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IN THE

Supreme Court of the United States

October Term, 1962

No. 609 40

RALPH D. ABERNATHY, FRED L. SHUTTLESWORTH, S. S. SEAY, SR., and J. E. LOWERY,

Petitioners,

THE NEW YORK TIMES COMPANY, a corporation,

—v.—

L. B. SULLIVAN,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Petitioners submit this reply brief (a) to correct major misstatements and distortions of the Record, and of the applicable law, which permeate respondent's opposing brief; and (b) to point out respondent's attempt to evade and obscure the grave constitutional issues and violations of petitioners' fundamental Fourteenth Amendment rights.

This Court should note at the outset that respondent does not directly challenge any of the material record facts set forth in the Petition,* nor dispute a single one of the

* Hereinafter "P. B." will denote our Petition for Certiorari and "R. B." will denote "Respondent's Brief in Opposition".

myriad of governing applicable decisions of this Court, therein cited and shown to require review and reversal of the judgment below.

1. Respondent erroneously asserts that the "sole defect of due process" which petitioners presented below was the deficiency of evidence against them (R. B., p. 4).

The record facts and authorities set forth in our Petition (P. B., pp. 13-14; 21, 22), demonstrate that petitioners properly presented and challenged the violations of their basic Fourteenth Amendment rights in the courts below and that, as a matter of law, these objections and violations were not waived and are properly before this Court.

2. Respondent disputes petitioners' statements concerning the treatment of their motions for new trial (R. B., p. 4). However, the record facts (P. B., pp. 13-14) demonstrate that petitioners never waived or discontinued their motions for new trial. Moreover, respondent's brief does not and cannot deny: (a) that said motions were duly and timely filed within the 30-day period and appearance duly made on December 16, 1960, the continued date, in compliance with Title 13, Section 119 of the Alabama Code cited by respondent (R. B., p. 23); (b) that the trial judge refused petitioners' repeated requests for a ruling on their motions; (c) that the record contains no direct ruling by the trial judge that said motions were discontinued or had "lapsed". These facts and the surrounding circumstances support the understanding set forth in our Petition (and petitioners' reliance thereon) that petitioners' new trial motions would be heard together with the Times' motion for a new trial. Respondent does not deny that the trial judge on March 3, 1961, heard extensive argument by counsel for the Times but refused to hear or permit petitioners' counsel to even make a statement for the record with respect to such understanding.

Contrary to respondent's assertions (R. B., p. 5), petitioners' Assignments of Error to the Alabama Supreme Court (R. B., pp. 24-5) clearly show that petitioners urged violation of their Fourteenth Amendment rights in the refusal of the trial judge to hear or enter a ruling on their motions for a new trial.

3. Neither the "atmosphere of racial bias, passion and hostile community pressures", nor the flagrant bias and lack of qualifications of the trial judge, and other abridgments of fundamental requirements of due process and fair and impartial trial set forth in our Petition are denied by respondent—although properly challenged and objected to in the courts below both by the Times and petitioners.

Contrary to respondent's groundless assertions (R. B., pp. 7-8) the Times, in fact, repeatedly challenged the denial of fair and impartial trial below by appropriate objections and by its motion for new trial (R. 2038-9; 2044-8).* Both the Times' Assignments of Error to the Alabama Supreme Court and the Times' Brief on Appeal to that Court, demonstrate that numerous assignments (e.g., Nos. 14-17; 81) and numerous points in said Times' Brief (e.g., pp. 128-130), were directed against the "Evident Bias, Passion and Prejudice of the Jury" and to the "Denial of the Right of the Times to a Trial by an Impartial Jury under the Fourteenth Amendment" and the improper influence of hostile press and community pressures.

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* Indeed, the Record notes the statement by the Times' eminent Southern Counsel that the Sullivan verdict "could only have been the result of the passion and prejudice revived by that celebration [the Centennial Commemoration] and other events embraced within that Civil War celebration" and the failure of the Court to adjourn the trial even during the day "while ceremonies took place changing the name of the Court to 'Confederate Square'" (R. 1661). And again that plaintiff [Sullivan] "was allowed to present the case to the jury as a sectional conflict rather than as a cause of action for libel" (R. 2047).

Prior to the filing of the separate petitions by the Times (No. 606), and by petitioners (No. 609) with this Court on November 21, 1962, counsel for the individual petitioners herein apprised counsel for the Times that the question of the Fourteenth Amendment violations resulting from the clear denial of fair and impartial trial, bias, prejudice and hostile community pressures and the related questions would be presented to this Court in our petition. Counsel for both the petitioners and the Times were familiar with this Court's practice of considering together petitions dealing with the same judgment of a lower court, as in the case at bar.

4. Respondent erroneously asserts that petitioners' objections to the racially segregated courtroom, the atmosphere of racial bias, passion, and hostile community pressures which pervaded the trial, the improper newspaper and television coverage of the trial, the intentional and systematic exclusion of Negroes from the jury and from voting, the presiding trial Judge having been illegally elected and not properly qualified to preside over the trial and the appeals to racial bias by respondent's attorneys, were not raised below or are outside the record* (R. B., pp. 7-11).

Respondent poses false issues. Petitioners (as shown hereinabove and in our Petition) properly presented their constitutional objections embracing these abridgments of their fundamental rights to due process and equal protection of law.

In any event, we submit that, under established authority, these fundamental constitutional questions are prop-

* This contention, of course, does not go to petitioners' objections of lack of evidence, and the violations of petitioners' rights of free speech, press and assembly which respondent concedes are properly before this Court (R. B., pp. 13-19).

erly before the Court for review even if we assume *arguendo* that they were not all presented below with the technical precision respondent asserts is required.

Respondent does not dispute or deny that the trial below took place in a racially segregated courtroom, or that the trial judge, Walter B. Jones, has expressly stated and proudly boasted of conducting trials in Alabama in segregated courtrooms where "white man's" justice governs and the Fourteenth Amendment is allegedly inapplicable (P. B., pp. 3, 17). Nor does respondent dispute or deny that Negroes in Alabama have been systematically and intentionally excluded from juries and voting (resulting in a trial before an all white jury and a judge elected only by whites). These matters are not only undisputed, but are matters of common knowledge and the subject of judicial notice.

Thus, three decades after this Court's decision in *Norris* v. *Alabama,* 294 U. S. 587, one need only to look at *U. S. ex rel. Seals* v. *Wiman,* 304 F. (2d) 53, to learn that Alabama still excludes Negroes from juries; from *Alabama* v. *U. S.,* 304 F. (2d) 583, aff'd —— U. S. ——, 31 L. W. 3080 (October 1962), one sees that Negroes are still excluded from voting in Alabama.*

Thus, these undisputed violations of Negro petitioners' basic rights to due process and equal protection of laws are inherent and implicit in the trial transcript.

Respondent further does not deny the existence of bias, racial prejudice, hostile community pressures affecting the trial, and the prejudicial newspaper and television reports

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* As Petition shows (P. B., pp. 10, 17) state enforced racial segregation in Alabama extends throughout all areas of public and civic activities.

thereon. Respondent does not dispute or deny that improper appeals to racial bias were made by his counsel.*

It has been repeatedly held that such violations of basic and fundamental constitutional rights, which plainly appear on the record, are properly reviewable irrespective of whether the state "local forms" of practice have been complied with. *Williams* v. *Georgia,* 349 U. S. 375; *Terminello* v. *Chicago,* 337 U. S. 1; *Patterson* v. *Alabama,* 294 U. S. 600; *Blackburn* v. *Alabama,* 361 U. S. 199; *U. S. ex rel. Goldsby* v. *Harpole,* 263 F. (2d) 71 (5th Cir.), *cert. den.* 361 U. S. 838.

Moreover, where as here, petitioners have raised objections as best they can, and have put the issues plainly before this Court, petitioners submit that established authority requires that this Court review these objections, even if they were not raised in accordance with Alabama local forms of practice and strict procedural technicalities. This was so held in *Rogers* v. *Alabama,* 192 U. S. 226. There, a Negro objected to the selection of the Grand Jury because Negroes had been excluded from the list of eligible persons. This objection had been stricken in the Alabama Court on the grounds that it was not in the form prescribed by the appropriate Alabama statute. This Court, nevertheless, reviewed the objection and reversed the judgment below, even though it "assume[d] that this section was applicable to the motion", saying (p. 230):

> "It is a necessary and well-settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

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* Contrary to respondent's false assertion, the Record below notes petitioners' objection to the use of the word "nigger" (P. B., App. B, p. 88).

Accord: *Brown* v. *Mississippi,* 297 U. S. 278, 285; *Davis* v. *Wechsler,* 263 U. S. 22; *American Ry. Express Co.* v. *Levee,* 263 U. S. 19, 21; *Ward* v. *Love County,* 253 U. S. 17, 22.

Moreover, as this Court held in *Davis* v. *Wechsler, supra,* p. 24:

> "* * * the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

5. Our Petition sets forth undisputed facts demonstrating that the Record below is devoid of any rational evidence of authorization, consent or publication by any of the petitioners of the alleged libel or of any malice on their part. Respondent does not challenge or dispute a single one of these facts nor any of the authoritative decisions set forth in our petition. To avoid review and reversal, respondent erroneously asserts that the only question reviewable in this Court is whether the record "is entirely devoid of evidence of any authorization, consent or publication by petitioners of the libel" (R. B., p. 13).

This assertion is groundless and contrary to this Court's decision in *Stein* v. *New York,* 346 U. S. 156, 181 (R. B., p. 18):

> "Of course, this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding."

Accord: *Wood* v. *Georgia,* 370 U. S. 375; *Craig* v. *Harvey,* 331 U. S. 367; *Pennekamp* v. *Florida,* 328 U. S. 331.

Moreover, this Court has repeatedly held that it is not the mere presence of *any* evidence which precludes review, but of evidence of a sufficient rational connection to justify the judgment; *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 246-7; *Thompson* v. *Louisville,* 362 U. S. 199; *Garner* v. *Louisiana,* 368 U. S. 157.

To support his groundless assertions respondent distorts the record and the applicable law.

As our Petition (pp. 6-7) demonstrates the direct and undisputed testimony of petitioners and of others was that petitioners did not in any way authorize, consent or publish the advertisement and that their names were added without their knowledge or approval. In short, there was no evidence to justify petitioners' liability or a finding of malice on their part.

Against this unchallenged and uncontradicted evidence, respondent speciously asserts that: (a) petitioners' failure to reply to respondent's retraction letter sent pursuant to Title 7, Sections 913-917 of the Alabama Code (R. B. in No. 606, App. C., pp. 53-55) constituted as a matter of fact and law, an admission that they published the alleged libel or that they ratified same; and (b) the Randolph letter showed evidence of petitioners' authorization and consent (R. B., pp. 14-18).

Respondent's assertions are entirely groundless both in fact and in law.

A. The retraction demand: Sullivan's letters of April 8, 1960 (Pltf.'s Exs. 355-358 at R. 1412-1417) were a "demand for public retraction" in compliance with the requirements of Title 7, Sections 913 to 917 et seq., Alabama Code. Moreover, the record facts set forth in the Petition and hereinabove, demonstrate among other things that none of the petitioners had seen the Times ad of March 29, 1960 prior to

the service of Sullivan's complaint on or about April 19, 1960. Since they owned no newspaper, it was impossible for petitioners to comply with Sullivan's demand that they "publish in as prominent and public a manner as the Times ad, 'a full and fair retraction' of the alleged defamation." Under these circumstances, petitioners did not have to reply, and as a matter of established law, failure to respond cannot be deemed an admission or a ratification.

Thus, the Fifth Circuit in *Parks and Patterson* v. *New York Times Company,* 308 F. (2d) 474, 480 (5th Cir.) cited with apparent approval the rule stated in Corpus Juris Secundum, Vol. 53, Libel and Slander, §149:

> ". . . [M]ere silence on the part of one in whose name a libel is unauthorizedly published will not render him liable."

Similarly, in *A. B. Leach & Company* v. *Peirson,* 275 U. S. 120 (miscited in R. B., p. 16), suit was brought on a claimed contract allegedly set forth in a letter sent to the defendant, which made a demand for performance—which letter defendant failed to answer. This Court ruled that plaintiff could not impose a duty on defendant to answer his letter or predicate liability thereon, saying (p. 128):

> "A man cannot make evidence for himself by writing a letter containing the statements that he wishes to prove. He does not make the letter evidence by sending it to the party against whom he wishes to prove the facts. *He no more can impose a duty to answer a charge than he can impose a duty to pay by sending goods.*" (Italics added.)

All of the cases cited by respondent in support of his unfounded and untenable theory in this regard are completely distinguishable both in fact and in law from the case at bar in that they all deal with situations, where the

statements were made either in the physical presence of a person, or as part of a mutual correspondence, where the Court, in view of the special prior relationship of the parties to the case, found a duty to reply.

Respondent's miscitation and misstatement as to these authorities clearly appears from the citation by respondent (p. 15, n. 11) of the Annotation in 70 A. L. R. 2d 1099, the title of which (deliberately omitted by respondent) is the "Admissibility of Evidence of party's silence as implied or tacit admission, where a statement is made *by another in his presence,* regarding circumstances of an accident". Wigmore on Evidence, §1071, discusses a similar proposition and emphasizes statements made in a party's *presence.*

By like token, respondent's failure to reply does not constitute a ratification. Established and governing authority is clear that a prerequisite of "ratification" (even in contract cases) requires knowledge by the "ratifying" party of all the relevant facts involved which petitioners did not have here; respondent, on the other hand, cites no applicable authority for his contention.

B. The Randolph letter: It is undisputed and cannot be challenged that the Randolph letter (Pltf.'s Ex. 345 at R. 1397) has no list of names attached thereto and referred to "signed members of the Committee"—of which concededly petitioners were not members. The testimony of Murray and Aaronson, on whom respondent relies (R. B., p. 14) conclusively demonstrates that petitioners' names were not attached to the letter and that their names were used without their knowledge or consent (R. 1880; 1891; 1934-5).*

* The assertion of the Alabama Supreme Court that the Randolph letter certified that the petitioners had given permission for the use of their names (P. B., App. B, p. 63) is equally groundless and a perfect example of the "distorted fact finding" engaged in below.

Respondent, in a desperate attempt to bolster his specious arguments here, goes outside the Record below to rely on the *Parks* case, *supra,* and *Abernathy* v. *Patterson, et al.,* 295 F. (2d) 452, *cert. den.,* 368 U. S. 896, as demonstrating the correctness of the judgment below (R. B., pp. 14, 15, 17). Neither helps him.

The ruling in *Parks, supra,* as correctly summarized and described in our Petition (P. B., p. 12, n. 9), lends no support to respondent's position nor to the groundless assertions in his brief (R. B., p. 15) that the Fifth Circuit ruled that "matters of substance" or a jury question of petitioners' liability were presented by the Record in the instant *Sullivan* case. On the contrary, the decision in the *Parks* case is clearly shown by the Opinion to rest on matters not contained in the Record in the instant *Sullivan* case (see: 308 F. (2d) 478, at pp. 479 and 482), and the issue considered by the Court in the *Parks* case was the question of "colorable liability" of petitioners to defeat removal of the libel suits brought by Governor Patterson and Commissioner Parks to the federal courts.

As shown in our Petition, the two-majority judges in the *Parks* case recognized the absence of any liability on the part of petitioners on the Record in the instant *Sullivan* case submitted in that suit, and took no issue with District Judge Johnson's findings and decision below that on the Record in the *Sullivan* case at bar there was not a "scintilla of evidence" or any "recognized theory of law" to support any claim against petitioners (195 F. Supp. 919, 922-3). This is further confirmed by the dissenting Opinion of Judge Ainsworth in the *Parks* case, which states in relevant part:

> "The majority opinion apparently agrees with the principal findings of the court below [i.e., District Judge Johnson, quoted above] . . .", 308 F. (2d) 474, 483.

Similarly, *Abernathy, supra,* on which respondent attempts to rely (R. B., p. 14), is completely distinguishable. That suit was an injunctive action brought under the Federal Civil Rights Act and did not present the issues involved in the *Sullivan* case at bar; even the matters carefully quoted out of context by respondent (R. B., pp. 6-7) from the *Abernathy* Complaint, on their face, lend no support to respondent's erroneous assertions; moreover, the Court of Appeals in *Abernathy, supra,* expressly noted that while injunctive relief under the Civil Rights Act was not an available remedy, plaintiffs in that case could seek relief by appeal to the Alabama Supreme Court and ultimately "review in the Supreme Court of the United States" (295 F. (2d) 452, 458).

6. Contrary to respondent's incredible assertions and suggestions that this case is an ordinary "private" libel action, our Petition clearly shows that this action, and the four companion cases on substantially identical complaints (instituted by Governor Patterson, Mayor James and Commissioners Parks and Sellers of Montgomery), based on the identical New York Times ad against the identical defendants, and seeking a total aggregate judgment of two and a half million dollars therein (in which judgments in the sum of $500,000 each have already been entered in two cases—namely, the instant *Sullivan* verdict, and the judgment in the companion James suit (P. B., pp. 8-9)), together with the additional pending suits by Birmingham officials seeking a total of $1,300,000 in damages against the Times based on the Harrison Salisbury articles on racial tensions, and the suits of $1,500,000 by Alabama officials against the Columbia Broadcasting System, Inc., based on a television program on racial problems (P. B., pp. 9-10), clearly present an ominous and unprecedented threat against basic constitutional liberties and will revive in new guise the long proscribed doctrines of "Seditious Libel".

As demonstrated in our Petition, the grave violations of petitioners' fundamental constitutional guarantees are part and parcel of, and induced by Alabama's notorious and undisputed massive statutory "cradle to grave" system of racial segregation. These unprecedented libel prosecutions are clearly designed to punish and intimidate all who criticize Alabama's unconstitutional exclusion of Negroes from juries, voting, public schools, libraries and other public and civic affairs.

Indeed, the Record below notes that the instant *Sullivan* suit was instituted three days after the public announcement by Attorney General Gallion of Alabama, that on instructions from Governor Patterson he was examining into the legal aspects of "damage actions" against the New York Times and others, based on the New York Times ad of March 29, 1960 (R., p. 1442). The related companion libel suits by Mayor James, Commissioners Parks and Sellers, and Governor Patterson were instituted shortly thereafter.

The record facts set forth in our Petition and hereinabove entirely demolish respondent's incredulous assertions that ordinary "private" libel actions are herein involved, and further explain respondent's failure to dispute a single material Record fact or any of the numerous authoritative decisions set forth in our Petition, which establish that the grave violations of petitioners' Fourteenth Amendment rights below are the direct results of state action and part and parcel of Alabama's statutory racial segregation system.

CONCLUSION

The unprecedented judgment below of $500,000 punitive damages against petitioners, in the undisputed absence of any evidence of malice on their part, and upon a record devoid of evidence of consent, authorization or publication of the claimed libel on petitioners' part, conflicts with fundamental basic constitutional guarantees as heretofore defined by this Court. The reasons set forth in our Petition and hereinabove urgently require review and reversal of the judgment below.

Respectfully submitted,

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