitting up on the box car, together with Patterson. He and I were on one box car and Eugene and Andy on the other one. I was sitting there looking in on the gondola, but Andy, Haywood and Eugene were not. Haywood was sitting as far as that man (indicating) from me and the others were back on the other box car. Andy went down in the gondola when they were putting the men off; it was not at Paint Rock, but right after the train left Stevenson; that is not Andy Patterson sitting right there (indicating); his name is Haywood Patterson. We all went down in there when we went to put off the men. Patterson went down there with us; all four of us went down in there to put them off. I was in the gondola when I told them not to throw him off but to bring him back.

"The long, tall, black fellow had the pistol. He is not here. I saw none of those here with a pistol. I saw five of these men here rape the girl. After we put the men off, we went back on the box car and I was sitting up on the box car holding to that wheel, looking down at them. I did not tell the officers I saw everyone rape her but me. I did not tell them that. I did not tell them that I saw the defendant rape her. I did not see the defendant rape the Bates girl. I did not see him do anything except he just helped put off the men. He was putting them off because they kept stepping across him and talking about putting us off. I saw one knife down in there. That boy back there (indicating) had it, Eugene; he is the one that had the knife. I did not see him hold it on the throat of that girl. He did not have hold of her throat, because he was sitting up on the box car. I saw one down in the gondola, a little white-handle knife. Clarence Norris had that knife; I do not know where he got it; I do not know what he did with it. He had it the last time I know anything about it. I am sure the defendant did not do anything."

Some of defendant's other witnesses testified that the defendant was in the gondola car and participated in the affray with the white boys, but that he did not participate in the commission of the rape. This testimony tends to show a conspiracy between those who went into the car and forced the white boys from the train, and that this appellant aided and abetted in the commission of the of-

fense. 22 R. C. L. 1170, § 6; State v. Burns, 82 Conn. 213, 77 A. 1093, 16 Ann. Cas. 405; State ex rel. Attorney General v. Tully, Judge, 102 Ala. 25, 16 So. 722.

[11] It is settled law that an order refusing a new trial on the ground that the evidence is not sufficient to support the verdict, or that the verdict is contrary to the evidence, will not be disturbed, unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust. Cobb v. Malone & Collins, 22 Ala. 630, 9 So. 738.

Prior to the enactment of the statute authorizing review on appeals of rulings on motions for new trials, such rulings were not reviewable, and the statute as first enacted applied only to civil actions at law. After its construction and application in the case cited and numerous decisions reaffirming the rule of that case, the statute was amended by the Act of September 22, 1915, p. 722, making it applicable to appeals in criminal cases, and since that amendment the rule announced in Cobb v. Malone & Collins, supra, has been repeatedly reaffirmed. Dees v. Lindsey Mill Co., 210 Ala. 183, 97 So. 647; Hatfield v. Riley, 199 Ala. 383, 74 So. 380; Price v. Price, 199 Ala. 433, 74 So. 381. And the same rule is applicable to criminal cases. Caldwell v. State, 203 Ala. 412, 84 So. 272.

[12] Applying this rule we are not able to affirm that the verdict of the jury is contrary to the weight of the evidence. On the contrary, the verdict is amply supported by the evidence.

We have heretofore treated all exceptions reserved during the trial, and have found nothing to warrant a reversal or justify the granting of a new trial.

But the appellant insists that he was prejudiced by the applause of the people in the courtroom when the jury, in another case involving the same transaction and other defendants, returned into court with a verdict of guilty and recommending the death penalty, and the court should have ex mero motu declared a mistrial and continued the case.

The only recital in the bill of exceptions which purports to give a full history of the trial is, after the examination of the first witness for the state was concluded, "thereupon the following occurred: The Court: I think the jury is ready to report; Sheriff, take this jury into the jury room while the other jury reports. Thereupon the jury retired to the jury room." Following this another state witness was called and the trial proceeded. There is no recital of any disturbance or applause; nor was any question raised in respect thereto.

The motion for a new trial alleges that when the jury reported in the case of State

v. Weems, and Norris, after the jury in this case had been carried to the jury room and the door closed, but to which the transom was partly open, the spectators in the courtroom burst into applause, and this applause spread to persons on the streets around the courthouse, and that some were heard to exclaim "Whoopie." And offered evidence allunde, consisting of the ex parte affidavits of the defendant and others, and the testimony of witnesses given ore tenus, some of which tended to prove these averments.

[13, 14] The purpose of the statute which allows a bill of exceptions is to bring into the record all matters, not a part of the record proper, for the purposes of the appeal, that the court may have before it a history of the case, in so far as it is necessary to the questions presented for review, and all matters occurring during the trial in the presence of the court of which the court might take notice, must be stated in the body of the bill in the order of their occurrence, and to be reviewable on appeal, the general rule is that some action of the court must be invoked in respect thereto. Hendry v. State, 215 Ala. 635, 112 So. 212; Dempsey v. State, 15 Ala. App. 199, 72 So. 773; Decatur Water Works Co. v. Foster, 181 Ala. 176, 49 So. 759; Sovereign Camp, W. O. W. v. Gay, 30 Ala. App. 650, 104 So. 895.

[15] It is not permissible to inject such matters—occurrences during the trial in the presence of the court—by evidence allunde on the hearing of the motion for a new trial, for the all-sufficient reason that such practice would inject into such hearing a controversy in respect to which the court might be advised by his own personal observation, leading to the conclusion that the issue was without merit. Hopkins v. Commonwealth, 210 Ky. 378, 275 S. W. 881.

[16] We therefore hold that this matter is not presented, and error in denying the motion for a new trial cannot be affirmed on this ground.

[17] It is also urged that there was some commotion on the streets when the jury reported in the Weems and Norris case, and that there was a band parade playing popular tunes such as "There'll Be A Hot Time In The Old Town Tonight." The evidence goes to show, in fact is without dispute, that the parade was put on by the Ford Motor Company in demonstrating Ford trucks, and had no connection with the proceedings in this case against the defendant; that the noise was made by a graphophone with an amplifier to attract the people in Scottsboro to inspect the caravan of Ford trucks, brought into Scottsboro by the "Ford people" in no way connected with that county, except they had an agency there. The only other music was by the hosiery mill band playing for the guard

mount of the militia after 6 o'clock in the evening.

The evidence as to the extent of the commotion or applause in the street was in conflict, and the evidence fails to show that it was such as to reach the ears of the jury, which was then confined in the jury room in the courthouse.

There was, therefore, nothing in these matters to put the court in error for refusing a new trial.

No question was raised on the trial as to the constituent element of the venire from which the jury was selected, except as heretofore treated, and there is nothing in the statutes regulating the selection of persons qualified to serve as jurors, or in the interpretation of said statutes by the courts that in any way discriminates against any citizen as to his right to serve as a juror; nor does the evidence show any such discrimination in this case. Code of 1923, § 8003; Acts 1931, p. 59; Thomas v. State of Texas, 212 U. S. 278, 29 S. Ct. 393, 53 L. Ed. 512; Ragland v. State, 187 Ala. 5, 65 So. 776.

The remaining ground to be considered relates to the question of newly discovered evidence, and, as heretofore stated, there is nothing in the evidence, or the circumstances which any of the evidence tends to prove, going to show that the accused had sexual intercourse with the witness Victoria Price, by or with her consent, express or implied.

[18] On the contrary, the evidence shows that she was forcibly ravished, and the defendant's sole contention is that he was not present in the car at the time the offense was committed, and did not aid or abet those who participated in the crime. In these circumstances evidence going to show specific acts of sexual intercourse between the alleged victim and other men, and her general reputation for chastity, was not material as going to show consent. Rice v. State of Florida, 35 Fla. 236, 17 So. 283, 46 Am. St. Rep. 245; Griffin v. State, 155 Ala. 88, 46 So. 481; 22 R. C. L. 1175, § 5; McQuirk v. State, 84 Ala. 435, 4 So. 775, 5 Am. St. Rep. 381.

[19] It is the settled law of this state, which is in accord with the weight of authority, that newly discovered evidence which goes merely to the credibility of witnesses examined on the trial is not such as authorizes the granting of a new trial. Fries v. Acme White Lead & Color Works, 201 Ala. 618, 79 So. 45; Southern Railway Co. v. Wildman, Adm'r, 119 Ala. 505, 24 So. 764; Vanderburg v. W. W. Campbell, 84 Miss. 89, 8 So. 206; Goodwin v. Aaron, 203 Ala. 677, 85 So. 17; Harrell v. Gondolf, 6 La. App. 50; Dohron v. Baker-Wakefield Cypress Co., 151 La. 618, 59 So. 1010.

The motion for new trial was therefore denied without error.