

TEXAS COURT VOIDS RUBY'S CONVICTION IN OSWALD DEATH

Orders Retrial Outside Dallas —Cites the Publicity and Inadmissible Evidence

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

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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. Shepard, 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 discharged 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.