LEO M. FRANK HAS NOT LOST ALL HOPE; COUNSEL WILL MAKE VIGOROUS FIGHT TO SAVE THE LIFE OF THEIR CLIENT

Loses in Supreme Court

LEO M. FRANK.

Frank's Attorneys Preparing for New Battle—May Appeal to Federal Courts, or Make Extraordinary Motion.

CONVICTED MAN STOICAL WHEN HE HEARS NEWS; MAKES NO STATEMENT

Trial Judge's Remarks No Ground for New Trial, Holds High Court—Perversion Evidence by Conley Admissible.

Leo M. Frank, denied by the supreme court a new trial for the murder of Mary Phagan, now faces one of three final recourses:

First, motion for a re-hearing before the court which handed down yesterday's decision;

Second, an extraordinary motion for new trial before the superior court, in which he was originally arraigned, on a basis of newly found evidence;

Third, an appeal to the supreme court of the United States on the grounds that he was technically deprived of constitutional rights during his first trial.

He can invoke all three, in which event, it is not likely the case will finally end within less than a year's time.

The defense is seeking to extract the weaknesses of the affirmative opinion and the strength of the dissenting one to present both in a new fight for a new trial, which is to be waged in either the same supreme court in which the sustaining verdict was handed down or in the federal supreme court, America's ultimate tribunal.

No fixed plans have been made by Attorneys Luther Rosser and Rube Arnold, the convicted man's counsel, for further attack. Both stated Tuesday afternoon that their ideas were indefinite, but that they would never cease fighting.

Frank Still Calm.

In his cell in the Tower Frank maintained characteristic calmness and composure throughout the day. In the afternoon a barber came and clipped his hair and shaved him. An hour later he exercised on the dumbells, which has become a daily practice since his long imprisonment. To a jail attache who has entree to his cage Frank is reported as having said:

"The truth will finally out. It can't be pinned down forever. It will take time—maybe an age, but it will eventually come, and I will then be an exonerated man. I am not worrying, because I'm depending on truth. In time the world will know the guilty man and I will be cleared. It will take time, but time will do it."

His wife, Mrs. Lucile Frank, staying at the home of relatives, Mr. and Mrs. A. E. Marcus, said over the telephone to a Constitution reporter last night:

Wife Was Surprised.

"Certainly the decision came as a surprise. We are only waiting for the truth to claim its own. My husband is in good health and he is bearing up well. I am too nervous and unstrung to talk much. Later, maybe, I will talk more and have many things to say. But not tonight."

Her voice had a trace of tears and there was a sob in her throat. She had undergone a hard day. Twice she had visited the cell of her husband. The latter visit lasted until late at night, when she departed reluctantly. Frank was besieged by friends all during the day, many remaining until as late as 10:30 o'clock at night, when he was forced to retire.

Frank's defense, it is widely circu-

lated, will rely chiefly upon the dissenting opinion of Chief Justice Fish and Associate Justice Beck, of the supreme bench, in their new and final battle for the client. The sentiment of these judges was based largely upon the theory that admission of the testimony of Jim Conley, the negro star witness, and of C. B. Dalton, was improper.

The stories of Conley and Dalton related to the alleged perversion of the defendant. The contention of the conflicting opinion, however, presented by Justices Hill, Atkinson, Evans and Lumpkin, was that in Frank's particular case and in the circumstances of the particular murder of which he was accused, it was perfectly legal to introduce evidence pertaining to his conduct with women other than the girl with whose murder he was charged.

The opinion of the assenting justices is briefly and tersely put in the following paragraph of their decision's final headnote:

"The evidence supports the verdict, and there was no abuse of discretion in refusing a new trial."

It was also held that the refusal of Judge L. S. Roan, the trial justice, to grant a new trial on grounds of disorder in the courtroom was proper, and furthermore, that the supreme court did not consider oral expressions of the trial justice which might be rendered at the time of denial of motion for new trial. This latter ruling related to the famous remarks of Judge Roan in which he declared his indecision as to either the guilt or innocence of Leo Frank.

"I fully expected the decision," stated Solicitor General Hugh M. Dorsey. "Frank had a fair trial, and an impartial one. He was found guilty, and guilty I believe him to be. Had I not believed him guilty throughout the case, I would never have prosecuted him."

Frank to Be Re-Sentenced.

The solicitor will soon take the necessary action to have Frank re-sentenced. This will be done at an early date.

"I have no desire to hasten affairs," said Dorsey. "I will waste no time, however."

In view of the dissenting opinion of the two supreme justices, it is believed counsel for the defense will seek a new hearing before the supreme court. A thorough survey of both opinions will decide. In this case, they will endeavor to have the case sent again to the supreme court. This would be their only hope.

Charges of technical failure would be the basis of their second presentation in event they follow such course. To put it before the supreme court directly would mean on the grounds of purely the dissenting voices in the decision handed down Tuesday. Similar instances are in the annals of the history of Georgia courts.

It is also expected that the defense will sift the evidence of each of the three instances in which their client's case hung in the scales—the original trial, the hearing before Judge Roan for a new trial and the hearing before the supreme court—in an effort to find technical points that will warrant its introduction to the government supreme court.

In this case, it is said, allegations will be made that Frank was deprived of constitutional rights. This is stated to be the only federal point which might involve a case similar to that of Frank's trial. The Frank case before the federal court would require months and months.

A motion extraordinary could be made on the grounds of newly-discovered evidence. This would have to be carried before the trial court, over which Judge Ben Hill presides since Judge Roan's departure. In this instance the case could only be forwarded to the supreme court, in which it met defeat Tuesday.

Hope Is Dissenting Opinion.

"The strongest argument, I think, that could be made in our behalf," Luther Rosser said Tuesday afternoon, "is contained in the dissenting opinion of Chief Justice Fish and Justice Beck."

By which it was inferred, but not confirmed, that the plan of action for the new fight would be a renewal of the argument before the supreme court. A re-argument of this nature would consume practically the same amount of time required for the original argument and decision. Such a motion would necessarily have to be on the basis that the court failed to decide some material point presented in the bill of 103 separate objections.

In voicing their sentiment for granting a new trial, Justices Fish and Beck said that the evidence of Conley and Dalton was inadmissible, in that it related mostly to Frank's alleged conduct with women other than Mary Phagan.

They held that an accused person cannot be expected to face in court accusations other than those contained in the bill of indictment. Men untrained in legal processes of reasoning, as jurors, for instance, are liable to be influenced greatly, they held, by such irrelevant testimony.

"They conclude," the opinion reads, "that persons guilty of this crime might be equally as guilty of that."

The remittur of the supreme court—the legal form of the decision—will reach the superior court within a period not less than ten days. Frank can then be brought before Judge Hill for resentence. Not less than twenty days and not more than sixty can expire between sentence and execution.

Jim Conley's trial, by the decision of the supreme court, is made a certainty for the week of February 23. He will be arraigned on a charge of accessory after the fact. He declared to reporters yesterday that he had felt confident all the while that the supreme court would affirm the lower tribunal's verdict.

"They've got the right man," he declared, "and he knows it."

Dorsey's Statement.

Solicitor Hugh Dorsey expressed no surprise at the decision of the supreme court.

"Frank had a perfectly fair trial. As near as it is possible to demonstrate a thing of that kind mathematically, he was proved guilty.

"From the very first suspicion pointed to him. The detectives suspected him from the very first. I was not satisfied with mere suspicions and went into the case from every angle. I wanted to find the man who was guilty; it made no difference to me who he was. I became convinced of Frank's guilt and I am convinced of it today.

"He had the benefit of the best legal talent money could buy. He had position and influential friends to serve him. The jury thought him guilty and said so; the trial judge thought he had been given a fair trial and refused to grant him a new one. The supreme court has now stated that the lower court did not err.

"I am sorry for the family and friends of the man who have stood by him so loyally."

Headnotes of Decision.

The headnotes of the decision in the Frank case read as follows:

"On the trial of one accused of the murder of a young girl in a factory building of which he was superintendent where circumstantial evidence is relied upon largely if not wholly to prove the defendant's guilt it is not sufficient cause for a new trial under the special facts of the case that the state was permitted to prove the demeanor of the night watchman of the factory and also that of the accused on the morning after the discovery of the body.

"2. A young girl was killed in a pencil factory on Saturday afternoon, which was also a public holiday, when the factory was not in operation. The evidence showed that she went to the office of the superintendent for her pay, and no witness testified to having seen her alive thereafter. There was other evidence from which the jury might infer that the killing occurred in a room on the same floor where the office of the superintendent was situated. An employee of the factory, who was present in the building testified that on that morning the accused had said to him that he desired the witness to watch for him as the witness had been doing the rest of the Saturdays,' or 'other Saturdays,' that he did watch at the door when the girl went up to the office of the accused; that he heard her scream; that subsequently the accused called to him to assist in removing the body of the deceased.

Court Did Not Err.

"He also testified to certain signals given by the accused to him while watching. Held, that it was competent to show by the witness how he had been watching for the accused on previous Saturdays, and to explain the system of such alleged signals employed by the accused, and the reference thereto by the accused.

"(a). The same witness testified that, after the girl had gone to the office of the accused, he had heard footsteps going in the direction of the place where he first saw the body, and after hearing the scream and the signal from the accused, the latter told the witness that he 'wanted to be with a little girl,' and she refused him, and he struck her and guessed he struck her too hard, and she fell and hit her head against something, and he did not know how badly she was hurt. Witness then said that the accused added: 'Of course, you know I ain't built like other men.' From the condition of the body it might have been inferred that the person who did the killing sought to have a sexual relation, natural or unnatural, with the deceased, and that the blow did not cause death, but it was brought about by choking the deceased with a cord. Held, that it was relevant to explain the expression above quoted to showing previous transactions of the accused, known to him and to witness, which indicated that his conduct in sexual matters differed from that of other men.

"(b). As a general rule evidence of the commission of one crime is not admissible upon a trial for another, where the sole purpose is to show that the defendant has been guilty of other crimes, and would, therefore, be more liable to commit the offense charged; but, if the evidence is material and relevant to the issue on trial it is not admissible because it may also tend to establish the defendant's guilt of a crime other than the one charged.

"(c). Under the rule just announced, the evidence of the witness above mentioned, which it was sought to withdraw from the jury, and also the evidence of another witness, which corroborated him in regard to other improper transactions with women, in which the accused took part, occurring at the same place, not a great while before the homicide, and in regard to the watching by the first witness, while lascivious practices were being engaged in at that place, and in regard to compensating him thereafter, was admissible as throwing light upon the motive of the accused and also as indicating his design or schemes in regard to his practices at that place, in connection with which the evidence authorized the jury to find that the murder occurred, and tending to show the identity of the criminal.

"Paragraph 3. Under the facts of the case it was irrelevant to show as to circumstance indicating a consciousness of guilt that the defendant who had manifested interest in ferreting out the perpetrator of the homicide for the commission of which he was subsequently indicted and had taken part in the employment of detectives for that purpose and had interviewed one person suspected and refused an interview to one indicating that the defendant was aware of the witness' knowledge of the defendant's guilt, when such interview was proposed by detectives, including the one he had employed.

"Paragraph 4. Where the testimony of a witness is competent, he may be permitted to give the details of experiments on which his testimony is based.

Health Board Controversy.

"Paragraph 5. The details of a controversy between the former president and secretary of the state board of health in their official relations was foreign to any issue involved in the trial of the case. The testimony was provoked by a question propounded by counsel for the defense who directed examination of his witnesses. The testimony did not tend to obscure any issue in the case or prejudice the defendant, and the reception in evidence of the excerpt from the minutes of the state board of health dealing with such controversy is no ground for a new trial.

"6. Where it was material to show at what time the girl who was killed arrived at the factory at which the homicide occurred, and after this point the contentions of the state and the accused differed, as well as in regard to the point at which she left the street car on which she came from her home, and the defendant introduced evidence to show the scheduled time at which the car was due to arrive at a certain point where it was claimed on behalf of the state that she left it, and the time it would require for the car to go from that point to another at which the accused claimed that the girl alighted, as well as the testimony of certain witnesses that the car in question reached the first point at the time fixed by the schedule (specifying it), and one of them testified on cross-examination that 'we never arrive in advance of schedule time;' and where the defendant also introduced other evidence as to schedules of the street cars on another route in the street to account for the defendant's presence at other places at such times during the day, it was competent for the solicitor general to thoroughly sift the witnesses introduced by the accused on cross-examination, and also to introduce evidence in rebuttal tending to show, in addition to the fact that the testimony of a witness for the accused was inexact in regard to the schedule, that in fact the car on the line traveled by the girl in going from her home to the factory frequently arrived at the point above mentioned several minutes in advance of schedule time.

Impeachment of Witnesses.

"(a). If in any respect the cross-examination or the evidence introduced in rebuttal was not strictly within the proper range of such evidence, it was not of such a character as to require a reversal.

"7. The testimony referred to in the seventh division of the opinion was relevant, and properly received by the court.

"8. A witness testified to matters material to the defense. She was asked if her wages had not been increased by the parent of the accused's wife and if a gift had not been made to her by the wife of the accused, and answered in the negative. Upon laying the proper foundation for impeachment, it was competent to introduce her own affidavit and the testimony of another witness to show that she had made statements contradictory of her testimony stated above.

"9. On the trial of one for the murder of a female, where the testimony tended to show that the garments of the victim of the homicide were torn and her . . . organs had suffered . . . violence, . . . and the defendant introduced a witness to establish his good character, it was competent on cross-examination to ask such witness if he had not heard of certain lascivious acts of the defendant with other females.

"10. Likewise, under the circumstances referred to, the preceding note, where the defendant introduced evidence of his good character, the prosecution could reply by offering proof of his general bad character for lasciviousness.

"11. Where the court instructs the jury under degree and strength of circumstantial evidence essential to a conviction, in the language of the statute, it is generally not ground for a new trial that he declines to give a written request abstractly elaborating this principle of evidence.

Regarding Disorder in Court.

"(a). The requests set out in grounds 60, 61 and 62 of the motion for a new trial are not so accurate or appropriate as concrete application of the principle involved as to render the failure to give them cause for a new trial.

"12. As pointed out in the twelfth division of the opinion, the request to charge as therein set out invaded the province of the jury, and was properly refused.

"13. Where a defendant puts his character in issue, and the prosecution offers rebuttal evidence, tending to show that his general character in respect to a trait involved in the case is bad, failure to cross-examine the rebutting witnesses is legitimate ground for argument. Likewise, counsel for the state may discuss any feature of the defendant's statement.

"14. In view of the reference which had been made by one of counsel for the accused to the circumstances of a celebrated criminal case, occurring in California, and of his concession of the right of the solicitor general to likewise discuss the facts of that case in regard to it, no objection was raised to the reading of a telegram from the district attorney in San Francisco, there was no error in allowing the solicitor general to proceed with his argument on that subject, without reading such telegram or letter.

"(a). Nor did it furnish cause for granting a new trial that the presiding judge did not charge to the effect that the facts of the case above mentioned and other celebrated cases referred to by the solicitor general in his argument should have no influence upon the jury in making their verdict, and that they should try this case upon its own facts and the evidence introduced therein. It not appearing that any ruling was invoked in regard to the argument of cases other than that above mentioned, or that any written request was made invoking a charge of the character indicated.

Medical Witnesses.

"15. Whether or not the argument of the solicitor general, seeking to deduce an inference from the examination on behalf of the accused of certain medical witnesses and from their testimony, that they must have been summoned because of being family physicians and well-known to some of the members of the jury, was illogical or well-founded, under the colloquy which was had by counsel among themselves and with the court, and the statements solicitor general or stop him from making such argument will not, under the facts of the case, require a reversal.

"16. The alleged disorder in the court room during the progress of the trial was not of such character as to impugn the fairness of the trial, or furnish sufficient grounds for reversing a judgment refusing a new trial.

"(a). The court was authorized from the evidence to find that certain cheering or applause outside of the court room, referred to in the sixteenth division of the opinion, was not heard by the jury, and that they did not have knowledge of the same until after the verdict was returned.

"17. Where a verdict is received in open court, and a poll of the jury demanded, and while the poll is being taken loud cheering from persons on the outside is heard, and which is continued until after the poll is concluded, and where from the evidence the court is authorized to find that the jury was not influenced to render other than true answers to the questions propounded, the circumstances of the cheering on the outside is not a sufficient ground to require a new trial.

Judge Roan's Remarks.

"18. On conflicting evidence the judge on the hearing of the motion for a new trial, acting as trior, did not err in holding that the jurors whose impartiality was attacked were competent.

"19. When the order overruling a motion for new trial contains nothing to indicate that the judge was dissatisfied with the verdict, or that he failed to exercise the discretion required of him by law, the supreme court will not, in determining whether the judge has exercised such discretion, consider oral remarks made by him pending the disposition of the motion.

"20. The evidence supports the verdict, and there was no abuse of discretion in refusing a new trial."

No Ground for Reversal.

In the main opinion of the four justices upholding the lower court, there occurs the following comment on that ground of the motion for a new trial which cited Judge Roan's remarks at the time he denied that motion in the lower court:

"The bill of exceptions recites that the judge orally stated 'that the jury had found the defendant guilty; that he, the judge, had thought about this case more than any other he had ever tried; that he was not certain of the defendant's guilt; that with all the thought he has put on this case he was not thoroughly convinced whether Frank was guilty or innocent, but that he did not have to be convinced; that the jury was convinced; that there was no room to doubt that; that he felt it his duty to order that the motion for a new trial be overruled.'

"It is insisted that the remarks made by the judge in denying the new trial indicated judicial disapproval of the verdict.

"We do not think so. The jury found the accused guilty. The court was called upon to determine wether under the record the defendant should be granted a new trial. He refused it, and the rule in such cases is that even if the court should consider a case weak, yet, if he overrules the motion for a new trial, one ground of which is that the verdict is contrary to law and evidence, his legal judgment expressed in overruling the motion will control; and if there is sufficient evidence to support the verdict this court will not interfere because of the judge's oral expression as to his opinion. Bray v. State, 69 Ga., 763 (4); Sav., Fla. and Western Ry. Co. v. Steinhouser, 121 Ga. (2)."

Evidence Sufficient to Uphold.

The last paragraph of the main opinion is as follows:

"The record in this case is voluminous. We have attempted to group the various assignments of error so as to bring the opinion within reasonable grounds. Some of the points are deemed of minor importance, not amounting to error, and some of them were not referred to in the briefs, and therefore no specific reference is made to them. We have given careful consideration to the evidence, and we believe that the same is sufficient to uphold the verdict; and, as no substantial error was committed in the trial of the case, the discretion of the court in refusing a new trial will not be disturbed.

"Judgment affirmed. All the justices concur, except Fish, C. J., and Beck, J., dissenting."

The main body of the opinion commences as follows on the ground alleged in the motion for new trial that the court had erred in permitting Solicitor General Dorsey in his argument to comment on the failure of Mrs. Frank to visit her husband right after he was accused of the murder:

"Exception was also taken to the court's permitting the solicitor general in his argument to comment upon the failure of counsel for the defendant to cross-examine certain witnesses offered by the state; and also to comment upon the failure of the wife of the accused to visit him in jail. What has just been said (overruling another ground) covers the first of these complaints.

"As to the latter, the accused in his statement had referred to the failure of his wife to visit him soon after his incarceration, and had given an explanation of it; and the solicitor had a right to comment on the statement."

Prejudice of Two Jurors.

Paragraph 18 of the main opinion referred to bias alleged against the two jurors, Johonning and Hensleo:

"The 73d ground of the motion for a new trial is 'Because the juror A. H. Hensleo was not a fair and impartial juror, but prejudiced against the defendant when he was selected as a juror, and previously thereto had expressed a decided opinion as to the guilt of the defendant, and when selected as a juror was biased against the defendant in favor of the state.'

"The movant submitted evidence tending to show that previous to the trial, this particular juror had made certain expressions to different people, indicating a strong bias and prejudice against the accused. The juror denied under oath having made any statement in substance that he was biased and prejudiced against the accused, and on the other hand positively affirmed that he was unprejudiced against the accused, and that his mind was perfectly impartial during the trial. The rule is clear that when the impartiality of a juror is challenged on a motion for a new trial, the judge becomes a trior as to the issue made and his judgment will not be disturbed unless it appeared that there has been an abuse of discretion. Wall v. State, 126 Ga., 649 (4). On the conflicting evidence there was no abuse of discretion in this case.

"Another juror, Mr. Johenning, was attacked, but under the conflicting evidence we think the court did not abuse his discretion in holding that he was not prejudiced or biased."

Practically without exception, Solicitor Dorsey was upheld on every point by the supreme court.