

Appeal Made by Leo Frank For New Trial Turned Down By Georgia Supreme Court

With All Justices Concurring, Highest Court Tribunal Hands Down Opinion Denying Motion Based on Newly Discovered Grounds

Leo M. Frank, convicted of the murder of Mary Phagan, yesterday lost another point in his fight for liberty when the supreme court handed down an opinion denying his motion for a new trial on the ground of newly-discovered evidence.

Frank's last stand in the courts will be based on the motion to set aside the verdict on constitutional grounds. This motion was carried to the supreme court several months ago at the same time the extraordinary motion was made. It will be argued before the supreme justices October 26.

This is the second time the supreme court has refused to interfere in the Frank case. The first motion carried before that tribunal was that for a new trial founded on the plea that Frank's trial had been misconducted and was influenced by mob element.

Last Stand in Court.

The motion before the supreme court, based on constitutional grounds, was presented by John L. Tye, of the law firm of Tye, Peeples & Jordan. It was carried before Judge Ben Hill, of the criminal division of superior court, for a hearing. Solicitor Dorsey, instead of fighting the motion directly, filed a demurrer in rebuttal.

Judge Hill upheld the demurrer, per-

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APPEAL MADE BY LEO FRANK DENIED

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mitting the motion to go up to the supreme court by this route. Solicitor Dorsey's demurrer was based on the ground that the motion had not been filed at the proper time in accordance with time-honored practice. It was on this ground that Judge Hill acted.

Therefore, if the supreme court—upon coming to a decision on the constitutional motion—upholds the defense and grants a new hearing, the case will be sent back to Judge Hill for a second trial. Then the solicitor general would have to combat the motion directly.

In event the supreme court grants a new hearing it may go back to the supreme court again. For should Judge Hill deny it, Frank's defense will be permitted to send the motion right back to the same tribunal.

Motion Is Overruled.

In ruling on the extraordinary motion, the supreme court has this to say:

"An extraordinary motion for a new trial on the ground of newly-discovered evidence is addressed to the sound discretion of the trial judge and a refusal to grant it will not be reversed unless such discretion is abused. On the hearing of such a motion the court may hear affidavits making a counter showing on behalf of the state, so as to go to the bottom of the showing and show, if possible, how much of real substance and merit there is in the alleged new evidence."

The John L. Tye motion is based entirely on the constitutional ground that Frank's personal rights were taken from him when he was not present when the verdict was received against him. It is the one phase of the case on which his counsel expects to carry their battle to the supreme court of the United States if necessary.

Ruling of Court.

That ruling of the supreme court Wednesday, in full, follows:

"32 Criminal, March T., 1914.—Frank v. State.

"1. After a person accused of crime has been convicted and a new trial has been denied him, and the judgment has been affirmed by this court, an extraordinary motion for a new trial on the ground of newly-discovered evidence is addressed to the sound discretion of the trial judge (there being certain general rules as to evidence of particular kinds, and as diligence, etc.), and a refusal to grant a new trial on such a motion, will not be reversed unless such discretion is abused.

"In view of the nature of the alleged newly-discovered evidence on the basis of which an extraordinary motion for a new trial was made in the present case, and of the strong counter-showing made by the state in regard to it, there was no abuse of discretion on the part of the trial judge in refusing to grant a new trial; nor was there error in overruling the motion on any of the grounds set out therein.

"Leo M. Frank was indicted for the murder of Mary Phagan, and was found guilty. He moved for a new trial on numerous grounds. Among them was the ground that the verdict was contrary to law and the evidence, as well as attacks on various rulings of the trial court. This motion was heard by the judge before whom the trial took place. It invoked a decision from him both as to whether he had committed any error of law which required a new trial, and also, whether, in the exercise of a sound discretion under the facts of the case, he should grant a new trial.

New Evidence Offered.

"He overruled the motion for a new trial. The case was brought to the supreme court by a bill of exceptions, where the judgment was affirmed, 141 Ga. 243. A rehearing in the supreme court was asked and denied. After this the defendant made what is termed an extraordinary motion for a new trial under a civil code (1910), sections 6089, 6092, based on the ground of newly-discovered evidence. The first cited of these two sections discloses that, 'all applications for a new trial, except in extraordinary cases, must be made during the term at which the trial was held,' etc. The latter of the two sections provides, among other things, that, 'whenever a motion for a new trial shall have been made at the term of trial in any criminal case in this state, and overruled, or when a motion for a new trial has not been made at such term, in either event no motion shall ever be made or received, unless the same be an extraordinary motion or case, such as is provided for in section 6089 of this code.'

"On the hearing of the application a number of affidavits were introduced for the purpose of sustaining the motion. On behalf of the state a vigorous counter-showing was made. This extraordinary motion was heard before a different trial judge than the one who had previously overruled the first motion for a new trial. After hearing evidence on behalf of the movant and the state, the judge overruled the extraordinary motion. The case has again been brought to this court by a bill of exceptions assigning error on that judgment.

Brown Case Cited.

"The statutory expression, 'an extraordinary motion or case,' the nature of such a motion, and the discretionary power of the trial judge who passed upon it, have been so recently considered in *Brown v. State*, 141 Ga., 783, that it is not necessary to enter into a discussion of them here. Omitting numbering, the first two headnotes of that case read as follows: 'After one accused of crime has been convicted, and has made a motion for a new trial, and the judgment denying it has been affirmed by this court, when an extraordinary motion for a new trial is made, based on the ground of newly-discovered evidence, it should be made to appear that such evidence is so material that it would probably produce a different verdict. An extraordinary motion for a new trial on the ground of newly-discovered evidence is addressed to the sound discretion of the trial judge, and a refusal to grant it will not be reversed unless such discretion is abused. On the hearing of such a motion, the court may hear affidavits making a counter-showing on behalf of the state, so as to go to the bottom of the showing and discover, if possible, how much of real substance and merit there is in the alleged new evidence.'

"We deem it unnecessary to take up each of the grounds of the motion and discuss them separately; in the light of the evidence offered in support of the motion, it cannot be held that the discretion of the presiding judge, in refusing to grant the extraordinary motion, was abused, or that a case is made requiring a reversal.

"In addition to the case above cited, see in this connection Civil Code (1910) sections 6085, 6086; *Mitchechell v. White*, 74 Ga. 327 (5); *Clark v. State*, 117 Ga. 254 (8); *Jenks v. State*, 117 Ga. 714; *Duggan v. State*, 124 Ga. 438 (1); *Burge v. State*, 133 Ga. 431; *Norman v. Goode*, 121 Ga. 449. Judgment affirmed. All the justices concur."