

COMMONWEALTH OF MASSACHUSETTS.

Norfolk, ss.

Superior Court.

COMMONWEALTH OF MASSACHUSETTS:

vs.

NICOLA SACCO and BARTOLOMEO VANZETTI :

Brief of Commonwealth on motion of defendants for new trial.

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I. The reasons and cause for the motion for new trial filed in the within case are as set forth in said motion "the facts, matters and things set forth in the affidavit of Jeremiah J. McAnarney with the exhibits attached thereto. From an examination of the allegations and exhibits to which reference is thus made it appears that the defendant claims that Walter Ripley, the foreman of the jury which heard the above~~entitled~~ case, had in his possession during the course of the trial three 38-calibre loaded cartridges which had previously been removed by him from a Harrington and Richardson revolver similar in model and calibre to the revolver introduced in evidence by the Commonwealth as an exhibit, and numbered 27. Said cartridges were marked "S.&W. 38 U.M.C.", and one of them bore the additional letters "S.H."

The claim of the defendants seems to be that said Ripley at some time during the course of the trial placed the said cartridges "side by side with the shells introduced by the Commonwealth, the same being shells which the Commonwealth claimed came from the defendant Vanzetti's revolver, as hereinbefore set forth, that it seemed to him that his shells were a trifle larger than the shells introduced as having been taken from the defendant Vanzetti's revolver, Commonwealth's exhibit Number 32." It is also claimed that said Ripley has said that there was a discussion of the said shells and that certain jurors have stated in affidavits annexed to said motion for

new trial that they had seen shells in the possession of said Ripley.

II The affidavit of Jeremiah J. McAnarney, so far as it relates to statements made to him by said Ripley, is not admissible in evidence unless it becomes admissible under revised Laws, Chapter 175, Section 66, as re~~en~~acted in the General Laws, which says, "A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the Court finds that it was made in good faith before the commencement of the action, and upon the personal knowledge of the declarant."

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In the within case it appears that whatever may have been done by said Ripley as his associates, neither party to the case was at fault in the matter, and in reference to such a situation Mr. Justice Gray says on page 466, "But where evidence has been introduced tending to show that, without authority of law, but without any fault of either party or his agent, a paper was communicated to the jury, which might have influenced their minds, the testimony of the jurors is admissible to disprove that the paper was communicated to them, though not to show

whether it did or did not influence their deliberations and decision. A jurymen may testify to any facts bearing upon the question of the existence of the disturbing influence, but he can not be permitted to testify how far that influence operated upon his mind."

In this decision the Court has apparently considered all prior Massachusetts cases on the subject and from a perusal of the decisions from the date of the Woodward case to the present day, the law appears to be as therein stated.

IV The Court will not hear evidence as to what was done by the jury in their jury~~room~~ and in the course of their deliberations, or what motives influenced them to make this or that finding, or what arguments may have been advanced by one or more individual jurors, or what they said, or what they did. The Court, however, will find as a fact whether or not the paper or other object alleged to have been in the possession of one or more of the jurors was in the possession of such juror or jurors, and whether such paper or other object "might have influenced their minds."

V In the present case, the possession of 38-calibre cartridges and the view of such cartridges by one or more of the jurors could not in any possible view have affected the minds of the jurors on the issues of the case which was being tried.

1. All six bullets found in or near the bodies of Parmenter and Berardelli were 32-calibre bullets fired from automatic pistols.

2. There was no claim made by either side that bullets of any other calibre or description were fired at or near the scene of the shooting or caused the death of either one of the deceased.

3. The five bullets of 38-calibre found in the Harrington and Richardson revolver when it was taken from the person of the defendant Vanzetti on his arrest were introduced for the purpose of showing that he carried a loaded revolver when arrested. Any comparison between those bullets and any other 38-calibre bullets of any type or model could have had no effect upon the issues of the case.

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AFFIDAVIT OF J. J. McANARNEY.

Ripley, when summoned as a juror, wore a vest having in its pocket three 38-calibre shells loaded with powder and ball taken from his Harrington and Richardson revolver.

That the fact these shells were in his pocket did not occur to him until after exhibits number 27 and 32 were introduced in evidence. That at the time said shells were shown to the affiant two had a straight scratch across them, and one had a cross.

That when Ripley placed these shells side by side with those introduced by the Commonwealth, it seemed to him that his shells were a trifle larger than the shells in exhibit number 32. That this comparison was made during the trial, and before the verdict was rendered "and that he had not seen the shells introduced in evidence, exhibit number 32, since leaving the jury*room before the jurors in the above entitled case agreed upon their verdict.

That there was discussion of the shells, but who participated therein, and what was said Ripley refused to state.

That Ripley died suddenly three days after the statement was made.

AFFIDAVIT OF AMANDA S. RIPLEY.

Walter Ripley, husband of the affiant, died October 10, 1921.

That about a week after his death she found in the pocket of his vest that he wore while a juror two cartridges marked "S&W 38 UMC SN"

AFFIDAVIT OF WALTER HERSEY.

Walter Ripley had two or more shells loaded with powder and ball during the time he acted as a juror and that the affiant saw the shells.

AFFIDAVIT OF SEWARD PARKER.

Affiant was informed by other jurors that Ripley did have one or more shells loaded with powder and ball in the bed-room during the trial but the affiant did not see them.

AFFIDAVIT OF J. J. McANARNEY.

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Walter Ripley, husband of the affiant, died October 19, 1921.

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