TEXAS COURT VOIDS RUBY'S CONVICTION IN OSWALD DEATH

Orders Retrial Outside Dallas —Cites the Publicity and Inadmissible Evidence

10/6/66

Text of the presiding judge's opinion is on Page 31.

By MARTIN WALDRON
Special to The New York Times

AUSTIN, Tex., Oct. 5 — The Texas Court of Criminal Appeals reversed today the murder conviction of Jack Ruby, who was sentenced to death in 1964 for the slaying of Lee Harvey Oswald, assassin of President Kennedy.

In addition, the court ordered the case transferred out of Dallas County, where the shooting took place. Presiding Judge W. A. Morrison said Ruby should not have been tried there.

Separate opinions, all agreeing that Ruby's conviction should be set aside, were written by all three judges who reviewed the case.

The main opinion, written by Judge Morrison, said that the trial judge, Joe B. Brown, should not have allowed testimony that Ruby had told a Dallas police officer shortly after Oswald's shooting that he had planned to kill Oswald if the chance arose.

Slain on Television

A nationwide television audience saw Ruby, a 55-year-old nightclub owner, step forward and fire one shot into Oswald's abdomen as the suspect was being transferred to the county jail on Sunday, Nov. 24, 1963.

Ruby's statement, which the court said tended to show that Oswald's slaying was premeditated, was made while he was in custody of the Dallas police and there was no testimony that Ruby made the statement spontaneously, the court said.

The introduction of it into evidence, therefore, was in violation of the Texas criminal code, which requires that all confessions be voluntary and spontaneous, the judges held.

In his jail cell in Dallas, Ruby greeted the news of the reversal of his conviction with a statement that he was "elated."

District Attorney Henry Wade, who prosecuted Ruby in 1964, said he would insist that Ruby be tried again and that he would ask for the death penalty once more.

Ruby was convicted of murder, a charge that, in Texas, also embraces the lesser crimes of murder without malice and negligent homicide.

Might Accept Plea

Mr. Wade said in Dallas that he would again seek to have Ruby tried on a charge of murder. If the trial should be transferred to another county, Mr. Wade would not necessarily be the prosecuting attorney, but in the past prosecutors in counties to which trials have been transferred for retrial have invited the original prosecutor to participate.

Mr. Wade said he might accept a plea of guilty of murder if Ruby and his lawyers were willing to accept a sentence of life imprisonment.

Ruby's lawyers insisted at his first trial that he was insane at the time he shot Oswald, suffering from psychomotor epilepsy.

Phil Burleson of Dallas, one of six attorneys handling Ruby's case, said an effort would be made to get all the attorneys together on a telephone conference call sometime later this week to plan future strategy.

Sam Houston Clinton Jr. of Austin, one of Ruby's attorneys, said that the time Ruby has served in jail since his arrest "probably" could be counted if Ruby should be convicted of murder without malice.

Under Texas prison rules, convicts are given 20 days' extra credit for every 30 days served without incident, and a five-year sentence can be completed in three years.

If Ruby should be convicted of murder without malice, and he should be given credit for

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the time already served, he would be a free man at the end of his next trial.

There was no indication as to when the Ruby case would come to court again.

District Attorney Wade said that he would ask the Court of Appeals for a rehearing on the decision.

"We do not think there was any error," he said. "We hope to get them to change their opinion."

Mr. Wade has two weeks in which to apply for a rehearing.

The court applauded the decision of Judge Brown to disqualify himself from any further participation in the Ruby case.

Judge Brown had been under criticism for preparing a book about the case during the trial, and with the handling of publicity about the trial itself.

In its order today the court assigned the Ruby case to Judge Louis T. Holland of Montague, Tex., who presided at a hearing in which Ruby was ruled sane on June 13, 1966.

Judge Morrison said it was not necessary to detail the error made in the trial in not transferring Ruby's case out of Dallas.

High Court Cited

United States Supreme Court decisions in the case of Billie Sol Estes, convicted of fraud in Texas, and Dr. Samuel H. Sheppard, convicted of murder in Ohio, are controlling, he ruled. Both of these cases were preceded by extensive newspaper and radio and television coverage.

The testimony that caused the court to reverse Ruby's conviction was given by Detective Sgt. Patrick T. Dean. Sergeant Dean was identified in Dallas as the plainclothes officer who was holding the handcuffed Oswald by the arm when Ruby darted out of a crowd of reporters and shot Oswald with a .38-caliber revolver.

Sergeant Dean testified during Ruby's trial that he had questioned Ruby about 40 minutes after the shooting and that Ruby told him he would be glad to answer questions after he was assured that his answers would not be made available to "magazines or publications."

The officer quoted Ruby as saying that he had seen Oswald in a police line-up on the night of the assassination and that when he saw the sarcastic sneer on Oswald's face he had decided that if he got a chance to do so, he would kill him.

"Obviously this statement

constituted an oral confession of premeditation made while in police custody and therefore was not admissible," Judge Morrison wrote. "The admission of this testimony was clearly injurious and cause for a reversal of this conviction."

In a special concurring opinion today, Appeals Judge W. T. McDonald commented at length on the desirability of transferring Ruby's trial away from Dallas.

"It is apparent from the record that President Kennedy's assassination occurred at a site on a Dallas street so close to the Ruby trial courthouse that it could be seen daily by the jurors," he wrote.

"The writer feels it fair to assume that the citizenry of Dallas consciously and subconsciously felt that Dallas was on trial and the Dallas image was uppermost in their minds to such an extent that Ruby could not be tried there fairly while the street, nation and world judged Dallas for the tragic November events."

Judge McDonald, who was defeated in last spring's primary for a new term on the Court of Appeals, said 10 of the 12 jurors who convicted Ruby had witnessed the shooting of Oswald on television.

"The Dallas County climate was one of such strong feeling that it was not humanly possible to give Ruby a fair and impartial trial."

Cites TV Coverage

He said the Texas criminal code "demands and requires that witnesses to the charged offense cannot serve as jurors."

"There can be no difference to the competency of a witness who has heard via telephone or radio, or saw a matter through a mirror or field glasses and a witness who has viewed a matter on television," he said.

But Judge K. K. Wooley, who wrote a third separate opinion, did not agree with Judge McDonald's findings on the availability as jurors of people who had seen Ruby shoot Oswald on television.

"In view of another trial and future trials," Judge Wooley wrote, "it should also be clearly understood that the majority does not hold that a juror who saw the shooting of the deceased on television is, for that reason alone, disqualified or subject to challenge for cause as being 'a witness in the case.'"

On a procedural matter, Judge Wooley said he did not think that all of Ruby's lawyers, past and present, should have been allowed to present oral arguments on the case to the Court of Criminal Appeals.

He was referring to Joe A. Tonahill of Jasper, Tex., who was associated in the defense of Ruby with Melvin Belli of San Francisco.

Ruby attempted to dismiss Mr. Tonahill several times after his conviction, but the attorney refused to be discharged. Mr. Tonahill's insistence that Ruby was insane led to the sanity hearing.

After that hearing, Ruby again discnarged Mr. Tonahill but the appeals court allowed the lawyer to present arguments and to file a brief in the appeals court. Judge McDonald said at the time that Mr. Tonahill "has exemplified the highest standards of the legal profession, remained true to his duty, and has done an outstanding job in briefing and presenting this case before this court."

Mr. Tonahill said he would withdraw from the case now that it had been reversed. With the court striking down Sergeant Dean's testimony about the premeditation, any "law school graduate" could handle the case, he said.

Other attorneys for Ruby said that without proof of premeditation, Ruby could not be convicted of first-degree murder. Murder without premeditation is called murder without malice in Texas and the maximum sentence is five years.

Five Lawyers on Appeal

Five lawyers acted without fee in handling Ruby's successful appeal for retrial. William M. Kunstler of 511 Fifth Avenue, who was one of them, said here yesterday.

The others, he said, are Mr. Burleson, Sol Dann of Detroit, Elmer Gertz of Chicago and Mr. Clinton.

Mr. Burleson, he said, remained from the original trial lawyers' team that was headed by Melvin Belli. Mr. Dann, he said, is a lawyer for Earl Ruby, the defendant's brother who lives in Detroit. Mr. Dann, he went on, brought in Mr. Gertz, once defense counsel for Nathan Leopold in the celebrated Chicago murder case.

Mr. Kunstler, a member of the national board of directors of the American Civil Liberties Union, said Earl Ruby, Mr. Dann and Mr. Gertz went to Selma, Ala., to enlist him a year and a half ago while he was engaged in civil rights cases there. Mr. Clinton, legal director of the Texas Civil Liberties Union, joined in, Mr. Kunstler said, when he sought someone with a Texas civil liberties background.

REP. FORD DEFENDS WARREN UNIT REPORT

WASHINGTON, Oct. 5 (AP) — Representative Gerald R. Ford, a member of the commission that investigated the assassination of President Kennedy, said today no evidence had been brought up that would cast doubt on its findings.

The report of the commission headed by Chief Justice Earl Warren has been the target of several critics recently. These have not so much attacked the central finding that Lee Harvey Oswald shot Mr. Kennedy, but rather have suggested that the commission conducted its study hastily and showed more interest in producing a report that would quiet rumors than in following every possible lead to the end. Some have suggested the possibility that someone in addition to Oswald might have been involved.

Mr. Ford, a Michigan Republican and his party's leader in the House, said in a statement that the American people should ask themselves one question:

"In all of the critiques, has any new evidence been introduced that would cast doubt on the findings of the Warren Commission? There is only one answer to that question, and that answer is 'no.'"

A Case in Point

POUGHKEEPSIE, N. Y., Oct. 5 (AP)—A meeting hall at the Hudson River State Hospital burned to the ground today while 30 hospital safety officers were holding a conference on, among other things, fire fighting. The officers were off to dinner at the time.

Text of Judge's Order on New Ruby Trial

Special to The New York Times

AUSTIN, Tex., Oct. 5—Following is the text of the order by Presiding Judge W. A. Morrison of the Texas Court of Criminal Appeals overturning the conviction of Jack Ruby:

Shortly after noon on November 22, 1963, the President of the United States was assassinated within the courthouse area in the city of Dallas. A short while thereafter Lee Harvey Oswald was apprehended, but only after Patrolman Tippitt was killed in an effort to question him.

Oswald was placed in the Dallas City Jail. Two days later on November 24, in the basement of the city jail as Oswald was being transferred to the county jail, he was shot by appellant at close range, from which wound he died.

Countless thousands witnessed this shooting on television. Four days later this appellant was indicted for Oswald's murder. His sole defense was that of insanity in that he was suffering from psychomotor epilepsy.

On February 10, 1964, a change of venue hearing began in Criminal District Court No. 3 of Dallas County upon the motion of appellant to transfer the case to some county other than Dallas. The court did not grant the change of venue; the selection of the jury began on February 17, was completed on March 3, and a verdict of guilty with punishment set at death was returned on March 14.

The voluminous record in this appeal finally reached this court, and the case was set for submission on March 10, 1965.

Prior to submission a serious question arose as to which of many lawyers should be recognized by this court as appellant's counsel on appeal. In view of this, we entered an order directing the trial court to hold a hearing to determine whether or not appellant had become insane since his trial and thereby rendered incapable of rationally selecting his counsel. Such hearing was held, and the record reached this court containing a finding that appellant was presently sane, and we promptly set the case down for submission.

During the trial, over the strenuous objection of appellant that anything appellant may have said while in police custody constituted an oral confession in violation of the statutes of this state and was not admissible as res gestae, Sgt. Dean of the Dallas police testified as to a conversation which he had with appellant on the fifth floor of the Dallas city jail where he had been incarcerated, undressed and interrogated by other officers before Dean and Secret Service Agent Sorrells arrived at his cell.

Prior to answering any of Sorrells' questions, appellant asked if his answers would be made available to "magazines or publications" and after being assured that he was being questioned only for police purposes, appellant replied, "I'll be glad to answer your questions."

The time element which elapsed between appellant's arrest and the conversation in question varies between 10 and 40 minutes depending upon whether Dean's testimony at the trial or his written report made two days after the occurrence is accepted. Be this as it may, appellant was in a jail cell and had been interrogated by other officers prior to this conversation.

Under none of the authorities cited in Notes 1-3 of Moore v. State, 380 S.W. 2d 626, could this statement be held to have been spontaneously made. See also Holman v. State, 243 S.W. 1093; McBride v. State, 27 S.W. 2d 1100; Bradford v. State, 54 SW. 2d 516; Hamilton v. State, 135 S.W. 2d 476; Trammell v. State, 167 S.W. 2d 171; Oldham v. State, 322 S.W. 616, and Furrh v. State, 325 S.W. 2d 699, cited by appellant's counsel and counsel acting as friends of the court. The test in this state is spontaneity and these facts do not fit the test. One who is cautious enough to inquire whether his answers to the questions to be propounded to him are to be released to news media is not speaking spontaneously.

Sorrells questioned appellant about how he had been able to penetrate the police cordon protecting the transfer of Oswald. At the conclusion of this questioning and as they were preparing to leave, according to Dean's testimony, he asked appellant a question and appellant told Dean that he had seen Oswald in a police lineup two nights before and that when he saw the sarcastic sneer on Oswald's face he had decided that if he got a chance to do so, he would kill him.

Obviously this statement constituted an oral confession of premeditation made while in police custody and therefore was not admissible. The admission of this testimony was clearly injurious and calls for a reversal of this conviction.

What we have heretofore said makes it unnecessary to discuss in detail the error of the court in failing to grant appellant's motion for change of venue. Both Estes v. Texas, 381 U.S. 532, 14 L. Ed 2d 543, 85 S. Ct 1628, and Sheppard v. Maxwell, 34 L.W. 4451, were decided after appellant's trial, but each case related to a state court trial held prior to appellant's trial and determines the law applicable to this case, and both are hereby controlling.

It is abundantly clear from a careful study of both opinions of the Supreme Court of the United States and the record of this case that the trial court reversibly erred in refusing appellant's motion for change of venue. Not only are we bound legally by the holdings of the Supreme Court, but as practical public servants it becomes our duty to avoid the costs which are taxed against the state of Texas when one of our decisions fails to follow the rules announced by the Supreme Court. See also Pamplin v. Mason (CCA 5th July 27, 1966) affirming Mason v. Pamplin, W.D. Tex. 1964, 232 F. Supp. 539.

Judge Joe B. Brown, who tried this case, has recused [removed] himself from any further connection with the case and, we have concluded, properly so.

For the errors pointed out, the judgment is reversed, and the cause is remanded with directions that the venue be changed to some county other than Dallas. It is so ordered.

Truculent Texan

Jack Ruby

Special to The New York Times

DALLAS, Oct. 5 — Jack Ruby, the man who shot Lee Harvey Oswald in Dallas in November, 1963, has been described by his friends as a semi-illiterate hothead.

Although outwardly a gregarious, nattily dressed individual, he lived in a gloomy apartment cluttered with old boxes and newspapers. And a close friend said he brooded in the privacy of his rooms. He loved animals, especially dogs, but could not establish a close relationship with more than one or two humans.

Man in the News

Many of his acquaintances dodged him because he would lash out at them in vile language or suddenly strike them with his fists.

Ruby was an accomplished brawler, and would not hesitate to tangle with men six inches taller and 50 pounds heavier than his 5 feet 9 inches and 175 pounds. Nor would he back away from disputes with men smaller than he or with women.

"Jack was always fighting," said one of his sisters.

Since being sentenced to death in March, 1964, Ruby has spent much of his time in the Dallas County Jail drawing pictures of nude women and playing solitaire under the watchful eyes of jailers.

Although his attorneys said he was insane when he shot Oswald, assassin of President Kennedy, one of Ruby's principal interests has been to prove that he is not now insane, a contention that was upheld in a state court on June 13, 1966.

Ruby has also taken part in the appeals of his death sentence, hiring and dismissing attorneys as the legal complexities of his case have become more and more ensnarled. Today, the Texas Court of Criminal Appeals upset his conviction and ordered a new trial.

A Natty Dresser

Several of the jailers who have conducted the 24-hour-a-day watch on Ruby have become convinced that he has grown tired of the role he has been cast in since the day he shot Oswald.

Although he still dresses in a neat and natty fashion, and still talks very rapidly, in recent months Ruby has appeared to be pale and his talkativeness has appeared to be forced.

United Press International

"Jack was always fighting"

Before he shot Oswald to death before a nationwide television audience, Ruby was a loud and boisterous man who used his fists as well as his tongue to express a seemingly wide displeasure with life in general.

He was born in Chicago in 1911, the exact date undetermined. During his life, he used a half-dozen or more birth dates.

He was the son of immigrant Jews from Poland and was named Jacob Rubenstein, which he changed on Dec. 30, 1947, after moving to Dallas.

Ruby, the fifth of eight children, was reared in a Chicago ghetto. His father, an unemployed carpenter for the last 30 years of his life, was frequently drunk. And his mother had delusions, including one that for years she had a fishbone stuck in her throat.

When he was 11 years old, Ruby and two younger brothers and a younger sister were taken from the family and put into a foster home for a short time because of the frequent fights between his parents.

After being returned home, he did not stay long, roaming the streets of Chicago with neighborhood gangs. He learned to street brawl, many of his fights being prompted by other ruffians referring to Jews in a derogatory fashion.

He was always hot-tempered and was called "Sparky" when he was a boy because of his temper. Being called by his nickname provoked more than one fight itself, according to a sister, Mrs. Eva Grant.

Ruby left school in the eighth grade and sold tip sheets at race tracks, fell in with gamblers and in general drifted around the country.

After serving as a private first class in the Air Force during World War II, Ruby came to Dallas, where Mrs. Grant was operating a nightclub.

As a nightclub owner, Ruby had a special fondness for police officers, giving them cards entitling them to special prices.

Ruby never married, although he had an 11-year romance with a Dallas divorcee, who says she refused to marry him because of his hot temper, among other things.

One of Ruby's clubs, the Carousel Club, features striptease dancers and had other burlesque features. A number of his former employes told the Warren Commission, which investigated the assassination of President Kennedy, that Ruby was a bad boss, that he frequently refused to pay them and that he used obscene language toward them and sometimes struck them.

Ruby was his own bouncer at his clubs and frequently beat patrons whose conduct he disapproved of. He was arrested several times in Dallas on assault charges.

He was in tax difficulties with the Federal Government at the time he shot Oswald. The Government said he owed $40,000 in back taxes from his nightclubs. The claim is pending.