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VIGNETTES OF THE CRIMINAL LAW

CHARLES C. ARADO[1]

1. *Twenty-five Years in Prison Doesn't Satisfy the State*[2]

The defendant had been removed from Leavenworth Prison where he was serving a twenty-five year sentence for robbery of the United States Mails. The state's attorney's office was not satisfied to see him punished merely by imprisonment. They wanted his life for the murder that resulted, according to their theory, as an outgrowth of the mail robbery. Their contention was that after the defendant had robbed the mails and was carrying away his loot, he approached a doctor driving a Ford Coupe. He commanded the physician to step out of his car. The defendant jumped in and drove away. He had not driven far when he was approached by a deputy sheriff of Cook County who had been directed to the scene of the robbery. The sheriff was slain, apparently, as he tried to make the arrest. There was no direct identification of the accused as the man who killed the deputy. Circumstantial evidence, however, indicated that he must have been the slayer. He made no statements to the police upon his arrest, a short time after the robbery. The Ford Coupe was abandoned in Barrington, many miles from the southwest part of the county, where the hold-up and murder took place. To prosecute this "hanging case," the State's Attorney assigned two of his most experienced men, attorneys bent upon securing a verdict of death. To complete the picture was a judge known to be very strict in his rulings, determined to enforce the law to its last letter.

A court reporter testified for the defense as to the answers which had been made by two of the state's witnesses to questions propounded at the coroner's inquest. Such testimony was not admissible as original evidence on account of being hearsay. A foundation had been laid for it, however, by asking two prosecuting witnesses on cross-examination if they had not made the statements in question at the inquest. The court reporter's testimony revealed that they had in fact made these statements at that time. Next was called the defendant's mother, whose address proved to be a street in the village

[1]Member of the Chicago Bar.

[2]The next preceding article under this general title, and by the same author, appeared in this JOURNAL XXVI, 5, at pp. 703ff.

where the car had been abandoned. She testified that she had been in the Federal Court at the time that her son was asked whether he was guilty of the mail robbery; and that she heard what his plea to the accusation had been. When asked what it was, the state objected. Defense counsel stated, "That is all." There was no cross-examination of the old lady, who seemed very poor, and naturally heartbroken. When walking past her son she grasped his arm and stopped to kiss him. Tears welled in her eyes. A bailiff took hold of her arm and told her to pass on. Inasmuch as the "killing" car had been located in Barrington, the state was entitled to argue, from the fact that the mother lived there, that it was very likely the defendant who drove it and abandoned it shortly before visiting her home. While this evidence was damaging to the defense, the appearance of the bent figure of the white-haired mother probably offset the disadvantage. It was a heart-rending sight to see the old lady attempt to caress her son. Such a scene conveyed to the jury the idea that the defendant was not as desperate or depraved as the state was picturing him. His mother still had confidence in him and was watching over him in this, the most trying moment of his life. The scene demonstrated that the boy was not completely abandoned, that there was at least one person who still had faith in him.

The next witness was an investigator who claimed to have done work for a number of noted trial lawyers. He testified that he had been engaged in the case and had interviewed the state's star witness who had identified the accused as the man with the three white mail sacks, and who had commanded him to step out of his Ford Coupe. The investigator testified that this witness had told him that he was not sure that the defendant was the man. He had asked the doctor to sign a statement to that effect but the latter declined. This was vital testimony for the defense. It tended to shake the identification. If the investigator were to be believed, then the doctor's testimony in this case was to be materially discounted. There was little likelihood that the investigator did not understand the doctor when he was speaking to him. In fact, the jury had to conclude that he could not be so mistaken. If not believed, it was because they considered he was lying. His general appearance was above the average and he gave the impression of being most conscientious. With this witness, the defense rested its case.

The state rushed their star witness on the stand in rebuttal. He admitted that the investigator had seen him on the day mentioned by the latter in his testimony. In answer to the prosecutor's ques-

tion, however, "Were you asked this question and did you make this answer, "the doctor replied, "I made no such answer to his question." An officer was then called who testified that the doctor positively identified the defendant at their first meeting and had never wavered in later confrontations.

The prosecutor spoke exactly twenty-five minutes in final argument, visualizing in detail the robbery of the three sacks of mail. He said, "I will take you to the scene. We have produced witnesses to tell you about the mail robbery. They identify the accused. The doctor is held up within a few minutes of this time, in the immediate vicinity of the robbery. Three sacks of mail are noticed by the doctor. The latter says the accused drove his car away. In the immediate vicinity, at about this time, there is a shooting of a deputy sheriff. Now, who do you suppose killed him? Who had a motive to kill him?" The prosecutor presented the customary approach in every murder case resulting from a holdup: "The penalty for robbery includes life imprisonment. Now, when the robber kills a man, in addition to his crime of robbery, he naturally should be punished more severely. The only way that you can inflict a greater punishment than life imprisonment is to electrocute him. That is why capital punishment is on the statute books. It provides the fitting punishment for those offenses which are not adequately punishable by life imprisonment. Inasmuch as slaying is a more grievous offense than robbery, you gentlemen will carry out the intent of the legislature by inflicting the extreme penalty as provided by the Statutes of Illinois."

With the odds hopelessly against the accused, with no theories of defense presented, the jury was given the case. Much to the consternation of the prosecutors the jury entertained a doubt about the identification of the defendant. They did not want to decree death if it were even remotely possible that he was not guilty. The verdict carried twenty-five years' imprisonment, a decided victory for the defense.

The jury might have reasoned: Why did the government charge him with robbery if they had a death case against him for murder? If the case wasn't strong enough to satisfy the prosecutors, in the first place, is it strong enough to satisfy us now? As a matter of fact, the Federal Government invariably leaves the prosecution for murder in the hands of the state where the offense is committed.

Summary

Although the accused was under a long sentence for robbery

under a federal indictment, the state felt that he should forfeit his life for a murder that grew out of the robbery. Because the jury was unacquainted with the true reason why the more serious charge was not prosecuted in the first instance, they were likely to explain the situation upon a theory of inherent weakness as a death penalty case. The mother of the accused was introduced to the jury for the purpose of generating sympathy and apparently succeeded in her mission.

2. *Alibi in Payroll Robbery Trial*

The defense attorney was ably assisted by a veteran detective who personally appeared in court every day of the trial. The defendant, fifty-two years of age, was out on bonds. The alleged hold-up occurred on November 24. The state's attorneys, polite and courteous to everyone, were not prosecuting in a manner which would graphically portray a desperate, Jesse-James hold-up of a payroll crew, netting the bandits Fifty-Seven Thousand Dollars in cash and One-Half Million Dollars in checks. Everything about the courtroom seemed peaceful and calm. The prosecutors moved along at a moderate, almost slow gait. Evidence was presented in an orderly but not impressive manner. The only striking moves were made by defense counsel. He was always on his toes, eager for the fray. His eyes shone brightly, his step was elastic. As he examined witnesses, he walked around the courtroom. Glib of tongue, free and easy about everything, he was a most picturesque sight, entirely extemporaneous in his utterances. In his conduct of the trial there appeared to be no plan or system. But whenever he talked, words rushed from his lips. He indicated a supreme confidence in the result.

The state was contending that the auto containing the hold-up men was a Lincoln. Its number had been noted and the car located. In it had been found several guns, burglar's tools, masks, and a police gong. Neither the car nor any of these articles had been traced to the accused. The defending attorney maintained in his closing argument that the fact that the state had neglected to trace the number of the car should be taken as an indication that their investigation did not in any way connect the defendant with it. The state was relying solely upon identifying witnesses including the driver of the payroll car and two shabbily-dressed boys, called by the defense attorney, "Gutter-snipes and potential murderers," who said that the defendant was the bandit who did not have a mask on and who reached into the payroll car to grab one of the suitcases containing the money.

O'Hearn, who was assisting the convoy of money, was a jovial, ruddy-complexioned officer who had been shot in the arm during the hold-up. He failed to recognize or identify the defendant. There was an apparent friendliness between defense counsel and this officer. The fact that he did not identify the accused, after he had testified that he had known him for eighteen years, was probably the strongest evidence in favor of the defendant's innocence. Counsel argued that if anybody could identify the defendant it would be a man who had known him for this long period of time.

The preparation of the state's case had been in the hands of the Chief of the Highway Police whom counsel claimed was attempting to gain his former high position on the local force, on the strength of his arresting and convicting one of the perpetrators of a big payroll robbery. He continued to say that the officer's actions and conduct in this case were like the wig on his head—false.

The defense revolved around an alibi. The accused had been a good witness. He talked readily but in a subdued tone. He knew how to act when telling his story. The other witnesses supporting and corroborating his account were Mr. Loree, an owner of a pool room, the latter's son, Mooney, and another young man, all appearing business-like and worthy of belief. A barber and Loree's son testified in accordance with the story of the defendant that they had seen the accused in the barber's shop at the hour of the alleged hold-up. The barber stated that the accused came into his shop every Tuesday and Saturday for shaves. Most of the other witnesses for the defense did not testify directly in support of the alibi. Their testimony was to the effect that they had remembered Thanksgiving Day, the day after the alleged offense, because of a party given by the defendant's wife. They all testified that the defendant had been present, that they had not seen a bruised or bandaged finger, and that they would have seen it if it had been so bruised or bandaged.

The strongest item of proof in the state's case revolved around the incident of the defendant's index finger which had been completely amputated at the date of the trial. The driver of the payroll car had testified that he shot the defendant in the hand. The accused maintained that he had not suffered an injury to his finger until December 4, eleven days later, when this finger had been cut while opening a bottle of 'home brew." His story was to the effect that a Dr. Mills was called and amputated his finger in the kitchen of his home. The doctor did not know the precise date when his patient suffered the injury. Because there had been a Dr. Held in

attendance at the party on November 26, and he did not appear at the trial, the state inferred that it was likely he who had attended the defendant immediately after the commission of the offense.

Loree's son having testified that he saw the defendant at Tom's barber shop at or about the time of the alleged hold-up, an engineer, Thrasher of the I. C., was called by the state to testify that on November 23 at about Nine O'Clock he drove his engine to Champaign with Fireman Loree as his helper. They arrived at Champaign at Three O'Clock on the morning of November 24. The witness further testified that at 11:00 A.M. on November 25th, he and Loree left Champaign for Chicago. Records were introduced and the state's attorney was permitted to read them, after the witness testified that he made the records in the course of his employment. Loree's son, however, took the stand in sur-rebuttal and explained that he had left Champaign as soon as his train pulled into the town and hurried back to Chicago to see his girl. The prosecutor did not cross-examine him extensively in regard to this return trip. It was a vital feature of the case. If the jury believed that this witness had seen the defendant in Tom's store it would create genuine doubt of guilt. On the other hand, if his testimony impressed the jury with its falsity, they would disregard the entire defense and term it a "frame-up."

Counsel was as breezy and glib in his final argument as he had been during the conduct of the trial. He had been a prosecuting attorney for so long a period that he felt perfectly at home in the surroundings. He spoke sufficiently loud for all in the courtroom to hear every word. Not once did he refer to a note made during the trial of the case, if he had in fact made any. Nor was there anything about his conduct of the trial or argument which indicated that he had made any previous preparation whatsoever. His apparent purpose in affecting a care-free manner was to impress the jury with the idea that it was a simple case, that there had not been much for the defense to do because of the inherent weakness of the state's evidence. He conveyed the impression that the identifying witnesses had been framed by the Chief of the Highway police; that they did not compare in character or reputation with the witnesses for the defense; that all the jury needed to do was to say that the "alley-rats" might be mistaken; whereas to find the defendant guilty, it was necessary for them to declare high-grade men to be perjurers. In short, he left the impression with the jury that it was a one-sided case in favor of the defense. There was no occasion, therefore, for him to worry about the result.

Because of its extemporaneous character, the address held the rapt attention of the jury. He talked for a half hour and in concluding said that the defendant's wife was not permitted by the law to testify for him. He proceeded to read four or five lines of the well-known melody, "Sal, Old Gal of Mine." Then, walking about eight steps toward the grey-haired wife of the accused, as all in the courtroom followed him in sheer amazement, he addressed her in a whispering, yet distinct tone, "Old gal, you have carried a load for a long time. You haven't known what it is to secure a good night's sleep for over two years. Thank God, tonight, your worries are going to be over. Your husband will go home with you, a free man." The nerves of his hearers were gripped as he turned sharply to the jury and said, "Thank you."

One of the courtroom fans, in commenting upon the case, said that the evidence of the state as to identification was weak and the defense of alibi strong. The defendant's explanation of the injury to his finger at a later date—substantiated by several witnesses who had been with the accused and who had not seen the injury—was considered his strongest point.

One of the points relied upon by counsel in questioning the identification of the state revolved around the tel-type messages issued by the Chief of Highways, which did not fitly describe the defendant. They did not refer to him as being lame, or as being fifty-two years of age. In fact, they recited that the perpetrators were around the age of twenty-six. Counsel became very demonstrative in his reference to this evidence as he walked up the steps to the witness chair and sat down to indicate to the jury how the accused had walked to the same witness stand with his crippled leg. The tel-type messages did not say a word about one of the alleged robbers being shot in the melee. If a bandit had been shot, that would certainly have been one of the most important identifying clues that could have been broadcast to the different outlying stations. Since these messages did not refer to such a shooting, counsel argued that the story of the payroll car driver to the effect that he had shot one of the culprits was able to have one of them say that he had visited a police who had arrested the accused with a recently amputated finger.

Counsel's cross-examination of one of the "alley-rats," about twelve years old, was a clever performance. He asked the questions in rapid succession, seemingly approving everything they said. He was able to have one of them say that he had visited a police gymnasium on several occasions and that the "Chief" had been very

friendly to him. When counsel asked him why he had gone there so often the witness hesitated, unable to explain his motive. He had testified that he saw muskets in the hands of some of the bandits which were six feet long. Counsel, in his final argument, brought out emphatically that the boy had not been called as a witness to confront the accused until a month after the offense and that in the meantime he had been in the custody of kindly policemen. He had been asked on cross-examination, "Whom did you talk to the first time in regard to this hold-up? Describe his pal who was standing beside him. Why do you say that he was Jewish?" In answer to the last question, the youth had replied, "Because he had black hair."

Most of the alibi witnesses, upon being asked when they had first known that they were to become witnesses in this trial, answered. "Last week." Inasmuch as the commission of the hold-up occurred over two years ago and whereas the defendant had been apprehended within a month after its commission, there was little doubt that defense counsel, himself, had been in direct communication with these witnesses soon after the arrest. This is an example, however, of the ludicrous stories which witnesses will tell unless there has been a thorough rehearsal of their testimony.

It was apparent that counsel had been at the scenes involved during his investigation of the facts, before the trial. His efficient conduct of the trial was rewarded with a verdict of not guilty.

Summary

Here is a trial where a former prosecutor, appearing in the role of defense counsel, assumes the aggressive and fights unremittingly for an acquittal. He introduced upright citizens to establish an alibi and made the customary argument to the effect that it was easier for the jury to say that the identifying witnesses were mistaken than to brand the defense witnesses as perjurers. He also raised a collateral issue involving the defendant's injured finger. When he satisfied the jury as to the truth of his contention concerning this issue, they were likely to give credence to the balance of the defense testimony. The manner in which defense counsel handled the cross-examination of boys appearing for the state by having them given exaggerated, ludicrous testimony was also considered worthy of comment. Where eye-witnesses give a description of a defendant at variance with that of the accused on trial, an alert defending attorney is in a favorable position to attack its credibility. This point is developed in the story of the trial.