182 So. 3

WEEMS v. STATE.

8 Div. 845.

Supreme Court of Alabama.

June 9, 1938.

1. Criminal law ⇐911, 1156(1)

Before passage of amendatory act relating to appeals from decisions on motions for new trials, such a motion was addressed to discretion of trial court, and was not reviewable on appeal. Code 1923, § 6088.

2. Criminal law ⇐1066, 1124(4)

Under statute relating to appeals from decisions on motions for new trials, it is essential to right to review of such decisions that exception should be reserved, and that exception, with evidence and ruling on motion, should be incorporated in bill of exceptions. Code 1923, § 6088.

3. Criminal law ⇐1066

An act making motions in writing a part of record proper, reviewable on appeal without exceptions being reserved, does not apply to motions for new trial. Code 1923, § 9459.

4. Criminal law ⇐1091(10)

The bill of exceptions is the vehicle for showing an exception to ruling on motion for new trial, and is the only method of presenting such a ruling for review. Code 1923, §§ 6088, 9459.

5. Criminal law ⇐1124(4)

The enactment of 1915 statutes, relating to appeals from decisions on motions for new trials, and making motions in writing a part of record proper, reviewable on appeal without exceptions being reserved, as part of 1923 Code, was a legislative confirmation of their prior interpretation as not authorizing review of ruling on motion for new trial except through incorporation in bill of exceptions of exception to ruling, evidence, and ruling itself. Code 1923, §§ 6088, 9459.

6. Criminal law ⇐1124(4)

Where no mention of motion for new trial was made in bill of exceptions, ruling on motion and sufficiency of evidence to support verdict were not presented for review. Code 1923, §§ 6088, 9459.

7. Rape ⇐46

In prosecution for rape, wherein prosecutrix testified that group who raped her, including accused, took white-handled knife and 50 cents from her, testimony of deputy sheriff that he found white-handled knife and 50 cents on one of group, other than accused, was admissible.

8. Criminal law ⇐726

In prosecution of negro for rape, bill of exceptions showing statement of accused's attorney that prosecutor had asked jury: "How would you like to have your daughter on that train with nine negroes in a car?" objection to argument as inflammatory, overruling of objection, and exception, following statement of prosecutor that his argument was not as inflammatory as that of accused's attorney, did not authorize reversal of conviction.

Appeal from Circuit Court, Morgan County; W. W. Callahan, Judge.

Charlie Weems was convicted of rape, and he appeals.

Affirmed.

Osmond K. Fraenkel and Samuel S. Leibowitz, both of New York City, for appellant.

This court has the power to set aside convictions and grant new trials when, in the interest of justice, it is necessary to do so. In the light of the facts in this case, a new trial should have been granted. Vinson v. State, 22 Ala.App. 112, 113 So. 86; Mayes v. State, 22 Ala.App. 316, 115 So. 291; Skinner v. State, 22 Ala.App. 457, 116 So. 806; Hubbard v. State, 23 Ala.App. 537, 128 So. 587; Culbert v. State, 23 Ala.App. 557, 129 So. 315; McKenzie v. State, 25 Ala.App. 586, 151 So. 619; Bradley v. State, 21 Ala.App. 539, 110 So. 157; Id., 215 Ala. 140, 110 So. 162. See Patterson v. State, 224 Ala. 531, 141 So. 195. There was no contention by the prosecutrix that one of the defendants had a knife, and it was error to allow the state to bring the subject of the knife into the case. The statement by the solicitor in argument to the jury was inflammatory, and the objection thereto should have been sustained. Tannehill v. State, 159 Ala. 51, 48 So. 662; James v. State, 170 Ala. 72, 54 So. 494; Moulton v. State, 199 Ala. 411, 74 So. 454; Johnson v. State, 212 Ala. 464, 102 So. 897; Richardson v. State, 204 Ala. 124, 85 So. 789; Bridges v. State, 225 Ala. 81, 142 So. 56; Perdue v. State, 17 Ala.App. 500, 86 So. 158; Jones v. State, 21 Ala.App. 234, 109 So. 189; Fisher v. State, 23 Ala.App. 544, 129 So. 303; Black v. State, 23 Ala. App. 549, 129 So. 292; Williams v. State, 25 Ala. 342, 146 So. 422.

A. A. Carmichael, Atty. Gen., and Thos. S. Lawson, Asst. Atty. Gen., for the State.

Since the bill of exceptions contains no reference to the motion for new trial nor any exception to the court's ruling thereon, this court will not review the ruling of the trial court refusing the motion for new trial. Stover v. State, 204 Ala. 311, 85 So. 393; Dukes v. State, 210 Ala. 442, 98 So. 368; Grace v. Old Dominion Garment Co., 213 Ala. 550, 105 So. 707; Pelham v. State, 24 Ala.App. 330, 134 So. 888; Id., 223 Ala. 155, 134 So. 890; Hull v. State, 232 Ala. 281, 167 So. 553; Dodson v. State, 27 Ala. App. 286, 171 So. 384; Campbell v. State, 27 Ala.App. 389, 173 So. 96; Pruett v. State, 27 Ala.App. 386, 172 So. 911. Whether argument is prejudicial must be decided on its own merits as disclosed by attendant facts. Owens v. State, 215 Ala. 42, 109 So. 109; Davis v. State, 27 Ala. App. 342, 172 So. 343. The record does not show all the side plays and surroundings of the case and the argument of counsel for defendant witnessed and heard by the trial court. The argument in question did not constitute reversible error. Griggs v. State, 21 Ala.App. 530, 109 So. 611; Dunn v. State, 19 Ala.App. 576, 99 So. 154; Bruce v. State, 22 Ala.App. 440, 116 So. 511; Bynum v. State, 231 Ala. 491, 165 So. 581.

BROWN, Justice.

[1] Before the amendment of § 2846 of the Code of 1907, by the Act of September 22, 1915 (Acts 1915, p. 722, § 1), a motion for new trial in criminal prosecutions was addressed to the trial court's discretion, and was not reviewable on appeal. Suttles v. State, 15 Ala.App. 582, 74 So. 400; Burrage v. State, 113 Ala. 108, 21 So. 213; Cooper v. State, 88 Ala. 107, 7 So. 47; Smith v. State, 165 Ala. 50, 58, 51 So. 610, 611.

The statute as amended by said act was first applied on appeal in a criminal case, in Britton v. State, 15 Ala.App. 584, 74 So. 721, decided on March 23, 1917, by the Court of Appeals.

[2] It was there said (page 722): "It is manifest from the provisions of this statute that it is essential to the right to review the ruling of the trial court on a motion for new trial that an exception should be reserved, and *that this, with the evidence and the ruling of the trial court on the motion, should be incorporated in the bill of exceptions.*" (Italics supplied.)

[3] In this connection it was also held that the act approved September 18, 1915 (Acts 1915, p. 598, § 1), now § 9459 of the Code 1923, making motions in writing a part of the record proper, reviewable on appeal without exceptions being reserved, did not apply to motions for new trial. Britton v. State, supra; Powell v. Folmar, 201 Ala. 271, 78 So. 47; Stover v. State, 204 Ala. 311, 85 So. 393.

[4] These statutes, since that decision, have been brought forward in the Code of 1923, sections 6088, 9459, without change in verbiage and this court and the court of appeals have uniformly held that the bill of exceptions is the vehicle for showing an exception to the ruling on motions for new trial, and is the only method of presenting the same for review. Hull v. State, 232 Ala. 281, 167 So. 553; Ex parte Grace, Grace v. Old Dominion Garment Company, 213 Ala. 550, 105 So. 707; Dukes v. State, 210 Ala. 442, 98 So. 368; Stover v. State, supra; William H. Pelham v. State, 24 Ala. App. 330, 134 So. 888; Id., 223 Ala. 155, 134 So. 890.

[5] The subsequent enactment of these statutes as a part of the Code of 1923, was a legislative confirmation of their interpretation. Spooney v. State, 217 Ala. 219, 115 So. 308.

[6] No mention of the motion for new trial is made in the bill of exceptions incorporated in the record in this case, and it being the only vehicle provided by law for showing the ruling and exceptions thereto, the ruling of the court on the motion and the sufficiency of the evidence to support the verdict is not presented for review.

The appellant's counsel, in argument at the bar, conceded that the questions raised by the defendant's motion for change of venue and transfer of the case for trial to the Federal Court, in the light of the ruling in Patterson v. State, 234 Ala. 342, 175 So. 371; Id., 302 U.S. 733, 58 S.Ct. 121, 82 L.Ed. 567, is without merit, and we pass this phase of the case without further comment.

[7] The testimony of Simmons, the deputy sheriff, that, "shortly after the ne-