LEO FRANK LOSES IN SUPREME COURT

Petition to Set Aside Verdict Because He Was Not in Court When It Was Rendered, Denied.

The fight which has been waged in the state courts to save Leo M. Frank, convicted of the murder of little Mary Phagan, came to an end Saturday at 1 o'clock—so far as the state courts are concerned—when the supreme court affirmed the decision of Judge Benjamin H. Hill in refusing to set aside the verdict on the ground that Frank was not in court when the verdict was read.

Within a few minutes after the decision had reached the clerk's office, Leonard Haas, attorney and close personal friend of Frank, declared that the next move would be in the nature of a writ of error to the United States supreme court. Attorney Haas is still hopeful as ever that Frank will be freed.

"I am more certain than ever that the truth is coming out," Attorney Haas said. "Frank is just as innocent of the crime he has been convicted of as I am, and I know that I had nothing to do with the killing."

All justices of the supreme court except Justice Fish, who is ill, concurred in the decision.

The opinion of the court, covering almost every phase of the case, was written by Justice Warner Hill. The decision covers more than thirty-two pages. It goes into a lengthy review of the law and the evidence, and cites a number of authorities on the subjects of motions for new trials and motions to dismiss.

The salient point in the opinion is that the points made by Frank in his motion to set aside the verdict of the jury could and should have been made in the previous motion for a new trial. The court quoted a number of authorities, and in connection with the points stated above, said:

"It will be seen that where a motion for a new trial is made, that the defendant in his motion for a new trial set out all that is known to him at the time or by reasonable diligence could have been known by him as grounds for a new trial."

Frank Was Hopeful.

Frank, in his cell in the Tower, was taking his daily exercise in the corridor, when he was informed that the supreme court had decided aginst him. His wife and other members of his family and several friends were with him. His demeanor when informed of the action of the court indicated that he had either received previous information of the reverse, or that of a man who was steeled to bear up under any circumstance.

"I did not expect an unfavorable decision from the supreme court," he said. "I put great faith in my lawyers, and consequently I looked for the best. I have nothing to say at present."

Frank intimated that he would probably give out a statement later in the afternoon. He said that if nothing interfered he would probably prepare a statement.

Before carefully reading the decision of the court, Attorney Haas told reporters that he would have a conference with the other attorneys engaged in the case. He explained that the conference would be held immediately—just as soon as copies of the decision could be prepared by a stenographer.

"We are going to the United States supreme court on a writ of error," Attorney Haas said with emphasis. "I believe that will be the next logical step. However, we will have plenty of time to determine on our future plans."

Attorney Haas declined to comment on the ruling of the supreme court. He said that he had not been given time to carefully discuss the various reasons given by the court.

The court, in citing its reason for refusing Frank's motion to set aside, pointed out that if, on the trial of the indicted for murder, a verdict of guilty is received in the absence of the prisoner and without his consent, while he is incarcerated in jail, a motion for a new trial is an available remedy in such a case if it is made in time. But, the court says, where a motion for a new trial is made by the defendant with the knowleige of the fact that the verdict was rendered in his absence, and such a motion does not contain that fact as a ground for a new trial, though it is recited therein, it is too late after the motion for a new trial has been denied and the judgment has been affirmed by this court to make a motion to set aside the verdict on that ground.

After quoting a number of authorities on the above point, the court asks:

Did Leo Frank Know?

"Did the defendant in the instant case kno wat the time he made his motion that he was absent without his consent when the verdict of guilty was rendered against him?

"He must have, of necessity, known it, and likewise his counsel. In one ground in his motion for a new trial (which was reviewed and passed on by this court in the case of Frank v. the State (141 Georgia 243), it was alleged: 'Defendant was not in the courtroom when the verdict was rendered, his presence having been waived by counsel.'

"When one convicted of crime makes a motion for a new trial, it is his duty to include everything in it which was appropriate to such a motion, and which was known to him at the time. As we have seen, defendant could not have made the question under consideration in the motion for a new trial.

"The court does not question the right of a defendant on trial for a crime in this state to be present in the courtroom at every stage of his trial, and to be tried according to the established procedure, but the court points out that the accused may waive trial and plead guilty, and this plea includes the power to waive mere incidents of the trial, such as his presence at the reception of the verdict. But the court also points out that it knows of no provision in the constitution of the United States or of the state, nor of any statute which gives an accused person the right to disregard the rules of procedure in a state, which afford him due process of law, and demand that he shall move in his own way and be granted absolute freedom because of an irregularity (if there is one) in receiving the verdict.

"If an accused person could make some of his points of attack on the verdict and reserve other points known to him, which he could then have made, there would be practically no end to a criminal case," says the decision.

Dealing with that part of the motion to set aside the verdict on the grounds of disorder in the courtroom, of cheering and applause outside the courtroom and of the oral remarks of the trial judge before signing the order denying the new trial, the decision holds that these questions were raised and adjudicated in the motion for a new trial, and, therefore, they would not again consider them in passing on the motion to set aside the verdict.

Judge Hill's remarks in the decision are as follows:

"It will be seen that where a motion for a new trial is made, that the defendant must, in his motion for a new trial, set out all that is known to him at the time, or by reasonable dilligence could have been known by him, as grounds for a new trial.

"Did the defendant in the instant case know at the time he made his motion for a new trial that he was absent without his consent when the verdict of guilty was rendered against him? He must of necessity have known it, and likewise his counsel. In one ground of his motion for a new trial which was reviewed and passed on by this court, it was alleged: 'Defendant was not in the courtroom when the verdict was rendered, presence having been waived by his counsel.'

"When one convicted of crime makes a motion for a new trial, it is his duty to include everything in it which was appropriate to such a motion and which was known to him at the time. As we have seen, the defendant could have made the question under consideration in the motion for a new trial. In Daniels v. Powers, 79th Georgia, 785, the judgment of conviction for a felony had been affirmed by the supreme court on a writ of error brought by the defendant, and this court held that the legality of his conviction could not be brought into question by a writ of habeas corpus sued out by him, save for the want of jurisdiction appearing on the fact of the record as brought from the court below to the supreme court.

Judge Bleckley commented as follows:

"We rest the case upon the general rule that, after a judge of the superior court has presided in any case in the superior court of any county, and the judgment rendered at the trial has been affirmed by this court, it is to be taken for all purposes that it was a legal trial and judgment cannot be questioned for anything but the want of jurisdiction appearing upon the face of the proceedings as ruled upon here.

"It is the undoubted right of a defendant, who is indicted for a criminal offense in this state, to be present at every stage of his trial, but he may waive his presence at the reception of the verdict rendered in his case. In Cawthorne v. the State, a waiver was made by the defendant's counsel in his presence, as to his personal presence at the reception of the verdict. This court held in that case: 'Even if an attorney, by virtue of the relation of attorney and client, existing between himself and one charged with a felony, has no implied right to waive the right of his client to be present at the reception of the verdict if the attorney makes an express waiver to this effect in the presence of his client, who does not at the time repudiate the action of his counsel, a verdict afterward received in the absence of the accused, and in consequence of the waiver, will not be held to be invalid at the insistence of the accused, seeking, after the reception of the verdict, to repudiate the action of his counsel in making the waiver.'"

Chiefly on Solicitor Dorsey's demurrer, in the hearing before Judge Ben Hill, was the decision of the supreme court made on Saturday. The success of the solicitor's demurrer in the hearing before Judge Hill had the effect of bringing the question of validity of the demurrer, rather than the merits of the motion itself, before the court.

Solicitor Dorsey's demurrer set up six grounds on which he asked that the supreme court dismiss the motion without a hearing by the lower court. His first contention was that a motion to dismiss should be predicated on some defect appearing on the face of the record or the pleadings. The second ground was that Frank, if he wished to take advantage of the fact that he was not in the courtroom at the time of the verdict, should have included this point in his motion for a new trial which he filed shortly after his conviction.

The supreme court sustained the solicitor on the above point.

The other contentions of the solicitor all held that Frank's conduct had amounted to an estoppel, that is, that he too late adopted the remedy which might have been proper at an earlier time, but that it was not now, after he had successively fought other motions through the lower court and the supreme court.

Frank's lawyers maintained that the doctrine of estoppel does not exist in criminal cases, and that a man on trial for his life has the right at any time to assert for his protection any right given him under the law.

Frank's attorneys have exhausted every means within their power, insofar as the state courts are concerned, in an effort to free him from the charge of murder for which he has been convicted and sentenced to death, and unless the United States supreme court decides that the state supreme court and Judge Hill have erred in refusing to grant the motion to set aside the verdict, the only recourse which will then be left open will be an application for commutation of sentence before the governor and the prison commission.

The case can be sent back to the state courts by the United States supreme court to have the error corrected.

Dorsey to Represent State.

Although it was the popular opinion that the work of Solicitor General Hugh M. Dorsey was done on the Frank case when the supreme court rendered its final verdict, the Frank forces in their next move will still have to face the solicitor when the case goes to the United States supreme court.

"I will fight the case as long as it stays in the courts," Dorsey stated to a reporter for The Constitution Saturday afternoon. Beyond this, however, he would have nothing to say bearing on the case.

Up to the present stage Dorsey has combatted every move of Frank's attorneys. He entered the case when Coroner Donehoo first empaneled a jury on the inquest at police headquarters a few days after the body of Mary Phagan was found on April 26, 1913. He had also taken an active hand in the investigation that led up to the inquest.

In the proposed supreme court fight Mr. Dorsey will be assisted by Assistant Solicitor General E. A. Stephens, who has been associated with him in every phase of the famous Frank battle.

Defense Was Confident.

That the attorneys for Leo Frank had built great hopes on the supreme court decision, and that it was a distinct shock to them, was stated by Leonard Haas, associate counsel for the convicted man in his plea for constitutional right.

"We did not believe that the supreme court would deny the motion," Mr. Haas said. "We were confident that Frank would be released by the court's decision.

"We have not given up hope, however. The United States supreme court has many precedents to govern it, in all of which it has ruled that a prisoner cannot waive his presence at time of verdict."

Within the next two weeks Frank's counsel will file before the state supreme court an application for writ of error to be taken to the government tribunal. Writ of error means that a constitutional point exists in the case and has been raised and that it is worthy of the consideration of the United States court.

Then Goes to Washington.

Once the writ is granted, it goes automatically into Washington. The solicitor general has the right of protesting on the ground that no constitutional point exists. In this event, argument is called for from both sides. Frank's attorneys, however, contend that Dorsey cannot afford to present this argument because of practical admission of a constitutional point when he argued it before the trial judge and supreme court.

The United States supreme court battle will be fought by Attorneys Tye, Peeples & Jordan and Leonard J. Haas and Herbert Haas, assisted by Harry A. Alexander. Luther Rosser and Reuben Arnold will not be associated in it, having withdrawn by agreement from the fight when the constitutional point was raised.