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To be argued by
OSMOND K. FRAENKEL.

Supreme Court

OF THE STATE OF ALABAMA.

CLARENCE NORRIS,
Appellant,
against
STATE OF ALABAMA,
Respondent.

ANDY WRIGHT,
Appellant,
against
STATE OF ALABAMA,
Respondent.

CHARLIE WEEMS,
Appellant,
against
STATE OF ALABAMA,
Respondent.

APPELLANTS' BRIEF.

These three appeals present another phase of the Scottsboro cases which have several times been before this Court. As this Court recently

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affirmed the conviction of one of the other defendants in these cases (*Patterson* v. *State*, 234 Ala. 342), we will not again discuss any of the points involved on that appeal, however much counsel may remain unreconciled to the views there taken by this Court.

There are, however, certain important considerations which apply to the cases now before the Court which were not involved in any of the appeals heretofore considered.

One important respect in which the present cases differ from the last Patterson case and also from the earlier Patterson and Norris cases (229 Ala. 226, 270) is that in each of the three pending cases motions for new trial were filed within the time allowed by law (Norris, p. 46; Wright, p. 48; Weems, p. 48).

These motions presented to the Trial Court and now present to this Court a unique situation. As this Court will remember, originally nine Negroes were charged with the crime here involved. These defendants were Haywood Patterson, Eugene Williams, Charlie Weems, Roy Wright, Ozie Powell, Willie Roberson, Andy Wright, Olen Montgomery and Clarence Norris. Subsequent to the conviction of the defendants now appealing, the State of Alabama released four of the defendants, Willie Roberson, Olen Montgomery, Roy Wright and Eugene Williams, and dismissed the charges against them. The ostensible reason for dismissing the charges against the two last named was that at the time of the alleged commission of the crime they were so young that they should not be held responsible. However, the reason for dismissing the charges against Willie Roberson and Olen Montgomery

was that Victoria Price's identification of these two defendants was erroneous. It is expressly alleged in paragraph "3" of the various motions for a new trial that the prosecuting attorney in requesting the dismissal of the indictments in these two cases conceded that the testimony of Victoria Price "in that regard was not worthy of belief." The motions for a new trial further stated that by reason of this admission the weight to be given to any of the testimony of Victoria Price had been materially weakened, if not entirely destroyed, and that the defendants, therefore, were entitled to new trials so that they might call these facts to the attention of a jury.

The significance of the events subsequent to the conviction of these defendants cannot be minimized. Since Victoria Price was equally positive in her identification of all of the nine defendants, there can be no doubt that the release of these four defendants casts such doubt upon the validity of the prosecution's case that in the interests of justice a new trial should be had of all those convicted upon her testimony.

Appellants also raise certain questions arising upon rulings made by the Trial Court. These will be dealt with separately hereafter.

Before discussing these legal points, however, it may help the Court for us briefly to summarize the testimony at each of these three trials. In order not to burden the Court with undue repetition, counsel respectfully refer to the brief which was submitted on behalf of Haywood Patterson on his last appeal where, on pages 4 to 13, the facts were outlined as they had been developed at the trial then under review and at the earlier trials. We shall here confine ourselves to such

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facts as were differently developed at the trials now under review.

Gilley, who had at one time attempted to corroborate Victoria Price, did not testify at any of the three trials. The State was unable to produce any testimony of alleged confessions by the defendants such as it produced at the last Patterson trial. However, an attempt was made in two of the three trials to prejudice the case of the defendant by testimony to the effect that, although denying his own guilt, he had sought to implicate the others arrested with him. This will be more fully discussed hereafter.

The trials now under review differ also from the earlier trials with regard to the testimony of Dr. Bridges. He, as at the earlier trials, completely contradicted Victoria Price's contention that she had sustained injuries. However, neither the State nor the defense read in evidence any of the testimony which had previously been brought out relating to the finding of semen in the vagina of Victoria Price.

New testimony was offered by the prosecution in an endeavor to refute contentions previously made by the defense based upon the physical measurements of the Paint Rock station area. This subject was discussed at length on the Patterson appeal (see brief, pp. 10 to 12. See also brief in the earlier cases, pp. 28 to 35. The difference in the measurements in the diagrams in the two briefs is due to different testimony given at the two trials; the conclusions, however, are not affected by those differences).

The testimony of Russo and Brannan, as appears on the diagram on page 11 of the Patterson brief, taken together with the testimony of the

Station Master, Hill, completely contradicted Victoria Price's testimony as to the car out of which she descended when she arrived at Paint Rock. This testimony was of vital importance, because of Victoria Price's insistence that she had at all times been in the last of the gondolas in the string of gondolas. Naturally, if the girls were riding in this last car the Negroes in jumping over the gondola from the box cars must necessarily have seen them. It has been throughout the contention of the defense that the girls were riding in one of the middle cars in the string, that the fight between the white boys and the Negroes took place in the gondola just behind the one in which the girls were riding, and that the Negroes never knew there were girls on the train. This version of the case was confirmed by Carter.

The prosecution undoubtedly recognized the force of these arguments and, therefore, at the trials now under review deliberately withheld the testimony of Russo and Brannan and, for the first time in any of the many trials which have been held, put on the witness stand two sons of the station master, H. C. Hill and Lucian Hill. H. C. Hill testified in substance that he saw Victoria Price on the train in the gondola immediately in front of the box car (Norris, p. 75; Wright, p. 62; Weems, p. 68). The other brother, Lucian Hill, testified that he took a Negro off the train from the second gondola from the back but he did not identify the Negro (Norris, p. 84; Wright, p. 65; Weems, p. 69). No excuse was given for the failure of the State to produce these witnesses at any of the earlier trials. It is significant, however, that H. C. Hill testified that the gondola car in which he claimed to have seen Victoria

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Price was approximately opposite the water tank when the train stopped (Norris, p. 76). An inspection of the diagram on page 11 of the previous brief indicates that the last of these gondola cars did not stop anywhere near the water tank.

Another new witness appeared in the last two of these trials, Oscar Burton, who claimed to have worked for the railroad and to have seen a white woman in the car from which the boys were thrown off (Wright, p. 69; Weems, p. 70). He also gave no excuse for not having previously testified and showed such lack of familiarity with railroad matters as to have been thoroughly discredited (Wright, p. 70).

Essentially, therefore, no corroboration of the prosecuting witness was offered at any of these trials. Her own testimony became progressively more confused and incredible. The Court is asked to read the cross examination of the prosecutrix in these three cases (Norris, pp. 51-69; Wright, pp. 54-60; Weems, pp. 56-66). A reading of this testimony leads to the conclusion expressed by Judge Horton when he set aside the second conviction of Patterson, namely, that "It bears on its face indications of improbability and is contradicted by other evidence." The analysis of the basic elements in the prosecutrix's story made by Judge Horton applies to the records now before the Court as aptly as to the record then before him. None of the weaknesses and improbabilities in her story which he pointed out have been cured. On the contrary, the prosecutrix has involved herself in such a mass of contradictions and inconsistencies as to be utterly unworthy of belief.

POINT I.

The Court erred in not granting the motions for a new trial.

As already pointed out, timely motions for a new trial were made in each of these cases and denied. These motions rested on four grounds. We shall not here argue the first or second grounds because in substance they are identical with matters urged on previous appeals.

The third ground relates to the events subsequent to the convictions, namely, the freeing of the four other boys. The fourth ground relates to the weight of the evidence.

The Court of Appeals has repeatedly asserted its power to set aside convictions and grant new trials when, in the interests of justice, it is necessary to do so.

See:

Vinson v. *State*, 22 Ala. App. 112;
Mayes v. *State*, 22 Ala. App. 316;
Skinner v. *State*, 22 Ala. App. 457;
Hubbard v. *State*, 23 Ala. App. 537;
Culbert v. *State*, 23 Ala. App. 557;
McKenzie v. *State*, 25 Ala. App. 586.

This Court has approved that doctrine by affirming *Bradley* v. *State*, 21 Ala. App. 539, in 215 Ala. 140. The rule is also recognized by the first appeal in the *Patterson* case (224 Ala. 531). Under these authorities and in the light of the facts of these cases new trials should have been granted.

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POINT II.

The Court erred in rulings on evidence.

1. In the *Norris* case Deputy Sheriff Simmons was permitted, over objection and exception, to testify to a conversation with defendant in jail after his arrest. He stated that defendant denied having raped anyone but accused the other eight boys of having done so (p. 83). The Trial Court based its ruling on the decision of this Court in the earlier *Norris* case (229 Ala. 226). At the trial then under review the reception of similar evidence was justified on the ground that it related to the conduct of persons with whom defendant had been jointly indicted. That trial was based on such a joint indictment (old *Norris* record, p. 6), which was held void by the Supreme Court of the United States (294 U. S. 587). Consequently new indictments were found against the various defendants. Such indictments were, however, not joint indictments. Only Norris himself is named in the indictment upon which this conviction is based (p. 7). Consequently the basis for this Court's earlier decision no longer applies. No other possible basis for the reception of such evidence can be suggested. The natural effect of the evidence was to prejudice the defendant. It has no probative value on the subject of his own guilt.

Similar testimony was given in the *Wright* case (p. 71).

2. In the *Wright* case Simmons testified, over objection and exception, that a knife was taken

from one of the boys in the jail at Scottsboro (pp. 70, 71). As there was no contention by the prosecutrix that Wright had a knife, it was improper to bring the subject of the knife into the trial against him.

POINT III.

The Court erred in overruling objections to the summation of the prosecuting attorney.

1. In the *Norris* case Mr. Hutson, during the course of his argument, said: "*I know he is guilty, and I think Mr. Leibowitz knows he is guilty.*" Thereupon Mr. Leibowitz objected and moved for a mistrial. Mr. Hutson said: "I will say in my opinion he is," presumably referring to the defendant's guilt. This was construed by the Court to be a withdrawal of the original statement. The Court went on to state to the jury that Mr. Hutson had a right to express his opinion and, therefore, overruled the motion for a mistrial, to which exception was noted (pp. 110, 111).

The Trial Court erred in its ruling. It should have rebuked the prosecutor for the remarks which he made. Indeed it is questionable whether even a rebuke could erase the harm done by such remarks. It is well settled that a prosecutor may not express his personal opinions as to the guilt of the defendant.

Such is the rule in this state. In *Taylor* v. *State*, 22 Ala. App. 428, the Solicitor was rebuked because he said that the case would have been

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nol prossed if he had not thought it a good one. Presiding Judge Bricken said:

> "The office of Solicitor is of the highest importance, he is the representative of the State, and as a result of the important functions devolving upon him as such officer necessarily holds and wields great power and influence, and as a consequence erroneous inconsistencies and prejudicial conduct on his part tend to unduly prejudice and bias the jury against the defendant. This without reference to the instructions of the Court. The test in matters of this kind is not necessarily that the conduct of the Solicitor complained of did have such effect upon the jury, but might it have done so?"

The Judge said further:

> "But however guilty the defendant may appear to be from the evidence, he is nevertheless entitled to a fair and impartial trial, and before a judgment of conviction can be permitted to stand, upon appeal, it must affirmatively appear that the trial below proceeded throughout without prejudicial and substantial error."

Recent cases in other jurisdictions are to the same effect:

> *People* v. *Edgar,* 34 Calif. App. 459;
> *State* v. *Pierson,* 331 Mo. 636;
> *State* v. *Webb,* 254 Mo. 414;
> *State* v. *Hess,* 240 Mo. 147;
> *State* v. *Goodwin,* 217 S. W. 264 (Mo.);
> *State* v. *Susan,* 152 Wash. 365.

The reason for such holdings is well expressed in the last of these cases. It is there pointed out that to permit a prosecuting attorney to express his own views concerning the guilt of the accused throws "into the scales the weight and influence of the personal character of counsel for the state, and, to some extent at least, calls upon the jury to support his judgment."

It is one thing to argue that the evidence indicates the guilt of the accused, it is entirely different and improper for the prosecuting attorney to argue that he knows that the accused is guilty or even that he believes him to be guilty. Particularly is such conduct prejudicial in a case so doubtful as this.

2. In the *Weems* case Mr. Hutson in his summation said: *"How would you like to have your daughter on that train with nine Negroes in a car?"* An objection to that statement on the ground that it was inflammatory was overruled and exception noted (p. 78).

There can be no doubt that the purpose of these remarks was to inflame the jury and to induce the jurors to render a verdict for reasons extraneous to the case. Such practice has been universally condemned by the Courts of this state. The Courts of Alabama have been conspicuously solicitous in their regard for the right of defendants charged with serious crimes to be tried according to the evidence alone, and on innumerable occasions they have reversed convictions as perhaps growing out of improper appeals to passion and prejudice.

One of the leading cases reaching this result is *Tannehill* v. *State,* 159 Ala. 51. A Negro de-

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fendant sought by Negro witnesses to prove an alibi. The Solicitor pointed out that the alibi was set up "by a lot of Negro witnesses." He emphasized in his argument that Negroes would stick to each other and would perjure themselves to come to the aid of one of their people. In reversing the conviction for murder Judge Simpson of this Court said:

> "It is the duty of the Court to see that defendant is tried according to the law and the evidence, free from any appeal to prejudice or other improper motive, and this duty is emphasized when a colored man is placed upon trial before a jury of white men. The courts in some other jurisdictions have held, on what seems to be good reason, that the injury done by such remarks cannot even be atoned by the retraction or the ruling out of the remarks."

A few years later a conviction was reversed because the Solicitor had argued that "if that Negro was taken out of court there would not be much left." See *James* v. *State*, 170 Ala. 72.

And perhaps the most frequently cited case on the subject is *Moulton* v. *State*, 199 Ala. 411. A Negro was convicted for the murder of a white man and the Solicitor argued, "If you do not hang this Negro, you will have a similar crime in this country in six months." He said also: "Unless you hang this Negro our white people living out in the country won't be safe; to let such Negroes go unpunished will cause riots in the lands." The conviction was reversed, although the trial Judge had sustained an objection to the

last of the two remarks, and had excluded from the consideration of the jury remarks about white and black races. After pointing out that the general atmosphere of the case required a summation free from prejudicial remarks and emphasizing the fact that there was evidence more favorable to the defendant than the jury's verdict indicated, this Court said:

> "Considering the general conditions surrounding the trial, all of which had before that appeared in this cause, and the menace of it all to a calm and dispassionate application of a just and humane law, the Court is of opinion that the matter here brought in review involved an appeal to race prejudice, and should have been so recognized and treated at the time of the ruling upon it."

The Court pointed out further that a general statement by the trial Judge in his charge did not constitute a sufficient cure for error of this sort.

In another case, *Johnson* v. *State*, 212 Ala. 464, in which the question did not need to be decided, this Court, by Judge Gardner, went out of its way to say:

> "It may not be amiss to suggest, however, that particularly in trials of this character, the Solicitor in argument should be careful to refrain from any remarks calculated to arouse race prejudice, or other remarks as to local conditions, not shown by the proof or that could not properly be so shown."

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See also:

Richardson v. *State,* 204 Ala. 124,

and

Bridges v. *State,* 225 Ala. 81.

The same rule has been universally followed in the Court of Appeals. See *Chambers* v. *State,* 17 Ala. App. 178. It was held not enough for a Solicitor to take back an objectionable remark, particularly where the audience by its laughter showed a hostility to the defendant. The Court reversed the conviction in this instance, even though no exception had been taken at the time, stating:

> "The unrebuked laughter by the spectators was calculated to create 'a general atmosphere of the cause' highly prejudicial to the interests of the defendant and calculated to influence the jury."

In *Perdue* v. *State,* 17 Ala. App. 500, a conviction was reversed because a Solicitor argued that Negroes would swear lies to help each other, defendant having offered an alibi by several unimpeached Negro witnesses. In *Jones* v. *State,* 21 Ala. App. 234, the Solicitor had argued that defendant was trying to save "his own yellow head and that of his black mammy." The Court sustained an objection by the defendant's counsel to any references to color. The Solicitor then maintained that the jury had a right to look at the color of the witness and to determine his credibility. The Court refused an instruction that these remarks were highly improper and the conviction was reversed on appeal, Judge Samford saying:

> "It may well be doubted that even prompt and positive action on the part of the Court would have cured the injury already done to the defendant, and certainly the perfunctory ruling of the Court in excluding remarks as to the color of the defendant did not have that effect. It is the first and one of the highest duties of a Trial Judge to see that a defendant on trial in a criminal case has a fair and impartial trial, and to prevent, as far as possible, all improper, extraneous influences from finding their way to the jury. One such extraneous influence, well known to all men, is race prejudice, and when such is ingenuously injected into the trial of the case by the prosecutor in his closing argument to the jury, the Court ex mero metu, and certainly on motion of defendant, should use prompt and vigorous methods in letting the jury know that such arguments will not be tolerated by the courts."

See also:

Fisher v. *State,* 23 Ala. App. 544;
Black v. *State,* 23 Ala. App. 549;
Williams v. *State,* 25 Ala. App. 342.

CONCLUSION.

New trials should be granted to each of the defendants.

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