

SPLIT COURT DENIES NEW TRIAL TO FRANK

Voting Four to Two, Georgia
Judges Uphold His Conviction
of Murder of Factory Girl.

NEGRO'S STORY CHIEF ISSUE

Minority Holds Tales of Alleged Degeneracy Were Inadmissible—Talk
of Appeal to Federal Courts.

Special to The New York Times.

ATLANTA, Feb. 17.—"I am an innocent man and I do not think I will be hanged for a crime that I never committed," said Leo M. Frank to-day when told that the Georgia Supreme Court, by a vote of 4 to 2, had sustained the verdict of the lower court, which sentenced him to death for the murder of 14-year-old Mary Phagan, who was killed in the pencil factory of which Frank was Superintendent.

"I believe some way will be found," Frank continued, "to prove my innocence and to upset the verdict. I have not lost hope."

Rabbi David L. Marx, accompanied by Mrs. Leo Frank, her father, Emil Selig, and J. M. Goldstein, attorney for the condemned man, went to the jail about noon to inform the prisoner of the court's decision. Frank heard the news with calmness, and comforted his wife, who was greatly distressed. Rabbi Marx also showed deep emotion.

"Frank received the news as calmly as if it were an every day event," said Mr. Goldstein. "He is perfectly composed and confident that he will be ultimately cleared of all suspicion of guilt. I do not understand how an absolutely innocent man can be ultimately convicted of any crime, much less the terrible crime that has been charged against Frank."

Unless an extraordinary motion for a new trial or some other move in behalf of Frank intervenes he will be sentenced within ten days or two weeks. The Supreme Court was regarded as virtually the last resort of Frank's lawyers.

Frank's attorneys refuse to comment on the decision. There is talk of an appeal to the Federal Supreme Court, but lawyers here doubt if that court would consider the case, as there is no Federal question involved.

Judges Atkinson, Evans, Lumkin, and Hill voted to affirm the decision of the lower court, while Chief Justice Fish and Judge Beck dissented.

As to Judge Roan's Opinion.

Concerning the expression of doubt of Frank's guilt, made by Judge Roan in denying a new trial, the majority of the court held that this was not a warrant for a new trial. The majority's comment was as follows:

"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 whether under the evidence the defendant should be granted a new trial. He refused to do so. 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."

The majority held that Frank had had a fair and impartial trial, and that as to the alleged anti-Frank demonstrations they did not prejudice the interests of the defendant or warrant a reversal of the verdict.

The majority also held that evidence of Frank's alleged degeneracy was admissible as thrown in light on Frank's remarks in connection with the crime of murder and his conduct at the time the Phagan girl was slain. On this point the opinion said:

"An employe 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 office of the accused; that he heard her scream; that subsequently the accused called on him to assist him in removing the body of the deceased. 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.

The opinion went on to comment on the alleged remark of Frank to Conley, "You know I ain't built like other men," and added:

"Held that it was relevant to explain the expression above quoted to showing previous transactions of the accused, known to him and to witness."

As to Juror's Bias.

In regard to the alleged bias of A. H. Hensley, a juror, the prevailing opinion said:

"The juror denied under oath having made any statement that he was 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 trier as to the issue made, and his judgment will not be disturbed unless it appears that there has been a clear and convincing showing of bias on the part of the juror on the conflicting evidence. There was no abuse of discretion in this case."

In conclusion the majority said: "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 bounds. 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 decision of the court in refusing a new trial will not be disturbed."

Sharp Issue on "Degeneracy" Tale.

Judges Fish and Beck, in their dissenting opinion, confined themselves for the most part to the "degeneracy" evidence of Conley and the statement of Judge Roan. They said:

"In the case at bar the other Justices say in the prevailing opinion that the evidence of Conley as to the tale of lasciviousness on the part of defendant with other women was properly admitted in evidence because they tended to show a common scheme or plan of related offenses. We take issue with them on this proposition."

The opinion continued: "It is perfectly clear to us that evidence of prior acts of lasciviousness, committed by the defendant with other women at and near the place where the deceased was assaulted and killed, considered in connection with the circumstances, set forth in the opinion of the majority of the court, did not tend to prove a pre-existing design, system, plan, or scheme directed forward to the making of an assault upon the deceased or killing her to prevent its disclosure. They did not show nor tend to establish, in our opinion, any prior design or system on the part of the defendant, which included the doing of the act charged in

the indictment against him as a part of its consummation. "They were wholly independent acts, having, as we think, absolutely no connection with the offense charged in the indictment, and the admission of the evidence in relation to them was certainly calculated to prejudice the defendant in the minds of the jurors and thereby deprive him of a fair trial."

"For reasons which we have assigned in showing that the evidence of Conley, with which we have specifically dealt, was inadmissible, we think that other evidence in the record, which was objected to, tending to show independent acts of lasciviousness on the part of Frank or improper conduct with other parties at other times, was inadmissible. And all that we have said in demonstrating the inadmissibility of the testimony of the witness, Conley, as to different and independent acts of lasciviousness, is equally applicable to the testimony of the witness, C. B. Dalton, set out in the twenty-first and twenty-second grounds of the motion for a new trial."

The dissenting opinion set forth that a motion was made by counsel for the defense to strike out the parts of Conley's evidence, telling of Frank's alleged immoral acts with other women, and that this motion was overruled.

Evidence of another crime on the part of the defendant is other defendant, is incompetent," urged the minority opinion. "The defendant can come into court prepared only to meet the charges made against him in the indictment," was given as a further reason why extraneous testimony, such as parts of Conley's story, should be excluded.

Another reason given was that "jurors are, by virtue of their lack of technical training, prone to attach undue importance to trifling matters."

The opinion continued: "Certain other grounds assigned error upon rulings, admitting testimony over objections. Some of these grounds were not urged in the brief of counsel for plaintiff in error, others show the admission of evidence, clearly irrelevant, but independent of the evidence, which we have endeavored in the foregoing opinion to prove inadmissible, and of sufficient materiality to amount to cause for granting a new trial."

Solicitor Says He's Guilty.

Solicitor Hugh M. Dorsey, when informed that the Supreme Court had affirmed the judgment of the lower court, said:

"I am not surprised. I fully expected it. I have never heretofore authorized any newspaper statement as to my opinion concerning Frank's guilt, but I am willing now to be quoted as saying that there is not the shadow of a doubt in my mind but that the outcome is just and righteous. Frank murdered little Mary to shield himself."

Jim Conley, whose story was the greatest factor in the conviction of Frank, occupies a cell on the floor just below that on which Frank is confined. He is to be tried next week as an accessory after the fact.

STORY OF REMARKABLE CASE.

Judge's Amazing Statement in Denying Frank a New Trial.

Leo M. Frank was pronounced guilty by a jury at Atlanta, on Aug. 15, of having murdered 14-year-old Mary Phagan. He was sentenced to death the next day. A motion for a new trial was denied on Oct. 31, but the case was carried to the Supreme Court of the State.

Frank's case has aroused more interest throughout Georgia and the country generally than any other that has come before the courts of that State in many years. The prominence of the accused, the allegations made that in his conviction race prejudice played a part, the statement of Judge L. S. Roan, who presided at the trial, in denying the first motion for a new trial, the character of the witness upon whose evidence Frank was convicted, and the later discovery of new evidence not presented at the trial, all conspired to raise doubts in the minds of many, who considered the case as they read reports of it.

Judge Roan made this remarkable statement:

"I have given this question long consideration. It has given me more concern than any other I was ever in, and I want to say here that, although I heard the evidence and the arguments during these thirty days, I do not know this morning whether Leo Frank is innocent or guilty. But I was not the one to be convinced. The jury was convinced, and I must approve the verdict and overrule the motion for a new trial."

The Girl's Disappearance.

Mary Phagan was the daughter of Mrs. J. W. Coleman, who lived on Lindsey Street, twenty to twenty-five minutes from the pencil factory on Forsyth Street, Atlanta, where the girl was employed. There she operated a machine for putting metal tips on the ends of lead pencils.

The material used in her machine having given out, Mary had not gone to work for several days during the latter part of the week ending April 26. On Friday, April 25, she did not appear to get the wages due her. The next day was a holiday, and in the afternoon there was to be a parade of Confederate veterans. On her way to see the procession the girl called at the factory to get the money due her, which was only \$1.20.

At 2 o'clock on Sunday morning Newt Lee, the negro watchman of the building, telephoned to the police that he had found the body of a white woman in the basement. This was later identified as that of Mary Phagan.

The watchman told the police that he had recognized the body as that of a white woman, though the police were unable to determine this point until they examined the flesh under the stockings, the face and hands were covered with cinders and grime, some of which had been drawn into the nostrils and throat, as if breathed in during a death struggle. A piece of jute rope, three-eighths of an inch in diameter, was fastened about the neck with a slip-knot, and drawn so tightly that it had sunk into the flesh. It was established that death was due to strangulation.

Over the face was tied a piece of cloth, the negro watchman had been torn from the girl's petticoat. One eye was blackened and swollen, as though it had been struck by a clenched hand before death. Above both eyes was a slight abrasion. On the left side of the head was a wound over two inches long, open to the skull, and on the left leg, just below the knee, was another wound. The physicians found evidence that she had been assaulted.

Fifty feet away, near a pile of cinders, were found the girl's hat and one shoe. The back door of the basement, leading to an alley, had been pried open and a staple was missing.

Two Notes Near the Body.

Two notes, written in lead pencil, were found near the body. One was written on a discarded sheet of yellow order blank. It was in an ill-formed hand and partly illegible. As read by the police, it ran:

"Mam, that negro fire down here did this. * * * He push me down that hole * * * a long tall negro black that who is was long sleam negro, i write white— (here follow unprintable words.)"

Translated from negro English, this read: "Mammy, (mama,) that negro fireman down there did this when * * * and he pushed me down that hole (a trap door). A long, tall black negro—that is who it was—a long, slim, tall negro. I write white * * *"

The second note, which was on a sheet from a scratch pad, was in the nature of a supplement to the first. It said, in effect, that the accused would pretend that the night watchman had committed the crime but that the "long, tall black negro did it by himself."

Here was a mystery, and the local newspapers took it up for all it was worth. They reviewed the fact that many crimes had gone unpunished in the community, and the question was asked if the perpetrator of this outrage was to go unpunished. "Who killed Mary Phagan?" was asked in seven-column headlines, and vengeance was demanded. The police were told it was "up to them," and they went to work at once.

Lee, the negro watchman, who had reported the finding of the body, was promptly arrested, as was the "long, tall, black negro," specified in the note,

otherwise the elevator boy; Gault, a white man, who had been seen talking to Lee at the door of the pencil factory at 8 o'clock Saturday evening, and several other persons.

The Arrest of Frank.

Finally the police arrested Leo M. Frank, Superintendent of the factory. The main evidence against him at the time was that when he was told of the murder he was nervous, and became what the police thought unduly agitated. Besides, he was the last person who had seen the girl alive who admitted it.

Frank was a native of Quero, Texas, and was 29 years old. The year he was born his parents moved to Brooklyn, and there he attended the public schools. After preparing at Pratt Institute he entered Cornell University, and was graduated there in the class of 1906. After a few months of employment as draughtsman with the B. F. Sturtevant Company of Hyde Park, Mass., he became an engineer and draughtsman with the National Meter Company of Brooklyn.

In 1907, having made a contract with several citizens of Atlanta, who contemplated the establishment of a pencil factory, he went to Europe and spent nine months over there learning the business. After starting the factory in 1908 he married Miss Lucy Selig of Atlanta. At the time of his arrest he was reputed to be exceptionally happy in his family life and an exemplary citizen. He was the President of the local B'nai B'rith and much respected.

One by one, the rest of those arrested in connection with the case seemed to have established his innocence, until only Frank was left. The Solicitor General, Hugh M. Dorsey, finally came to the conclusion that he had enough circumstantial evidence to convict Frank, and with it he went before the Grand Jury on May 23 and obtained an indictment.

Public Sentiment Stirred Up.

Rumors had spread as to the mutilation of Mary Phagan's body, and the crime was attributed to a degenerate. The newspapers had joined the State in offering large amounts for the apprehension and conviction of the murderer and as each clue was found it was described and its significance portrayed.

A machinist at the pencil factory found in the metal room where Mary Phagan had worked several strands of hair, which, it was alleged, were positively identified as belonging to the dead girl. The same man also discovered what were at first said to be blood stains on the floor of the meat room near the women's dressing room, but which, when analyzed, turned out to be something else.

Feeling ran high in Atlanta, so much so that the Mayor issued a statement, remonstrating with the newspapers.

"I want to appeal to the people of Atlanta, not to be misled by sensational reports," he urged.

Gov. Joseph M. Brown also took the matter up and rebuked the newspapers, saying that they must not conduct trials.

A theory of the crime, evolved by a detective who had been working on the case, was largely adopted as the true one. This detective figured that the girl rejected an improper proposal and her insulter struck her. The force of this blow, it was argued, broke the girl's neck on the handle of the lathe in the metal room and an attempt was made to revive her in a near-by lavatory. This failing, her assailant realizing that he would be charged with a heinous crime if the girl recovered, tied the cord about her neck to choke her if she were not dead, and carried the body down through the trapdoor into the basement, intending to cremate it in the furnace. There, reasoning that smoke from the chimney of the factory on a holiday would attract attention, he wrote the notes, in order to divert suspicion, and pulled the staple out of the back door so as to make it appear that the body had been carried in from the outside.

Convicted on Negro's Evidence.

Frank's trial began on July 28. The intense popular interest in the case was shown by the massing of 2,000 to 3,000 people about the courtroom.

Nearly 300 witnesses were called. Frank's character was attacked, and a strong effort was made to show that he was depraved. At the same time numerous witnesses, whose own characters could not be impeached, testified that he was a man of unusually high character, and devoted to his wife. The trial lasted for a month.

It was not until five days after the body of Mary Phagan was found that the police took into custody James Conley, a negro watchman in the pencil factory. His arrest was brought about by the fact that the day watchman of the factory discovered the man in the act of washing his shirt. Conley at first denied that he could read and write, but later he admitted he could do both.

It was largely upon his testimony that Frank was convicted. After telling many tales, Conley finally made a confession in which he said he was at Frank's dictation the two notes found near the dead girl. A few days later the negro made a second confession, and the next day, which was May 29, he made still another. This was sprung as a surprise in the courtroom.

He told of meeting Frank on Friday, April 25, and being asked by him to come to the factory early the next morning. He said he had been in the habit of "watching" for the Superintendent on Saturdays, when a caller was in the office on the second floor. He would sit downstairs, he said, with his eyes on the outer door, and at a stamp on the floor above he would lock the door, unlocking it, after an interval, at a whistle from above.

He told of considerable length of the events of Saturday morning, and finally of the arrival of Mary Phagan. "The negro said he heard steps overhead, making in the direction of the office, and a little later the steps of two persons walking in the direction of the metal room. A little later there was a scream. Another caller, a woman, came in and went upstairs, but came down soon afterward. Then he heard somebody running from the metal room to the office on tiptoe, and then steps in the direction of the metal room. Then he went to sleep."

His Story of Frank's Admissions.

He was aroused, he said, by a stamping on the floor overhead. He locked the door. Later came a whistle, and he unlocked it. He went upstairs and found Frank standing at the head of the steps, trembling and rubbing his hands. One hand held a piece of rope.

The negro said Frank told him he went into the metal room to see if the Phagan girl's work had come, made a request, was refused, struck her, and her head fell against something; he didn't know how badly she was hurt.

After certain stories, purporting to be tales of other amours of Frank, the negro said the Superintendent asked him to bring the body of the girl out of the metal room and put it away, adding that there would be money in it for him. The negro said he found the body on the floor, as he had heard about the neck. The cloth was also tied around the neck as if to catch the blood.

At Frank's direction, the negro said, the two of them conveyed the body to the elevator, which would not work. Frank ran and got a key to the switchboard from his office. Once in the basement, they dropped the body in front of the boiler.

Then they went up to the office, where Frank dictated the notes for the negro to write, and gave him \$200, following it with a suggestion that the negro go down and burn the body. However, Conley refused to go back to the basement alone, and Frank took back the money.

After telling the negro to keep his mouth shut, Frank leaned back in his chair, according to Conley, and said:

"Why should I hang? I have wealthy people in Brooklyn."

"What about me?" the negro said he himself asked.

Frank told him not to worry, and that if the police arrested him he would get him out on bail and send him away. He gave the negro a box of cigarettes and told him to come back in the evening and dispose of the body. The negro agreed to do so upon Frank's promise to "fix it" about the money. The negro said he spent some of the money he found in the cigarette box and went home and fell asleep. He did not see Frank again until the following Tues-

day, when the Superintendent enjoined him to keep his mouth shut, and said that if he had come back on Saturday night, as he promised, there would have been no trouble.

Negro Admitted Jail Terms.

Conley admitted under cross-examination that he usually drew his wages through another negro because he generally owed money to other men and could in this way keep out of paying them. He also admitted that he had been in jail seven or eight times within the last three years.

In the testimony brought out at the trial, the time element formed an important feature. According to the Solicitor General's chart, Mary Phagan entered Frank's office at 12:12, and left it at 12:14. Between 12:20 and 12:22, one of the men employees was in the office. At 12:30 another caller saw Frank in his office, and at 12:40 he was on the fourth floor of the building with two employes. At 1 o'clock Frank left the factory, locking the door. Ten minutes later he was seen at a point three blocks away, and at 1:20 he was seen to get off a car and enter his home. He went back to his office at 3 o'clock, according to the chart, and remained there until 6, most of the time working on his financial sheet.

Conley swore on the stand that Mary Phagan was killed before Miss Montine Stover entered the factory, and Miss Stover swore that when she went in she looked at the factory clock, and it was 12:05. The conductor and brakeman of the trolley car in which Mary Phagan rode swore that she left the car at 12:07, at a point three and a half minutes' walk from the factory. Conley swore that the body was taken down to the basement in the rickety freight elevator. Two men at work on the top floor of the building did not see the wheels or cables moving, or hear them. At the bottom of the elevator shaft were found an uncrushed ball of twine and a parasol, belonging to Mary Phagan, which, the defense asserted, were proof that the elevator had not moved that day, or these would have been crushed by its striking the bottom of the shaft.

New Evidence Uncovered.

After Frank had been sentenced, other evidence was found. Beneath the ladder which led from the trap door to the basement floor, was found a piece of log, about two feet long and eighteen or twenty inches in diameter. At one corner was an extremely sharp angle.

Then it was noticed by those who made an investigation, that a pile of cinders, taken from the firebox of the boiler, did not appear in the State's diagram of the scene of the murder, though it extended a distance of sixty to seventy-five feet along a wooden partition, and was about four feet high in places. An accumulation of dust on top showed that the cinders had been there a long time. It was cinders like these that discolored the face and filled the mouth and nostrils of Mary Phagan.

On Dec. 3, there was fished out of this cinder pile a piece of rope about four feet long, of the kind that was used to tie about the throat of the murdered girl.

With these things and other circumstances, the defense thought it could construct a theory of the crime, that that would differ materially from what was presented by the prosecutor, and that would prove Frank innocent.

Stories of Prejudice.

In their appeal for a new trial, Frank's counsel cited as evidence in favor of granting it that in the first trial great crowds gathered outside the courtroom and through these the jurors had to pass on their way to and from court four times a day. Hawkers circulated through the crowds selling placards containing verses referring to Frank's race and stirring up the passions of the crowd. There was applause for the utterances of the prosecuting officer in the court room.

Prior to the trial, counsel said, the town was alive with rumors of Frank's alleged degeneracy. It was said that he had used his position to insult girls in the pencil factory, and several girls came forward to assert that Frank had made advances to them. Prominent Atlantans admitted that they were inclined to convict him because of their belief in these stories, and the effect of the stories on the crowds of mill workers was immense.

The militia was held in readiness on several days of the trial to prevent violence. The editors of the three leading papers in Atlanta sent word to Judge Roan near the close of the trial not to let the case go to the jury on a Saturday, because they feared bloodshed if a verdict should be rendered when the millworkers, enjoying a half holiday, were in the downtown streets.