Supreme Court of the United States

OCTOBER TERM, 1934.

No.

HAYWOOD PATTERSON,

Petitioner,

against

STATE OF ALABAMA.

PETITION AND BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI.

WALTER H. POLLAK,
OSMOND K. FRAENKEL,
Attorneys for Petitioner.

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CONSTITUTIONAL PROVISIONS AND STATUTES.

Supreme Court of the United States

OCTOBER TERM, 1934.

HAYWOOD PATTERSON, *Petitioner,*

vs.

STATE OF ALABAMA.

PETITION FOR WRIT OF CERTIORARI.

TO THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Haywood Patterson, respectfully alleges:

A.

Summary statement of the matter involved.

Petitioner is now confined in Kilby Prison in the City of Montgomery, State of Alabama, under sentence of death for the alleged crime of rape. His execution is set for February 8, 1935. He was convicted at a trial held in Morgan County, Alabama, before Judge Callahan and a jury. An appeal was taken from that conviction to the Supreme Court of Alabama, which is the highest court of the State of Alabama. The conviction was affirmed by that Court on June 28, 1934. A timely application was made on July 9, 1934 for a rehearing, which application was received and considered by the Court. The application for a rehearing was denied on October 4, 1934.

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At the outset of the case petitioner moved to quash the indictment on the ground that the grand jury which brought in the indictment in Jackson County had been drawn from jury rolls from which negroes had been excluded because of race or color. Petitioner also moved to quash the venire of the petit jury in Morgan County where the action had been brought on for trial on the ground that negroes had been excluded because of race or color from jury service in that county. The Court refused to permit petitioner to introduce evidence which petitioner deemed necessary to support the claim of exclusion.

B.

Reasons relied on for the allowance of the writ.

1. Petitioner was denied the equal protection of the laws guaranteed to him by the Fourteenth Amendment of the Constitution of the United States in that negroes were excluded from jury service in Jackson County, Alabama, in which county was found the indictment against him, and that such exclusion was by reason of their color.

A motion was made by petitioner before the commencement of the trial to quash the indictment on these grounds. The motion was entertained and evidence introduced in support thereof which established such discrimination. The claim of federal right was considered by the trial court.

2. Petitioner was denied the equal protection of the laws guaranteed to him by the Fourteenth Amendment of the Constitution of the United States in that negroes were excluded from jury service in Morgan County, Alabama, the county in which the case was tried, and that such exclusion was by reason of their color.

A motion was made by petitioner before the commencement of the trial to quash the venire on these grounds. The motion was entertained and evidence introduced in support thereof which established such discrimination. The claim of federal right was considered by the trial court.

3. Petitioner was on numerous occasions, both with reference to the motion to quash the indictment and with reference to the motion to quash the venire, deprived of an opportunity of offering material proof in support of his contention that discrimination had been practiced.

The foregoing questions were expressly passed upon by the Supreme Court of Alabama upon an identical record in connection with the appeal of Clarence Norris, one of the negroes charged with participation in the same alleged crime. Petitioner's claims of federal constitutional right were overruled by the Supreme Court of Alabama or were unconstitutionally disregarded by that Court.

In support of the foregoing grounds of application your petitioner submits the accompanying brief setting forth in detail the precise facts and arguments applicable thereto.

WHEREFORE your petitioner prays that this Court, pursuant to United States Judicial Code, Section 237 b, as amended by Act of February 13, 1925, 43 Statutes 973, issue a writ of certiorari to review the judgment of the Supreme Court of the State of Alabama affirming your petitioner's conviction for rape, as aforesaid.

All of which is herewith respectfully submitted this 1st day of December, 1934.

HAYWOOD PATTERSON, Petitioner,
By WALTER H. POLLAK,
OSMOND K. FRAENKEL,
Attorneys.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1934.

HAYWOOD PATTERSON, *Petitioner,*

against

STATE OF ALABAMA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court below.

The opinion has not yet been reported officially. It appears in 156 So. 567 and at pages 788-794 of the record.* An application for rehearing was denied without opinion (806).

II.

Jurisdiction.

1.

The statutory provision is Judicial Code, § 237b as amended by Act of February 13, 1925, 43 Stat. 937.

*References, unless otherwise noted, are to the Patterson transcript of record. Since all questions raised upon this application with respect to negro exclusion are discussed in the companion petition for writ of certiorari and brief heretofore filed by Clarence Norris on November 17, 1934, Docket No. 534, they are not here repeated. It is accordingly suggested that the Norris petition and brief be read first.

2.

The date of the judgment is June 28, 1934 on which date the Alabama Supreme Court affirmed (799). A petition for rehearing was filed July 9, 1934 (802). The application was denied October 4, 1934 (806).

3.

The case comes within the provisions of §237b.

The claims of federal constitutional rights for the protection of which the jurisdiction of this Court is invoked are:

That the systematic exclusion of negroes because of race or color for service on grand and petit juries in Jackson County, where the grand jury was drawn (48-49), and in Morgan County, where the petit jury was drawn (423-424), was in violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. Incidental to these claims is the further contention that the court erred in excluding evidence offered by petitioner to prove discrimination and exclusion.

The claims of denial of constitutional rights based upon negro exclusion were specifically raised in the motion to quash the indictment (49) and in the motion to quash the venire (424). The questions were expressly considered and the rights ruled against by the trial court (163, 495). Exceptions were noted to each ruling (167, 497). The record in the Patterson case was by stipulation made a part of the record in the Norris case. Both records therefore on the motions to quash the indictment and the venire are identical. In the Norris case the Supreme Court of Alabama expressly passed upon these questions and expressly overruled them in an opinion (Norris Record, 676-687). In the Patterson case the Alabama Supreme Court affirmed the conviction (793) but did not state whether it passed upon these questions.

4.

The following cases among others sustain the jurisdiction:

Strauder v. *West Virginia,* 100 U. S. 303, 309; *Neal* v. *Delaware,* 103 U. S. 370, 397 and *Rogers* v. *Alabama,* 192 U. S. 226, 231, establish that the exclusion of negroes from grand and petit juries solely on the ground of their race or color is in violation of the Constitution. *Carter* v. *Texas,* 177 U. S. 442, 448, 449, holds that the refusal to give the defendant a full opportunity to prove his claim of discrimination is a denial of the federal constitutional rights. *Beidler* v. *Tax Commission,* 282 U. S. 1, 8; *Fiske* v. *Kansas,* 274 U. S. 380, 385-6; *Creswill* v. *Knights of Pythias,* 225 U. S. 246, 261 and *Ancient Egyptian Order* v. *Michaux,* 279 U. S. 737, 745, decide that where a federal right has been asserted and denied, it is the province of this Court to ascertain whether the conclusion of the state court has adequate support in the evidence. *Carter* v. *Texas, supra,* lays down the principle that it is for this Court to determine whether the federal right has been properly called to the attention of the state court; and *Rogers* v. *Alabama,* 192 U. S. 226, 230, 231; *Ward* v. *Love County,* 253 U. S. 17, 22; *Davis* v. *Wechsler,* 263 U. S. 22, 24, 25; *Des Moines Navigation & R. R. Co.* v. *Iowa Homestead Co.,* 123 U. S. 552, show that this Court will not permit state courts to deny a federal right by the unfair application of local practice.

III.

Statement of the case.

Petitioner is one of the nine negroes referred to in the Norris petition and application for certiorari. Petitioner has had three trials and has been three times convicted. The first conviction was reversed by this Court (*Powell* v. *Alabama,* 287 U. S. 45). The second conviction was set aside by the trial judge, Horton, as against the

weight of the evidence (see opinion printed in the Appendix, p. 27). The third conviction, after trial before Judge Callahan, we seek here to review.

The motions to quash the indictment and the venire.

Petitioner made a motion to set aside the indictment and a motion to quash the venire before Judge Horton.* Petitioner renewed the motions before Judge Callahan upon the record before Judge Horton together with additional evidence. Judge Callahan denied both motions.

The proceedings in this—the Patterson—case were by stipulation made applicable to the defendant Norris (Norris Record, 42a). Accordingly, the identical papers with identical paging are printed in both records (44-167, 418-497).**

Patterson was found guilty on December 1, 1933. On the same day Norris' trial commenced. Norris was found guilty on December 6. On that day both men were sentenced. Motions for new trials were made (Patterson Record, 748-785; Norris Record, 643-673). Both motions were stricken by Judge Callahan on the application of the Attorney General (Patterson Record, 24-25; Norris Record, 24-25). In Patterson's case the bill of exceptions was also stricken.

The following are the facts concerning the striking of the motion and of the bill in Patterson's case.

The striking of the motion for a new trial.

Patterson, as we have just said, was found guilty on December 1. Immediately after the verdict, Patterson's counsel requested an extension of time beyond 30 days within which to file a motion for a new trial, stating that the transcript of testimony was necessary in order to prepare a proper

*Since Judge Horton set aside the conviction, his rulings on these motions never became subject to review.

**The details of these motions together with the page references appear in the brief on certiorari submitted by Clarence Norris, page 7, *et seq.*

motion and that he had been informed by the stenographer that the transcript would not be ready in less than a month (32). The court refused an extension beyond 30 days, saying in substance, "You have 30 days within which to make a motion for a new trial, and after you have made such motion within the 30-day period, you may then apply to me for a continuance for additional 30-day periods in order to file your amended motion based upon the transcript." This statement was made in the presence and hearing of the Attorney General of the State and of other counsel for the State (32-33), and the assertion of the court that the defendant's counsel had 30 days within which to file the motion was not objected to or commented upon (33).

Petitioner's counsel relied upon the statements of the court. The papers on the motion for a new trial were filed on December 29, within the 30 days allowed by the court. At the time the motion papers were filed, a copy was sent to the Attorney General (35-36). It was retained by him without objection. Because the transcript had not been received, continuances were requested and obtained for the purpose of filing an amended motion. The motion was continued to January 27 and, after an interchange of letters (35, 40-41), to February 24 (35, 42).* The attorneys for the State said nothing. They did nothing until February 24. On that date for the first time counsel for the state proposed a different theory,—proposed the theory that the defendant did *not* have "30 days within which to make a motion for a new trial"; and the trial court (in opposition to the declaration it had made at the time of verdict and inconsistently with its own action in granting continuances) sustained the theory thus propounded by the state.

On February 24, the Attorney General, reciting that the judgment against Patterson had been rendered on December 6 (24) at a term which ended by operation of law on December 23, moved to strike the motion for a new trial because it was not filed until after the expiration of the term. The court granted the motion to strike the motion for a new trial (25). The defendant excepted (25). The defendant made application for a rehearing (26) upon papers setting forth the representations of the court, the acquiescence of the Attorney General in those representations and in the continuances granted by the court, and the reliance thereon by counsel (26-42). The application was considered and denied (43). Upon appeal the ruling striking out the motion for a new trial was affirmed (791).

*The court in the meantime made no suggestion that there was any doubt about the validity of the extension or the effectiveness of the continuances (see telegrams and letters, pp. 38-9, 40, 41, 42).

The striking of the bill of exceptions.

In Alabama a bill of exceptions must be presented within (a) "90 days from the date on which the judgment is entered" or (b) "within 90 days after the granting or refusing of a motion for a new trial" (Code, Sec. 6433, Appendix, p. 19).

Had the motion for a new trial been entertained and denied on February 24, the time to file the bill of exceptions would have expired in May, 90 days later. Until February 24 defendant's counsel had no inkling that a motion to strike was to be made (36) although copies of the papers on the motion for a new trial had been served on the Attorney General nearly two months before.* With the motion for a new trial *not* entertained, the 90-day period for filing the bill of exceptions instead of expiring in May would run from the date of judgment and would expire on March 1 or March 6, depending on whether the judgment date is conceived to be December 1 or December 6.

Upon the question what is to be conceived as the true date of judgment the following are the relevant facts:

*The fact that the State allowed two months to pass before moving to strike out the motion for a new trial lulled the defendant's counsel into a mistaken sense of security concerning the time available for the preparation of the voluminous bill of exceptions.

The docket of December 1 does contain the words "ordered and adjudged" that "the defendant" is "hereby adjudged guilty as charged and that his punishment be fixed at death." But December 6—not December 1—was the day of sentence (*supra*, p. 7). And the docket of December 6 shows that on that day it was "ordered and adjudged" that the defendant "be and he is hereby sentenced to death by electrocution" * * * and that it was "further considered, ordered and adjudged by the Court" that the sheriff deliver up Patterson to the warden of Kilby Prison until the 2nd of February, and on that day he be electrocuted (19-20).

And the Attorney General—moving as we know on February 24 to strike the motion for a new trial—defined his contention in these words, "that this court no longer has jurisdiction, power or authority over the judgment rendered in this cause on the 6 day of December, 1933" (24).

The bill of exceptions was presented on March 5 (785), less than 90 days after December 6 but more than 90 days after December 1. The court received the bill and signed the bill,—on May 2 (785). The clerk certified the record on May 9 (786-7). On the day of the argument of the two appeals—May 25 (Patterson Record, 798; Norris Record, 698)—the Attorney General moved to strike the bill of exceptions in the Patterson case on the ground that it was not filed until more than 90 days after the date of judgment. On *this* occasion the Attorney General declared the date of judgment to be December 1 (798).

On June 28 the Supreme Court of Alabama affirmed both judgments (Patterson Record, 788; Norris Record, 676). In its opinion in the Patterson case it upheld the striking of the motion for a new trial (789). It also said that the bill of exceptions in the Patterson case should be struck (791). The court accompanied these rulings with the statement that it did "not question the bona fide intention" of the petitioner "to conform to our laws touching motions for new trial and presentation of bills of exceptions" (793).

Patterson moved for a rehearing. His motion recited that the State was estopped from contending that the judgment had been rendered on December 1 and asserted that the striking out of the bill of exceptions was a violation of the defendant's constitutional rights. The motion reiterated his contentions that constitutional rights were denied by the overruling of the motions to quash the indictment and to quash the venire (804).

The Alabama Supreme Court entertained the motion. It considered "each and every ground" of the motion and denied the motion (806).

IV.

Errors below relied upon here. Summary of argument.

The Alabama courts denied petitioner's constitutional rights in refusing to quash for negro exclusion the indictment by the grand jury in Jackson County and the venire of the petit jury in Morgan County and in refusing to permit the petitioner full opportunity to prove that negroes were systematically excluded.

POINT I.

The Alabama courts denied petitioner's constitutional rights in refusing to quash for negro exclusion the indictment by the grand jury in Jackson County and the venire of the petit jury in Morgan County and in refusing to permit the petitioner full opportunity to prove that negroes were systematically excluded.

A.

These claims, asserted originally on the trial of this petitioner Patterson and by stipulation made applicable to the case of the petitioner Norris, appear, as we have said, in identical form and identical paging in both records (44-167, 418-497). The questions are fully discussed in the brief on the Norris application for certiorari (pp. 7-28). That discussion is adopted by the petitioner Patterson and to it the Court is respectfully referred.*

B.

1. The claims of constitutional rights were duly raised in the trial court by motion to quash the indictment and by motion to quash the venire. They were expressly overruled in the opinions of that court. Exceptions were taken to the denials (163-167, 495-497; see also brief on Norris application for certiorari, p. 7).

2. The Supreme Court of Alabama expressly, when in the Norris case the record in the Patterson case was before it, overruled these claims (Norris Record, 676-687). The question whether they separately passed upon the identical issues in the Patterson case is, therefore, wholly technical.

*The only difference between the two cases is that in the Patterson case the bill of exceptions was stricken and in the Norris case it was not.

3. That the claims of federal constitutional right were actually passed upon when the Alabama Supreme Court affirmed Patterson's conviction there is no reason to doubt. "All motions which are made in writing"—and the motions to quash the indictment and the venire were made in writing—together with "the ruling of the court thereon" become a "part of the record proper on appeal" (Code, Sec. 9459, Appendix, p. 21). The Alabama Supreme Court is required to pass upon all questions "apparent on the record or reserved by bill of exceptions" (Code, Sec. 3258, Appendix, p. 19).

The Alabama Supreme Court did not disregard *all* questions. It disregarded only those questions "reviewable alone by bill of exceptions" (793). It did not suggest that these motions were among the questions reviewable by bill of exceptions "alone."

Motions challenging the composition of the jury, whether grand or petit, may be brought before the appellate court in any way that certifies to the accuracy of the record on these motions. The question is thoroughly discussed and the authorities are collected in the late opinion of Bond, C. J., writing for the unanimous Maryland Court of Appeals in *Lee* v. *State,* 163 Md. 56. The Maryland court reversed a judgment of conviction because of the exclusion of negroes. And it specifically overruled the contention that the issue should have been raised by bill of exceptions.

It seems then clear, under the Alabama statutes and under the common law, that motions addressed to the composition of juries are part of the record without a bill of exceptions. The question has not been decided in Alabama. But the implication of the only authority we have been able to find is that motions of the sort need not be brought up by bill of exceptions (*Stover* v. *State,* 204 Ala. 311, 312). Both statute and common law thus confirm that the Supreme Court of the State did pass upon the questions raised by the motions to quash the indictment and the venire.

4. But had the Supreme Court of Alabama in so many words expressly refused to pass upon these questions the circumstance would have made no difference. A claim of federal constitutional right is denied "as well by the refusal of the state court to decide the question as by an erroneous decision of it" (*Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282).

The identical record was before the Alabama Supreme Court. The claims of federal constitutional right were upon that record expressly overruled,—in the opinion in the Norris case, argued at the same time as the Patterson case and decided on the same day as the Patterson case. If the Alabama Supreme Court had refused to consider Patterson's contentions under the Fourteenth Amendment such action would have been "equivalent to a decision against the federal right which was actually set up and claimed" (*Des Moines Navigation Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, 555, 556).*

5. Definitely the petitioner's opportunity to have a review by this Court of the rulings which denied his claims under the Constitution of the United States cannot be lost by the striking—under a ruling as to a local practice—of his bill of exceptions:

Whether federal constitutional rights have been sufficiently brought to the attention of the state courts is itself a federal question in the decision of which this Court is not concluded by the view taken by the highest court of the state (*Carter* v. *Texas*, 177 U. S. 442, 447), especially where

*The appeals in two cases arising out of the same transaction and involving the same claim of federal right had been argued together in the state court. In one case the federal question had been presented in the printed brief; in the other it had not. Because of the failure to present the question in the printed brief in the second case—although it had been raised on the trial in both cases—the Supreme Court of Iowa refused to consider it, saying: "We are required to hold that the question of prior adjudication cannot be determined in this case" (quoted 123 U. S., at p. 554). But this Court took jurisdiction of the federal question in this second case and reversed the judgment of the state court on the merits.

the federal rights were distinctly asserted in the trial court (*Erie Railroad Co.* v. *Purdy*, 185 U. S. 148, 154; see also *Love* v. *Griffiths*, 266 U. S. 32, 33), most especially where the very claims under the constitution of the United States were in a companion case and on an identical record overruled by the court of last resort of the state (*Des Moines Navigation Co.* v. *Iowa Homestead Co.*, *supra*).

"Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights when plainly and reasonably made, is not to be defeated under the name of local practice" (*Davis* v. *Wechsler*, 263 U. S. 22, 24).*

The state through its officials, judicial and executive, misled petitioner seeking to assert his constitutional rights:

The court declared and the Attorney General acquiesced in the declaration that petitioner had "thirty days within which to make a motion for a new trial",—*i. e.*, until December 29 *not* 23. Subsequently continuances were twice granted.

The Attorney General did not move seasonably to strike the motion for new trial nor did he give the least intention that he regarded the motion as made too late. On the contrary he waited until February 24 before making his motion to strike. Had he made his motion in time and had it been granted there would have been plenty of time to serve the bill of exceptions.**

Rogers v. *Alabama*, 192 U. S. 226, supplies a familiar illustration:

The issue was of negro exclusion. The Alabama courts refused to consider the papers which raised the issue upon the ground that they were too prolix. This Court expressly rejected this ruling upon the point of local practice and passed upon the case made.

**The Court will of course understand that a bill of exceptions would not be prepared until the motion for a new trial had been disposed of. If the motion for a new trial had been granted—as on the preceding trial it had been granted by Judge Horton (Appendix, p. 27)—there would have been no occasion for a bill of exceptions.

Even after February 24th, when the motion for a new trial was stricken,—the bill of exceptions would have been prepared and filed within the 90-day period had not the defense once more been misled,—this time by the motion of the Attorney General fixing the date of judgment as December 6. The bill of exceptions *was* filed within the 90-day period,—*accepting* as the date of judgment December 6, the date the Attorney General of Alabama himself accepted and declared on February 24.

Under the Alabama law the failure to file the bill of exceptions within the statutory time is not a jurisdictional defect. Unless there is affirmative action—unless a motion to strike the bill of exceptions is made—a bill, though filed late, must be entertained. This the Supreme Court of Alabama recognized (792) citing *Ettore* v. *State*, 214 Ala. 99.* The Attorney General was under no obligation to make the motion to strike. In view of the facts that this was a capital case, that the defense had been misled, that the circumstance had been called to his attention (29-32, 35-36, 42), the Attorney General was under compelling obligation *not* to make the motion.

The Supreme Court of Alabama stated that it was applying "settled construction" in sustaining the motion to strike the bill of exceptions (793). But the Alabama courts had never before considered a case in which state officials had first misled a defendant as to the time for filing his bill and later made the delay in filing the basis for striking the bill. There was no precedent for holding that the Attorney General in this case was not debarred from changing, to the detriment of the defendant, his position

*Michie Annotated Code (1929) states (p. 1056) that the matter of time "has ceased to be jurisdictional."

with reference to the date of the judgment. If he was precluded from claiming the date to be other than as originally stated by him, namely, December 6, 1933, then the motion to strike must have been denied.*

The issue of federal constitutional right, there is every reason to suppose, was considered by the court of last resort of the state as well as by the trial court. For the issue of negro exclusion was raised not by bill of exceptions "alone" but by separate motions in writing; the striking of the bill did not affect the consideration of the federal issue. And if the fact as to the local practice had been otherwise this Court's jurisdiction would not have been impaired. Suppose the state court had ruled that under the state practice the right to raise the federal issue was forfeited by a matter concededly not jurisdictional: by a few days' delay in filing the bill of exceptions,—delay in which the trial court, the prosecuting officials of the county, the chief law officer of the state acquiesced and to which they contributed. Suppose the state court had found no unfairness in such a practice and result,—even in its relation to issues under the Constitution of the United States. This court applies its own view of what in the circumstances is fair (Compare *Creswill* v. *Knights of Pythias*, 225 U. S. 246; *New York Central R. R.* v. *New York & Pa. Co.*, 271 U. S. 124, 126; *Ancient Egyptian Order* v. *Michaux*, 279 U. S. 737, 744-745; *Postal Telegraph Cable Co.* v. *Newport*, 247 U. S. 464, 475, 476). Fairness requires that the rulings which denied rights under the Constitution of the United States be reviewed by this Court (*Davis*

*That on general principles he was so precluded is clear. See *Gas & Electric Co.* v. *Simpson*, 118 Tenn. 532, 539-543; *Winona Paper Company* v. *First National Bank*, 33 Ill. App. 630, 632; cf. *Brown* v. *Snell*, 57 N. Y. 286, 301. *Ettore* v. *State*, cited by the Supreme Court of Alabama (792) involved a wholly different question. There the statutory period had expired *before* the state officials had in any way acquiesced in the filing of a late bill. There was no contention that the officials had contributed to the delay and thereby prejudiced the defendant.

v. *Wechsler, supra; Taylor* v. *United States,* 286 U. S. 1, 5; *Jennings* v. *Philadelphia, Baltimore & Washington Ry. Co.,* 218 U. S. 255, 258; *McGourkey* v. *Toledo & Ohio Ry.,* 146 U. S. 536, 550; *In re Chateaugay Iron Co.,* 128 U. S. 544, 556; *Davis* v. *Patrick,* 122 U. S. 138).

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers to the end that rights under the Constitution of the United States should be preserved, and accordingly a writ of certiorari should be granted and the Court should review and reverse the decision of the Supreme Court of Alabama.

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ALABAMA CODE.

SECTION 3258. (6264) (4333) (4509) (4990) *Assignment or joinder of error unnecessary; duty of court.*—In cases taken to the supreme court or court of appeals under the provisions of this chapter, no assignment of errors or joinder in errors is necessary; but the court must consider all questions apparent on the record or reserved by bill of exceptions, and must render such judgment as the law demands. But the judgment of conviction must not be reversed because of error in the record, when the court is satisfied that no injury resulted therefrom to the defendant.

SECTION 6433. (3019) (616-620) (2761) (3113) (2760) (2358) *When bill signed.*—Bills of exceptions may be presented to the judge or clerk at any time within ninety days from the day on which the judgment is entered, and not afterwards; and all general, local, or special laws or rules of court in conflict with this section are repealed, abrogated and annulled. The judge or clerk must indorse thereon and as a part of the bill the true date of presenting, and the bill of exceptions must, if correct, be signed by the judge within sixty days thereafter. When the bill of exceptions is presented to the clerk, it shall be his duty forthwith to deliver or forward it to the judge. Presentation of the bill of exceptions within ninety days after the granting or refusing of a motion for a new trial shall be sufficient to preserve for review the rulings of the trial court on the trial of the original cause, as well as the ruling of the court on the motion for a new trial.

SECTION 6434. (3020) *Striking bills of exceptions, and declining to consider them because not signed within time required.*—The appellate court may strike a bill of exceptions from the record or file because not presented or signed within the time required by law, but shall not do so ex mero motu, but only on motion of a party to the

record of his attorney; the object and effect of this statute being to allow parties to waive or consent for the time of signing bills of exceptions.

SECTION 6670. *Executions on judgments; new trial must be asked in thirty days.*—After the lapse of ten days from the rendition of a judgment or decree, the plaintiff may have execution issued thereon, and after the lapse of thirty days from the date on which a judgment or decree was rendered, the court shall lose all power over it, as completely as if the end of the term had been on that day, unless a motion to set aside the judgment or decree, or grant a new trial has been filed and called to the attention of the court, and an order entered, continuing it for hearing to a future day. (1915, p. 707, Sec. 3.)

SECTION 8603. (7247) *Qualifications of persons placed on jury roll and in jury box.*—The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over sixty-five years of age, or, who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror, or who cannot read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English, and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box. (1909, p. 305, Sec. 11.)

SECTION 8606. *Jury commission must place name of every qualified person on jury roll: Use of initials alone not allowed.*—The jury commission shall see that the name of every person possessing the qualifications prescribed by

this chapter to serve as a juror shall be placed on the jury roll and in the jury box, and they may summon and cause to attend before them any person residing within the county and examine him on oath, touching the name, residence, occupation and qualification of any person residing in the county. The commission must not allow initials only to be used for a juror's name, but one full Christian name or given name, shall in every case be used, and in case there are two or more persons of the same or similar name, the name by which he is commonly distinguished from the other persons of the same or similar name, shall also be entered as well as his true name. (1909, p. 305, Sec. 14.)

SECTION 9459. *Motions made in writing, on appeal, become part of record.*—All motions which are made in writing in any circuit court or any court of like jurisdiction in any cause or proceeding at law, shall, upon an appeal become a part of the record, and the ruling of the court thereon shall also be made a part of the record, and it shall not be necessary for an exception to be reserved to any ruling of the court upon any such motion; and it shall constitute a part of the record proper on appeal. (1915, p. 598, Sec. 1.)

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OPINION OF JUDGE HORTON.

MORGAN CIRCUIT COURT.

State of Alabama,

Plaintiff,

vs.

Haywood Patterson,

Defendant.

The defendant in this case has been tried and convicted for the crime of rape with the death penalty inflicted. He is one of nine charged with a similar crime at the same time.

The case is now submitted for hearing on a motion of a new trial. As human life is at stake, not only of this defendant, but of eight others, the Court does and should approach a consideration of this motion with a feeling of deep responsibility, and shall endeavor to give it that thought and study it deserves.

Social order is based on law, and its perpetuity on its fair and impartial administration. Deliberate injustice is more fatal to the one who imposes than to the one on whom it is imposed. The victim may die quickly and his suffering cease, but the teachings of Christianity and the uniform lessons of all history illustrate without exception that its perpetrators not only pay the penalty themselves, but their children through endless generations. To those who deserve punishment, who have outraged society, and its laws on such an impartial justice inflicts the penalties for the violated laws of society, even to the taking of life itself; but to those who are guiltless the law withholds its heavy hand.

The Court will decide this motion upon the sole consideration of what is its duty under the law. The Court must be faithful in the exercise of the powers which it believes it possesses as it must be careful to abstain from the assumption of those not within its proper sphere. It has endeavored with diligence to enlighten itself with the wisdom declared in the cases adjudged by the most pure and enlightened judges who have ornamented the Courts of its own state, as well as the distinguished jurists of this country and its Mother England. It has been unstinted in the study of the facts presented in the case at bar.

The law wisely recognizes the passions, prejudices and sympathies that such cases as these naturally arouse, but sternly requires of its Ministers freedom from such actuating impulses.

The Court will now proceed to consider this case on the law and evidence only making such observations and conclusions as may appear necessary to explain and illustrate the same.

There are a number of the grounds of the motion. The Court has decided that no good purpose may be subserved in considering a number of these; without deciding whether these grounds are well based or not, the Court sees no need of their being considered. These omitted grounds are such as probably would not re-occur in another trial, and if they did they would certainly be under a different form. The vital ground of this motion, as the Court sees it, is whether or not the verdict of the jury is contrary to the evidence. Is there sufficient credible evidence upon which to base a verdict?

The case of Caraway vs. Graham, 218 Ala. 453; 118 So. 807, was a suit against a surgeon for malpractice. The lower Court refused to grant a new trial, but the Supreme Court reversed the lower Court. Judge Sayre delivered the opinion of the Court stating:

> "The Court here should proceed with great caution; but it should leave no evident mistake unrighted. 'This

> Court has not renounced its duty nor neglected its power'—certainly it ought not to do so—'to revise the verdict of juries, and the conclusions of the trial judges on questions of facts, where, in our opinion, after making all proper allowance and indulging all reasonable intendments in favor of the court below, we reach a clear conclusion that the finding and judgment are wrong.' Twinn Tree Lumber Co. vs. Day, 181 Ala. 565, 61 So. 914, 915.
>
> It cannot be said that there was no contradiction in the evidence and its tendencies; the question for decision was one for the jury, in the first place, at least. Nevertheless, ultimately and within reasonable limits it is the right and duty of the Court to revise the finding of the jury. The case at bar was in a peculiar sense one to be decided on the expert testimony. The great weight of that testimony was with the defendant, and our judgment is that the motion for new trial should have been granted."

In Yarbrough vs. Mallory, 225 Ala. 579; 144 So. 447, a decision most recently rendered, Judge Bouldin granted a new trial because in his opinion the verdict was clearly unjust and declared that the Court need not determine what wrongful influence resulted in gross miscarriage of justice. In defining these influences he stated:

> "'Bias' means to incline to one side. 'Passion' means moved by feeling or emotions, or may include sympathy as a moving influence without conscious violation of duty. 'Prejudice' includes the forming of an opinion without due knowledge or examination."

We note that Judge Bouldin says that a jury may be moved by passion thus vitiating the verdict, and states that passion may include sympathy as a moving influence; and there need be no conscious violation of duty.

Again in the case of Birmingham News Co. vs. Lester, 222 Ala. 503, 133 So. 270, the same judge, Judge Bouldin, declared:

> "That the credibility of witnesses is involved, that opinion evidence of value, not conclusive upon the trier of fact, is to be considered, and that there is no yardstick to measure the damages for physical pain and suffering, does not withdraw the case from the supervisory power of the trial court over the verdicts of juries. In all these matters he is in like position with the jury, and clothed with the power and duty to relieve against verdicts which allowing all reasonable presumptions in their favor, are still found to be clearly wrong and unjust from any cause, whether by reason of passion and bias, or from mistake, inadvertence or failure to comprehend and appreciate the issues."

In Roan vs. State, 143 So. 454, a case of conviction of murder in the first degree, the Supreme Court, speaking through Thomas, J., declared:

> "We may conclude by saying that after allowing the reasonable presumptions in favor of the correctness of the verdict rendered—guilty of murder in the first degree—we are clear to the conclusion that on the evidence before us the preponderance thereof is against the verdict rendered."

And a new trial was granted.

These are the latest decisions of our Supreme Court. They could be multiplied.

Turning to the Court of Appeals we will consider a few cases rendered by that Court.

The case of Black vs. State, 24 Ala. App. 433; 136 So. 425, was a case of carnal knowledge, a case of like nature as rape. The evidence is set out in much detail and the

Court will not attempt to state it except that the prosecutrix testified positively to the fact. The Court of Appeals speaking through Bricken, P. J., concludes its decision in these words:

> "As stated, the evidence as to the defendant's carnal knowledge of Rachel Davis was in conflict, but it is insisted that when her evidence as to the unlawful act is considered in the light of human experience and common knowledge, the defendant's motion of a new trial should have been sustained, and that the weight of evidence against the verdict is so great that, 'the substantial ends of justice require the examination of the facts by another jury.' "

The case of Skinner vs. State, 22 Ala. App. 457; 116 So. 806, was a case of rape. In that case, Rice, J., declared:

> "As for sustaining the conviction for the offense of rape suffered by appellant, we feel impelled to say that under and in obedience to the well established rule prevailing in this state, it is our opinion, and we so hold that the evidence was entirely insufficient and the trial court erred in not setting aside the verdict and granting a new trial."

Culbert vs. State, 23 Ala. App. 557; 129 So. 315, was likewise a case of rape where the Court of Appeals set aside the verdict and granted a new trial.

It is unnecessary to further cite the decisions as to the duties of Courts in setting aside the verdicts of juries. The law is practically uniform.

Another question to be considered by the Court is how far a Court should go in referring to the evidence in a case upon granting or refusing a motion for a new trial on account of the insufficiency of the evidence. The English courts appear to be very careful in refraining from

setting out the evidence. This does not appear to be the prevailing doctrine either in this state or the other states, as well as the Supreme Court of the United States. Our Courts do not hesitate to set out any part or all the evidence when requisite in considering its sufficiency or insufficiency.

The Court will next consider the law as especially applicable to the crime of rape.

In the case of Bodde vs. State, 52 Ala. 395, Chief Justice Brickell, in speaking of the evidence of a prosecutrix who appeared to lack chastity, declared the law as follows:

> "Her known want of chastity may create a presumption that her testimony is false or feigned. Whether it creates such presumption, the jury must determine from all the evidence. She may be of ill fame for chastity, but she is still under the protection of the law, and not subject to a forced violation of her person, for the gratification of the propensities of the man who has strength to overpower her. No principle of law forbids a conviction on her uncorroborated testimony, though she is wanting in chastity, if the jury are satisfied of its truth. Her testimony should be cautiously scrutinized and the Court and jury should diligently guard themselves from the undue influence of the sympathy in her behalf which the accusation is apt to excite. If she did not conceal, but immediately discovered the offense, and the offender if known to her; if the place of its commission was such that if she made outcry it would not probably be heard and bring her assistance and defense,—these and other circumstances should be considered by the jury. The manner in which she testifies—the consistency of her testimony should also be carefully considered."

In Barnett vs. State, 83 Ala. 45; 3 So. 612, Judge Somerville said:

> "In prosecutions for rape it is very proper for the jury to be exceedingly cautious how they convict a defendant on the uncorroborated testimony of the prosecutrix, especially where there is evidence tending to impeach her credibility; for the experience of courts in modern times has amply attested the assertion of Lord Hale, that the charge of rape is 'an accusation easy to make and hard to be proved, and harder still to be defended by the party accused though never so innocent.'"

The U. S. Supreme Court, in the case of Mills vs. U. S., 164 U. S. 644; 41 Law. Ed. 584, in setting aside a verdict of a jury convicting a defendant and sentencing him to death thus declared the law:

> "The crime itself is one of the most detestable and abominable that can be committed, yet a charge of that nature is also one which all judges have recognized as easy to be made and hard to be defended against; and it has been said that very great caution is requisite upon all trials for this crime, in order that the natural indignation of men which is aroused against the perpetrator of such an outrage upon a defenseless woman may not be misdirected, and the mere charge taken for proper proof of the crime on the part of the person on trial."

33 Cyc., page 1485, declares the general holding of all the Courts to be as follows:

> "The Courts have repeatedly approved Sir Mathew Hale's statements in regard to the crime of rape, that, 'it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent;' and that we should 'be the more cautious upon

trials of offenses of this nature wherein the Court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over hastily carried to the conviction of the person accused thereof by the confident testimony, sometimes of malicious and false witnesses.' ''

The law as to granting new trials in cases of rape is thus summed up in 33 Cyc., page 1497:

> "But defendant should not be convicted without corroboration where the testimony of the prosecutrix bears on its face indications of unreliability or improbability, and particularly when it is contradicted by other evidence; and where the evidence preponderates in favor of defendant, or the verdict appears to have been influnced by passion or prejudice, it should always be set aside unless there is corroboration of prosecutrix."

With the law so written, let us now turn to the facts of the case. The Court will of necessity consider in detail the evidence of the chief prosecutrix, Victoria Price, to determine if her evidence is reliable, or whether it is corroborated or contradicted by the other evidence in the case. In order to convict this defendant, Victoria Price must have sworn duly to the fact of her being raped. No matter how reliable the testimony of the defendant and his witnesses, unless the State can make out a case upon the whole evidence a conviction cannot stand.

The claim of the State is that the defendant raped Victoria Price; that is the charge. The circumstances under which the crime was claimed to have been committed appear as follows:

On March 25th, 1931, the prosecutrix, Victoria Price, and Ruby Bates, her companion, boarded a freight train at

Chattanooga, Tennessee, for the purpose of going to Huntsville, Alabama. On the same train were seven white boys, and twelve negroes, who it appears participated, or are charged with participating in the occurrences on such train. All were tramps or "hoboing" their way upon this same freight train. About Stevenson, Alabama, a fight occurred between the negroes and the white boys and all the white boys, except one named Gilley, got off the train, or were thrown off the train, a short time after the train left Stevenson, Alabama. The distance from Stevenson to Paint Rock is thirty-eight miles. The train was travelling between twenty-five and thirty-five miles an hour. Some of the white boys, who were thrown off the train, returned to Stevenson, Alabama, and the operator there telegraphed to Paint Rock, a place down the line, reporting the fight, causing a posse and a large crowd to form at Paint Rock, and they surrounded the train as it pulled into Paint Rock and took therefrom nine negroes, one of whom was this defendant, the two white girls, and their white companion, Gilley. The negroes were arrested and lodged in the Scottsboro jail as well as the two women, and the seven white boys. The two women were forthwith carried to the office of a physician in Scottsboro, arriving there from one hour to one and one-half hours after they claimed a rape was committed upon them, and were examined by two skilled physicians, Drs. Bridges and Lynch. It was while the train was travelling between Stevenson and Paint Rock, between shortly after noon and three o'clock that the alleged rape was committed.

There have been two trials of this case; one at Scottsboro and the other the recent trial at Decatur. The trial at Scottsboro was reversed by the Supreme Court of the United States, who declared the defendants did not have the assistance of counsel. The motion in this case is upon the result of the trial at Decatur. The evidence at the trial at Decatur was vastly more extensive and differed in many important respects from the evidence at Scottsboro.

Much of the evidence at Scottsboro was introduced at the trial at Decatur, and the Court will consider the entire evidence submitted as it may appear necessary in considering this motion. The Court shall endeavor in quoting the evidence to quote it substantially, and sometimes literally as given, only stating its substance when requisite to make its meaning clear.

As stated the State relies on the evidence of the prosecutrix, Victoria Price, as to the fact of the crime itself, necessarily claiming that her relation is true. The defense insists that her evidence is a fabrication—fabricated for the purpose of saving herself from a prosecution for vagrancy, or some other charge.

The Court will, therefore, first set out the substantial facts testified to by Victoria Price and test it as the law requires, as to its reliability, or probability, and as to whether it is contradicted by the other evidence.

She states that on March 25, 1931, she was on a freight train travelling through Jackson County from Stevenson to Paint Rock; that Ruby Bates was with her on the train; that she had boarded the train at Chattanooga, Tennessee; that when she first boarded the train she got on an oil tank car. That at Stevenson, she and Ruby Bates walked down the train and got on a gondola car—a car without a top. That the car was filled with chert, lacking about one and one-half or two feet of being full. That the chert was sharp, broken rock with jagged ends; that as the train proceeded from Stevenson seven white boys got in the car with them and that they all sat down in one end of the car, next to a box car; that in about five or ten minutes twelve colored boys jumped from the box car into the gondola, jumping over their heads. That the defendant was one of them. That the colored boys had seven knives and two pistols; that they engaged in a fight with the white boys, ejecting all from the train except one, Orville Gilley; that this white boy stayed on the gondola, remained there and was still on the car when Paint Rock was reached,

and saw the whole thing that thereafter occurred on this car. That one of the negroes picked her up by the legs and held her over the gondola, and said he was going to throw her off; that she was pulled back in the car and one of the negroes hit her on the side of the head with a pistol causing her head to bleed; that the negroes then pulled off the overalls she was wearing and tore her step-ins apart. That they then threw her down on the chert and with some of the negroes holding her legs and with a knife at her throat, six negroes raped her, one of whom was the defendant; that she lay there for almost an hour on that jagged rock, with the negroes lying on top of her, some of whom were pretty heavy; that the last one finished just five minutes before reaching Paint Rock and that her overalls had just been pulled on when the train stopped at Paint Rock with the posse surrounding it. That she got up and climbed over the side of the gondola and as she alighted she became unconscious for a while, and that she didn't remember anything until she came to herself in a grocery store and she was then taken to Scottsboro, as the evidence shows, in an automobile and that in about an hour or an hour and one-half Dr. Bridges and Dr. Lynch made an examination of her person.

This witness further testified that she was wet on her private parts; that each negro wetted her more and more; that her private parts were bleeding; that the blood was on her clothes; that her coat had semen on it; that when Dr. Bridges and Dr. Lynch examined her they saw her coat and it was all spattered over with semen; that her dresses had blood and semen on them; that she had them on when the doctors examined her; that the coat was cleaned and that she washed the dresses in the jail before the trial. The evidence further shows without dispute that all nine negroes were taken in charge by the officers and carried to the Scottsboro jail.

With seven boys present at the beginning of this trouble with one seeing the entire affair, with some fifty or sixty

persons meeting them at Paint Rock and taking the women, the white boy, Gilley, and the nine negroes in charge, with two physicians examining the women within one to one and one-half hours, according to the tendency of all the evidence, after the occurrence of the alleged rape, and with the acts charged committed in broad daylight, we should expect from all this cloud of witnesses or from the mute but telling physical condition of the women or their clothes some one fact in corroboration of this story. Let us consider the rich field from which such corroboration may be gleaned.

1. Seven boys on the gondola at the beginning of the fight, and Orville Gilley, the white boy, who remained on the train, and who saw the whole performance.

2. The wound inflicted on the side of Victoria Price's head by the butt end of a pistol from which the blood did flow.

3. The lacerated and bleeding back of the body, a part of which was stripped of clothing and lay on jagged sharp rock, which body two physicians carefully examined for injuries shortly after the occurrence.

4. Semen in the vagina and its drying and starchy appearance in the pubic hair and surrounding parts.

5. Two doctors who could testify that they saw her coat all spattered over with semen; who could testify to the blood and semen on her clothes, and to the bleeding vagina.

6. Two doctors who could testify to the wretched condition of the woman, their wild eyes, dilated pupils, fast breathing, and rapid pulse.

7. The semen which must have eventually appeared with increasing evidence on the pants of the rapists as each

wallowed in its spreading ooze. The prosecutrix testified semen was being emitted by her rapists, and common sense tells us six discharges is a considerable quantity.

8. Live spermatozoa, the active principle of semen, would be expected in the vagina of the female from so recent discharges.

9. The washing before the first trial by Victoria Price of the very clothes which she claimed were stained with semen and blood.

The Court will not present the evidence which will show: That none of the white seven boys, or Orville Gilley, who remained on the train were put on the stand, except Lester Carter; that neither Dr. Bridges nor Dr. Lynch saw the wound inflicted on the head by the pistol, the lacerated or bleeding back which lay on jagged rocks; that the semen they found in the vagina of Victoria Price was of small amount; that the spermatozoa were non-motile, or dead; that they saw no blood flowing from the vagina; that they did not testify as to seeing the semen all spattered over the coat or blood and semen on the clothes; any torn garments or clothes; that these doctors testified that when brought to the office that day neither woman was hysterical or nervous about it at all, and that their respiration and pulse were normal; and that the prosecutrix washed the clothes evidencing the blood and semen.

Taking up these points in order what does the record show: None of the seven white boys were put on the stand, except Lester Carter, and he contradicted her.

Next was Victoria Price hit in the head with a pistol? For this we must turn to Dr. Bridges. It was agreed in open court that Dr. Lynch, who in company with Dr. Bridges at Scottsboro examined the two girls, would testify in all substantial particulars as Dr. Bridges, and Dr. Lynch was excused with that understanding when Dr. Bridges

completed his examination. In considering Dr. Bridges' testimony we observe he was a witness placed on the stand by the State. His intelligence, his fair testimony, his honesty, and his high professional attainments, impressed the Court, and certainly all that heard him. He was frank and unevasive in his answers. The Court's opinion is that he should be given full faith and credit. In further considering his testimony it was shown that he was examining these women with the most particular care to find evidence of a rape upon them, and that the women were accusing the negroes, and were being required to cooperate and exhibit whatever indicated they had been abused. Returning to the pistol lick on the head. The doctor testifies: "I did not sew up any wound on this girl's head; I did not see any blood on her scalp. I don't remember my attention being called to any blood or blow on the scalp." And this was the blow that the woman claimed helped force her into submission.

Next, was she thrown and abused, as she states she was, upon the chert—the sharp, jagged rock?

Dr. Bridges states as to physical hurts: we found some small scratches on the back part of the wrist; she had some blue places in the small of the back, low down, in the soft part, three or four bruises about like the joint of your thumb, small as a pecan, and then on the shoulders a blue place about the same size, and we put them on the table, and an examination showed no lacerations. The evidence of other witnesses as well as the prosecutrix will show that the women had travelled from Huntsville to Chattanooga, and were on the way back. There is other evidence tending to show they had spent the night in a hobo dive; that they were having intercourse with men shortly before that time. These few blue spots, and this scratch would be the natural consequence of such living; vastly greater physical signs would have been expected from the forcible intercourse of six men under such circumstances.

Victoria Price testified that as the negroes had repeated

intercourse with her she became wetter and wetter around her private parts; that they finished just as they entered Paint Rock, and that she was taken in an automobile immediately to the doctors' office. There Dr. Bridges and Dr. Lynch, as has been shown, examined her. They looked for semen around her private parts; they found on the inside of her thighs some dirty places. These dirty places were hardly dry, and were infiltrated with dust, about what one would get from riding trains. It was dark dirt or dust. While the doctor did not know what this drying fluid was, his opinion was that it was semen, but whatever it was, it was covered with heavy dust and dirt. He next examines the vagina to see whether or not any semen was in the vagina. In order to do this he takes a cotton mop and with the aid of a pseculum and headlight inserts the cotton mop into the woman's vagina and swabs around the cervix, which is the mouth of the uterus or womb. He extracts from this vagina the substance adhering to the cotton after he has swabbed around the cervix, and places this substance under the microscope. He examines this substance to see if spermatozoa are to be found, and what is the condition of the spermatozoa. Upon the examination under the microscope he finds that there are spermatozoa in the vagina. This spermatozoa he ascertains to be non-motile. He says to the best of his judgment that non-motile means the spermatozoa were dead. For any fluid escaping from the vagina to become infiltrated with coal dust and dirt this dirt under the circumstances in this case must have gradually sifted upon the drying fluid, and necessarily a considerable period of time would be required for such an infiltration. The fresh semen emitted by so many negroes would have had a tendency rather to wash off any dirty places around the vagina, and it must have remained there for a considerable period for it to become thus infiltrated with dust and coal dust. Around the cervix the spermatozoa live under the most favorable conditions. While the life of the spermatozoa may be variable, still it appears

from the evidence that in such a place as this it would have taken at least several hours for the spermatozoa to have become non-motile, or dead. When we consider as the facts hereafter detailed will show, that this woman had slept side by side with a man the night before in Chattanooga, and had intercourse at Huntsville with Tiller on the night before she went to Chattanooga. When we further take into consideration that the semen being emitted, if her testimony were true, was covering the area surrounding the private parts, the conclusion becomes clearer and clearer that this woman was not forced into intercouse with all of these negroes upon that train, but that her condition was clearly due to the intercourse that she had had on the nights previous to this time.

Was there any evidence of semen on the clothes of any of the negroes? In the case of State vs. Cowing, 99 Minn. 123; 9 Am. & En. Ann. cases 566, the Court said the physicians who testified stated that the semen would have remained on the clothes and could have been found after the expiration of several days. And this is probably a well known fact. Though these negroes were arrested just after the alleged acts, and though their clothes and pants were examined or looked over by the officers, not a witness testified as to seeing any semen or even any wet or damp spots on their clothes.

What of the coat of the woman spattered with semen, and the blood and semen on the clothes and the bleeding vagina?

Dr. Bridges says he did not see any blood coming from her vagina; that Mrs. Price had on step-ins, but did not state that they were torn or had blood or semen on them. Not a word from this doctor of the blood and semen on the dress; not a word of the semen all spattered over the coat. And this was a doctor so conscientious and thorough in his examination as to make the woman undress and to examine with care every part of her body; a doctor

who in his search for semen went to the extent of swabbing out the vagina and of examining its contents under the microscope.

What of the physical appearance of these two women when the doctors saw them? Dr. Bridges says that when these two women were brought to his office neither were hysterical, or nervous about it at all. He noticed nothing unusual about their respiration and their pulse was normal.

Such a normal physical condition is not the natural accompaniment, or result of so horrible an experience, especially when the woman testified she fainted from the injuries she had received.

The fact that the women were unchaste might tend to mitigate the marked effect upon their sensibilities but such hardness would also lessen the probability of either of them fainting. If the faint was feigned then her credibility must suffer from such feigned actions. And this witness' anger and protest when the doctors insisted on an examination of her person was not compatible with the depression of spirit likely to be caused by the treatment she said she had received.

Lastly, before leaving Dr. Bridges let us quote his summation of all that he observed:

> "Q. In other words the best you can say about the whole case is that both of these women showed they had had intercourse?
> A. Yes, sir."

Is there corroboration in this? We think not, especially as the evidence points strongly to Victoria Price having intercourse with one Tiller on several occasions, just before leaving Huntsville. That she slept in a hobo jungle in Chattanooga, side by side with a man. The dead spermatozoa, and the dry dirty spots would be expected from these earlier acts.

Victoria Price testified that she washed her clothes which were stained with semen and blood before even the trial at Scottsboro.

The Supreme Court of Minnesota, in the case of State vs. Cowing, 99 Minn. 123, 9 Am. & En. Ann. cases 566, in setting aside a conviction of rape laid great stress and largely based its action upon such conduct of the prosecuting witness; this Court said:

> "While not without some corroboration, the testimony of prosecutrix is aided most largely by that of her sister; but, that corroboration is to be weighed in connection with the fact, that she and her sister, by washing the skirt, which if her testimony were true, would probably have borne evidence of blood and semen, effectually destroyed the best possible evidence under the circumstances."

Is there any other corroboration? There was a large crowd at Paint Rock when the freight arrived there. While they differed in many details as the make-up of the train and the exact car from which the different persons were taken, all of which is apparently unimportant, all agreed upon the main fact, that the nine negroes, the two women, and the white boy were all taken from the train. This undisputed fact constitutes about the whole extent of their evidence, except a statement by Ruby Bates that she had been raped, which experience the said Ruby Bates now repudiates. This statement by Ruby Bates appears to have been made under the following circumstances. There were three witnesses who testified to having seen the women at Paint Rock. One of the witnesses first saw them after they had gotten off the car and were both standing. Another witness did not see them for some time, he having first rounded up all the negroes. The third witness saw them as they were getting off the car. He states they first started to run toward the engine and as they approached a crowd

of men they turned and ran back in the opposite direction, and met a part of the posse who stopped them. Mr. Hill, the station agent, then came up to the women and asked them if the negroes had bothered them. Thereupon Ruby Bates stated that they had been raped. The facts appearing that the women instead of seeking the protection of the white men they saw were at first frightened, and the question propounded was in itself suggestive of an answer. Mr. Hill also states that the negroes were in a coal car; that he saw the heads of the negroes over the top of the car and they were trying to climb over the sides, were pulling themselves up, trying to get off. This clearly indicates that the negroes were not in the car filled with chert as the prosecutrix claims.

For any other corroboration in the evidence we now return to the freight train as it passes along the track just after leaving Stevenson. The witness, Lee Adams, at a point about one-quarter of a mile from the train, sees a fight between a number of white and colored boys; this is an admitted fact in the case.

The evidence of Ory Dobbins was admitted in corroboration of Victoria Price. When his evidence is studied it is found it does not corroborate her, or if so, very slightly. The good faith of this witness need not be the slightest questioned, only the lack of correspondence of his testimony with hers. He stated that he lived three miles from Stevenson near the railroad as it ran toward Scottsboro; that as he walked to his barn he saw a freight train; that as it passed his house he saw a white woman sitting on the side of a gondola and a negro put his arm around her waist and throw her back in the car; that he saw the car as it passed; that it was in his line of vision for a few feet, pointing out a door in the court room as the distance. His reason for stating it was a woman is as follows:

> "Q. You know it was a woman, don't you?
> A. She had on women's clothes.

The Court: She had on women's clothes?

Q. What kind of clothes, overalls?
A. No, sir, dress."

The very basis of his statement that she was a woman because she had on a dress does not apply to the women in this case, who were dressed in overalls.

He said it was in a coal car and there were five or six people in the car. Victoria Price says when they took hold of her that it occurred in a car almost filled with chert, and there were fifteen people in the car. The witness Dobbins said the gondola was between two box cars, while the evidence shows the gondola in which the woman was was the fifth of a string of eight gondolas.

The witness further stated that the car upon which he saw this occurrence was back toward the caboose. On the other hand the official make-up of the train shows the freight train consisted of forty cars; that the women were in the eleventh or twelfth car from the engine and there were twenty-eight or twenty-nine cars between this car and the caboose. In view of the fact that it was along in this vicinity that the fight was occurring between the negroes and the white boys, and as his reason for saying it was a woman was on account of the dress, and all agree these women had on overalls, this can at its best be only slight corroboration.

This is the State's evidence. It corroborates Victoria Price slightly, if at all, and her evidence is so contradictory to the evidence of the doctors who examined her that it has been impossible for the Court to reconcile their evidence with hers.

Next, was the evidence of Victoria Price reasonable or probable? Were the facts stated reasonable? This is one of the tests the law applies.

Rape is a crime usually committed in secrecy. A secluded place or a place where one ordinarily would not be observed is the natural selection for the scene of such a crime. The

time and place and stage of this alleged act are such to make one wonder and question did such an act occur under such circumstances. The day is a sunshiny day, the latter part of March; the time of day is shortly after the noon hour. The place is upon a gondola or car without a top. This gondola, according to the evidence of Mr. Turner, the conductor, was filled to within six inches to twelve or fourteen inches of the top with chert, and according to Victoria Price, up to one and one-half feet or two feet of the top. The whole performance necessarily being in plain view of any one observing the train as it passed. Open gondolas on each side. On top of this chert twelve negroes rape two white women; they undress them while they are standing up on this chert; this prosecuting witness is then thrown down and with one negro continuously kneeling over her with a knife at her throat, and one or more holding her legs, six negroes successively have intercourse with her on top of that chert, as one arises off of her person, another lies down upon her; those not engaged are standing or sitting around; this continues without intermission although that freight train travels for some forty miles through the heart of Jackson County; through Fackler, Hollywood, Scottsboro, Larkinsville, Lin Rock and Woodville, slowing up at several of these places until it is halted at Paint Rock; Gilley, a white boy, pulled back on the train by the negroes, and sitting off, according to Victoria Price, in one end of the gondola, a witness to the whole scene; yet he stays on the train, and he does not attempt to get off of the car at any of the places where it slows up to call for help; he does not go back to the caboose to report to the conductor or to the engineer in the engine, although no compulsion is being exercised upon him, and instead of there being any threat of danger to him from the negroes, they themselves have pulled him back on the train to prevent him being injured from jumping off the train after it had increased its speed; and in the end by a fortuitous circumstance just before the train pulls into Paint Rock,

the rapists cease and just in the nick of time the overalls are drawn up and fastened, and the women appear clothed as the posse sight them. The natural inclination of the mind is to doubt and to see further search.

Her manner of testifying and demeanor on the stand militate against her. Her testimony was contradictory, often evasive, and time and again she refused to answer pertinent questions. The gravity of the offense and the importance of her testimony demanded candor and sincerity. In addition to this the proof tends strongly to show that she knowingly testified falsely in many material aspects of the case. All this requires the more careful scrutiny of her evidence.

The Court has heretofore devoted itself particularly to the State's evidence; this evidence fails to corroborate Victoria Price in those physical facts, the condition of the woman raped, necessarily speaking more powerfully than any witness can speak who did not view the performance itself. The Court will next consider her credibility, and in doing so, some of the evidence offered for the defendant will also come in for consideration. In considering any evidence for the defendant which would tend to show that Victoria Price swore falsely, the Court will exclude the evidence of witnesses for defendant, who themselves appear unworthy of credit, unless the facts and circumstances so strongly corroborate that evidence that it appears true.

Lester Carter was a witness for the defendant; he was one of the white boys ejected from the train below Stevenson. Whether or not he is entitled to entire credit is certainly a question of great doubt; but where the facts and circumstances corroborate him, and where the failure of the State to disprove his testimony with witnesses on hand to disprove it. the Court sees no reason to capriciously reject all he said.

Victoria Price denied she knew him until she arrived at Scottsboro; it became a question to be considered as to whether Lester Carter knew her at Huntsville and saw her

committing adultery on several occasions with one Tiller just before leaving for Chattanooga, and returning on the freight the next day; the facts he testified to might easily account for the dead spermatozoa in her vagina. He says he met Victoria Price and Tiller while in jail at Huntsville. That all three were inmates of the jail at the same time. That Ruby Bates visited Tiller and Victoria Price while they were in jail, and he, Carter, met her at the jail. That after all had gotten out, and he had finished his sentence, he stayed in the home of Tiller and his wife, and he and Tiller would go out and be with these girls. That they all planned the Chattanooga trip together, and that just before the trip, or the night before, all four were engaged in adulterous intercourse. Victoria Price stated on the stand that Tiller, the married man, was her boy friend and was in her home the night before she left for Chattanooga; that he had a right there, and he was corresponding with her. Tiller was in the State's witness room then and identified by Lester Carter, when he was brought out of the witness room by the Court's order. Tiller, though there in court, was not put on the stand to deny what Carter said. There is no reason to doubt Carter was telling the truth then. Next Carter said that when he and Ruby Bates and Victoria Price arrived in Chattanooga about eight o'clock at night, all went to what is known as the "Hoboes' Jungle", a place where tramps of all descriptions spent the night in the open; there are numerous witnesses who corroborated him in this statement; that they met the boy Gilley and all four slept side by side, he by the side of Ruby Bates, and Victoria by the side of Gilley. Victoria Price, said that she and Ruby Bates went to Chattanooga seeking work; that they went alone and spent the night at Mrs. Callie Brochie's, a friend of hers formerly living in Huntsville, but had moved to Chattanooga. Was this true? The Chattanooga Directory was introduced in evidence; residents of Chattanooga, both white and colored, took the stand stating that no such woman as Callie Brochie

lived in Chattanooga and had not ever lived there so far as they knew. Though Victoria Price first made this statement more than two years ago at Scottsboro, no witness was offered either from Chattanooga or Huntsville showing any such woman had ever lived in either such place.

Victoria Price said the negroes jumped off a box car over their heads into the gondola, where she, Ruby Bates, and the seven white boys were riding with seven knives and two pistols and engaged in a fight with the white boys; the conductor of the train who had the official make-up of the train, stated there were eight gondola cars together on the train; that the women were in one of the middle cars, and that there were three gondola cars between the car in which they were riding and the nearest box car. Lester Carter stated that he was one of the seven boys engaged in the fight with the negroes; that he did not see a single knife or pistol in the hands of the negroes. And although these seven white boys were kept in jail at Scottsboro until after the first trial no one testified to any knife or pistol wounds on any of them.

Further, there was evidence of trouble between Victoria Price and the white boys in the jail at Scottsboro because one or more of them refused to go on the witness stand and testify as she did concerning the rape; that Victoria Price indicated that by so doing they would all get off lighter.

The defendant and five of the other negroes charged with participating in this crime at the same time went on the stand and denied any participation in the rape; denied that they knew anything about it, and denied that they saw any white women on the train. Four of them did state that they took part in the fight with the white boys, which occurred on the train. Two of them testified that they knew nothing of the fight, nor of the girls, and were on an entirely different part of the train. Each of these two testified as to physical infirmities. One testified he was so diseased he could hardly walk, and he was examined at Scottsboro

according to the evidence and was found to be diseased. The other testified that one eye was entirely out and that he could only see sufficiently out of the other to walk unattended. The physical condition of this prisoner indicates apparently great defect of vision. He testified, and the testimony so shows that he was in the same condition at Scottsboro and at the time of the rape. He further testified that he was on an oil tank near the rear of the train, about the seventh car from the rear; that he stayed on this oil tank all of the time and that he was taken from off of this oil tank. The evidence of one of the trainmen tends to show that one of the negroes was taken off of an oil tank toward the rear of the train. This near blind negro was among those whom Victoria Price testified was in the fight and in the party which raped her and Ruby Bates. The facts strongly contradict any such statement.

History, sacred and profane, and the common experience of mankind teach us that women of the character shown in this case are prone for selfish reasons to make false accusations both of rape and of insult upon the slightest provocation, or even without provocation for ulterior purposes. These women are shown, by the great weight of the evidence, on this very day before leaving Chattanooga, to have falsely accused two negroes of insulting them, and of almost precipitating a fight between one of the white boys they were in company with and these two negroes. This tendency on the part of the women shows that they are pre-disposed to make false accusations upon any occasion whereby their selfish ends may be gained.

The Court will not pursue the evidence any further.

As heretofore stated the law declares that a defendant should not be convicted without corroboration where the testimony of the prosecutrix bears on its face indications of unreliability or improbability, and particularly when it is contradicted by other evidence. The testimony of the prosecutrix in this case is not only uncorroborated, but it also bears on its face indications of improbability and is

contradicted by other evidence, and in addition thereto the evidence greatly preponderates in favor of the defendant. It, therefore, becomes the duty of the Court under the law to grant the motion made in this case.

It is, therefore, ordered and adjudged by the Court that the motion be granted; that the verdict of the jury in this cause, and the judgment of the Court sentencing this defendant to death be, and the same is hereby set aside and that a new trial be and the same is hereby ordered.

This June 22nd, 1933.

JAMES E. HORTON,
Circuit Judge.