22590

State of Minnesota

In Supreme Court.

State of Minnesota,

Respondent,

vs.

Max Mason,

Appellant.

APPELLANT'S BRIEF

F. L. BARNETT
Chicago, Ill,
R. C. McCULLOUGH,
Duluth, Minn.
Attorneys for Appellant.

State of Minnesota

In Supreme Court.

State of Minnesota,

Respondent,

vs.

Max Mason,

Appellant.

APPELLANT'S BRIEF

THE CASE STATED.

The 16th of June, 1920, was an eventful day in the peaceable, law-abiding city of Duluth, Minn., for on that day the rule of reason failed, giving way to anarchy and bloodshed. Wild rumors of an unspeakable outrage upon a young white

woman, alleged to have been committed by black fiends in human shape, the consequent whisperings of vindictive retribution, aroused and intensified by race hatred, finally found expression in open appeal to lawlessness. Suddenly the city was in the throes of mob frenzy, which overriding all bounds of law, spent itself upon three human beings in an orgy of awful brutality. Only their mutilated bodies dangling in the air at the rope's end, appeared to appease the lynching mob.

Then came the calm after the storm and the spirit of law and order, which for a few tragic hours had been at the mercy of the mob asserted itself. Still later justice exacted its toll for the terrible turmoil and by just judgments, the commonwealth vindicated its belief in the supremacy of the law.

Also came the inquiry into the charges of brutality, which incited the mob to action, and as a result of that inquiry, at the November term, Monday, November 22, A. D. 1920, before Hon. L. S. Nelson, Judge of the St. Louis District Court, and a jury of his peers. Max Mason, defendant in the above entitled case, was placed upon trial upon an indictment, charging that on the night of the 4th [sic] of June A. D. 1920, he, with six other co-defendants committed the crime of rape upon Irene Tusken, in the city of Duluth. Originally twenty men had been held by the police authorities, to answer for that crime. Of that number, three men, Elmer Jackson, Isaac Magie [sic] and Elias Clayton were

hanged by the mob (Exhibit C, Rec. 228). Seven of those first arrested were discharged at eleven o'clock the day of the lynching, (Rec. 214) so that finally when quiet was in a measure restored, thirteen alleged rapists remained in the Duluth jail.

> The Grand Jury inquiry resulted in the failure of the authorities to connect seven of the imprisoned men with any offense and they were discharged. Seven men were indicted and all remained in jail until the conclusion of the trial of William Miller, who was found not guilty, after which the indictments against the four other men were nolle possed. For the many vital errors manifest upon the record, the defendant, Max Mason, prays a reversal of the judgment by which he is imprisoned in the a penitentiary for a term of seven to thirty years.

ASSIGNMENT OF ERRORS.

1. The Court erred in overruling the motion to quash the indictment.

2. The verdict is contrary to the law and the evidence.

3. The evidence is not sufficient to sustain the judgment.

ARGUMENT.

DEFENDANT COMPELLED TO TESTIFY AGAINST HIMSELF.

The error first assigned should be conclusive of defendant's right to a reversal of the judgment, the Supreme Court of this state having declared the law, State v. Froiseth, 16 Minn., citing many courts as unquestioned authority upon the doctrine stated.

There is no enter safeguard to liberty than that enactment in the Constitution of the United States re-enacted in the Constitution of every individual state, except Iowa and New Jersey, which protect the citizen from being compelled to testify against himself. That protection was guaranteed to defendant in the Constitution of Minnesota, which in Article I, Section 7, Minnesota State Statutes, reads as follows:

> "No person * * * shall be compelled in any criminal case to be a witness against himself."
> Constitution of Minn., Act I. Sec. 7.

So plain is the text of this, prohibition against forced confession that it should require no argument to show that the defendant, Max Mason was denied his constitutional rights when, being imprisoned on a charge of rape and incarcerated under a mittimus charging rape taken to an anteroom of the Grand Jury, then without knowing his

destination and against his will, he was taken by the Sheriff into the presence of the Grand Jury, then and there considering the charge of rape pending against him (Rec. 443) . There without advice of counsel, with no warning by the County Attorney or any other officer, with no waiver of his rights, executed by him, he was compelled to answer the questions of the County Attorney and the different jurors, of and concerning the crime charged against him; to tell where he was at the time of the alleged rape, what work he was engaged in doing at that hour, what part he took in the alleged rape, and who were the guilty parties in the offense charged. This was the treatment which Mason suffered before the indictment was returned and as in direct conflict, with the provision of the statute above quoted and if it means what it says, and what the Supreme Court construing it declares it to mean, then the indictment which was returned by the Grand Jury, upon which defendant was tried should have been quashed. The denial of the motion to quash was fatal error.

THE GUARANTY UNIVERSAL.

The. Constitutional guaranty of the United States against self incrimination is repeated in the Constitution of nearly all the States of the Union. That protection is not only universal but it aims to be complete. Wigmore in Vol. three, page 3105, speaking of its scope, says:

> "The protection under all clauses, extends to all manner of proceedings in which testimony is taken, whether litigious or not, and whether ex parte or otherwise, it therefore applies in all kinds of courts in the methods of interrogation before the Court, in investigations by the Grand Jury, and investigations by a legislature or a body having legislative functions."

This concise and unequivocal statement of the law expressed in Wigmore on Evidence, Volume 3, page 3105, #2254, cites the following authorities:

State v. Froiseth, 16 Minn. 296;

People v. Kelly, 24 N. Y., page 74;

Wilson v. State, 41 Tex. Crim. 115, 13-22, 119;

Counselman v. Hitchcock, 142 U. S. 547.

Not only does this constitutional guaranty extend to statements sought to be obtained from the witnesses in reference to the offense charged, it operates to protect the witness from testifying to any facts "tending to incrimination." This is the law stated by Wigmore, in 'his third volume on Evidence, page, 3117, Section 2260, which reads, as follows:

> FACTS "TENDING TO CRIMINATE." Most criminal acts are made up of two or more subordinate facts, each an essential part of the completed crime. For. example; embezzlement assumes (1) a position of trust, or employment. (2) The receipt of valuables by the incumbent, (3) their improper disposal. So also arson at common law involves (1) the

> existence of a structure, (2) its use as a dwelling, (3) the setting fire by the accused, (4) a destruction of some part of the structure. Again, forgery by utterance involves, (1) possession by the accused, (2) a certain kind of document, (3) false in its nature, and (4) it's transfer to another person. In all these instances, no one of the component facts constitutes of itself the crime, and yet every one of them must be established in order to establish the crime. It is therefore obvious that unless the privilege is to remain an empty formula easily evaded, it's protection must extend to each one of these facts taken separate as well as to the general whole. It would be immaterial whether the evasion consisted in obtaining from the witness himself all these component facts by separate inquiry, or in obtaining one such fact by inquiry of himself and the remainder by other proof; the difference would be merely in the quantity of evasion; for it would be the witness' own disclosure which still would be essential to complete the proof, and his own disclosure would thus essentially involve a crimination fact.
>
> Such and no more is the orthodox traditional doctrine that the privilege covers facts which even "tend to criminate."

Illustrative of the law, thus stated, reference is made by the author, to the trial of Aaron Burr,1807, during which trial the prosecutor placed before the witness who had been secretary to Burr, a decipher letter and asked him, "Do you understand the contents of that paper?" Counsel for 'Burr objected and the witness refused to answer, claim

ing the constitutional privilege upon the ground that while the question itself might be innocent, it tended toward self-incrimination.

A recital of that fact is to be found in the Section of page 2260 Wigmore and reads as follows:

> "Marshall, C. J., sanctioning the witness' refusal says: "According to their (the prosecution's) statement, a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual the Court can never

> know. It would seem, then, that the Court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laves."

The record, in the case at bar, shows that Mason and in fact all of the indicted co-defendants were taken from the jail to the court house in which a Grand Jury was in session to an anteroom of the Grand Jury room. Then without any warning as to his rights, without advice of counsel and without being told to what place he was being taken or for what purpose, Mason in custody of the jailer, was taken before the Grand Jury and compelled to testify. After Mason had testified of and concerning the rape which had been charged against him and to answer which charge he was then imprisoned, he was indicted by the Grand Jury. Thereafter upon affidavit stating the facts of his forced self-incrimination before the Grand Jury, a motion was made to quash the indictment. The motion was overruled and defendant was placed upon trial upon the indictment which the court refused to quash.

The action of the court in refusing to quash the indictment was fatal error. Upon this point, several decisions are conclusive.

In Minnesota v. Froiseth, 16 Minn. 296, already referred to, Judge McMillan, speaking for the Court, declared the law in this jurisdiction in language following:

> "The first question presented is whether the fact, that the defendant was required by the Grand Jury to testify, and in pursuance of such requisition did testify before that body touching the charge and matters set forth in the indictment, vitiates the indictment.
>
> It is conceded by the attorney general that this objection is fatal to the indictment.
>
> We think there can be no doubt upon the question. The Bill of Rights expressly declares, that 'no person * * * shall be compelled in any criminal case to be a witness against himself.' Const., Art. 1 Sec. 7. The statute of this state which provides that 'on the trial of all indictments, complaints and other, proceedings against persons charged with the commission of crime or offenses, the person so charged shall, at his request, but not otherwise, be deemed a competent witness.' Gen. Stat., Ch. 73; Sec. 7, as amended Sess. Laws 1868, Ch. 70, whatever may be its effect, certainly does , not take away or impair the rights declared and secured to all persons by the Bill of Rights. The objection is therefore fatal to the indictment."

The doctrine so clearly announced in this case has proven to be accepted authority on the question presented. In Illinois, a case similar to the one at bar, was presented to the State Supreme Court in Boone v. The People, 145 Illinois 440. The constitutional provision and the statutes of the two states are almost identical and the interpretation of the law by the Illinois Supreme Court followed the interpretation of the Minnesota Supreme

Court, Mr. Justice Phillips delivering the opinion of the Court, saying (page 449):

> * * * "and where, as here, the defendant charged with crime is taken from the jail and before the Grand Jury, and interrogated about the matter with which he is charged with crime, such an error must be held fatal to the indictment. It was error to overrule the motion to quash the indictment. The State v. Froiseth, 16 Minn. 296."

In State v. Gardner, 88 Minn., page 130, the Court says (page 138):

> "If in fact the defendant was compelled to be a witness against himself before the Grand Jury, it was a violation of his personal right guaranteed him by the constitution of the state, which provides that no person in a criminal case shall be compelled to be a witness against himself. If such were the case, it was the imperative duty of the Court to grant his motion to quash the indictment, for courts have no discretion in the matter of giving effect to constitutional guarantee. State v. Froiseth, 16 Minn. 260." Citing additional authorities.

In the case of State v. Bramlet in Mississippi, reported in the 47 Southern, page 433, the defendant was subpoenaed to appear before the Grand Jury, as a witness. He appeared, testified and was subsequently indicted. His motion to quash the indictment, however, at the trial was sustained and indictment was quashed. From the order of the court, quashing the indictment the State appealed.

The Supreme Court sustained the action of the lower court in quashing the indictment.

NO CRIME PROVEN.

The most casual study of the evidence shows that the State absolutely failed to prove that the crime of rape was committed. Not a word of direct evidence is sown in the record, because the prosecuting witness—the victim of alleged rape, testified that she was unconscious from the time she was thrown to the ground, she could not testify and did not testify whether or not there was penetration. No one testified that there was penetration, the only evidence tending to prove penetration, offered by the State, was entirely circumstantial and was confined to the evidence of Sullivan, who after testifying that he was ten feet away, back of the men in the alleged assault, said:

> "I saw one of them get on top of her at a time and he would leave and another would get on. The dresses were pulled up." Record page 93.

He said that later, "the man that, had been holding the gun to my head, defendant Mason, went and got on top of the girl," remaining there about three minutes." Page 94. Witness continues, "'He came back and took the gun from the fellow that was holding it to my head at that time and that fellow (co-defendant Miller) went and got on top of the girl, and the girl happened to come to then

and raised up. I don't know, he changed his mina or something and he got off." (Rec. 95).

These sentences contain the entire evidence of a direct nature tending to prove that at the time of the alleged assault, there was actual penetration. He says that six of the accused men got on top of the girl and then got off. That is the direct evidence offered by the State to prove rape. Of the six men, four were discharged from the indictment upon motion of the County Attorney, and Miller, who was identified as positively as Mason, upon almost the same evidence adduced at the Mason trial, was found not guilty.

To supply the plain deficiency of direct proof of penetration the State offered the evidence of Mrs. Tusken, the mother, who being questioned by County Attorney, as to Miss Tusken's condition, immediately afterwards testified, '"Well, she was hysterical and nervous." Considering the fact, that the story told by her and Sullivan had caused a riot during which a mob with indescribable brutality hanged three innocent men, it is no wonder that she was hysterical and nervous. As to her physical condition, necessarily resulting from rape, she volunteered no complaint.

> "Well, I asked her how she felt and she says, she ached all over." Page 185.

Mr. W. E. Tusken, the father, also testified in answer to the inquiry of County Attorney Green, as to her condition that "She was nervous and excited and hysterical and exhausted.'" Rec. 190.

"Did she make any complaint about soreness?

A. No, she did not to me."

From this record, it is seen that the only evidence of penetration was the statement of Sullivan as to what he saw the six defendants do. This the State claims was proof of rape. The inference that rape was committed is negatived by the following facts:

1. There was no evidence on the part of the prosecuting witness that she knew there had been penetration.

2. That no evidence of a drop or stain of blood upon the body of the prosecuting witness or a stain of seminal laid upon her clothing.

3. That she never complained to her mother of any wound, injury or soreness to the sexual organs.

4. That she never complained of any soreness to her father.

5. That after the alleged rape, she walked five blocks in company with Sullivan, sat on the steps of a school house about five or ten minutes, (Rec. 320) and talked with him, took the car and rode toward home, walking three blocks more and talked with him about a half hour after she arrived there, passed her father who was reading the daily paper in the parlor without saying anything to him, except, "I am going to bed". (Rec. 187)

That she was asleep at one o'clock (Rec. 188) when her father heard Sullivan's story of the alleged rape. That she went with her father to the police station at two o'clock, (Rec. 189) went back home and later went to the Canadian Northern yards at five o'clock that morning to identify the men and was there until seven o'clock that morning, (Rec. 190), when she returned home. During all this time, there is no evidence that she complained to any person of any physical injury, naturally resulting from rape. Indication of her condition when she arrived home immediately after the alleged rape, the record (page 182) shows that her mother testified:

> "Q. Had you seen your daughter the night before. June 14th?
> A. Well, I had gone to bed, but she stopped at my door and she says, 'Mamma, I met Jimmie tonight and w e went to the circus.' I says `all right, dear, go to bed now.' And she went to her room."

Later, during the morning of June 15th Miss Tusken went to bed and Dr. Graham, the family physician; was called to examine her about ten o'clock. His testimony shows without the slightest doubt, that there was no rape. In his testimony as witness for the state (Rec. 233 and later for defendant, Rec. 356) there appears the following evidence:

> "Q. Dr. Graham, you know the young lady, Miss Tusken?
> A. Yes, sir.

Q. You know, the family?
A. Yes, sir.
Q. Doctor, did you—There has been some testimony to the effect that you examined the young lady on the afternoon of the 15th of June?
A. Yes, sir, I did.
Q. Where did you see her at that time?
A. At her home.
Q. Whereabouts in her home?
A. In—she was in bed.
Q. And did you examine her private parts at that time?
A. Yes, sir.
Q. What did you find the condition thereof?
A. I found a normal condition.
Q. When you say her condition was normal, what will you say,--you talked with her, what war her general condition mentally and physically, as far as you could tell?
A. She seemed slightly nervous; the physical condition was good.
Q. How did you make your examination doctor?
A. Digital and the use of the speculum—both.
Q. In case of an examination by a speculum, how is that made, doctor?
A. By, introducing the speculum into the vagina.
Q. You cannot detect any abrasions or tears of the vagina, can you?
A. Yes, sir, you can.
Q. When you made the examination by the speculum, did tears, wounds or abrasions appear?
A. No, sir.

Q. And there was none there?
A. No, Sir. .
Q. When a digital examination is made; that is by the use of the hand?
A. Yes, sir.
Q. In making a digital examination, Does that or does it not test the sense of touch, soreness and so forth?
A. Yes, sir.
Q. Did you make a digital examination?
A. Yes, sir.
Q. At that digital examination was there any evidence of soreness or sensitiveness of injury?
A. No, sir. I made an examination of the girl, a vaginal examination with a speculum and a digital, as it is called with the finger. Found the girl clean looking in every way at that time. Does that include telling what was done?
Q. What was done? Yes.
A. Why, I used the speculum in the vagina; argyrol—a 25 % argyrol solution, wiping out the vagina carefully.
Q. During the examination with the speculum, did you then notice that there was,--were there any tears in the vagina?
A. No, Sir.
Q. Any abrasions?
A. No, sir.
Q. Were there any bruises?
A. No, sir.
Q. Was there any inflammation of the parts?
A. No, Sir.
Q. The digital examination, doctor, would that in the examination you made disclose any soreness?

A. It might.
Q. Was any soreness complained of?
A. No, sir.
Q. During that digital examination, doctor, if there was soreness or tenderness of the parts would that be disclosed by flinching?
A. Oh, it might be; some people do not flinch as easily as other people.
Q. In that case, did the patient flinch at all?
A. No, sir.
Q. The antiseptic used by you during that time, doctor, was that one of the standard treatments for prevention of infection?
A. I think so, yes.
Q. And you used it for that purpose?
A. Yes, sir.
Q. Doctor, will you say whether or not that treatment as you say, to prevent infection, if there had been a penetration, was that treatment thorough or casual?
A. It was thorough.
Q. How was that argyrol applied?
A. Cotton dipped in the argyrol.
Q. And in that, application did anything transpire by which you were compelled to use an additional digital—?
A. I did use additional—after taking out the speculum to make it more thorough, as the speculum lays against the inside of the vagina. I did it without the speculum, in as well as with it in.
Q. And that cotton swab, did that ever come out at the time?
A. Yes, it came out when I pulled it out.
Q. Was that taken out in its original form or did some of the cotton come so you had to take it with your fingers?

A. Yes.
Q. That is a fact, is it?
A. Yes, sir.
Q. And in that second part of the operation, did yon notice any flinching at that time?
A. No, sir.

NO RELIABLE IDENTIFICATION

The two necessary conditions precedent to the conviction of defendant Mason, were, first, legal evidence that the crime of rape was committed, and, second, that the defendant Mason was the person who committed the crime. If the jury believed from the evidence, beyond a reasonable doubt, that the crime of rape was committed, it must also appear, beyond a reasonable doubt, that Mason himself committed the act, or that the crime was committed by one or more of the co-defendants while he stood by aiding and abetting, and was therefore guilty as an accessory. The State's evidence was presented to show that a criminal assault was made by six or seven men upon Irene Tusken, beginning at 9:15 in the evening, at the conclusion of the Menagerie show, at a point on the circus ground thirty feet from the side show and the same distance from the Arch. (Rec. 53) the entrance on Grand Avenue and a few feet from the entrance to the Menagerie door, fifteen or twenty feet. (Abst. 20-22.)

MISS TUSKEN'S IDENTIFICATION.

At the time and place here mentioned, the two complaining witnesses Irene Tusken and her companion, James Sullivan, testified that they were held up by a bunch of size or seven colored men, who robbed both of them; taking a ring from the woman, and from the man a pocketbook, both articles, however, were graciously returned by the robbers to their victims. (Rec. 23.) At this place near the circus tent, one man Miller, took hold of Miss Tusken's arm, with one hand and put his other over her mouth; another man, Mason, placed a gun to the head of Sullivan, then the others of defendants following, all proceeded from this well lighted crowded place on the circus grounds without molestation from any one of the more than two or three hundred people (Rec. 436) there present, across the circus ground to a ravine about three hundred feet distant, where each of the men in turn committed rape upon the woman. (Rec. 24-30.)

At the time the assault began and the robbery committed; by the light on the circus ground, Miss Tusken says she saw the faces of all the men (Rec. 57), but did not see the face of any of them well enough to recognize them. (Rec. 58.)

> Q. At the time that Mason or Miller and the other three men, four or five men as the case may be, blocked you there on the road to the sideshow; you saw their faces didn't you?
> A. Yes, sir, I saw faces.

Q. You had a good look at their faces?
A. Not a very good look; it was rather dark.
Q. You saw the face of Miller at that time and recognized him?
A. Why, no, l didn't recognize his face.
Q. Didn't you see his face at that time well enough to know? Did you?
A. No, sir.
Q. Well, did you see the face of any of them well enough to know them?
A. No, sir." (Rec. 58.)

The next morning at six o'clock she saw all of the indicted men, when they were brought face to face with her for identification. Each one of the seven indicted men, Mason included, was brought in front of her and Sullivan, all were questioned in the presence of Miss Tusken and Sullivan and, about four feet from them. At that time and place, and under those circumstances, a few hours after the alleged assault, Miss Tusken and Sullivan did not identify any of them. (Rec. 58.) The following verbatim questions and answers shown in the transcript of evidence, show the failure of the identification:

"Q. You say the neat morning, you were out early in the morning?
A. Yes. (Rec. 58.)
Q. Out for identification?
A. It was about six o'clock.
Q. All those Negro employees of the circus were there?
A. Yes, sir.
Q. Did you identify any of them?

A. Yes, sir.
Q. Which ones did you identify?
A. No one in particular, but—
Q. Which one did you identify?
A. None of them.
Q. Did you see those six or seven men or any of them the next morning when you got out there? (Rec. 63.)
A. Not that I remember there very distinctly.
Q. You did not identify any of them?
A. No, not that morning. (Rec. 63.)
Q. Did I understand you to say the man who took the—you have seen the man who took the ring, since he took it and gave it back to you? (Rec. 70.)
A. No, sir, not that I remember.
Q. You did not recognize him that morning?
A. No, sir.
Q. I understood you to say yesterday, that you looked at the face of the men and saw their faces in the light. Was there light enough for you to see these men's faces at that time?
A. Yes, sir. (Rec. 77.)
Q. And did you see their faces?
A. Yes, sir.
Q. And all the other faces?
A. Yes, I think I did.
Q. Mason among the rest?
A. Yes, sir.
Q. And Miller among the rest?
A. Yes, sir. (Rec. 71.)
Q. Will you describe any of the others (defendants) whose description you can now recall? (Rec. 62.)
A. I cannot describe them very fully, just as to the size he was. They were tall.

Q. All the rest were tall?
A. All the rest were tall.
Q. Did you see any of these six or seven men after that night?
A. Not that I remember, I couldn't recognize them again.
Q. Were any of these six or seven men brought out there to you in July for identification?
A. Yes, sir.
Q. Did you identify any of those men then?
A. Yes, sir. .
Q. Did you see those six men or seven men or any of them, the next morning when you got out there (June 16th)?
A. Not that I remember there very distinctly.
Q. You did not identify any of them?
A. No, not that morning. (Rec. 63)
Q. Did you (July 15th) select out of the thirteen men, any other man that you could identify except Miller and Mason?
A. No, sir.
Q. Did you recognize any of the six or seven men who were brought out there that night as being in the block of men-who stopped you?
A. No, sir.
Q. Have you ever identified any men except Miller and Mason?
A. No, sir.
Q. You did not identify them that morning and did not identify them that night?
A. No, sir.
Q. Do you know new any other men who were present when this alleged assault was made on you?

A. No, sir.
Q. Mason and Miller were the only ones?
A. The only ones." (Rec. 65.)

By this testimony, it appears that Miss Tusken saw the faces of the defendants that night in the light of the circus grounds, that she saw the same men's faces at six o'clock next morning, June 16th, in plain, day light, and that she did not recognize any of the men she saw that morning or identify any of them as participants in the offense alleged to have been committed a few hours previous. Mason was there within a few feet of her, she looked him in the face and did not identify him.

SULLIVAN'S IDENTIFICATION.

The effort of James Sullivan, the corroborating witness, to identify suspects who were charged with the alleged rape, failed completely to furnish reliable legal evidence against any person. He was a witness to the proceedings, on the lighted circus grounds, at the time Miss Tusken's ring was taken and returned, his own property taken and returned, the assault of one man who took hold of both arms of Miss. Tusken and another, Miller, who held his hand over her mouth to prevent her outcry. All this he says occurred not far from the door of the circus and side show at a time when Captain Schulte says there were more than two or three hundred people present. He was forced to go to he ravine and these witness the

assault. During this attach of more than half an hour, he was at all times present and still he was not able to identify and did not identify a single person, Mason or any one of the six co-defendants; he vas not able to identify and did not identify a single suspect; brought before him next morning. Mason and the six co-defendants, one by one stood in front of him, told their names and answered questions. He did not recognize Mason, Miller or any one of the other co-defendants. All were released and returned to their work. The absolute unreliability of his identification is shown by the following excerpts from the transcript of his evidence at the trial.

"Q. What is the first thing the first Negro—what did he do?
A. Put a gun to my head. (Rec. 111)
Q. What kind of a looking man was he?
A. Heavy set fellow.
Q. Is that all?
A. Short, heavy set.
Q. Did you see his face?
A. No, I didn't get a good look at his face. (Rec. 112.)
Q. You didn't look at his face?
A. I saw his face, but I couldn't describe his face.
Q. It was light there?
A. No.
Q. It was not light during that time?
A. No, it wasn't dark and it wasn't light.
Q. Anyhow it was light enough for you to notice his face?
A. We saw, his face.

Q. You couldn't describe it?
A. No, sir.
Q. At that time, did you recognize him?
A. No, Sir.
Q. You were not able to recognize him the next morning? (Rec. 113)
A. No, sir.
Q. And did you recognize him the next morning?
A. No, sir.
Q. Did you see him the neat morning? Do you know you saw him the next morning or not?
A. I don't know, they had quite a bunch of them.
Q. You don't know whether you saw him or not?
A. No, sir.
Q. Did you talk to the bunch? Were you talking to the next man? What was the next man that you noticed?
A. This tall fellow.
Q. How tall a man was he?
A. He was quite a bit taller than the other fellow.
Q. And what was his size—large built—large heavy built or slim?
A. Kind of slim.
Q. Did you ever see that man afterwards?
A. Yes, Sir.
Q. You saw him that night, Mr. Sullivan, did you see his face?
A. Yes, sir.
Q. Look at it good?
A. Yes, sir.
Q. You were able to recognize him then?
A. I couldn't tell their faces.

Q. That is not what I asked you. That man Miller, you saw him that night, you say?

A. Yes, sir.

Q. You saw his face?

A. Yes, sir.

Q. Did you see his face so you could recognize it after that?

A. No. (Rec. 114.)

Q. After you saw him that night, did you see him the next morning?

A. I don't know whether I did or not.

Q. You don't know that you saw him?

A. No.

Q. What, time did you finally get to the cars where these men were to be picked out?

A. I don't know. I could not tell the time, I never had a watch.

Q. I believe that this is the time you say each one was brought up in front of you, one at a time?

A. Yes, sir. (Rec. 152)

Q. Each one was asked what his name was, his occupation, how long he had been with the show—something of that kind?

A. Yes, sir.

Q. That was done in your presence?

A. Yes, sir.

Q. And in Miss Tusken's presence?

A. Yes.

Q. It was in broad daylight then wasn't it?

A. Yes, sir. The railroad men had come to work then.

Q. When these men were brought before you what did you do?

A. I picked them out mostly by their voice and their size. (Rec. 153)

Q. Why did you pick them out?
A. Because the police asked me to pick out the ones I thought were about the size. I told him I could not tell by their faces—
Q. So the police asked you to pick out every man that was about the size of any one of the seven that were there that night—is that right?
A. Yes, sir.
Q. You told them you could not tell any of their faces, didn't you?
A. Yes, sir. (Rec. 155)
Q. And as the men came up to be identified, did you look at their faces or look at their form?
A. Their form.
Q. Didn't you bother about that because yon couldn't tell anything about it—you had told the police that you could not tell by the face?
A. I told them I couldn't describe them by the face.
Q. Now, on the morning when yon were there to pick out these men according to the voice and according to the size, did you pick out Mason?
A. I don't remember
Q. Yes, or no, did you pick out Mason?
A. I can't say yes or no.
Q. Did you pick out Mason that morning?
A. I don't know.
Q. Do you know whether you saw, Mason that morning?
A. I don't know that either.
Q. Did you pick out Miner?
A. I 'don't remember, because there was--
Q. I don't ask you the reason, I asked did you or not?

A. I don't know.

Q. If you did not pick out Mason and if you did not, pick out Miller, will you tell us why you did not pick out Mason or Miller?

A. I said I didn't know whether I picked them out or not. (Rec. 157)

Q. I don't think you understood my question. My question is, if you did not pick them out, why didn't you do so?

A. I don't know whether I picked them out or not.

Q. No, if I told you that you did not pick them out, that is, suppose you did not pick them out, that morning at that time, now will you tell the jury you did not pick them out?

A. I don't know whether I picked them out or not. I could not suppose I did or did not.

Q. You don't know whether you did or not?

A. That is what I said before.

Q. This man, you say, is Mason, is it?

A. Yes, sir.

Q. Look at him now and see if you picked him out that morning?

A. I said I didn't, know." (Rec. 158)

INSTRUCTED IDENTIFICATION.

Positive identification or even partial identification from facts within the knowledge of the prosecuting witness, Miss Tusken, and the corroborating witness, Sullivan, down to the meeting of the Grand Jury in July, having failed to identify either Mason or Miller with the alleged rape,

the State undertook to obtain evidence of identification while the Grand Jury was in session. Two lines of action were decided upon and both were carried out.

The unusual procedure by which all the defendants were compelled to go from the jail to the Grand Jury room and compelled to testify against themselves, was the first movement to fix evidence of guilt upon the seven men, who, though charged with rape, had not been identified by anyone, who had been released on the morning after the alleged crime, because both prosecuting witnesses had failed to identify them, who had never confessed any guilt, never made any incriminating statements to any one, but, who, at all times, had protested their innocence. This procedure appeared insufficient to serve the purpose of the prosecution and other effort became necessary.

The second phase of the procedure is disclosed by the evidence that, while the Grand Jury was in session, one month after the alleged rape, and after Miss Tusken and Sullivan had testified (Rec. 41), it was arranged to go to the jail, take all the thirteen men out to the circus ground, after nine o'clock at night, and there to bring them, one by one in the presence, within a few feet of both Miss Tusken and Sullivan and there compel them to give their names, answer various questions, and in other ways submit themselves to be viewed and inspected. While they were telling their names, they were giving abundant opportunity to the two

prosecuting witnesses, to associate the size, color and facial features, with the names of the different prisoners. The result was, both prosecuting witnesses picked out two men whose form and size made one phase of identification easy,--one man was short and heavy set, the other was tall and slim. The short heavy set man had said that his name was Mason and the tall slim one said his name was Miller, so that it was an easy matter for the prosecuting witnesses to identify two men in July, whom, by their inability to identify, they had acquitted in June.

Thing evidence of identification does not show that the witnesses knew of their own knowledge that Mason and Miller were the identical persons who, on the night of June 14th, committed the alleged assault upon Miss Tusken, on the contrary it shows, and shows only that after ample opportunity and abundant instruction, that they knew these two defendants, Mason and Miller, were the identical persons who were present at the circus grounds on the night of July 15th for the purpose of their inspection and shows nothing whatever as to the identity of the men who participated in the alleged attack of June 14, 1920.

Fortified with the knowledge received at the circus ground of the names, size and face of both Mason and Miller by this inspection, Miss Tusken and Sullivan were able to return to the Grand Jury and give the names of the two defendants, Mason and Miller and to assure the State that

when the case was called for trial, the short heavy man and the tall slim man would be identified.

IMPROPER EVIDENCE ADMITTED.

The admission of the evidence of Dr. Nicholson, (Rec. 241) was not only error, but the evidence was highly prejudicial to defendant. In fact it was of controlling influence with the jury, who evidently believed that Max Mason, on the 15th day of June was suffering from gonorrhea. The medical evidence on this point was controlling, considered together with the evidence by Miss Tusken that three days before she was examined by Dr. Coventry on July 10th, she noticed a vaginal discharge. Evidence of this discharge, which three days later was diagnosed by Dr. Coventry as gonorrhea, no doubt caused the jury to believe that she contracted the ailment from Mason on the night of the alleged offense. The jury found Mason guilty, upon the otherwise identical evidence offered by the State against Mason's co-defendant, Miller, who was promptly acquitted. The only reasonable theory which tends to account for the verdict of "guilty" as to Mason is to be found in the evidence of Dr. Coventry and Dr. Nicholson, which in its very nature was highly Prejudicial.

This evidence was inadmissible for two reasons. In the first place, the evidence was inadmissible because the defendant was compelled to give testimony against himself by submitting to the ex-

amination by Dr. Nicholson who testified that on the 19th day of July, he went to the jail, made an examination of all the prisoners under this rape charge, Mason among them. Dr. Nicholson testified that Mason made no objection to the examination, (Rec. 253). Mason denies the statement that he consented to the examination, says it was made over his protest, and submitted to only after a threat of punishment, if he refused to be examined (Rec. 400). It was the word of an accused against a physician of repute and believing the latter, they gave the former the penalty of conviction.

In the second place, the record shows that the evidence was inadmissible, because it was incompetent, irrelevant and that it did not tend to prove the issue. The accepted date of the alleged rape was June 14th, 1920. Miss Tusken says that she discovered that she was infected three days before she was examined by Dr. Coventry. The day of that examination way July 10th (Rec. 233). Dr. Coventry testified that gonorrhea manifests itself from two to ten days after contact. That gonorrhea would not develop after ten days (Rec. 240). According to Miss Tusken's testimony she first knew of the infection July 7th, and Dr. Coventry testified that his examination was made July 10th, and that the malady was acute—recent (Rec. 239). That examination made July 10th was twenty-six days after June 14th, the date of the alleged assault. Dr. Coventry's evidence that

the time elapsing between exposure and manifestation of gonorrhea, two to ten days is common knowledge, hence proof of the condition of the prosecuting witness who was suffering from acute gonorrhea on July 7th, twenty-three days after the possible contact of defendant Mason was irrelevant, incompetent and in no way tended to prove the issues joined.

Equally objectionable was the evidence of Dr. Nicholson, who testified that on July 19th he examined Mason, and found that he was suffering from acute gonorrhea. Upon cross-examination he said he could not tell when Mason contracted the disease except that "it was more than two weeks." (Rec. 250.)

> "Q. How much longer standing than two weeks, could you tell that?
> A. No.
> Q. Could the situation be the result of two weeks prior?
> A. It is possible."

So that the most that Dr. Nicholson could say, under oath, was that Mason was suffering from acute gonorrhea of two weeks' standing, how much longer, if any longer, he could not tell. This evidence of Mason's condition July 17th, one month and three days after June 14th, the date of the alleged rape, was also inadmissible because it was incompetent, irrelevant and, in no way tended to prove what occurred on the day of the alleged rape.

Further evidence of the harmful influence of that testimony is to be found in the fact that Mason testified at the trial, November 24th, that he did not have gonorrhea in June or July, that he had not been treated in jail for gonorrhea at any time during his confinement there; that he had been treated by a jail physician for cold, and that at the time he was testifying he was not infected with gonorrhea. Dr. Nicholson's testimony, that Mason was suffering from an acute attack of gonorrhea, July 17th, is wholly unbelievable, considered with the fact, that without treatment and confined in the jail all the time, Mason was absolutely free from gonorrhea in November.

PREJUDICE AND PASSION PREVAIL.

The evidence presented in support of the charge against Mason and the co-defendants shoved a remarkable case and all things considered the controlling play of prejudice can be easily seen. The bare charge—a criminal assault of seven men upon a woman, is sufficient to arouse prejudice in the most conservative mind and when to the charge is added the influence of racial antagonism, it becomes the more difficult for reason to hold sway.

But calm consideration of the evidence as shown by the transcript, forces the conclusion that whatever may have happened on the night of June 14th at the circus ground certainly the evidence fails to show beyond a reasonable doubt that the crime of rape was committed by the defendant. That a

young woman standing thirty feet from the sidewalk entrance to a circus tent door and fifteen feet from the menagerie tent door; in the presence of two or three hundred people, could be robbed and led away without molestation, in spite of her screams by seven big circus hands is beyond belief. Equally impossible is it for five or six husky circus laborers to ravish a virgin and leave not a single sign of violence, not a cut, a bruise, not an abrasion—not even inflammation. The physician for the family, called by the State, by his testimony, proved that the crime of rape had not been committed, and only the influence of prejudice and passion caused the jury to disregard the physical facts which proved the defendant not guilty.

Respectfully, submitted,

F. L. BARNETT,
R. C. McCULLOUGH,
Attorneys for Defendant.