



1-1-1928

Lessons of the Sacco-Vanzetti Case

Dudley G. Wooten

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Dudley G. Wooten, *Lessons of the Sacco-Vanzetti Case*, 3 Notre Dame L. Rev. 119 (1928).

Available at: <http://scholarship.law.nd.edu/ndlr/vol3/iss3/1>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

THE NOTRE DAME LAWYER

A Monthly Law Review

"Law is the perfection of human reason"

Volume III

JANUARY 1928

Number 3

THE LESSONS OF THE SACCO-VANZETTI CASE

By DUDLEY G. WOOTEN

The December number of the *American Bar Association Journal* contains a lengthy and very valuable contribution by Hon. William Renwick Riddell, LL. D., D. C. L. etc., Justice of Appeal, Ontario, Canada. The article was prepared at the request of the *Journal*, Justice Riddell having been selected as an unbiased and competent critic, for many years a distinguished jurist in his own country, and familiar with the general principles and precedents of the jurisprudence common to English dominions and the United States. The wisdom of the selection is abundantly demonstrated by the splendid exposition of this notorious criminal case which the Canadian judge has given to the American bar. His discussion is peculiarly forceful and instructive because it is based upon the exact official record of the proceedings in the case, from its inception to final determination, and the accuracy of statement is attested by reference to the actual transcript of the evidence and the various steps in the long-drawn-out progress of a cause that became notable for its unprecedented delays, its vicious treatment by prejudiced partisans, and the organized assaults of a world-wide conspiracy against law and government, supplemented by the irresponsible criticisms of an ignorant and mendacious public press. Indeed, it was these purely extraneous and incidental circumstances that gave to the case its extraordinary publicity, rather than any exceptional or intrinsic importance of the proceedings. Justice Riddell strips the whole affair of these adventitious features, and, singularly equipped as he is by years of experience on the appellate bench, he presents the law and facts with the absolute fairness, coolness

and discriminating logic of an able and disinterested judge. A remarkable feature of the article is the adroit and successful manner in which the writer avoids any direct criticism of American practice and procedure in criminal cases, while at the same time making it perfectly clear that he considers our system to be subject to the severest sort of critical examination and condemnation in many of its vital aspects. It must have been embarrassing, as it was certainly a delicate and difficult task for this foreign jurist to point out, in the best of taste and temper, but with covert sarcasm and deft allusions, the glaring and disgraceful defects of our methods of trying and appealing cases. American lawyers will find this to be the most instructive, as it ought to be the most humiliating, effect of Justice Riddell's history and analysis of the Sacco-Vanzetti trial, appeal, and extra-judicial futilities, which, taken all together, constitute the most scandalous episode in the annals of American courts; not for any miscarriage of justice, but for the amazing legal tactics and the monstrous perversions of procedure that enabled fairly convicted murderers to escape execution for seven years after final judgment in the courts of Massachusetts. Evidently this phase of the case, unknown and impossible under Canadian and English laws, or, for that matter, under the laws of any other civilized government in the world, is the thing that both perplexed and exasperated the Ontario jurist. If it does not arouse the American Bar Association to a sense of the absurdities and vices of our system of dealing with litigation, nothing can.

After a detailed and careful consideration of the record, Justice Riddell arrives at the following conclusions, which nobody who will weigh the law and facts impartially can question: That no testimony was wrongfully admitted or excluded; that the evidence which so fatally affected the defendants was given by themselves and against the advice of the trial judge; that there was no misconduct of the court, the jury or the prosecution; that there was a fair trial; that there was ample evidence to sustain the verdict of the jury; that there is nothing but subsequent declamation and vituperation to suggest prejudice or failure of duty on the part of the jury; that the motions for new trial were properly denied; that the great delay in executing the sentence was due to the motions of the defendants themselves,

and to the tenderness and leniency of the law and the court in respect to the rights of the accused for protection against injustice; and that if there was any error at all it was in the jury's verdict of guilty, upon which issue there was abundant testimony to warrant that verdict.

He points out that the extraordinary protection afforded the men by the trial judge, the appellate courts, and the Governor of Massachusetts, during the long and tedious resort to all sorts of devices and technical delays, is "alien to our (the Canadian) system", and could never have availed to delay the execution of defendants after judicial conviction, thus permitting the campaign of villification and misrepresentation which was waged by Socialists and Bolshevists all over the world, ably aided by a vindictive and unscrupulous press.

The things of most permanent interest to the legal profession, and to intelligent citizens generally, in Justice Riddell's article, are his guarded but unmistakable strictures upon American methods of trial and appeal, and which he intimates were responsible for the disputable transactions in the Sacco-Vanzetti case. Since they apply with equal force to all of our litigated business, civil as well as criminal, they are worthy of serious consideration, as the pointed suggestions of a judge of many years practical familiarity with a different and more efficient system. For instance, discussing some of the objections made to admission of testimony and the rulings of the trial court thereon, this learned judge remarks:

"There are some technicalities which I fail to understand, perhaps relics of a rigid practice. *E. g.*, a girl who had in the court below said of Sacco: 'I don't think my opportunity afforded me the right to say he is the man', in the trial court said positively he was the man; Counsel asks: 'How do you reconcile in your own mind the answers which you made in the Quincy court and in this court?' Counsel for Vanzetti objects, and the Court says: 'The phrase "in your own mind" is objectionable.' *I wonder why?*"

Again, quoting a lengthy and wordy war between counsel and court over the admission and exclusion of testimony upon objections and counter-objections, Justice Riddell comments:

"It strikes an Ontario lawyer as odd that counsel, on having an objection overruled, asks the court to 'kindly save an exception'. Before the introduction, some half a century ago, of stenographic reporting into our courts, it was customary to ask the court to 'note an objection', but now that is wholly unnecessary; no judge 'notes an objection', every objection appears

in the shorthand notes, and the party has the benefit of it without any 'noting' or 'saving' by the judge. To us, where there is a full stenographic report of all the proceedings, it seems an idle formality and waste of time to ask a judge to 'save an exception', and we wonder what would happen if he should refuse."

American courts have had full stenographic reports of trials for as long as or longer than in Canada, and there is no more necessity for such foolish and wasteful formality here than there; yet, in most of our courts a failure by counsel to note objections and save exceptions is fatal, for the appellate courts will not consider alleged errors by the courts below unless specially excepted to at the time the testimony is admitted or excluded. As for what would happen if the court refused to note the exception, the usual procedure, which the writer of this has had occasion to resort to on several occasions, is at once to call in bystanders and prove by them that the exception was actually noted and saved, their statements under oath to that effect being incorporated in the report of the stenographer.

Commenting further upon the frivolous and prolix methods of our courts and lawyers, as disclosed in the record of the Sacco-Vanzetti trial, he offers the following criticisms, the justice of which is painfully apparent to an American practitioner:

"Cross-examining counsel is not allowed to ask a witness: 'In other words, the man in front obstructed your view?'—he must ask: 'Did the man in front obstruct your vision?', and so avoid 'a fault that a great many attorneys have'. I do not think there is an Ontario barrister who does not have that 'fault' and wholly without consciousness that it is a fault—or an Ontario barrister who would think of objecting if opposing counsel framed a question or two in that way—or an Ontario judge who if such an objection were raised would not say: 'Let us get on; don't waste time.'

"Again, cross-examining counsel asks: 'You say that this man resembled one of the men you saw'" On objection, the court excludes the question, but gives counsel 'the privilege of asking directly without assuming as a fact that the witness has testified as you assume'. Counsel says: 'Well, the question stands and is excluded'. Were this a less serious occasion, a Canadian would think this episode elaborate fooling; as it is, he wonders which is the more reasonable, the judge who insists on a particular form of question, or the counsel who refuses a perfect equivalent for his own form. *Tantae celestibus irae.*"

This useless and more or less idiotic consumption of time and of space in the record accounts largely for the difference in the length of trials in Canada and England and in the United States, which is mentioned later on.

He quotes the old-fashioned, black-letter form of Common

Law Indictment as used in Massachusetts, full of redundant and meaningless verbiage, and contrasts it with the brief form prescribed by statute in Ontario: "The jurors for our lord the king present that A. B. and C. D. murdered E. F. at Toronto on May 27, 1926"—being an actual indictment tried out in his own court very recently. And he gives as the reason for this modern improvement, that "while we in Canada long adhered to the old traditions and followed the old forms, we recognized that we were—as we are—too busy and poor to indulge in and pay for frills, and that courts after all are business institutions to determine the rights of the people, collectively or individually, and at that with the least possible expenditure of time and money" Pity that like considerations of common sense and economy cannot be brought to bear in this Republic, especially in those States which adhere with asinine servility to the antiquated and absurd fictions and formalities of the Common Law, long since repudiated in the land of its birth.

Sacco and Vanzetti were jointly indicted for murder and arraigned September 28, 1920, and, after various dilatory motions and preliminary skirmishings, the trial began on May 31, 1921. Demurrers to the Indictment were interposed, argued and taken under advisement, but never decided. One of these was to the effect that the indictment was "uncertain, indefinite, contradictory and ambiguous", among other things because it failed to state "the make, size or caliber of the said bullet alleged to have been discharged from the loaded pistol" in the hands of the defendants. Regarding this demurrer, Justice Riddell remarks:

"No doubt counsel was well advised not to press the demurrer; in our courts it would be considered trivial and absurd, and would be instantly overruled, while counsel would think himself fortunate if he escaped ridicule."

The selecting of the jury began with the examination of a venire of 500 men, which was exhausted by the acceptance of 7 jurors, when an additional venire of 200 names was ordered and examined before the remaining 5 men were chosen. This consumed nearly a month, many challenges "for cause" having been made and sustained. Upon this point the Canadian judge comments:

"I have never known a jury panel to have more than 60 names, never but once heard a challenge for cause—if a challenge for cause were made in a court in which I presided, I should have to send for a law-book to know how

to proceed; it is not permissible to ask the challenged jurymen any question, and any ground of objection must be proved *aliunde*. What is done is for counsel who object to any juror for cause, to mention the cause privately to Crown Counsel, and, if there is any real cause, the jurymen is at once excused. I have done this a score of times as Counsel for the Crown or the defense and never heard of refusal or dispute."

Imagine, if you can, the average American attorneys for the prosecution and defense consenting to excuse a jurymen challenged for cause, by private agreement and without dispute. In Massachusetts each defendant was allowed forty-four peremptory challenges to twenty in Canada, and there was frequent and lengthy wrangling between court and counsel during the selection of the jury in this case. The same thing happens in every murder trial in most of the American courts. The actual trial lasted from May 31 to July 14, 1921, including empannelling the jury and argument of counsel. Commenting upon these proceedings, Justice Riddell has this to say:

"I have never but once seen it take more than half an hour to obtain a jury even in a murder case—the single exception was in a murder case tried before me in Toronto in April, 1927, against two jointly charged who severed in their defence. I had unwisely excused some jurymen from attendance and before the sheriff could procure their attendance some time elapsed and we took nearly 48 minutes in all to procure the jury The extraordinary length of trials in some American courts we never cease to wonder at. I have never seen a murder case except one last in our courts as long as four days: that protraction was due to the calling of about fifty experts, which was the cause of the Parliament at the next Session limiting the number of expert witnesses to five, unless by order of the court. (Canada Acts, 1906). I have looked up the record of the last murder case tried before me and find it took nearly three days: it was the trial of a man and woman for the alleged murder of the woman's husband, and took an unusually long time, the prisoners severing in their defence."

Contrast these Canadian records with some of our recent notorious criminal trials, such as the Loeb and Leopold case in Chicago, the Aimee Macpherson case in California, the Remtš case in Cincinnati, the Snyder and Gray case in New Jersey, as well as such civil trials as that of the House of David in Michigan. And when did any American legislature at its next session enact a law to correct the evils of such injurious procrastination and complications?

Then, after the trial and conviction, there ensued the most extraordinary proceedings, amazing and incomprehensible to the Canadian legal mind. Motion for new trial was filed July 18, 1921, the day after the verdict of conviction. On November 8, 1921, the first supplementary motion for new trial was filed, fol-

lowed by six other supplementary motions, in 1922, 1923, 1924, and 1926, all of which were denied by the judge who tried the case. On April 5, 1927, the Supreme Judicial Court, on appeal, found no error in the trial and affirmed the judgment of conviction, sentence of death being pronounced on April 9, the execution being fixed for the week of July 10. On August 6 an eighth motion for new trial and for revocation of sentence was entered, and petition for writ of error to the Supreme Court was filed the same day, alleging newly discovered evidence and prejudice on the part of the trial judge. These being denied because without merit and coming too late, application for a writ of error *coram nobis* was made before the Supreme Court and held to be an obsolete proceeding. Then appeal was made to the Governor for commutation and clemency, who read all of the record and motions himself, and appointed a committee of eminent men to make an independent investigation. Pending these remarkable efforts to override the judgment of conviction by legal devices of questionable validity, bitter and unwarranted attacks were made upon law and government in general and particularly upon the judge and officials of the trial court. Newspapers and magazines, without any knowledge of what had actually transpired in the courts, or of the evidence adduced before the jury, published the most scandalous and untruthful calumnies upon the integrity of the judges and the terms of Massachusetts laws. One Harvard law professor discredited his institution and his own sense of decency by a violent and partisan contribution in a leading New England magazine, furnishing food for further misrepresentation and villification by uninformed and prejudiced persons and organizations.

Speaking of these extra-judicial activities, Justice Riddell disposes of them briefly: "Such methods are alien to our system; the courts having made their last say, there is still open to the condemned another forum—on an application to the Crown for mercy, the Minister of Justice, if he entertains a doubt whether there should have been a conviction, may 'after such inquiry as he deems proper', direct a new trial at such time and before such court as he thinks proper". Also:

"On our Canadian principles these two men had a fair trial so far as any one can judge from the printed record. On conviction in Canada they would at once have been sentenced to death, the day of execution being fixed

three or four months later to enable them to take an appeal and the Executive to consider their case. The judge would forthwith make a full report of the trial, etc., for the information of the Executive. If an appeal is decided upon, it is taken without delay to our Court of Appeal—in Ontario, the Appellate Division; if the five judges are unanimous, there is no further appeal; if there be dissent, there is a further appeal to the Supreme Court of Canada, of six judges."

He then explains that "there was no new trial at Common Law in such cases", and that under the Canadian statutes the trial judge drops out of the case as soon as judgment is entered upon the verdict of the jury, the whole record goes up to the appellate judges for their judgment of affirmance or reversal, and the opportunity for such delays as occurred in the Sacco-Vanzetti case is "wholly foreign to our ideas."

In the outset of his fine article, Judge Riddell makes this significant and pertinent explanation:

"This paper is written in no missionary or polemic spirit—if there be occasion to compare our law or practice, it will not be to assert its superiority or to recommend its adoption by others. It is said that every country has the government it deserves; it is quite certain that every free country has the law it desires—I mean really does desire, not simply says it desires. Where I suggest the superiority of our law or practice, I mean superiority for Canadians; Americans are perfectly capable of selecting what is best for themselves, without any assistance from a Canadian."

Any American lawyer who has had much practical experience at the bar—not the legal pedagogue or the academic *doctrinaire*—will readily concede that, in the respects mentioned by this learned foreign jurist, the Canadian law and practice are manifestly superior to our own, in all the elements of efficiency, expedition and economy. It will also conclusively appear that the American people do not really desire, but simply say they desire, improvements along the lines indicated by his discussion. How far that condition of public sentiment is attributable to the apathy or the inability of American judges and lawyers, is the most serious problem that confronts the profession in this country. Justice Riddell's timely article is the best practical exposition of the defects of our system in a concrete case that has appeared in print. It is worth all of the statistical tabulations and visionary projects of the crime commissions, sociologists, biologists, professional reformers, and bar association resolutions, whose din and drivel have made a difficult subject more obscure and less easy to deal with intelligently.

University of Notre Dame
College of Law.