SUPREME COURT OF THE STATE OF ALABAMA

. . . . . -X

STATE OF ALABAMA

- against -

HAYWOOD PATTERSON,

Appellant

. . . . . -X

BRIEF FOR APPELLANT

This is the third appeal in what are commonly known as the Scottsboro cases. On the first of these appeals the Court affirmed the conviction of seven of the defendants, including this appellant, and reversed the conviction of one because he was under age (see 224 Ala. 524,531,540). These judgments were reversed by the Supreme Court of the United States on the ground that defendants had not had adequate representation by counsel (287 U.S. 45). Thereafter the venue of the trials was changed to Morgan County. This appellant was tried separately before Judge Horton and a jury in April 1933. In June 1933 Judge Horton set this verdict aside on the ground that it was contrary to the weight of the evidence. Thereafter this appellant and another of the defendants were tried separately before Judge Callahan in November 1933. The convictions were again affirmed (229 Ala. 226, 270) and again reversed by the Supreme Court of the United States, this time because of the improper selection of the juries (294 U.S. 587, 600). In January 1936 this appellant was brought to his fourth trial. The trial of none of the other Scottsboro defendants was completed

at that time, nor indeed has any such trial been held since. At this fourth trial now under review appellant Patterson was found guilty and sentenced to imprisonment for seventy-five (75) years.

Prior to the trial this appellant, as well as the other eight defendants, petitioned the Trial Court for a removal of the case to the United States District Court of the Northern District of Alabama. Each petition (pp. 12-15) was based on the contention that it was impossible for the defendant to obtain a fair trial in Morgan County and that Section 5581 of the Code of Alabama, as interpreted by this Court, permits but one change of venue in a criminal case. Defendant contended, therefore, that he was deprived of a fair trial by the operation of this statute in violation of his rights under the Fourteenth Amendment of the United States Constitution, and that pursuant to Section 31 of the Judicial Code of the United States he was entitled to a removal of his prosecution to the Federal Courts. Annexed to the petition were affidavits setting forth facts indicating the hostility which prevailed in Morgan County (pp. 16-19). The Court, after hearing argument, overruled the application, to which action defendant reserved an exception (p. 20).

Thereupon the Court, despite the prohibition of Section 5581, entertained a motion for a change of venue and denied the same (p. 33).

The evidence at this trial paralleled in many particulars the evidence given at the trial last under review by this Court, which evidence was fully analyzed in the brief

submitted by the two defendants then appealing. There are three ~~more~~ important respects in which this trial differs from the preceding trial. In the first place, no testimony was given on this trial by Gilley, the white boy who remained on the train during the entire time of the alleged raping. This Court will remember that one of the considerations which led Judge Horton to set aside the verdict at Patterson's second trial was the failure of Gilley to give any testimony in corroboration of Victoria Price. At the third trial before Judge Callahan in 1933 Gilley appeared. At the trial now under review, although Gilley was under subpoena by the State, he did not testify, probably because he had been convicted of robbery in Tennessee (see p. 52). No corroboration was offered by the State but an attempt was made to prove a confession by Patterson to a prison guard. The latter testified that while Patterson was awaiting word from the Supreme Court of the United States after his previous conviction he called for the warden, and not being able to get the warden, told the guard that he was guilty (see p. 69). Patterson denied that any such occurrence took place (pp. 123, 124).

This Court will also remember that at the original trials in Scottsboro the State had offered testimony by two doctors, Dr. Bridges and Dr. Lynch, who had both testified for the prosecution (see, for instance, Powell transcript p. 24). At the trial before Judge Horton Dr. Bridges also testified for the State. At the trials last reviewed by this Court Dr. Bridges was not called by the State but did testify for the defendants. At the time of this last trial Dr. Bridges was seriously sick and the Court did not think an attachment

should issue under such circumstances (see p. 101). Counsel for appellant then suggested that a showing be made for Dr. Bridges and the Court intimated that he would compel the State to admit the showing if it was correct (p. 102). Finally, the Court, over the protest of defendant's counsel, compelled defendant to offer in evidence the testimony of Dr. Bridges in its entirety, although defendant desired to offer only certain parts of it (see pp. 103-105). Defendant then read a portion of the testimony of Dr. Bridges, which was confined to a contradiction of Victoria Price's description of the condition of her body at the time she was examined by the doctor (see pp. 107, 108). No part of this testimony dealt with the finding of semen in her vagina.

This Court will remember that at the original Scottsboro trials Dr. Bridges had testified to the finding of this semen when called as a witness for the State and testified that the spermatoza did not move (p. 29). He gave similar testimony before Judge Horton and, of course, also before Judge Callahan at the previous trial. At the trial now under review the testimony with regard to the finding of the semen was not read to the jury. Mr. Knight for the State, however, did read the following:

"'I will ask you this question' -- This was a question asked by me of Dr. Bridges --. 'From your examination of Victoria Price's vaginal canal, in your opinion was the intercourse recent?' The answer was: 'I would say that it was recent, but I wouldn't put the hour or minute on it. I couldn't do that.' That is all the State cares to

read" (p. 110). That this evidence was offered by the State as corroborative of Victoria Price and for the purpose of showing that semen was found in her vagina is clear from the Judge's charge where he said:

> "It is claimed here, and whether that claim is true or not is left open for you to ascertain from the evidence, and before it is established you must believe it beyond all reasonable doubt, that semen was found in the private parts of Victoria Price" (p. 151).

The defense, in order to counteract the inference that the finding of semen was corroboration of the prosecutrix, sought to prove that the prosecutrix had had sexual relations with others than defendant and his associates within two days prior to her arrest. All attempts on the part of the defense to prove these facts were blocked by the rulings of the Court, as will be more fully discussed hereafter. Testimony to this effect had been produced at the trial before Judge Horton and was in his opinion accepted as a true explanation for the presence of the semen.

Appellant will not review in detail the evidence given at this trial since he realizes that the question of the weight of this evidence is not directly before this Court. Appellant believes, however, that a brief summary of the testimony given at the various trials will be helpful in enabling this Court to understand the case more thoroughly and will enable it to rule upon the legal questions presented in their true setting.

The Scottsboro Trials.

At the first trials at Scottsboro in April 1931 both girls, Victoria Price and Ruby Bates, testified that they had

been raped by all nine of these negroes and also by three other negroes who had not been apprehended. This was said to have occurred on a moving freight train in broad daylight, while one white boy remained in the car in which the raping took place, and after other white boys were thrown off by the negroes. All these white boys were in jail at Scottsboro while the trials were going on; but the only one who testified was the boy who remained in the car, Gilley, and, at the one trial at which he testified, he said nothing about any raping. Physicians who examined the girls immediately after they arrived at Scottsboro testified that they found a small quantity of semen in the vagina of each and that the spermatozoa in the semen were non-motile, and that the girls were then not nervous.

The Horton Trial

In April 1933 appellant's second trial took place before Judge Horton. Ruby Bates now testified for the defense and asserted that no raping at all had taken place. She contradicted Victoria Price's story in many vital particulars. Victoria Price had claimed that she and Ruby Bates had been travelling alone and had known none of the white boys on the train, that they had left their home to go to Chattanooga to look for work and that in Chattanooga they had spent the night with an acquaintance, Callie Brochie, whose place of residence Mrs. Price particularly described; that they had looked for work and not finding it had returned on the freight train alone (see Patterson transcript on last appeal pp. 768-771). Ruby Bates testified that the two girls had travelled in company with Lester Carter, with whom, and with a man named Tiller, they had, at home, on

the night before the ride on the freight train, had sexual relations; instead of spending the next night as Mrs. Price had stated, with Mrs. Brochie, the girls and Carter, along with Orville Gilley whom they had picked up en route, had slept in the open fields in what is known as the "hoboe jungles" and all four had returned together on the freight train (id. 771, 772). Miss Bates' story was corroborated in all particulars by Lester Carter (id. 772-775). Neither Gilley nor Tiller testified at this trial although Tiller was in court under subpoena from the State.

Testimony was given by a medical expert, Dr. Reisman, to the effect that the finding of non-motile spermatozoa in Victoria Price's vagina indicated that the intercourse from which the spermatozoa came could not have been so recent as to be accounted for by anything which might have happened on the freight train within the two hours before (id. 764). Victoria Price described bruises and injuries to her body which would have been the natural result of a raping such as she claimed had occurred. The doctor who had examined her at Scottsboro, Dr. Bridges, contradicted this at every point, he having found only a few slight scratches on one wrist and one small dark spot on her entire body. There was also undisputed testimony that no such person as Callie Brochie had existed in Chattanooga, nor any such house as Victoria Price had described (id. 776, 777). The jury convicted.

This verdict Judge Horton later set aside as against the weight of evidence in an opinion characterizing Victoria Price as unworthy of belief (id. 753).

The conviction at that trial, in the face of all the evidence favorable to the defense, resulted undoubtedly from the existent high state of public feeling. A scurrilous pamphlet had been circulated during the early stages of the trial, a copy of which was reproduced in the former record as part of the motion for a change of venue (id. 273 to 332). During the trial meetings were held in neighboring communities at which threats were made against the defendants and their attorneys and it was necessary to have present a detachment of militia equipped with machine guns and other armament in order to preserve peace (id. 173, 174). The trial judge himself interrupted the trial to make an address to the audience in which he pleaded with the people that they avoid violence and allow the law to take its course (id. 174).

The actions of the prosecuting officials at that trial also contributed to the inflaming of public opinion. The Attorney General employed a sneering attitude toward witnesses for the defense (id. 177), one of the solicitors for the state insinuated in summation that some of the witnesses for the defense had been influenced by funds gotten from New York (id. 178); and another solicitor said in summation to the jury: "Show them that Alabama justice cannot be bought and sold with Jew money from New York" (id. 179). The state of feeling in that community was recognized by the trial court even before he set the verdict aside; for immediately he arranged the postponement of the other cases which were to have been tried and called attention to the heated atmosphere which had surrounded the case, saying

that he had had "great difficulty in preventing extraneous influences having some effect on the jury" (id. 180, 181).

The First Callahan Trial

Before Judge Callahan in November 1933 Victoria Price repeated substantially the story she had told on previous occasions except that the details of the injuries she claimed to have sustained now differed in many respects both in that she said she had received certain injuries about which she had never before testified (id. 532, 533, 550, 551) and that she left out certain things as to which previously she had been contradicted (id. 541, 546, cf. 716, 717). The Judge did not permit her to tell what had taken place in Chattanooga. The State did not put Dr. Bridges on the stand, evidently in order to deprive the defense of an opportunity of proving that the semen in Victoria Price's body could be accounted for by acts of intercourse other than the alleged raping. If this was the prosecution's motive it succeeded, for, when defendant put Dr. Bridges on the stand and he testified to the finding of the semen (id. 644, 645) the Court would not permit defendant in any way to bring out the facts of the prior intercourse (id. 663).

At this trial Orville Gilley appeared and, for the first time in the history of these cases, he said he had witnessed the alleged raping. He admitted that he had made no attempt to get help on the moving freight train (id. 607-609); that when the train arrived at Paint Rock he had left it without in any way trying to assist the raped girls (id. 595); and that while at Paint Rock he told no one there

had been raping (cf. Norris Transcript, 540, 577). No other of the white boys testified except again Carter, who again appeared for the defense. Carter was permitted to tell nothing either about the sexual acts which had taken place prior to the ride to Chattanooga or about what occurred in Chattanooga (id. 663, 667-669).

Almost from the beginning of that trial Judge Callahan openly showed his hostility to the defense, not only by the frequency and character of the remarks which he made, but also by the aid he gave to the State in excluding questions of his own volition (id. 512, 514, 517). He remarked that questions were "entirely improper" (id. 542, 543, 642), frequently counsel was told, "don't go into that again" (id. 521, 531, 532, 535, 537, 598, 603, 606), and on one occasion the Court stated that a certain question was a "vicious attempt" (id. 663). It is true the word "vicious" was withdrawn after objection taken; but the damage had been done.

In his charge Judge Callahan continued to manifest his hostility. One of its most remarkable portions related to the semen found in Victoria Price's body. Although the State had refrained from calling Dr. Bridges to testify about this the Court pointed out that the State relied upon this semen as corroboration (id. 739), and then went on to say that of course the presence of the semen might be explained by the defense but that it had not been explained in this case by any evidence (id. 740). Thus unfairly and by discrimination the defense was undermined. The Court not only refused to permit proof which would have explained the presence of the semen, on the ground that this evidence was irrelevant,

but it then permitted the jury to find against the defense just because it had not explained the presence of this same semen.

The Trial Now Under Review

On this trial also Judge Callahan continued his hostile attitude toward the defense, as will be more fully discussed in the argument. Victoria Price's testimony was in the main similar to that which she gave at the previous trial. She again denied that she had left Huntsville with Carter or known him in Chattanooga (p. 56). Carter testified to the direct contrary (p. 111). He also testified that they met Gilley in Chattanooga and that the two boys, Victoria Price and Ruby Bates left together and boarded the train as one party (pp. 112, 113). Neither Tiller nor Gilley testified at this trial. The prosecutrix testified that her head bled a little after first stating that it did not bleed (p. 58); she also said that her back and hips and face and throat were scratched (p. 58), that her face was bleeding a little, that there were injuries practically all over her body, that there was a little blood on her left leg, that there were bruised places on her breast (p. 59). She also testified that her lips and cheeks were swollen (p. 60).

She denied having testified at other trials that practically all of the defendants had struck her (p. 59). She denied having previously testified that she had shown the doctor blood which had come out on her clothes (p. 60). Her previous testimony contradicting these answers was read into the record (p. 97).

With the exception of the purported confession, already referred to, no other testimony was introduced by the state which in any way bore upon the alleged rape. Three farmers testified that they saw the freight train passing slowly on its way from Stevenson to Paint Rock and observed fighting between persons in a gondola car. Two of these, Adams and Dobbins, did not see any women (pp. 86, 89). The other one, Morris, claimed that he saw two white women in a gondola about six or seven cars back from the engine (p. 73). He was in a barn about three-quarters of a mile away from the track. He thought the women were dressed in overalls (p. 74). How he, at this distance, was able to tell they were women was never explained. It is significant also that this witness claimed to have seen all six white boys put off the train (p. 74) although Dobbins, who observed the train about half a mile further on when it had already passed Luther Morris' place, still saw fighting going on in the car (p. 89).

Three other witnesses testified to what occurred when the train stopped at Paint Rock but their testimony adds nothing to the prosecution's case. The station master, Hill, testified that he saw some negroes in a car as the train passed the station and that after the train stopped there were two women standing on the ground at the end of the car in which the negroes had previously been (p. 75). Victoria Price, however, insisted throughout that she was in one of a string of gondola cars which was nearest to a box car away from the engine (p. 54) and that when the train stopped at Paint Rock she got out of that car and fell to the ground

as she did so (p. 56). The defense contended that the fight between the negroes and the white boys took place in one of the middle cars of the string and the measurements of the station area at Paint Rock confirm its version and dispute that of Victoria Price's. This will appear clearly from the diagram on the opposite page. While it may not appear material in which car Victoria Price was riding, if in fact she was raped, nevertheless her misstatement on this subject is indicative of her entire attitude in the case because the misstatement made it possible for her to describe a dramatic occurrence of negroes jumping down from a box car into a gondola (see p. 54). Obviously this picture which the prosecutrix has described on numerous occasions is a figment of her imagination and the defense contends that all the rest of her story is likewise false. The fact that Victoria Price could not have been in the last of the gondolas is confirmed also by Rousseau who testified that he saw some negroes climbing from the first of the gondolas on to the box car near the front of the train (p. 77) and that at that time he was somewhere between the water tank and the coal chute. The other witness, Brannan, said that he saw some people get off the train about four or five cars back of the engine (p. 90) and that he saw a woman sinking down to the ground about the fourth car from the engine, not possibly as much as the fifteenth car back (see p. 91). The gondola out of which Victoria Price said she went and fell was the fifteenth car according to the testimony of the conductor of the train, Turner (see p. 80). Moreover, this testimony of finding the woman so near the front of the train corresponds with the testimony of a defense witness, Ricks, the fireman of the train, that

he saw two women get off the train at Paint Rock and start running toward the engine until they were stopped by members of the posse (p. 92).

The State put in evidence the measurements of the Paint Rock station area which varied somewhat from the measurements given at the earlier trial, but nevertheless bear out the contentions of the defense, as appears from the diagram already referred to. These measurements make the distance between the station and the coal chute 874 feet with the water tank 352 feet from the station and 522 feet from the coal chute (p. 100).

The State contradicted Victoria Price not only by the testimony of Carter but also by the testimony of Dr. Bridges read from an earlier trial. He testified that he saw no blood and noticed no swelling (pp. 107, 108). He found no cuts and only a few slight small scratches on her wrist and the forearm of the left arm and very small blue marks in the small of her back (p. 108). He testified also that her respiration and pulse were both normal (p. 108). The defendant himself took the stand, as did a number of his companions. They all denied having had anything to do with either of the girls, indeed denied knowing that ~~xkmy~~ there were any girls on the train.

POINT I.

THE COURT BELOW ERRED IN NOT GRANTING APPELLANT'S PETITION FOR REMOVAL TO THE UNITED STATES DISTRICT COURT

Before trial appellant filed a petition requesting removal to the United States District Court for the Northern District of Alabama pursuant to Section 31 of the United States Judicial Code (28 USCA Section 74) (p. 40). The basis for the application was the prohibition contained in Section 5581 of the Alabama Code against a second change of venue in criminal cases (p. 42). The application was denied in an opinion which appears to rest upon the proposition that the provision of the Federal Code is applicable only to cases where it is claimed that a State statute violates a defendant's constitutional rights, Judge Callahan saying:

> "When it is reduced to this last analysis you must find a standing in court on your motion on the ground that the State of Alabama by its Constitution, or by some law, has infringed upon the constitutional rights of the defendant. And that you have failed, in my judgment, to do" (p. 49).

The opinion, however, makes no reference whatever to the provision of the Code upon which appellant's petition was based.

The respect in which appellant contends that the provision of the Code violates his constitutional rights is that it denies him the opportunity for a fair trial because of an arbitrary restriction on the number of permissible changes of venue. In support of this contention appellant submitted affidavits showing the state of public feeling in Morgan County (pp. 44-47). The prima facie

sufficiency of these affidavits has in no way been challenged. It is clear beyond the need for argument that to force a defendant to trial in a community which is hostile to him would be a denial of due process and thus a violation of his rights under the Fourteenth Amendment. Where such result follows from a statute the statute is, under such circumstances, itself unconstitutional. That the statute of Alabama was intended to have this effect is clear from the decisions of this Court. See Ex parte Lancaster, 206 Ala. 60 and the order which this Court entered subsequent to the last decision of the United States Supreme Court in the case of this very appellant. In that order the Court, after directing the quashing of the existing indictments and the submission of the case to a new grand jury properly chosen, said:

> "In the event of such new indictments, the trial thereon shall be had in the Circuit Court of Morgan County -- Ex parte Lancaster, 206 Ala. 60." (Since the grievance complained of results from the application of a statute the case comes within the decisions of the United States Supreme Court, such as Gibson v. Mississippi, 162 U. S. 565, Kentucky v. Powers, 201 U. S. 1.)

It may perhaps be urged that Judge Callahan denied the application on the theory that the statute complained of was not discriminatory in its application and there is some language in his opinion which gives color to that argument, although it is not precisely stated (see p. 48). While it is true that in some of the earlier cases the language of the Court would so indicate it must be remembered that those were all cases in which discrimination was the evil complained of. In this connection the Court's attention is called to the concurring opinion of Circuit Judge Morton of the United States Circuit Court of Appeals for the First Circuit in

Willen v. Capen, 74 F. 2nd 342 at 344. In that case, as here, the complaint was that the sentiment of the county in which the trial was to be had was such as to prevent a fair trial. There was no allegation, however, that any statute prevented a change of venue. Judge Morton, while concurring with his associates in denying the application on technical grounds, said:

> "The purpose of Section 31, speaking with reference to the present case, is to insure that persons accused of crime in state courts shall not be deprived of basic rights. Gibson v. Mississippi, 162 U.S. 565, 16 S. Ct. 904, 40 L. Ed. 1075. The statute does not deal with questions of law arising in the course of a trial. It is designed to protect fundamental rights which have been disregarded in the prosecution itself."

That in the case at bar the right complained of is basic can hardly be disputed. It is submitted, therefore, that the removal statute applies. The reason why a distinction has been made in the cases between deprivation of constitutional rights by statute and otherwise is that where the deprivation is by statute this can be passed upon in advance of trial as required by the removal statute. Where the issue is one which would arise during the trial the normal method of review is by certiorari to the highest court of the state. Here the existence of the statute was a legal bar to appellant's right to a change of venue. Under the circumstances described in the petition that amounted to a deprivation of his constitutional rights to a fair trial. Or at least he was entitled to have the Federal Courts determine the facts as to that issue. The application to remove should, therefore, have been granted. All subsequent proceedings were, under the terms of the statute, void.

POINT II.

THE COURT ERRED IN EXCLUDING EVIDENCE OF PRIOR ACTS OF INTERCOURSE OF THE PROSECUTRIX

It will be remembered that at the first trials of this case the prosecution proved by the testimony of the doctors who examined the girls that semen was present in the vaginas of both (see Weems transcript, pp. 27-32; Patterson transcript, pp. 27-28; Powell transcript, p. 25). At the trial before Judge Horton, as appears from his opinion, the State produced Dr. Bridges who gave similar testimony.

To meet the corroboration which, it might be argued, had been given Victoria Price's story by the finding of semen in her body, the defense then proved other acts of intercourse committed by Victoria Price within the two days preceding the alleged rape. In his opinion setting aside the second trial Judge Horton reviewed the evidence on this subject and recognized its force, stating:

> "Her condition was clearly due to the intercourse which she had had on the nights previous to this time."

However, at the trial now under review, as well as at the preceding trial, the State did not produce Dr. Bridges as a witness and Judge Callahan refused to permit the defense to prove what had been proved before Judge Horton. Dr. Bridges testified at the previous trial at some length about the finding of semen and Judge Callahan in his charge commented on this as corroboration of Victoria Price (see last transcript pp. 739, 740). At the trial

now under review Dr. Bridges was ill but parts of his testimony were read to the jury. As already noted, there was no direct testimony read to the jury concerning the finding of any semen and no testimony of any kind on this subject read by the defense. The State, however, read the single question already quoted which clearly brought to the attention of the jury the fact that semen had been found in the vagina of Victoria Price and that the doctor considered that to be evidence of intercourse recently had. Again Judge Callahan in his charge commented on this as corroboration of Victoria Price (p. 151).

Again Judge Callahan excluded all evidence offered by the defense for the purpose of explaining this alleged corroboration. This testimony was offered subsequent to the reading of the opinion expressed by Dr. Bridges. Lester Carter, who had known Victoria Price for about six weeks prior to their departure from Huntsville and who had left Huntsville together with her and Ruby Bates and arrived with them in Chattanooga (p. 111), was then asked the following questions, none of which he was permitted to answer. Indeed counsel was not even permitted to state the reason for asking the questions, as will appear from the following extract from the bill of exceptions:

"Q. I will ask you to state to the Jury whether or not during your stay in Chattanooga you were in company with Victoria Price and Ruby Bates substantially the entire time you were there?

"MR. KNIGHT: The State objects.

"THE COURT: Objection sustained.

"MR. WATTS: And the defendant excepts. We expect the witness to answer he was in her company substantially all the time she was in Chattanooga.

"A. All but a very few minutes --

"THE COURT: Wait a minute. Wait until he asks the question. (p. 111).

"Q. Now, I want to ask you if you know of your own knowledge whether Victoria Price, while in Chattanooga, had sexual intercourse with a man?

"MR. LAWSON: We object, if the court please.

" MR. KNIGHT: We object.

"THE COURT: That objection is sustained.

"MR. WATTS: And we except, and the purpose is to account --

"THE COURT: I understand the purpose.

"MR. WATTS: Does the court refuse to allow me to state the purpose?

"THE COURT: It is just of such character and so patently illegal I don't think it is proper for you to state your purpose, -- what you want to do about it.

"MR. WATTS: If the court please, of course, sometimes lawyers and courts don't agree, and we are in perfect good faith in this matter.

"THE COURT: I am not questioning your faith at all.

"MR. WATTS: We think we are entitled to account in this lawsuit for the presence -- the testimony they have read into the record, -- I understand Your Honor's ruling, -- of recent sexual intercourse, -- we look upon it, notwithstanding the court's rul-

ing, it is in the nature of cross examination of Doctor Bridges, and that is the purpose of it. We think we are entitled to show --

"THE COURT: Doctor Bridges is your own witness.

"MR. WATTS: I understand the court's ruling.

"We remained in Chattanooga for the night, and most of the next morning. Victoria Price and Ruby Bates and Orville Gilley left with me. We met Orville Gilley in Chattanooga.

"Q. I will ask you whether or not Orville Gilley, after you met him in Chattanooga, remained substantially all the time with you and Victoria Price and Ruby Bates.

"MR. LAWSON: The State objects.

"MR. WATTS: Don't answer until the court rules.

"THE COURT: The objection is sustained.

"MR. WATTS: We except. Now, if the court please, the purpose of this testimony --

"THE COURT: I understand the purpose.

"MR. WATTS: -- is to contradict --

"THE COURT: I understand the purpose, Mr. Watts. The objection is sustained.

"MR. WATTS: Will the court allow me to state -- (p. 112).

"THE COURT: I don't care to hear any argument. I want to be courteous, but why argue something that I have already ruled on. What is the need of ruling if I am going to open it up and argue it all over again?

"MR. WATTS: I think we have the right to make that statement.

"THE COURT: Well, I don't agree with you.

"MR. WATTS: Yes, sir. We except" (p. 113).

It is submitted that the exclusion of the foregoing testimony was error of the most serious and prejudicial character.

(Here will follow page 109, with the exception of the first five words, page 110 and the first paragraph of page 111 from the old brief which I am not copying over so as to save time).

The only cases which can be found laying down any different rule are People v. Kilfoil, 27 Calif. App. 29, and State v. Menard, 169 La. 1197. The decisions in these cases rested, however, upon the proposition that the corroborating ~~xix~~ evidence had been brought before the jury by the defense itself either on the direct testimony of its own witnesses or by the cross-examination of a State's witness. The soundness of this rule is open to much debate since it tends to make of a criminal trial too much of a game. In the interests of justice all the relevant facts should be adduced. If, therefore, it appears, no matter by whom brought out, that certain circumstances might be taken as corroboration of the prosecutrix it should be open to the defense to explain that there might have been a cause for these circumstances entirely independent of defendant. Where the corroborating circumstances were elicited by a question put by the Trial Judge the courts have adopted the broader view here contended for. See Thomas v. State, 178 Ark. 381, Gilbert v. Commonwealth, 204 Ky. 505.

However, even within the rulings in the California and Louisiana cases it is submitted that serious error

was committed by the Trial Court in this case. That the presence of the semen constituted a corroborating circumstance can of course, not be denied. The Court itself in its charge so treated it:

"It is claimed here, and whether that claim is true or not is left open for you to ascertain from the evidence, and before it is established you must believe it beyond all reasonable doubt, that semen was found in the private parts of Victoria Price. Well, you apply your common sense and knowledge again. If you are satisfied of that from the evidence in the case beyond all reasonable doubt, then you may find, or it may be at least presumed that she certainly had had sexual intercourse with a man. Then, you give attention to the evidence in the case, if believed by you, to determine when it was and who the man was. You are not justified in entering into the fields of supposition on that subject, but you will have to deal with the evidence in the case as to who had sexual intercourse with her. You are not authorized just to begin to wonder whether it could have been Jim Smith or John Jones or Mr. Johnson or somebody else. Look at the evidence. I don't say by looking at the evidence you will find enough evidence there -- that is not my province, -- to say who did it, but that is where you go to try to find out that question.

"In passing all these questions and contentions, however, gentlemen, you don't do it in a one-sided

way, of course. When I say all the evidence, I mean all of it; that means that that is offered by the State and that that is offered by the defendant." (pp. 151, 152).

The Court below appears to have based its ruling of exclusion upon the circumstance that the finding of the semen was testified to by Dr. Bridges who was the defendant's own witness (see p. 112). While it is, of course, true that Dr. Bridges was the defendant's own witness it is submitted that he was the defendant's witness only to the extent that the defendant read his testimony. And as again stated the portion of the testimony read by the defendant contains no reference whatever to any examination of Victoria Price's vagina (see pp. 107, 108). The only portion of the testimony which brought this matter before the jury was read by the State and consisted also of cross-examination by the State of Dr. Bridges at the previous trial (see p. 116).

It is probable, however, that the State will here contend that the ruling of the Court below was correct within the ruling of the Louisiana and California cases because the Court had required defendant to put in evidence Dr. Bridges' entire testimony. This was done over the protest of counsel and exception was noted. Counsel originally desired to present a showing for Dr. Bridges (pp. 100, 101). The Court then, however, insisted that instead of presenting a showing the defendant read the testimony at the former trial. Counsel believed that this would permit them to read such portion of that testimony as they desired to place

before the jury leaving it to the State to read whatever portions it might desire to present (pp. 103, 104). After long discussion which is to be found in the bill of exceptions from pages 100 to 107, the Court finally insisted that the defense must either offer all of the testimony or none, to which numerous exceptions were taken (pp. 105-107).

It is submitted that this action on the part of the Trial Court is wholly arbitrary and was itself prejudicial to the interests of the defense. It is not supported by any practice or authority which counsel have been able to find. There seems to be no good reason why the person who wishes to read testimony given at a former trial should be burdened by all of that testimony, both direct and cross-examination, as his own. Interests of justice are best concerned by permitting each side to read what it desires and charging the side which does read with responsibility for the matter so read. This action on the part of the Trial Court is urged here as independent ground for reversal and also as destroying the only basis upon which the Court's ruling with regard to the prior acts of intercourse could possibly rest. There was no legal basis for the contention that the testimony read by the State's attorney could be charged to the defendant. It was evidence of corroboration deliberately brought into the case by the State. Defendant under all the authorities should have had an opportunity of showing that the semen might have been due to acts of others than himself. For this error alone the judgment appealed from should be reversed.

POINT III.

DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE OF THE IMPROPER AND PREJUDICIAL CONDUCT OF THE TRIAL COURT

It is defendant's contention that at this trial, as at those last under review, the Court below showed unmistakable prejudice and hostility toward defendant of a character such that his right to a fair trial under the Constitution of the State of Alabama and the Fourteenth Amendment of the Constitution of the United States, was denied him. Before reviewing the incidents which occurred we desire to call the

(here follow pages 85, 86, 87 of the old brief, together with the first paragraph from page 88 with a few minor changes).

The attitude of the Court became clear when counsel was cross-examining Victoria Price in an endeavor to show discrepancies between her testimony at this trial and her testimony at other trials. The Court made the following remark:

> "I don't see anything to be gained by that. If you are going to introduce that record, it would just dispute her, and that is all you can get out of the whole thing."

Exception was noted (p. 60). As the cross-examination progressed and counsel sought to show close association between Victoria Price and the white boys confined in the jails at Scottsboro, the Court of its own motion objected to the question and refused further elaboration of the sub-

ject (p. 62).

The Court injected his own views improperly into the case and belittled the position of the defense by remarks made while counsel was seeking to establish the measurements of the train so as to prove that it was impossible for Victoria Price to have been in the gondola in which she always has insisted she was riding. The Court, while no question was even pending, said:

> "That strikes me as enough on that. We are magnifying, it looks to me like, things that are not very important" (p. 81).

Counsel having excepted to that statement discussion followed during the course of which the Court made a number of remarks such as: "What is important about that?" "You have attended to that matter a long while ago." "I still don't see the importance of it, but go ahead." "I don't see the force of that", to all of which remarks exceptions were taken (p. 82). This discussion was bound to have a serious effect on the jury since it belittled the importance of the point made by the defense about the situation at Paint Rock.

Almost immediately the Court again interjected his personality by answering counsel's request to ask another question: "Well, all right. When you get through with that one then there will be another. It will be some time before you are through." Exception was taken to that (p. 84).

Shortly thereafter counsel moved for a mistrial because of the irritability of the Court. Several times when counsel started to explain what was meant he was

interrupted although specific reference was made to the incident in connection with the train. Exception was noted to the denial of the motion (see pp. 86-88).

Defendant contends that this same attitude resulted in the rulings with regard to Dr. Bridges, already discussed, which will be found at pages 100 to 107 of the transcript. This attitude reached its climax during this discussion when the Court tried to insist that counsel had agreed to reading the entire testimony of Dr. Bridges; although over several pages of the transcript it appears quite clearly that counsel were seeking to read only portions of it, leaving it for the State to read the balance. It is because counsel desired to offer a showing for Dr. Bridges, the Court said: "I decline it. I am not going to be tampered with in that fashion." Exception was taken to that remark (p. 105) and a motion made for a mistrial because of that language which was overruled and exception noted (p. 106). While the Court offered to withdraw the word if offensive an impression had been made on the jury adverse to the defense which could not be eradicated by the few words spoken by the Court on that occasion.

The same attitude of harassing the defense was manifest by the Court's refusal to grant an adjournment at five minutes after five in the afternoon after a trial which had been going on for nine and one-half hours on that day (see pp. 93, 94). Exception was taken to that refusal.

Under the very well considered decisions of this Court already cited, it is submitted that conduct of this kind on the part of the Trial Judge requires reversal.