

COMMONWEALTH OF MASSACHUSETTS.

NORFOLK, ss.

IN THE SUPERIOR COURT.

No. 5546

Criminal Session.

COMMONWEALTH OF MASSACHUSETTS

v.

NICOLA SACCO and BARTOLOMEO VANZETTI.

DEFENDANTS' REQUESTS FOR RULINGS IN CONNECTION
WITH SUPPLEMENTARY MOTION FOR A NEW TRIAL.

Now come the defendants, appearing separately, and each for himself, and present to the Court the following requests for rulings of law and findings of fact in connection with the supplementary motion of each of them for a new trial.

1.

Aside from objections that may be made to particular affidavits offered by the defendants in support of their supplementary motion for a new trial, affidavits as such are admissible in evidence in support of propositions of fact upon which such a motion as the present is based.

Soebel v. Boston Elevated Ry., 197 Mass. 51,
Mattox v. United States, 146 U.S. 140,
and see other cases cited in brief.

2.

Under Superior Court rule No. XXIX, preliminary verification by affidavit of the facts relied upon as the ground of a motion such as the present is necessary to entitle the moving party to any hearing at all.

Borley v. Allison, 181 Mass. 246,
and see other cases cited in brief.

3.

Aside from such objections as may exist to particular affidavits filed by the defendants in this case, the same affi-

davits that are required by Rule XXIX for purposes of preliminary verification are admissible in evidence in support of the facts upon which the motion is grounded, whether or not the Court in its discretion hears oral testimony in addition.

Soebel v. Boston Elevated Ry., 197 Mass. 46
Manning v. Boston Elevated Ry., 187 Mass. 496,
and see other cases cited in brief.

4.

The allegations of fact in the affidavit of Jeremiah J. McAnarney as to statements made to him by Mr. Ripley, the foreman of the jury, are not inadmissible on the ground that they are hearsay.

Soebel v. Boston Elevated Ry., 197 Mass. 46,
and see other cases cited in brief.

5.

The allegations of fact in the affidavit of Jeremiah J. McAnarney as to statements made to him by Mrs. Ripley are not inadmissible on the ground that they are hearsay.

Soebel v. Boston Elevated Ry., 197 Mass. 46,
and see other cases cited in brief.

6.

The allegations of fact in the affidavit of Jeremiah J. McAnarney as to statements made to him by certain jurors other than Mr. Ripley are not inadmissible on the ground that they are hearsay.

7.

The allegations in the affidavit of Jeremiah J. McAnarney of statements made to him by the juror Ripley are admissible in evidence on these motions.

8.

The allegations in the affidavit of Jeremiah J. McAnarney of statements made to him by Mrs. Ripley are admissible in evidence on these motions.

9.

The allegations in the affidavit of Jeremiah J. McAn-

arney of statements made to him by certain jurors other than Ripley are admissible in evidence on these motions.

10.

None of the allegations in the affidavit of Jeremiah J. McAnarney as to statements made to him by the juror Ripley are inadmissible because in violation of any rule of public policy protecting the secrecy of the jury-room.

Woodward v. Leavitt, 107 Mass. 453
Mattox v. United States, 146 U.S. 140,
and see other cases cited in brief.

11.

None of the allegations in the affidavit of Jeremiah J. McAnarney as to statements made to him by certain jurors other than Ripley are inadmissible because in violation of any rule of public policy protecting the secrecy of the jury-room.

Woodward v. Leavitt, 107 Mass. 453
Mattox v. United States, 146 U.S. 140,
and see other cases cited in brief.

12.

On these motions the burden of proof resting upon the defendants in respect of the allegations of fact upon which their motions are founded, is a burden to prove those allegations by a fair preponderance of the evidence.

Com. v. Jordan, 207 Mass. 259

13.

In this case the admissions of the District Attorney as to propositions of fact alleged in support of the supplementary motions of the defendants for a new trial, are binding upon the Court as well as upon the Government itself, in the sense that facts thus admitted must be accepted as facts.

Com. v. Desmond, 5 Gray 80.

14.

The following facts must be accepted as established in the consideration of this motion, namely, that on May 30,

1921, Mr. Ripley, the foreman of the jury, took from a Harrington & Richardson 38 calibre revolver which he had long owned three loaded cartridges which he had also had for a "very long time", and took them to court with him, and had them with him during the entire trial, one being the exhibit attached to the affidavit of Jeremiah J. McAnarney, the other two the exhibits attached to Mrs. Ripley's affidavit, being also the three cartridges described in the affidavit of Hamilton, and shown on the photographs accompanying that affidavit; that at some time after Commonwealth's Exhibit No. 27 was introduced in evidence at the trial of the case, being the 38 calibre Harrington & Richardson revolver taken from Vanzetti at the time of his arrest, with five loaded shells (Exhibit 32) taken therefrom, and while serving as a juror in said case, and before the verdict was rendered, Mr. Ripley, for purposes of comparison, put his own three cartridges side by side with the five Vanzetti cartridges; and that one or more of the other jurors knew of the possession by Ripley of said three cartridges, and saw said three cartridges, and had some discussion concerning them in connection with said five Vanzetti cartridges.

See argument under Prop. IV of brief.

15.

In addition to the facts stated in the previous request for a ruling and finding, the following facts must be regarded as proved on this motion, namely: that Ripley or some other juror at some time during the trial experimented with the Ripley and Vanzetti cartridges and the Vanzetti revolver (Exhibit 27) by testing the three Ripley bullets and three of the Vanzetti bullets for hardness; by pressing one of the Ripley cartridges into the muzzle of the Vanzetti revolver; that in connection with these experiments and as an aid to the comparisons, some juror marked the three primers of the Ripley cartridges with

such marks that they might be distinguished not only from all the Vanzetti cartridges, but also from one another; that at least one of the purposes of making these experiments and comparisons was to determine the age of the five Vanzetti cartridges (Exhibit 32) in the sense of the period of time since they had been taken from the original package or packages; and that the conclusion that would naturally be drawn by such juror or jurors as participated in these experiments and comparisons was both unfavorable to Vanzetti in the sense of tending to discredit the testimony given by him in court, and also erroneous; and that its prejudicial effect upon Sacco was equally serious.

See argument under Prop. V of brief.

16.

It must be regarded as a proved fact on these motions that Ripley's act in taking the cartridges into the jury-room and in using them for whatever purpose he did use them while serving as a juror, was unknown to the defendants and their counsel until after the trial, and that they then exercised due diligence in bringing the facts to the attention of the Court.

See argument under Prop. VI of brief.

17.

It must be regarded as a fact on these motions that prejudicial inferences against both defendants might have been drawn by such juror or jurors as examined or discussed Ripley's cartridges or experimented with them.

See argument under Prop. VII of brief.

18.

On such facts as the Court must accept as established on these motions, both defendants are entitled to a new trial as matter of right.

See argument under Prop. VIII of brief.

19.

On the facts which must be regarded as established on these motions the right secured to each defendant by Art. XII of the Bill of Rights of the Constitution of Massachusetts to "produce all proofs that may be favorable to him" will be denied unless these motions are granted.

20.

On the facts which must be regarded as established on these motions the right secured to each defendant by Art. XII of the Bill of Rights of the Constitution of Massachusetts to "meet the witnesses face to face" will be denied unless these motions are granted.

21.

On the facts which must be regarded as established on these motions the right secured to each defendant by Art. XII of the Bill of Rights of the Constitution of Massachusetts to "be fully heard in his defence" will be denied unless these motions are granted.

22.

On the facts which must be regarded as established on these motions, unless the motions are granted the right secured to each defendant by Art. XII of the Bill of Rights of the Constitution of Massachusetts not to be "deprived of his life...but by....the law of the land" will be denied.

23.

On the facts which must be regarded as established on these motions a denial of these motions would violate the provision of the Fourteenth Amendment to the United States Constitution forbidding any state to "deprive any person of life, liberty, or property without due process of law."

24.

If it be the fact that Mr. Ripley, the foreman of the jury in this case, had with him during a part of the trial of the case three loaded 38 calibre cartridges, as stated in the affidavit of Jeremiah J. McAnarney, and used said cartridges

in any way in reaching any conclusion adverse to the defendant Vanzetti, then Vanzetti is entitled to a new trial as matter of law.

25.

If it be the fact that Mr. Ripley, the foreman of the jury in this case, had with him during a part of the trial of the case three loaded 38 calibre cartridges, as stated in the affidavit of Jeremiah J. McAnarney, and used said cartridges in any way in reaching any conclusion adverse to the defendant Sacco, then Sacco is entitled to a new trial as matter of law.

26.

If it be the fact that Ripley had with him in the jury-room three loaded 38 calibre cartridges of his own which he had possessed for a "very long time", and if during the trial he made a comparison or comparisons between these three cartridges and the five cartridges (Exhibit 32) taken from Vanzetti's revolver, then the defendant Vanzetti is entitled to a new trial as matter of right.

27.

If it be the fact that Ripley had with him in the jury-room three loaded 38 calibre cartridges of his own which he had possessed for a "very long time", and if during the trial he made a comparison or comparisons between these three cartridges and the five cartridges (Exhibit 32) taken from Vanzetti's revolver, then the defendant Sacco is entitled to a new trial as matter of right.

28.

If it be the fact that Mr. Ripley, the foreman of the jury, had with him during any part of the trial three loaded 38 calibre cartridges of his own which he had possessed for a "very long time", and at some time before the verdict was rendered discussed with some other juror or jurors his said three cartridges in connection with the cartridges (Exhibit 32) taken

from Vanzetti's revolver, then the defendant Vanzetti is entitled to a new trial as matter of right.

29.

If it be the fact that Mr. Ripley, the foreman of the jury, had with him during any part of the trial three loaded 38 calibre cartridges of his own which he had possessed for a "very long time", and at some time before the verdict was rendered discussed with some other juror or jurors his said three cartridges in connection with the cartridges (Exhibit 32) taken from Vanzetti's revolver, then the defendant Sacco is entitled to a new trial as matter of right.

30.

If it be the fact that Mr. Ripley, the foreman of the jury, had with him during a part of the trial of this case three loaded 38 calibre cartridges of his own which he had possessed for a "very long time", and if before the verdict was rendered he or any other juror or jurors made a comparison or comparisons between said three cartridges and any of the Vanzetti cartridges (Exhibit 32), or made tests of any of said cartridges for hardness, or pressed one of the Ripley cartridges into the muzzle of the Vanzetti revolver, or as an aid to any comparison or experiments placed distinguishing marks upon the primers of the Ripley cartridges, then the defendant Vanzetti is entitled to a new trial as matter of right.

31.

If it be the fact that Mr. Ripley, the foreman of the jury, had with him during a part of the trial of this case three loaded 38 calibre cartridges of his own which he had possessed for a "very long time", and if before the verdict was rendered he or any other juror or jurors made a comparison or comparisons between said three cartridges and any of the Vanzetti cartridges (Exhibit 32), or made tests of any of said cart-

ridges for hardness, or pressed one of the Ripley cartridges into the muzzle of the Vanzetti revolver, or as an aid to any comparison or experiments placed distinguishing marks upon the primers of the Ripley cartridges, then the defendant Sacco is entitled to a new trial as matter of right.

32.

If it be the fact that Mr. Ripley, the foreman of the jury, had with him during a part of the trial of this case three loaded 38 calibre cartridges which he had possessed for a "very long time", and if for purposes of determining the comparative age of said three cartridges and any or all of the cartridges (Exhibit 32) taken from Vanzetti's revolver, any comparisons or experiments were made by Ripley or any other juror or jurors between the Ripley cartridges or any of them and the Vanzetti cartridges or any of them, then the defendant Vanzetti is entitled to a new trial as matter of right.

33.

If it be the fact that Mr. Ripley, the foreman of the jury, had with him during a part of the trial of this case three loaded 38 calibre cartridges which he had possessed for a "very long time", and if for purposes of determining the comparative age of said three cartridges and any or all of the cartridges (Exhibit 32) taken from Vanzetti's revolver, any comparisons or experiments were made by Ripley or any other juror or jurors between the Ripley cartridges or any of them and the Vanzetti cartridges or any of them, then the defendant Sacco is entitled to a new trial as matter of right.

34.

If it be the fact that Mr. Ripley or any other juror might have been influenced adversely to either defendant by the fact that Mr. Ripley had with him, unknown to the defendants, while serving as a juror, three 38 calibre cartridges of his

own, or by anything that he or anyone else did or said about said cartridges prior to the rendition of the verdict in this case, then the defendant thus prejudiced is entitled to a new trial as matter of right.

35.

If it be the fact that Mr. Ripley, the foreman of the jury, had with him during a part or the whole of the trial of this case three loaded 38 calibre cartridges of his own, and if said cartridges were before the verdict experimented with, compared, or in any way used by himself or any other juror in such a manner as might have influenced the decision of any juror, and if this was unknown to the defendants and their counsel until after the verdict, then it is not necessary for the defendants or either of them to show in what way the mind of any juror was actually influenced by the presence of said three cartridges, or what was done with them by any juror during the trial of the case, nor will the Court speculate as to the extent to which the presence of said three cartridges and what was said or done with or about them may have prejudiced the defendants; but either defendant who might have been prejudiced by these occurrences is entitled to a new trial as matter of law.

36.

If the statements of fact attributed to Ripley in the affidavit of Jeremiah J. McAnarney are true, the defendant Vanzetti is entitled to a new trial as matter of law.

37.

If the statements of fact attributed to Ripley in the affidavit of Jeremiah J. McAnarney are true, the defendant Sacco is entitled to a new trial as matter of law.

38.

One of the issues of fact in this case was whether a bullet found in the body of the deceased Berardelli came from the Colt automatic pistol alleged to have been subsequently taken from the defendant Sacco, and expert testimony was introduced, both by the Government and by the defendant Sacco, on this issue, involving among other considerations a comparison of marks upon shells alleged to have been fired by way of experimentation in said pistol with marks upon shells alleged to have been picked up on the ground at the scene of the crime and after the crime was committed. If for the purpose of determining this issue, or assisting in the determination thereof, or for the purpose of throwing light upon the determination thereof, Mr. Ripley, the foreman of the jury, or any other member or members of the jury, used in the discussions in the jury room after the close of the evidence shells not introduced as exhibits in the case, but taken into the jury room by Mr. Ripley, the foreman of the jury, without the knowledge of the defendant Sacco, then as a matter of law the verdict against Sacco must be set aside.

39.

If on the trial of an indictment for murder by shooting with a pistol or pistols, or revolver or revolvers, in which a verdict of murder in the first degree is rendered against a defendant or defendants, it is subsequently and seasonably made to appear to the Court as a fact that without the knowledge of the defendant or defendants, or of their counsel, a member of the jury has had with him during the trial loaded revolver cartridges not introduced as exhibits in the case or admitted in evidence, and shows the same to another member or members of the jury, and that said cartridges may have been the subject of discussion between two or more members of the jury, and are in any event objects which by their appearance, or by experiments

which could be conducted for the purpose of comparison with exhibits in the case, or otherwise, might influence the jury in the determination of any material issue or issues of fact in the case, then the constitutional right of the defendant or defendants to a fair and impartial trial under the rules of law have been violated, and they are entitled to a new trial either as matter of law or because to refuse a new trial under such circumstances would be an abuse of discretion, their constitutional right being conferred both by Art. XII of the Bill of Rights of the Constitution of Massachusetts, and by the Fourteenth Amendment to the United States Constitution.

40.

Under the Constitution of this Commonwealth every defendant is entitled in a criminal case to meet the witnesses against him face to face, and to be fully heard in his own defence, and no person can be deprived of his life or liberty but by due process of law. This constitutional provision is violated in any case where any objects in the nature of real evidence which may have a material bearing prejudicial to the defendant upon any issue or issues of fact presented upon the trial of an indictment are, without the knowledge of the defendant, introduced into the jury room or exhibited to the jury collectively or to any one or more members thereof, whether before or during their deliberations after the close of all the evidence, which said objects have not been introduced in evidence in the case; and in any case, where this has occurred the Court has no discretion to refuse a new trial, but must as a matter of law, in order to secure to the defendant his rights under the Constitution of this Commonwealth, grant such a defendant or defendants a new trial.

41.

If it be the rule in civil cases that the granting of a new trial is discretionary with the Court where objects which

are in their nature pieces of real evidence, and may prejudice the rights of a party, are without his knowledge introduced into the jury room and examined or discussed by the jury, that rule cannot be applied in criminal cases, and especially in trials for the crime of murder, without violating the rights of the defendant under Art. XII of the Declaration of Rights of the Constitution of this Commonwealth; and such an occurrence in a criminal case gives the defendant a right to a new trial as a matter of law.

42.

If on the trial of an indictment for murder by shooting with a pistol or revolver, where one of the questions of fact is whether a bullet found in the body of one of the deceased came from a pistol or revolver alleged to have been taken from one of the defendants after the crime was committed, and where expert evidence has been introduced on that issue involving the comparison of shells or cartridges fired from that pistol with other shells alleged to have been found at the scene of the murder shortly after the crime occurred, it appears as a fact that during the deliberations of the jury after the close of the evidence other loaded pistol cartridges not exhibited in the case and not introduced in evidence were taken into the jury room by one of the members of the jury and exhibited to one or more members of the jury, and if the shells of such cartridges or some of them bear marks or scratches indicating experimentation therewith, and if the presence of said cartridges in the jury room, or experimentation therewith, by a member or members of the jury in the jury room might have prejudiced the defendants or either of them, then if there is a verdict of murder in the first degree against the defendants, the trial has not been conducted in accordance with the law of the land or due process of law or with the provisions of the Constitution of this Commonwealth or of the Fourteenth Amendment to the

Constitution of the United States, and it is not for the Court to speculate about or determine the question whether or to what extent the defendants, or either of them, were in fact prejudiced by the presence of such cartridges in the jury room as aforesaid, but the duty of the Court is as a matter of law to grant to the defendant or defendants a new trial.

43.

One of the issues of fact in this case was whether the Harrington & Richardson revolver claimed to have been found on the person of the defendant Vanzetti at the time of his arrest, together with the shells therein, was originally the property of the deceased Berardelli, and in connection therewith much testimony was introduced, including the testimony of experts both by the Government and by the defendant Vanzetti on this issue, involving among other considerations the question of the age of the shells alleged to have been found in the gun taken from Vanzetti and the time when said shells were secured. If for the purpose of determining this issue or assisting in the determination thereof, or for the purpose of throwing light upon the determination thereof, Mr. Ripley, the foreman of the jury, used his personal knowledge as to when he secured his shells and the age of same as a basis of comparison with the shells alleged to have come from the gun of Vanzetti, and used said information or might have used said information for the purpose of testing the credibility of the testimony of the defendant Vanzetti on the same issue, or any other member of the jury or members of the jury had communicated or might have had communicated to them the knowledge of the said Ripley on said issue with reference to his own shells, and discussed with said Ripley his own intimate personal knowledge of the history of his own shells and the age thereof, all without the knowledge of the defendant Vanzetti, then as a matter of law the verdict against Vanzetti must be set aside.

The following rulings are requested as an alternative in case such of the previous rulings as assert the right of the defendants to a new trial as matter of law are refused.

44.

If it be the fact that Mr. Ripley, the foreman of the jury in this case, had with him during a part of the trial of the case three loaded 38 calibre cartridges, as stated in the affidavit of Jeremiah J. McAnarney, and used said cartridges in any way in reaching any conclusion adverse to the defendant Vanzetti, then to refuse a new trial to Vanzetti would be an abuse of discretion.

45.

If it be the fact that Mr. Ripley, the foreman of the jury in this case, had with him during a part of the trial of the case three loaded 38 calibre cartridges, as stated in the affidavit of Jeremiah J. McAnarney, and used said cartridges in any way in reaching any conclusion adverse to the defendant Sacco, then to refuse a new trial to Sacco would be an abuse of discretion.

46.

If it be the fact that Ripley had with him in the jury room three loaded 38 calibre cartridges of his own, which he had possessed for a "very long time", and if during the trial he made a comparison or comparisons between those three cartridges and the five cartridges (Exhibit 32) taken from Vanzetti's revolver, then to refuse a new trial to Vanzetti would be an abuse of discretion.

47.

If it be the fact that Ripley had with him in the jury room three loaded 38 calibre cartridges of his own, which he had possessed for a "very long time", and if during the trial he made a comparison or comparisons between those three cartridges

and the five cartridges (Exhibit 32) taken from Vanzetti's revolver, then to refuse a new trial to Sacco would be an abuse of discretion.

48.

If it be the fact that Mr. Ripley, the foreman of the jury, had with him during any part of the trial three loaded 38 calibre cartridges of his own, which he had possessed for a "very long time", and at some time before the verdict was rendered discussed with some other juror or jurors his said three cartridges in connection with the cartridges (Exhibit 32) taken from Vanzetti's revolver, then to refuse Vanzetti a new trial would be an abuse of discretion.

49.

If it be the fact that Mr. Ripley, the foreman of the jury, had with him during any part of the trial three loaded 38 calibre cartridges of his own, which he had possessed for a "very long time", and at some time before the verdict was rendered discussed with some other juror or jurors his said three cartridges in connection with the cartridges (Exhibit 32) taken from Vanzetti's revolver, then to refuse Sacco a new trial would be an abuse of discretion.

50.

If it be the fact that Mr. Ripley, the foreman of the jury, had with him during a part of the trial of this case three loaded 38 calibre cartridges of his own which he had possessed for a "very long time", and if before the verdict was rendered he or any other juror or jurors made a comparison or comparisons between said three cartridges and any of the Vanzetti cartridges (Exhibit 32), or made tests of any of said cartridges for hardness, or pressed one of the Ripley cartridges into the muzzle of the Vanzetti revolver, or as an aid to any comparison or experiments placed distinguishing marks upon the primers of the Ripley cartridges, then to refuse

a new trial to Vanzetti would be an abuse of discretion.

51.

If it be the fact that Mr. Ripley, the foreman of the jury, had with him during a part of the trial of this case three loaded 38 calibre cartridges of his own which he had possessed for a "very long time", and if before the verdict was rendered he or any other juror or jurors made a comparison or comparisons between said three cartridges and any of the Vanzetti cartridges (Exhibit 32), or made tests of any of said cartridges for hardness, or pressed one of the Ripley cartridges into the muzzle of the Vanzetti revolver, or as an aid to any comparison or experiments placed distinguishing marks upon the primers of the Ripley cartridges, then to refuse a new trial to Sacco would be an abuse of discretion.

52.

If it be the fact that Mr. Ripley, the foreman of the jury, had with him during a part of the trial of this case three loaded 38 calibre cartridges which he had possessed for a "very long time", and if for purposes of determining the comparative age of said three cartridges and any or all of the cartridges (Exhibit 32) taken from the Vanzetti revolver, any comparisons or experiments were made by Ripley or any other juror or jurors between the Ripley cartridges or any of them and the Vanzetti cartridges or any of them, then to refuse a new trial to Vanzetti would be an abuse of discretion.

53.

If it be the fact that Mr. Ripley, the foreman of the jury, had with him during a part of the trial of this case three loaded 38 calibre cartridges which he had possessed for a "very long time", and if for purposes of determining the comparative age of said three cartridges and any or all of the cartridges (Exhibit 32) taken from the Vanzetti revolver, any comparisons or experiments were made by Ripley or any other juror or jurors

between the Ripley cartridges or any of them and the Vanzetti cartridges or any of them, then to refuse a new trial to Sacco would be an abuse of discretion.

54.

If it be the fact that Mr. Ripley or any other juror might have been influenced adversely to either defendant by the fact that Mr. Ripley had with him, unknown to the defendants, while serving as a juror, three 38 calibre cartridges of his own, or by anything that he or anyone else did or said about said cartridges prior to the rendition of the verdict in this case, then to refuse the defendant thus prejudiced a new trial would be an abuse of discretion.

By their Attorneys,

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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. SUPERIOR COURT

No. 5546 Criminal Session

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v.

NICOLA SACCO and BARTOLOMEO
VANZETTI

DEFENDANTS' REQUESTS FOR
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