FRANK APPEALS TO HIGHEST COURT

Application for Leave to Seek Writ of Error Made to Full Supreme Bench.

CLAIMS FEDERAL RIGHTS

Absence from Court When Jury Reported Held to Violate Constitutional Guarantee.

GEORGIA DECISION QUOTED

Brief Filed to Show State Court Did Pass on Federal Question, Which May Be Reviewed.

Special to The New York Times.

WASHINGTON, Nov. 30.—Henry A. Alexander of Atlanta, of counsel for Leo M. Frank, who has been sentenced to death for the murder of a factory girl in Atlanta in 1913, today asked the Supreme Court of the United States for leave to file a petition for a writ of error, at the same time filing a brief setting forth the history of the case and the grounds upon which the writ was asked. Chief Justice White accepted the brief, and was informed that another brief, that of Louis Marshall of New York, was in the mails and would be filed as soon as received.

The court's action today indicates that on Monday its decision will be handed down as to the request presented today. If that decision grants the permission asked, counsel for Frank will then ask for a writ of error. This point may take another week.

The time originally set for Frank's execution has long passed, and, while the Supreme Court of Georgia has sent down the remittitur, it is supposed that the resentencing will be postponed, pending decision by the Supreme Court of the United States upon the points before it, or that a date will be fixed sufficiently remote to allow the Federal tribunal full time in which to hand down its opinion.

In his brief Mr. Alexander based his plea on the ground that the prisoner was absent from the courtroom when the verdict was given against him; that there was a denial of due process of law because of the presence throughout the trial of hostile and threatening crowds, and that the presiding Judge, in overruling a motion for a new trial, declared he was not convinced of the guilt of the accused. Mr. Alexander referred to the decisions of Associate Justices Lamar and Holmes of the Supreme Court in denying a writ of error, commenting upon the fact that they found no compelling ground for Federal action. He added, however, that, while the Supreme Court of Georgia was within its rights in passing upon questions of local legal procedure, in passing upon these questions it had brushed aside the prisoner's rights under the Federal Constitution.

Proceedings Since the Verdict.

Mr. Alexander's brief follows:

STATEMENT.

When the verdict convicting Leo M. Frank of murder was rendered he was ordered by the petitioner, was received in court, both he and his counsel were absent, himself being incarcerated in jail. Their absence was due to a private statement made to counsel by the presiding Judge just before beginning his charge and without the knowledge of petitioner that he and counsel would probably be in danger of their lives should they remain in court and the verdict be for acquittal.

A motion for a new trial afterward made was overruled, and the judgment affirmed by the Supreme Court of Georgia. In this motion, the fact of his absence, while recited, was not made a ground.

Thereafter he filed a motion to set aside the verdict on the ground that the same was null and void, for the reason that his involuntary absence at its reception deprived him of due process of law as guaranteed by the Fifteenth Amendment to the Constitution of the United States; that his right to be present was not waivable by himself or his counsel in any manner whatever, and that the alleged waiver made by his counsel was of no effect because they had no authority to make it, and because it was involuntary, having been extorted from them by the extraordinary excitement and terror surrounding the trial and the statement of the Judge.

Another ground of the motion set forth the details of the continued and violent demonstrations of hostility against the accused as showing a denial of due process of law under the Fourteenth Amendment; and still another set forth is that the same Judge, in overruling a motion for a new trial, had declared that he was not convinced of the defendant's guilt.

This motion was dismissed on demurrer and that judgment affirmed by the Supreme Court of Georgia. A few days later it refused to grant a writ of error to this court.

The present petition has been presented successively to Mr. Justice Lamar and to Mr. Justice Holmes, who declined to grant the writ. Both gave counsel written statements of their reasons for so declining, and copies of these statements are presented herewith. These reasons were, in effect, that no controlling Federal question was presented and that this court had no jurisdiction because the decision of the State court was simply an interpretation of its own local procedure, which was a matter over which it had executive jurisdiction and which was binding and conclusive upon this court.

Federal Question Involved.

ARGUMENT.

Counsel filing this brief believes that a controlling Federal question is presented by this record and that this court has jurisdiction for the following reasons:

Permit us at this point to indicate respectfully exactly where the issue lies between counsel and the views of the Justices who have declined the writ. That can best be done by stating, first in what respects we agree with their conclusions, thus narrowing the field of difference.

First, then, we agree that the decision of the Supreme Court of Georgia was an adjudication of a point of State procedure, but, secondly, we submit that the refusal to grant the writ was error because of the failure, as we contend, to give full effect to this feature of the decision, to wit: That it shows on its face that the Supreme Court of Georgia felt that it could not, and shows that it would not, have come to the conclusion reached had it not first, as a necessary premise of such conclusion, overruled and denied the petitioner's claim of Federal right. In other words, while the head and front of the State court's decision was an adjudication of a point of local law, nevertheless that adjudication was predicated upon its views of federal law and would never have been at all had it not entertained those views regarding Federal law. It was only because the Supreme Court of Georgia interpreted the petitioner's claim of Federal right as it did that it was able to come to the conclusion that, under the local law, the petitioner, having acquiesced in the waiver made by his counsel, had surrendered his rights and was too late. The interpretation of Federal law was the very foundation on which it reared the superstructure of its interpretation of the procedure of the State. . . . In deciding the case, the Supreme Court of Georgia might have declared that, regardless of what might be the petitioner's Federal rights and regardless of whether the verdict rendered in his absence was in fact irregularity and regardless of whether the petitioner's right to be present was waivable or non-waivable, still, whatever these rights might have been, they had been asserted too late and not according to Georgia practice and therefore were lost. If it had done this, it is conceded that its decision would have involved only a matter of local procedure and would not have presented a Federal question.

Georgia Decision a Deduction.

But this is not what it did. What it did do was something entirely different, to wit: It declared a proposition of local law, not as an independent, self-sufficient principle of procedure, but expressly and distinctly so far as it was an underlying proposition of Federal law. To state the matter more explicitly, the Supreme Court of Georgia, being satisfied with the correctness of its previous ruling in the Cauthorn case, 139 Georgia 386, to the effect that a prisoner on trial for his life could waive his presence at the reception of the verdict, and having determined to adhere to it, simply gave expression to a postulate of that decision and held that such absence was in mere irregularity. In this conclusion, of course, was involved the proposition that the right to be present was waivable. This much being established, it was obvious, under the most elementary principles, that any error a person might have to object would be lost unless the objection were made at the first opportunity, to wit: The filing of a motion for a new trial.

In subhead note A of the third main head note (written, like all its head notes, by the court itself) the very use of a subhead note and of the word accordingly in introducing it shows that the proposition stated in that subhead note was stated as a corollary of or deduction from the proposition stated in the main head note. The main and subhead notes referred to read as follows, the italics being ours, to wit:

3. It is the right of a defendant on trial for crime in this State to be present at every stage of his trial and to be tried according to established procedure. But he may waive formal trial and verdict and plead guilty, and this includes the power to waive *mere incidents* of trial, such as his presence at the reception of the verdict.

(A) *Accordingly*, where, on the trial of one accused of murder, the counsel for the accused, at the suggestion of the trial Judge, waived the presence of the defendant at the reception of the verdict, without his knowledge or consent, and where the verdict was received and the jury polled by the court when the defendant was not present, but was confined in jail, and the defendant's counsel were also absent and where it appears that when the defendant was sentenced to suffer death he was present in court in person and by attorneys, and later, within the time allowed by law, made a motion for a new trial, which recited, among other things, his absence at the reception of the verdict, and that his presence had been waived by his counsel, and his motion for new trial was refused by the trial court and its judgment affirmed by the Supreme Court, *the defendant will be considered as having acquiesced in the waiver* made by his counsel of his presence at the reception of verdict, and he cannot at a subsequent date set up such absence as a ground to set aside the verdict in a motion made for that purpose.

Fundamental Right the Issue.

It thus appears that, while the conclusion reached by the Supreme Court of Georgia was a proposition of procedure, it was only an uncontested deduction necessarily drawn from another and far more radical and disputable proposition about which the real contest had been waged. The real issue—the dominating issue—was whether the right claimed by the petitioner was, as he contended, a great fundamental right indispensable to the preservation of human life and liberty and an integral element of due process of law, as guaranteed by the Constitution of the United States, which neither he nor his counsel could waive by any conduct on their part, or, on the other hand, as the State of Georgia contended, a "mere incident" of the trial whose violation was an "irregularity" only.

That issue having been joined and having been decided by the court in favor of the State's contention, the rest followed as a matter of course. If the right was a "mere incident," its violation of course was an irregularity only; and, of course, if it were an irregularity only, it might be waived, objection to any violation in order to be effective and listened to by the courts would have to be made at the very first opportunity. The first proposition being conceded, the rest followed easily and inevitably. There was no room left for further dispute.

The principal breastworks of the petitioner's defense having been successfully stormed by the State, the conquest of the remainder of the field was unresisted and perfunctory. In other words, the real battle in the case was waged around and about the underlying premises of the argument, which was a question of Federal law, and there never was and could not have been any contest at all about the conclusion reached, (a point of local procedure) once that question of Federal law was determined against the petitioner's contention.

To put the matter in another way, the decision of the Supreme Court of Georgia consists, in its ultimate analysis, of two syllogisms, which may be stated as follows:

The first: Major premise: That which is an irregularity only may be waived; minor premise: The failure to have the petitioner present at the reception of the verdict was an irregularity only; conclusion: Therefore it could be waived.

The second: Major premise: A violation of right that may be waived must be taken advantage of at the first opportunity or be lost; minor premise: The failure to have the petitioner present at the reception of the verdict was a violation of right that he could waive, (this premise is the conclusion of the first syllogism;) conclusion: Therefore, it was lost by failure to take advantage of it at the first opportunity.

Not a Mere Irregularity.

It is apparent that there would not be the slightest room for dispute about the correctness of any of the premises or conclusions stated in the foregoing syllogisms but for one, to wit: The minor premise of the first syllogism. As to the correctness of that minor premise there was the sharpest kind of dispute. That minor premise is a proposition of Federal law, and it overruled and denied a contention to the contrary made by the petitioner.

Now, it is evidently incorrect to say, because the conclusion of the second of the above syllogisms involves only a point of local procedure, that the Supreme Court of Georgia did not decide a controlling question of Federal law. It was obliged to do so to reach its conclusion. And that Federal law. Obviously it did decide a controlling question of Federal law. It was obliged to do so to reach its conclusion. And that Federal question was the crux of the case. If it had not decided that Federal question as it did it would not and it could not have reached the conclusion that the petitioner's rights had been lost by acquiescence in the waiver made by his counsel.

If one will but substitute for the minor premise of the first syllogism the proposition contented for by the petitioner, and then attempt to reach the same conclusion in the second syllogism, it will be quickly seen that that premise was the dominating and controlling factor in the reasoning of the court.

That the Supreme Court of Georgia was fully conscious of the necessity in order to sustain and justify its conclusion, of first establishing that the absence of the petitioner at the rendition of the verdict was a mere irregularity is made entirely evident by the manner in which, in the course of its opinion, it labors to do so. Indeed, practically the whole opinion is given up to it, except that part in which it states the proposition, which no one disputes, that an objection to a mere irregularity must be made at the first opportunity.

Eight Different Demonstrations.

A reading of the opinion shows the proposition that such absence of the petitioner was a mere irregularity in at least eight different ways, as follows:

First—In the third head note (written like all its head notes by the court itself) it declares in so many words that the presence of the petitioner at the reception of the verdict was a "mere incident" of the trial.—Opinion, Page 2, Line 9.

Second—It makes the very statement in haec verbis that such absence was an "irregularity," and by the phrase, "if there is one," seems to intimate a doubt in its mind if such absence amounted even to an irregularity—probably because it regarded the waiver made by counsel as binding.—Opinion, Page 28, Line 27.

Third—Mindful of the principle that the illegality of a verdict void for lack of jurisdiction is not waivable by the act of the parties, it expressly negatives the contention of the petitioner that his absence deprived the court of jurisdiction and rendered the verdict void and a nullity and condemns counsel for "trifling with the court" because they advised such a contention.—Opinion, Pages 9-14, Lines 5-9, on Page 9; Page 24, Line 23; Page 27, Line 16; Page 28, Lines 2-9.

Fourth—It states the proposition by implication by saying that the right of the petitioner to be present at the reception of the verdict was one that he could waive and which he had waived.—Opinion, Page 2, Lines 9, 26; Page 27, Line 13.

Fifth—It also states it by implication by adopting Justice Cobbs's personal obiter in the Cawthorne case, supra, declaring that it was a right counsel could effectually waive, and this despite the waiver having been extorted by the demonstrations of a mob.—Opinion, Page 24, Lines 32-36; Page 25, Lines 1-6.

Sixth—By adjudication that the petitioner had been accorded a full opportunity to defend himself, and this, although the unanimous voice of the courts of all English-speaking peoples has declared for centuries that in a capital case the presence of the accused at the reception of the verdict is an indispensable element of the right to be heard in his own defense.—Opinion, Page 1, lines 5 to 25, Page 9 to 14. See Pages 94 to 135, inclusive, of the brief filed with this as an exhibit, wherein all the authorities on this point are collated, same being one of the briefs filed in behalf of the petitioner when the case was pending in the Supreme Court of Georgia.

Seventh—By its statment treating the case of Lamptkin vs. State, 87 Georgia, 517, as analogous to the instant case. The pertinent portion of that case reads as follows:

When facts, and a witness by whom they can be proved, to manifest the incompetency of a juror, come to the knowledge of counsel for the accused, after the jury are sworn but before any further steps in the trial has been taken, the question of the juror's competency should then be raised and submitted to the court. It is not sound practice for counsel to remain silent, take the chances of acquittal for his client, and then, after conviction, urge the juror's incompetency as a ground for setting the verdict aside.

Opinion, Page 25, lines 6-14.

Eighth—By the second headnote and its subhead note (A) by which the court applies to the facts of this case the principle that an irregularity in procedure must be taken advantage of at the first opportunity, or else be held to have been waived and lost.

In Chlemmer v. Buffalo, Rochester &c. Co., 25 U. S. 1, Mr. Justice Holmes said:

And if it is evident that a ruling purporting to deal only with local law has for its premise or necessary concomitant a cognizable mistake, that may be sufficient to warrant a review.

We submit that this statement covers this case and demonstrates that this court has jurisdiction. While the conclusion reached by the State court undoubtedly lay within the field of State law, it is equally clear that in reaching it it was compelled to pass and did, in fact, pass through the domain of Federal law.

Respectfully submitted,
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