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Clerk, Supreme Court of Appeals

Record No. 7374

In the Supreme Court of Appeals of Virginia at Richmond

RAY WILLIAM ALLEN

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF CAMPBELL COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7374

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 3rd day of December, 1969.

RAY WILLIAM ALLEN, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Circuit Court of Campbell County
William W. Sweeney, Judge

On mature consideration of the petition to rehear of the plaintiff in error to set aside the judgment rendered herein on the 14th day of October, 1969, and grant a rehearing thereof, it is ordered that the said judgment be vacated and set aside, and a rehearing granted.

And upon further consideration of the petition of Ray William Allen heretofore filed in this case on January 17, 1969, a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Campbell County on the 14th day of November, 1968, in a prosecution by the Commonwealth against the said petitioner for a felony; but said *supersedeas*, however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

RECORD

* * * * *

page 38 } VIRGINIA: In the Circuit Court of the County of Campbell on Thursday the 14th day of November, 1968.

* * * * *

This day came the Attorney for the Commonwealth and Ray William Allen who stands indicted of a felony, to-wit: Hit and Run, appeared in court according to the condition of his recognizance, accompanied by his counsel, Paul Whitehead.

Whereupon the accused was duly arraigned and after being advised by his counsel entered his plea of not guilty to the indictment. Thereupon a jury, to-wit: George L. Torrence, W. O. Bennett, A. K. Dudley, Thomas L. Keys, Jr., James B. Gates, Acie D. Hamlett, J. E. Burton, Jr., John Ed Payne, Archie Yeatts, Scott F. Harrison, Charles J. Blanks, and W. A. Holt was selected in the manner prescribed by law, and duly sworn the truth of and upon the premises to speak. And after hearing a part of the evidence the defendant by counsel, moved the court for a mistrial; which motion was overruled, and the defendant by counsel excepted. After hearing the Commonwealth's evidence the defendant by counsel, moved the Court to strike the Commonwealth's evidence; which motion was overruled, and the defendant by counsel excepted. And having heard all of the evidence, the instructions of the Court and arguments by the Attorney for the Commonwealth and counsel for the defendant, the jury retired to their room to consider their verdict; and after sometime reported to the Court and rendered the following verdict: "We the jury find the accused Ray William Allen guilty as charged and fix his punishment at 30 days in jail and ($100) one hundred dollar fine, signed, Scott F. Harrison, Foreman."

Whereupon the defendant by counsel, moved the court to set aside the verdict of the jury on the following page 39 } grounds: that the verdict is contrary to the law and the evidence in the case; there is not sufficient legal evidence to sustain the verdict; the Court erred in not sustaining the motion for a mistrial in reference to the Commonwealth Attorney's opening statement; the evidence failed to show that the defendant either was driving the automobile at the time of the accident or that the automobile owned

by the defendant struck the person involved; and further on the grounds that the Court erred in refusing certain instructions offered on behalf of the defendant; which motion the Court overruled, and the defendant by counsel excepted.

And it being demanded of the accused if anything for himself he had or knew to say why the court should not now proceed to pronounce judgment against him according to law and nothing being offered or alleged in delay of judgment, it is ordered by the court that the said Ray William Allen be confined in the jail of this Court for a period of thirty (30) days and pay a fine of one hundred ($100.00) dollars, the period and fine by the jury ascertained as aforesaid.

The Court certifies that the said Ray William Allen was committed to the jail of this Court on May 26, 1968 and was bonded on May 26, 1968. The Court further certifies that the said Ray William Allen had the advice of and was represented by able counsel of his own choosing, and that at all times during the trial of this case the accused was present.

The Commonwealth is to recover of the defendant its costs by it in this behalf expended in the amount of $183.60.

The defendant by counsel, having indicated his intentions to apply to the Supreme Court for a writ of error and *supersedeas* a stay of execution is granted until the first day of the next term of this court, being January 13, 1969. And this case is continued.

page 40 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Notice is hereby given, pursuant to Rule 5:1, §4, of the Rules of the Supreme Court of Appeals of Virginia, that Ray William Allen, the defendant above mentioned, hereby appeals to the Supreme Court of Appeals of Virginia from the final judgment entered in this action on November 14, 1968.

Pursuant to the aforesaid Rules, the aforesaid defendant makes this his assignments of error and alleges that the Court erred:

(1) In refusing to set the verdict aside as contrary to the law and the evidence;

(2) In refusing to set the verdict aside as there was not sufficient evidence so as to sustain a verdict;

(3) In refusing to grant the defendant a mistrial when the opening statement made by the Commonwealth Attorney

referred to the defendant's being arrested on another charge;

(4) In refusing to set the verdict aside as there was not credible evidence to identify the defendant as the operator of the automobile which struck Virginia Elizabeth Habich, that there was not credible evidence to show that the defendant was operating the automobile which struck Virginia Elizabeth Habich, and there was not credible evidence to show that it was the defendant's automobile which struck the bicycle and Virginia Elizabeth Habich;

(5) In refusing to grant the defendant's Instructions B, C, E and H, as these instructions were not covered by other instructions and were proper statements of law and the defendant was prejudiced thereby;

(6) In granting the Commonwealth's Instructions 1, 2 and 3;

Paul Whitehead
Paul Whitehead, Attorney at Law
412 Krise Building, Lynchburg, Virginia
Attorney for the defendant,
Ray William Allen

* * * * *

Virginia
Circuit Court
Campbell County
Received and filed this the 18th day of December, 1968.
Teste: H. E. Bennett, Clerk

* * * * *

A stenographic report of the oral testimony and other incidents of the trial of the case of Commonwealth of Virginia against Ray William Allen tried on the 14th day of November, 1968 in the Circuit Court of Campbell County, Virginia, before Honorable William W. Sweeney, and Jury.

APPEARANCES:

E. Bruce Harvey, Commonwealth Attorney.
Paul Whitehead, attorney for the defendant.

* * * * *

page 3 } Note: The accused, having been arraigned and to his arraignment pleaded "not guilty", the following ensued:

Ray William Allen

The Court: You plead "not guilty". Remain standing for a moment. I want to ask several questions.

Q. What is your full name?

A. Ray William Allen.

Q. Your age?

A. Age thirty-three.

Q. Mr. Allen, you are the defendant mentioned in the indictment, are you not?

A. Yes, sir.

Q. And you have discussed this case with your attorney, Mr. Whitehead?

A. Yes, sir.

Q. Are you satisfied with your attorney?

A. Yes, sir.

Q. And you understand what your plea of "not guilty" means. You understand that?

A. Yes, sir.

Q. Any questions you want to ask about the plea or is there anything you don't understand about it? Has your lawyer explained it to you?

page 4 } A. Yes, sir.

Q. And are you ready for trial today?

A. Yes, sir.

The Court: You may have your seat. Let's call the jury.

Excerpt from Commonwealth Attorney's Opening Statement

Mr. Harvey: If your Honor please, and gentlemen of the jury, this morning the Commonwealth is bringing a case before you where this man is charged with hitting a person with his car while he was driving on the road and then running from the scene of where he had hit this person without rendering any aid at the time of the accident.

This occurred on May 25th, 1968 at approximately 7:30 p.m. It was daylight. Everything was real visible—nothing to prevent anyone from seeing.

The accused, Ray William Allen, was driving a car east toward Lynchburg at a point on Route 297 approximately four or a little over four miles west of Lynchburg. Just prior to this he was on a two-lane road and was approaching a divided highway.

page 5 } His victim, Virginia Elizabeth Habich, was riding a bicycle on the right side of the road as was proper for her to do and this defendant as he approached

her was weaving from one side of the road to the other and ran into her and knocked her off the bicycle, or at least caught her foot between the bicycle and the car, and, of course, she was eventually knocked off the bicycle.

Ray William Allen at approximately 11:30 that night was arrested in Lynchburg on another charge.

Mr. Whitehead: Now, if your Honor please, I don't think that is proper.

The Court: Let's not go into that.

Mr. Whitehead: We will ask for a mistrial.

The Court: I will ask the jury to disregard the statement. I first instruct the jury that any statements counsel make in their opening remarks are not evidence in the case. It is merely what they will attempt to prove. Your decision is going to be based on evidence you hear under oath on the witness stand and on instructions of the law I give you. That is the first thing I tell you.

The second thing I tell you is I want you to disregard the last statement Mr. Harvey made with reference
page 6 } to any arrest that might have followed this incident. We are only here to try this particular case and decide whether or not this man is guilty of hit and run involving personal injuries and that is all. Do you all understand that? Does any one of you feel he can not do as I have instructed or that what you have just heard might influence you one way or the other; if so, will you just raise your hand? Seeing no hand, I will deny the motion for a mistrial and proceed with the trial.

Mr. Whitehead: We want to note an exception, if your Honor please.

EVIDENCE FOR THE COMMONWEALTH

T. R. SEXTON, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Harvey:

Q. State your name, please.

A. T. R. Sexton.

Q. And what is your occupation?

A. State trooper.

Q. About how long have you been with the State
page 7 } police force?

A. Twenty-two and a half years.

Q. Mr. Sexton, did you investigate this Ray William Allen case that occurred May 25th, 1968?

A. Yes, sir.

Q. Tell us what happened. Tell us the result of your investigation.

A. On May 25th, 1968 on Saturday abut 7:45 p.m. I was going west on 297, what we call Timberlake Road. I came across a girl lying on the side of the road beside a bent up bicycle. The girl was injured. Members of the First Aid Crew at that time were administering first aid. She had a lacerated forehead and shoulder and had a laceration on the back of her left leg. At that time the only thing I knew was what she told me, that a car struck her, and there wasn't any car there.

Mr. Whitehead: I object to him going any further into what she told him.

The Court: At this point that is correct, Mr. Harvey.

By Mr. Harvey:

Q. Just where did this occur?

A. I will give you the location. This is a photograph showing 297 looking west as it looked last May. At that time that was the end of the divided highway. You notice over in the corner the Tidy Corporation truck. That

page 8 } is a truck that belonged to the Tidy Corporation. The accident was at this location. That is what we call the westbound lane. The girl and the bicycle were lying right here at this location. That is looking west.

Here is another photograph looking east. These photographs are identified as No. 1 and No. 2. This one looking east is looking at the sign "To Lynchburg" right here. That is where the girl and the bicycle were lying.

This photograph No. 3 shows the bicycle. It looked like it had been painted blue with green over top of it, green and blue paint on it. The fender here was dented and the paint was knocked off of it here and here. You can see the handle bars are bent. This bicycle was right beside the road.

I have some more pictures. Will it be all right to stand here and show them?

Mr. Whitehead: I don't think he has got to that point where he can show the other pictures.

T. R. Sexton

The Court: Are you, Mr. Harvey, putting these pictures in evidence or not?

Mr. Harvey: Yes, sir, we introduce them as Commonwealth exhibits 1, 2 and 3.

By Mr. Whitehead:

Q. You took these pictures yourself?

A. Yes, sir.

page 9 } The Court: The Court will admit these as Commonwealth's exhibits 1, 2 and 3 and you will be allowed to take them to the jury room with you.

By Mr. Harvey:

Q. Go ahead.

A. This was 7:45 p.m. on May 25th. About 11:30 p.m. that same day or that night I checked a '67 maroon Ford convertible with a black top which was on Perrymont Avenue in Lynchburg at the Seven-Eleven Store there next to Thomas Road. I found green and blue paint on the right end of the front bumper and dents on the right front fender, not in the front but on the side.

Q. Is that shown in any photograph?

A. Yes, sir.

Q. Come down here and show it to the jury. What number will this one be?

A. I will mark this one "No. 4". This is the car I checked in Lynchburg that night. You see right on the corner right on the end of the bumper what is blue and green paint. This one I mark "No. 5" shows a little further down the side. You can see the dent here in this location. No. 6 is a close-up, a closer shot. It shows the dent a little more in detail. This is paint you see here but, of course, you can't tell what color it is because it is a black and white picture. No. 7 is just a picture of the car from the rear. It had a maroon body with a black convertible top.

page 10 } Mr. Harvey: I would like to introduce those as Commonwealth's exhibits 4 through 7.

By Mr. Whitehead:

Q. You took those too?

A. Yes, sir.

The Court: The Court will admit these.

T. R. Sexton

By Mr. Harvey:

Q. At the time you observed the car and so forth did you talk with Mr. Ray William Allen?

A. No, sir.

Q. When did you get in touch with him?

A. The next morning on May 26th. I checked the car that night as far as ownership and it belonged to Ray William Allen, 1014 Timberlake Drive, Lynchburg. The next morning, May 26th, I went down to the police department in Lynchburg to talk to Mr. Allen. I told Mr. Allen the evidence I had and advised him of his rights as far as remaining silent and anything he said would be held against him and he had a right to see a lawyer and if he couldn't afford a lawyer we would get him one. He told me he understood all that but it wasn't anything to tell me anyway because he didn't remember anything except he run off the road twice on the gravel coming into Lynchburg.

Q. Did he say anything about whether he was driving at this particular place or not?

page 11 } A. He told me he come from Timberlake and this was between Timberlake and Lynchburg.

Q. Did he say anything about the time?

A. No, sir.

Q. He did tell you he drove from Timberlake?

A. Yes, sir.

Q. Did he say anything about driving from Timberlake to Lynchburg?

A. He just said he drove from Timberlake to Lynchburg and he remembered running off the road twice, hitting the shoulder twice on the gravel.

By the Court:

Q. What particular day or time was he talking about? Did he say?

A. No, sir, he didn't know the time. It was the same day on the 25th in the evening but he didn't know what time he left home.

By Mr. Harvey:

Q. The car you inspected was what kind of car?

A. A '67 Maroon Ford convertible belonging to Mr. Ray William Allen.

Q. Were you present when the car was inspected by Mrs. Hiram Jones and Miss Jessie Lindsay?

A. No, sir.

T. R. Sexton

The Court: Mr. Harvey, I will have to ask you
page 12 } to speak up. Your voice is too low.

By Mr. Harvey:

Q. Did Mr. Allen deny the charge that you made that night when you talked with him?

A. I talked to him the next morning down at the police station in Lynchburg. No, sir, he didn't deny it, he just didn't remember it.

CROSS EXAMINATION

By Mr. Whitehead:

Q. Mr. Sexton, did you say you told him he didn't have to say anything at all and he said he didn't know anything anyway?

A. That is exactly right.

Q. Is that what he said?

A. Yes, sir.

Q. That is denying it when he said he didn't know anything.

A. He didn't come right out and say he denied it. He told me he didn't remember anything except running off the road twice, so I guess that is denying it, yes.

Q. You advised him about his rights down there and you told him he had a right to have an attorney and didn't have to say anything at all and then he said he didn't know anything anyway.

page 13 } A. Except he ran off the road twice.

Q. Then did he say the only thing he remembered was running off the road twice but he didn't remember hitting anybody?

A. Right.

Q. Nothing was gone into as to what time he was on the road, was it?

A. No, sir. I don't know whether I told him the exact time that I had or not.

Q. You do know that when you got a call it was somewhere around 11:00 o'clock at night, don't you?

A. A little after 11:00.

Q. And you went then to the Seven-Eleven Store?

A. Yes, sir, on Perrymont Avenue.

Q. That is on Perrymont out near Thomas Road?

A. Yes, sir, kind of in the corner.

Q. You went there then and saw the Ford automobile sit-

ting there and you checked the license number on it and found out from the license number it did belong to Mr. Ray William Allen, did you not?

A. That was the second check. I knew before then but I wasn't positive.

Q. Then, as I understand it, you saw the car out there that night.

A. Yes, sir.

page 14 } Q. Then these pictures which you have taken of the automobile they were taken the next day, were they not?

A. Yes, sir.

Q. And after you saw the car out there that night at the Seven-Eleven Store then I believe in the meantime you or some police officer had the car moved from there down to Virginian Ford, did you not?

A. Yes, sir.

Q. Now, Virginian Ford, of course, was down near Main Street, wasn't it?

A. Yes, sir.

Q. And that is approximately how far from where you saw the car that night?

A. Two or three miles.

Q. Mr. Sexton, at the time that this accident occurred were you out in that neighborhood around that time, around 7:30 that night?

A. I don't know. I came across the accident around 7:45 and I couldn't pinpoint the time it occurred. I don't know how close I was.

Q. Had you gotten a call to investigate it?

A. No, sir, I just drove up on it.

Q. You were on duty?

A. Yes, sir.

Q. When you arrived there it was 7:45 p.m.?

page 15 } A. Yes, sir.

Q. And the accident had already occurred. Was the Lifesaving Crew there then? Had they come there?

A. No, sir. It was one of the members of the Lifesaving Crew on his private car out there.

Q. And you found this lady and her bicycle—say the road runs east and west—that would have been then on the south side of the road?

A. Yes, sir.

Q. And entirely off of the road?

A. Yes, sir.

T. R. Sexton

Q. I believe you have shown us where that sign was up there if you are looking east which would be so many miles to Lynchburg and she was just a short distance you say east of that sign?

A. Yes, sir.

Q. When you arrived there you say it was 7:45 p.m.? Was it still daylight?

A. Yes, sir.

Q. You could see all right?

A. Yes, sir.

Q. Was the weather clear?

A. Yes, sir.

Q. So we can understand the location, because the road has been changed out there so much, you have
page 16 } kindly shown these pictures and I notice in one of the pictures there is something that looks like rock posts. Do you know if those rock posts are still there or not?

A. I don't remember whether they are there now or not. I know they came back and took all the shoulder off and cut this down in here.

Q. You mean since that time?

A. Yes, sir. That whole thing has been changed since then.

Q. This picture No. 1 shows the edge of a truck right across the road there and that is where the Tidy Corporation is?

A. Yes, sir.

Q. If that road runs east and west then the Tidy Corporation would be on the north side, wouldn't it?

A. Yes, sir.

Q. And practically across the road from where you found the lady?

A. Close to it but not exactly across from it.

Q. Did you take the pictures of this automobile at the time the car was down at Virginian Ford?

A. Yes, sir.

Q. You have told us about seeing some paint on this automobile. I will ask you this: Did you get any samples of the paint to see whether or not it would match up with the paint either on the bicycle or on the car?

page 17 } A. No, sir. When I went to scrape the paint off it came off in dust. I couldn't get a piece even to try to match it.

Q. Were you able from your investigation to determine approximately what time this accident occurred?

Miss Jessie Lindsay

A. Yes, sir, approximately 7:30.
Q. I understand you did not take any pictures of the automobile until the next day and that was down at Virginian Ford.
A. Right.

Mr. Whitehead: All right, thank you, sir.

RE-DIRECT EXAMINATION

By Mr. Harvey:
Q. When you examined the car for the paint could you tell anything of the color of the paint on the car?
A. The only place it had paint on it was the end of the bumper and that was blue and green paint. I tried to get it off and it just came off in dust.
Q. And the color of the bicycle was what?
A. Blue and green.

Mr. Harvey: That is all.

The Witness Stands Aside.

page 18 } MISS JESSIE LINDSAY, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Harvey:
Q. Will you state your name?
A. Miss Jessie Lindsay.
Q. Miss Lindsay, on May 25th, 1968 were you driving on Route 297?
A. No, sir, I was not.
Q. Where were you?
A. I was on the car with my sister.
Q. You were in a car with your sister?
A. Yes, sir, that is right.
Q. Who is that?
A. Mrs. Hiram Jones.
Q. Tell us about what time this occurred and what you observed, and so forth.
A. It was about, I would say, about quarter past seven and we ran up behind this car, dark maroon, black top car, and it was first on one side of the road and then the other.
Q. And what happened as you recall?

Miss Jessie Lindsay

A. Well, it ran over and almost hit a car that was fixing to pull into the main highway and it swerved away from that and then it went over and hit this girl on the bicycle.

Q. Did you observe him hitting the bicycle?

page 19 } A. Yes, sir.

Q. Could you tell whether it was a man or woman driving?

A. No, sir.

Q. But you do identify the car as being a maroon color?

A. Yes, sir.

Q. Did you identify it as being a Ford or what kind of car it was?

A. No, sir.

Q. What happened as far as you all were concerned after you saw this car hit the girl?

A. Well, we stopped. We were on our way to Brookville High School and we stopped and got out.

Q. Did you notice the color of the bicycle?

A. It was blue.

Q. Did you observe whether or not the girl was injured?

A. The only thing I could see was the blood up here on her head. I didn't go to her because I can't stand anything like that. I can't stand the sight of blood.

Q. Did you identify the car the next day?

A. Yes, sir.

Q. Where did you go to identify it?

A. Down to the Virginian Ford place in Lynchburg.

Q. You saw a maroon car there?

A. Yes, sir.

page 20 } Q. Did you observe whether any paint was on the right fender?

A. Yes, sir, it was a tiny little bit of blue paint on the front fender.

Q. What kind of car did you observe?

A. It was a dark maroon car with a black top.

Q. Was this the car you saw the day before?

A. That was the car we were following.

Mr. Harvey: All right.

CROSS EXAMINATION

By Mr. Whitehead:

Q. You were riding in the automobile with your sister and I assume you were on the right front.

A. Yes, sir.

Miss Jessie Lindsay

Q. And you had not driven a car for a long time?
A. I don't drive at all.
Q. And you don't know one car from another?
A. No, sir.
Q. You didn't get the license number of the car that you saw strike the girl?
A. No, sir.
Q. Now, we will say Timberlake Road runs east and west. East would be toward *Lynchbug* and west would be toward New London. Now, you all were going in an east-
page 21 } erly direction, were you not?
A. Yes, sir.
Q. Now, before this accident you had followed this car for about three miles?
A. Yes, sir, I would think so.
Q. Then the girl on the bicycle she was coming toward you all, was she not?
A. That is what I presumed, yes, sir.
Q. She was going in the opposite direction from what you were going, wasn't she?
A. I think so.
Q. In other words, you were going toward Lynchburg or in an easterly direction and she was going toward Timberlake or a westerly direction?
A. Yes, sir.
Q. What side of the road was she on when she was struck?
A. On my right.
Q. And that would have been then on her left side?
A. Well, if she was going toward Timberlake it would have been.
Q. And that is the way she was going?
A. I presume she was.
Q. Well, you saw her.
A. Well, at that distance I just thought that she was going toward Timberlake.
page 22 } Q. At what distance?
A. Well, we was over here on this hill and she was up on that hill. It was a little dip in there.
Q. Let me ask you this: Here are some pictures. Take No. 1 and No. 2 and let me ask you this—maybe you better come down here if you don't mind, please—look at this picture. This would be looking west or looking toward Timberlake. Do you understand that picture?
A. Yes, sir.
Q. In other words, you were going east so you would be coming in this manner. Do you understand that?

Miss Jessie Lindsay

A. Yes, sir.
Q. You said something about a little hill.
A. We was on this hill over here and then there is a little dip and then you come up this hill here.
Q. I see. Then so we can understand it, and help me out if I am saying it wrong, you then were headed in an easterly direction?
A. That is right.
Q. And you were over on top of this hill which would be west of where the accident happened?
A. Yes, sir.
Q. And the accident happened near this sign—you see this sign right here?
A. Yes, sir.
page 23 } Q. Was it somewhere in the neighborhood of this sign here?
A. That looks like the sign, yes, sir.
Q. Now, this was on Saturday, I believe, and it was still daylight, wasn't it?
A. Yes, sir.
Q. And I believe you say it happened around 7:15?
A. Somewhere along there.
Q. And you all were going to Brookville School?
A. That is right.
Q. And when you first saw the car that you say struck the lady on the bicycle the car was headed east or toward Lynchburg, was it not?
A. Yes, sir.
Q. And you tell us you followed it for about three miles?
A. Yes, sir.
Q. And when you first saw the car it was on 297, wasn't it?
A. That is right.
Q. You never did see it get on 297, did you?
A. No, sir.
Q. And you tell us you were proceeding east and the bicycle would be proceeding west. Now, did you see the automobile strike the bicycle?
A. Yes, sir.
page 24 } Q. Did you get the license number of the automobile?
A. No, sir. We didn't get that close to it.
Q. Could you tell who was driving the car?
A. No, sir.
Q. Could you tell how many people were in the automobile?

Miss Jessie Lindsay

A. No, sir.

Q. Could you tell us, please—maybe you could point out something across the street or somewhere—approximately when this car came in contact with the bicycle how far were you from the bicycle.

A. I wouldn't have any idea.

Q. Would it be further than to that door there?

A. Yes, it would be farther than that.

Q. You know where the road is, 501 that goes through town here, would it be about that distance?

A. A little bit farther than that I would say.

Q. You did not get the license number and did not know who was driving and the only thing you knew it was a maroon car with a black top.

A. That is right.

Q. And you don't know what kind of car it was, whether a Chevrolet, Ford or what?

A. No, sir.

Q. The next day I believe you met some police officer down at Virginian Ford, did you not?

page 25 } A. Yes, sir.

Q. When you went down there on that occasion there was only one maroon Ford with a black top sitting there, wasn't it?

A. That is right.

Q. And you could not identify that as the car that struck the bicycle, could you?

A. Not until I walked around in front and saw the dent on the front fender and the blue paint on it.

Q. Was that the only way you had to identify it?

A. That is the way I figured it was the car.

Q. That is the way you figured it?

A. I thought that was the car, yes.

Q. You did not know that that was the car?

A. No, sir.

Q. When you went down to the Ford place was the car sitting where it is shown here in picture No. 7?

A. No, it was sitting over in here.

Q. And that was the only car sitting there with a maroon body and black top?

A. Yes, sir.

Q. After you all caught up with the car you tell us you followed it for about three miles. You never did pass it, did you?

A. No, sir.

Miss Jessie Lindsay

Q. And you could not tell us whether a lady or
page 26 } man was driving the car?
A. No, sir.

Q. You were riding with your sister. What kind of car did she have?

A. She has a Plymouth station wagon.

Mr. Whitehead: All right, thank you very much.

By the Court:

Q. Let me ask you a question. You haven't told us too much about exactly what happened and what you saw. I want to know whether or not the bicycle pulled out in front of the car you saw or whether the car pulled over and hit the bicycle. I want to know if the car ever slowed down. I want to know exactly what happened. Tell the jury exactly what happened in detail from the time you saw this thing happening, what the bicycle did and what the car did.

A. The car crossed over on the left and it looked like when the driver of the car saw the bicycle he pulled it back over to the right and hit the bicycle and then took off.

Q. Was the bicycle on the hard surfaced road? Is there any shoulder at that particular point where the bicycle was, or do you know?

A. I don't know whether it was or not.

Q. Did you see any brake lights come on on the car?

A. No, sir.

Q. How fast was the car going?
page 27 } A. I really don't know.
Q. Slow or fast?

A. It was going fast but the miles I don't know. It was going fast.

Q. What happened to the girl when the bicycle was hit?

A. It kind of threw her up in the air and she came back down and when we stopped and got out she was laying on her back with her hand out like that.

Q. And where did the bicycle end up?

A. One leg was over the bicycle. She was laying on top of the bicycle.

Q. Did you hear any horn blown?

A. No, sir.

Q. What did the car do?

A. It didn't stop. It just kept going.

The Court: All right, thank you.

Mrs. Hiram T. Jones

The Witness Stands Aside.

page 28 } MRS. HIRAM T. JONES, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Harvey:
Q. State your name.
A. Mrs. Hiram Jones.
Q. Mrs. Jones, were you driving on Route 297 around 7:30 p.m. the night of May 25th, 1968?
A. Yes, I was.
Q. What kind of car were you driving?
A. A '64 Plymouth station wagon.
Q. Who was in the car with you?
A. My sister and two daughters.
Q. Tell us what happened in relationship to a bicycle that was driving along the road. Just tell us what happened when you first saw the bicycle or the car before the bicycle.
A. Well, I drove up behind this car right after I passed the entrance to Timberlake.
Q. What kind of car was it?
A. It was a dark maroon with a black top, and the car was going from one side of the road to the other so I dropped back rather than to follow it too close and I followed it until after we got onto the dual lanes and I glanced on ahead and it was this bicycle over on the right and the
page 29 } driver of the car that was in front of me was over in the left lane of the double lanes and it looked like just before he got to the bicycle he went over, went right diagonally across the road, and hit the bicycle.

By the Court:
Q. Keep on and tell us everything you saw.

By Mr. Harvey:
Q. Wait, wait, wait, wait—what direction was the bicycle traveling?
A. I couldn't honestly say which direction the bicycle was going because I was watching the car. It just happened so quick that I really didn't see which way the bicycle was going.
Q. So you don't know if it was going toward Lynchburg or toward Timberlake?

Mrs. Hiram T. Jones

A. No.

Q. Go ahead.

A. So after the girl on the bicycle was hit and whoever was driving the car it just looked like to me he started going faster and never did stop, so I pulled up and the girl was laying on the ground on her back and I pulled up and stopped and my daughter went in this house there and called the Lifesaving Crew, and in the meantime Trooper Sexton just happened to be driving down Timberlake Road and he pulled in behind me, and I was telling him I wanted to re-
page 30 } port a hit and run, somebody had hit this girl. Then he asked me what color the car was and did I get the license. I told him I didn't get the license because I wasn't close enough behind to get it but I gave him the description of the car.

Q. What description did you give him?

A. Dark maroon with a black top.

Q. You didn't know whether it was a Ford or Chevrolet?

A. No, I didn't know what make car it was, and during that time the Lifesaving Crew came and they took the girl so we left.

Q. Did you observe whether the girl was injured or not?

A. She kept complaining about her leg and she had some scratches up here on her forehead and it was bleeding and her leg was bleeding.

Q. The next morning did you go down to identify the automobile?

A. Yes.

Q. Where did you go?

A. Down to Virginian Ford.

Q. Did someone call your attention to this particular car that you identified?

A. No, sir. Sergeant Witt was down there and when we walked into the lot he said—

Mr. Whitehead: You can't tell what somebody told you. You can tell what you saw.

page 31 } By Mr. Harvey:

Q. What did you see?

A. The car was sitting there that I identified.

Q. How did you identify it as being the car?

A. Well, it was dark maroon with a black top and it was a fairly new looking car. Then when I walked around on the side of it there was a dent in the front right fender.

Q. Did you observe any paint on it?

Mrs. Hiram T. Jones

A. It had blue paint on it.
Q. You first identified it as being a maroon car with a black top?
A. Yes, sir.

Mr. Harvey: That is all.

CROSS EXAMINATION

By Mr. Whitehead:
Q. Mrs. Jones, as I understand it, when this accident occurred, as the other lady explained, you were going to Brookville school.
A. Right.
Q. You come off of a knoll, down a dip, and up an incline.
A. Not too much of an incline but some.
Q. Were you over on the other knoll that would be west of where it happened when the accident took place?
A. Right.
page 32 } Q. Now, when this car that you saw went from the left side of the road to the right side of the road then did the car go over on the shoulder which would be the south shoulder?
A. It went straight to the bicycle.
Q. Then did it go on off the road too?
A. No, sir, didn't seem to go off the raod there. It had been off the road a couple of times before it got to the bicycle.
Q. I understand you did not get the license number.
A. No, sir.
Q. Then it was the next morning you were asked to come down to Virginian Ford?
A. Right.
Q. And there it was that you saw a maroon car with a black top?
A. That is right.
Q. That was the only car sitting there like that, wasn't it?
A. Well, I just happened to see this car.
Q. Did you see any other maroon cars there with black tops?
A. I didn't look for any more.
Q. Then you cannot tell us as far as you know whether this is the same car, can you?
page 33 } A. I said it was the same car. As far as I could tell it was the same car, and after seeing the right front fender I felt sure it was.

Mrs. Hiram T. Jones

Q. It looked like the same car?
A. Yes, sir.
Q. But you honestly can't tell us that was the same car?
A. I don't know one car from the other. The only thing I knew was the color of it.
Q. In other words, the car you saw down at Virginian Ford was the same color as the car you saw strike the girl?
A. Right.
Q. What time did it happen, Mrs. Jones?
A. Somewhere in the neighborhood of 7:30.
Q. You were planning to be at Brookville School at what time?
A. The program started at 8:00 o'clock.
Q. And you were planning to get there before the program started so you could get seated?
A. Yes.
Q. How long would you say it was before Mr. Sexton came up?
A. Just a matter of a few minutes.
Q. Which way was the lady going on the bicycle?
A. I honestly couldn't say.
Q. When you arrived both the girl and the bi-
page 34 } cycle would have been on what we call the south shoulder of the road?
A. It was on the right side of the road.
Q. Your right side of the road?
A. Yes.

Mr. Whitehead: Thank you.

The Witness Stands Aside.

The Court: Next witness.
Mr. Harvey: The Commonwealth rests.
Mr. Whitehead: We want to take up a matter with the Court.
The Court: Gentlemen, go back to the jury room, please.

(Jury Out)

Mr. Whitehead: If your Honor please, the defendant, by counsel, moves the Court to strike the evidence in this case on the ground that the evidence fails to identify this defendant as the operator of the vehicle that struck the young lady at the time the evidence shows she was struck; and, with reference to the charge in the indictment, the evidence is

wholly void of the fact that the defendant was operating the automobile that struck this lady and the bicycle;
page 35 } and furthermore, the evidence is wholly void of the fact that it was this defendant's car that struck the bicycle.

Mr. Harvey: The defendant, by his own admission, admits he was driving the car prior to being apprehended in Lynchburg and that he came from Timberlake and this car was identified as being owned by him. The car was identified by these two witnesses and I think all the circumstances point to the fact that he operated the car at the time.

The Court: The Court is of the opinion that the circumstantial evidence here is strong enough to create a *prima facia* case of hit and run involving personal injury. I think this is a jury issue. The Court will overrule the motion and submit the case to the jury.

Mr. Whitehead: All right, sir. We want to note an exception to your Honor's ruling.

page 36 } EVIDENCE FOR THE DEFENSE

JOHN S. KRAUSE, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Whitehead:

Q. Your name is John Steven Krause but everybody *calles* you "Jack"?

A. Yes, sir.

Q. What is your age?

A. Twenty-six.

Q. Where do you live?

A. 117 Melinda Drive, Lynchburg. That is in Vista Acres.

Q. Is that in Campbell County?

A. Yes, sir.

Q. Are you married?

A. Yes, sir.

Q. Now, at the time of this accident in question, May 25th, 1968, where were you working at that time?

A. At Babcock and Wilcox.

Q. Do you know Mr. Ray Allen here?

A. Yes, sir.

Q. How long have you known him?

A. I have known him most of my life.

page 37 } Q. Where are you employed now?

John S. Krause

A. I am with the public school system in Amherst.

Q. Teaching in high school?

A. Teaching in high school, yes, sir.

Q. Do you know where Mr. Allen lives?

A. Yes, sir.

Q. Now, at my request I will ask you this: Have you measured the distance from his home to 297? First, let me ask you this—there are two entrances to Timberlake, one we will say is the east end and one is the west end, where is his home in reference to one of those entrances? Which entrance is his home near?

A. I would say the east end, the end closest to Timberlake Drive.

Q. Would it be the entrance nearest to Lynchburg?

A. Yes, sir, the entrance nearest to Lynchburg.

Q. How far is it from his home to 297?

A. A little over a tenth of a mile.

Q. Now, at my request, did you measure and what is the distance from that entrance which we will refer to there to Timberlake, take on 297 and come east to the Tidy Corporation, do you know where that is?

A. Yes, sir.

Q. What is the distance from there to the Tidy Corporation?

page 38 } A. I would say right around a mile. That is what I measured.

Q. You say you have known Mr. Allen most of his life?

A. Yes, sir.

Q. Did you know him when he worked at B & W?

A. Yes, sir.

Q. Where does he work now?

A. It is my understanding he is still at B & W. He works for the Navy, a representative of the Navy at B & W.

Q. I will ask you this: Do you know what his general reputation is in the community in which he lives for being a peaceable and law-abiding citizen?

A. Yes, sir.

Q. What is it?

A. It is excellent.

Q. Do you know what his general reputation is for telling the truth?

A. In my opinion it is excellent.

Q. I think you told us you live in Vista Acres. Is that correct?

A. Yes, sir.

John S. Krause

Mr. Whitehead: All right, thank you.
Mr. Harvey: No questions.

The Witness Stands Aside.

Mr. Whitehead: We rest, if your Honor please.
page 39 } The Court: Any rebuttal?
Mr. Harvey: No, sir.

The Court: Gentlemen of the jury, the evidence in this case has been concluded. The next step is for me to discuss with counsel the instructions which will constitute the law in the case. That sometimes takes a little while and has to be done out of the presence of the jury. I am going to send you out a few minutes.

page 40 } (Jury Out)

OBJECTIONS AND EXCEPTIONS TO INSTRUCTIONS

The Court; The Court will now consider instructions offered on behalf of the Commonwealth and on behalf of the defendant, the accused being present. Considering first the instructions offered on behalf of the Commonwealth the Court will grant Instruction No. 1 as offered.

Mr. Whitehead: The defendant, by counsel, objects and excepts to the action of the Court in giving Instruction No. 1 on the following grounds:

First, on the ground that there is not sufficient evidence to base the instruction on;

Second, that there is no evidence that the defendant was the operator of the vehicle that struck Virginia Elizabeth Habich;

Third, there is no evidence to show that he either knew, or through the exercise of reasonable care should have known, that when he was driving the vehicle that he struck this lady; and

Fourth, that the evidence is wholly void of any evidence showing that he was the operator of the vehicle that struck this lady or had any knowledge while he was operating the vehicle it had struck this lady, Virginia Elizabeth Habich.

page 41 }

Commonwealth's Instruction No. 1 (Granted):

"The Court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant,

Ray William Allen, was the operator of a motor vehicle involved in an accident in which Virginia Elizabeth Habich, was injured, and further believe from such evidence that any such accident occurred under circumstances that the defendant knew, or as a reasonable person should have known, that an injury would or had occurred, then it was the duty of the defendant to immediately stop as close to the scene of the accident as possible without obstructing traffic and report to Virginia Elizabeth Habich his name, address, operator's or chauffeur's license number and the registration number of his vehicle, and further to render reasonable assistance to Virginia Elizabeth Habich, including, if requested by her or if it was apparent that medical treatment was necessary, the carrying of Virginia Elizabeth Habich to a doctor or hospital; and if you believe from the evidence beyond a reasonable doubt that the defendant failed in the duties aforesaid, then you should find him guilty and fix his punishment: (1) By confinement in the penitentiary for not less than one year nor more than five years, (2) by confinement in jail for not less than thirty days not more than one year, (3) by a fine of not less than fifty dollars nor more than five thousand dollars, or (4) by both such
page 42 } confinement in the penitentiary or in jail *jail* and such fine."

The Court: The Court will grant Instruction No. 2 as offered.

Mr. Whitehead: The defendant, by counsel, objects and excepts to the action of the Court in granting Instruction No. 2 on the ground that there is not sufficient evidence to base this instruction on.

Commonwealth's Instruction No. 2 (Granted):

"The Court instructs the Jury that it is not necessary that material facts be proven by direct evidence; that they may be proven by circumstantial evidence, that is, the jury may draw all reasonable and legitimate inferences and deductions from the evidence adduced before them."

The Court: The Court will grant Instruction No. 3 as offered.

Mr. Whitehead: The defendant, by counsel, objects and excepts to the action of the Court in giving Instruction No. 3 on the ground that there is no evidence to base the instruction on.

Commonwealth's Instruction No. 3 (Granted):

"The Court instructs the Jury that circumstantial evidence is legal and competent, and a person
page 43 } charged with a crime may be convicted upon circumstantial evidence alone, or upon circumstantial evidence connected with other evidence, if the Jury believe beyond a reasonable doubt from such circumstantial evidence that the person so charged is guilty; therefore, the jury have the right to convict the defendant upon circumstantial evidence alone, or upon circumstantial evidence coupled with other evidence, if from all the evidence the Jury believe that guilt of the defendant has been proven beyond a reasonable doubt."

The Court: The Court will refuse Instruction No. 4 on the basis that there is insufficient evidence upon which to base this instruction, although the jury could infer drinking in this case.

Commonwealth's Instruction No. 4 (Refused):

"The Court instructs the jury that voluntary drunkenness is no excuse for crime. A person cannot voluntarily make himself so drunk as to become on that account irresponsible for his conduct during such drunkenness. He may be perfectly unconscious of what he does and yet be responsible."

The Court: Now considering Defendant's instructions the Court will grant Instruction A as offered.

Defendant's Instruction A (Granted):

page 44 } "The Court instructs you that the burden of proof rests upon the Commonwealth throughout the case and never shifts. This means that the Commonwealth must prove that the defendant is guilty beyond a reasonable doubt of a crime, and every material element thereof, as charged in the indictment.

"The defendant does not have to prove his innocence, nor is he required to prove either beyond a reasonable doubt or by a preponderance of the evidence his defense or any fact, for all that is necessary to entitle him to an acquittal is that from the evidence as a whole, or lack of evidence, there is raised in the mind of the jury reasonable doubt of guilt.

"To warrant a conviction of the defendant the facts proved must not only be consistent with his guilt but be

inconsistent with his innocence and exclude every reasonable hypothesis of his innocence. And proof of his guilt by any mere preponderance of evidence or by evidence that raises in your mind only suspicion of guilt, however strong, or by evidence that for any proper reason falls short of satisfying you beyond a reasonable doubt of his guilt, is insufficient to warrant a conviction."

The Court: The Court will refuse Instruction B as being repetitious of other instruction and it is argumentative.

page 45 } Mr. Whitehead: The defendant, by counsel, objects and excepts to the action of the Court in refusing to give Instruction B on the ground that it states a correct statement of the law that is not covered by any other instruction in the case, and furthermore, the defendant is entitled to this instruction so that he may be given all the protections required by law.

Defendant's Instruction B (Refused):

"The Court instructs you that the fact that the defendant has been charged with a criminal offense or indicted therefor, raises no presumption that the defendant is guilty thereof.

"The defendant is presumed to be innocent of every charge against him until he is proven guilty thereof beyond a reasonable doubt. This presumption of innocence is not a mere form to be disregarded by the jury at pleasure, but constitutes a substantial right of the defendant and the jury must give the defendant the benefit thereof; it goes with the defendant throughout the trial and applies at every stage thereof until the jury has reached a unanimous verdict; and if the case is a doubtful one it is sufficient to turn the scales in favor of the defendant."

The Court: The Court will refuse Instruction C on the same ground I am refusing Instruction B.

page 46 } Mr. Whitehead: The defendant, by counsel, objects and excepts to the refusal of the Court to give Instruction C on the same ground stated in the objections to refusing to give Instruction B.

Defendant's Instruction C (Refused):

"The Court instructs you that if there is a conflict in the evidence on any fact or circumstances tending to establish the guilt or innocence of the defendant, a part of which is in favor of the theory of the Commonwealth and a part in favor of the theory of the defendant and you should entertain a reasonable doubt as to which is true, then it is the

duty of you in arriving at your verdict to adopt the evidence, theory and conclusion most favorable to the defendant."

The Court: The Court will grant Instruction D, as offered.

Defendant's Instruction D (Granted):

"The Court instructs you that the plea of not guilty denies every essential element of the crime charged and places upon the Commonwealth the burden of proving every essential element of the crime beyond all reasonable doubt and this burden never shifts but remains upon the Commonwealth through the entire trial and at every stage thereof."

The Court: The Court will refuse Instruction
page 47 } E on the same grounds I refused B and C.

Mr. Whitehead: The defendant, by counsel, objects and excepts to the action of the Court in refusing Instruction E on the same grounds assigned to the refusal of the Court to grant Instruction B.

Defendant's Instruction E (Refused):

"The Court instructs you that if upon the whole evidence in this case, there is any reasonable hypothesis consistent with the innocence of the defendant, you must find him not guilty; since a verdict of 'not guilty' means nothing more than that the Commonwealth has not proved its case to your satisfaction, beyond a reasonable doubt."

The Court: The Court will grant Instruction F as offered.

Defendant's Instruction F (Granted):

"The Court instructs the jury that the character of the defendant, when proven, whether good or bad, is a fact to be considered by the jury, but its weight as affecting the guilt or innocence of the defendant is a matter for the determination of the jury in connection with all the other facts proven in the case."

The Court: The Court will grant Instruction G as offered.

page 48 } Defendant's Instruction G (Granted):

"The Court instructs the jury that there is no burden upon the accused, Ray William Allen, to point out

the guilty party, but in this case the burden is upon the Commonwealth to prove beyond a reasonable doubt that Ray William Allen is guilty."

The Court: The Court will refuse Instruction H as offered because it requires absolute and positive knowledge on the part of the defendant that injury had been done to Virginia Elizabeth Habich which, in view of the evidence in this case, is not a correct view of the law. Under Instruction H, as offered, this jury could come to the conclusion that the accused was intoxicated to the extent that he did not remember any of his acts on the particular night and therefore was not guilty of the offense. The Court is also refusing Instruction H because paragraph (3) is repetitious of paragraph (2) and the wording of paragraph (4) is argumentative and constitutes a comment upon the evidence on the part of the Court.

Mr. Whitehead: The defendant, by counsel, objects and excepts to the action of the Court in refusing to give Instruction H on the grounds, as set *set* out in page 49 } the case of *Herchenbach* v. *Commonwealth,* 185 Va. 217, that these are the elements necessary for the Commonwealth to prove beyond a reasonable doubt to convict under the hit and run statute and under the indictment with which this defendant is charged, and therefore the refusal of the Court to give this instruction is error and the defendant has not been given an instruction which sets out his rights and what the burden is upon the Commonwealth to convict him under the circumstances; and furthermore, there is no evidence, no *scintialla* of evidence, that the defendant was drunk or under the influence of intoxicants.

Defendant's Instruction H (Refused):

"The Court instructs the jury that the burden is upon the Commonwealth to prove beyond a reasonable doubt:

"(1) That the defendant was the driver of the automobile which struck Virginia Elizabeth Habich;

"(2) That the defendant had knowledge of and was aware that harm had been done to Virginia Elizabeth Habich;

"(3) That it was present in the defendant's mind that there had been an injury;

"(4) That with the knowledge of all this and it being present in his mind, the defendant deliberately went away from the scene of the accident without making page 50 } himself known.

"And the Court further instructs the jury that if the Commonwealth fails to prove any one or more of the above elements or if the evidence raises in your minds a reasonable doubt as to any one or more of said elements, then you shall find the defendant not guilty of hit and run."

The Court: The Court will grant Instruction H-1 which changes Instruction H in the following particulars: Paragraph (2) has been changed to read—"That the defendant knew or should have known that harm had been done to Virginia Elizabeth Habich;" Paragraph (3) will be deleted. Paragraph (4) will be changed to read as follows: "That with knowledge of this, the defendant deliberately left the scene of the accident without making himself known." The rest of the instruction remains the same. Mr. Whitehead, do you want to comment on my passing on Instruction H-1?

Mr. Whitehead: Yes, sir. Instruction H-1 does not cover all of the things necessary to prove the defendant guilty as charged.

Defendant's Instruction H-1 (Granted):

"The Court instructs the jury that the burden is upon the Commonwealth to prove beyond a reasonable doubt:

"(1) That the defendant was the driver of the
page 51 } automobile which struck Virginia Elizabeth Habich;

"(2) That the defendant knew or should have known that harm had been done to Virginia Elizabeth Habich;

"(3) That with knowledge of this, the defendant deliberately left the scene o fthe accident without making himself known.

"And the Court further instructs the jury that if the Commonwealth fails to prove any one or more of the above elements or if the evidence raises in your minds a reasonable doubt as to any one or more of said elements, then you shall find the defendant not guilty of hit and run."

The Court: The Court will grant Instruction I pertaining to the caution the jury is to exercise in a case based on circumstantial evidence.

Defendant's Instruction I (Granted):

"The Court instructs the jury that when the Commonwealth relies upon circumstantial evidence in order to secure a conviction, it is the duty of the Jury to scan such evidence with great care and caution; and unless the cir-

cumstances proven are of such a character and tendency as to produce in the mind of the Jury a moral conviction of guilt of the defendant beyond a reasonable doubt; then you must find the defendant not guilty."

The Court: How long do you want to argue?
page 52 } Mr. Whitehead: About a half an hour.

JURY'S VERDICT

"We, the jury, find the accused, Ray William Allen, guilty as charged and fix his punishment at 30 days in jail and ($100) one hundred dollars fine."

"Scott F. Harrison, Foreman"

The Court: Is there any motion?

Mr. Whitehead: The defendant, by counsel, moves the court to set the verdict of the jury aside on the following grounds:

First, it is contrary to the law and the evidence in the case;

Second, there is not sufficient legal evidence to sustain the verdict;

Third, on the ground that the Court erred in not sustaining the motion for a mistrial when the opening statement was made by the Commonwealth Attorney with reference to this man being arrested on another charge;

Fourth, on the ground that the evidence failed to show that the defendant either was driving the automobile at the time of the accident and also it fails to show beyond a reasonable doubt that the automobile owned by the de-
page 53 } fendant struck the person involved;

Fifth, on the ground that the amendment made by your Honor in Instruction H-1 and refusing to give Instruction H fails to cover the things that are necessary in order to justify a conviction; and further, on the ground that the Court erred in refusing to give Instruction B which was a proper instruction and that that instruction is not covered by any other instruction in the case and in refusing to give Instruction B then the jury was not told with reference to the law as to the defendant being presumed to be innocent of every charge and that was most vital to the defense of the defendant; and further, on the ground that the other instructions refused should have been given and also that the defendant was entitled to have Instruction E because Instruction E states specifically what the law is applicable to the defendant and without that instruction the jury was not told what their verdict of "not guilty" meant and therefore we ask your Honor to set the verdict aside

for those reasons.

The Court: Mr. Harvey, do you care to respond on behalf of the Commonwealth?

page 54 } Mr. Harvey: No, sir.

The Court: Mr. Whitehead, I think both sides had a fair trial in this case. What the jury did or did not do was up to them. As far as being instructed as to the law and as far as the rulings I made, while perhaps not perfect, I think that this case was tried as fairly as I know how to try one and there is no reason as I see it for any delay on my part in ruling on the motion you have made at this time. I respectfully overrule your motion and I will enter judgement on the jury verdict as of today. I will hear you on whether or not I will let Mr. Allen remain on bond until such time as you exhaust appeal possibilities if you care to do so.

Mr. Allen, will you rise? Ray William Allen, do you have anything to say why the Court should not now pronounce judgment in this case?

Mr. Allen: No, sir.

The Court: Ray William Allen, in accordance with the jury's verdict the Court finds you guilty as charged and fixes your punishment at thirty days in jail and one hundred dollars fine. You can have your seat.

Mr. Whitehead: If your Honor please, at this time the defendant, by counsel, objects and excepts to the

page 55 } ruling of the Court and does ask for a stay of execution for a period to the next term. I think we can do it by then. That will give me an opportunity to get the evidence written out and apply to the Supreme Court for a writ of error.

I respectfully say with reference to the ruling of his Honor that it is my humble opinion there is certainly error in the instructions here and there is certainly error as far as the other grounds I have stated because, as far as I know, no instruction has been given in this case with reference to the fact the defendant is presumed to be innocent of every charge against him until proven and I feel under the circumstances, if your Honor please, that in view of that it would certainly be to the ends of justice to grant this stay and we respectfully ask the stay. This man will be right here. He works right here at the B & W and he will not leave the jurisdiction of this Court if the Court so says.

The Court: In reply to your statement about the instructions you and I disagree about that. I think the instructions clearly told the jury the law with reference to presumption of innocence the defendant is entitled to in a criminal trial.

I think Instruction D in effect told them that and
page 56 } I think the jury was properly instructed and sufficiently instructed upon the applicable principles of law which applied to an accused in a criminal case.

Now, on your next point I am going to exercise my discretion and I am going to agree with you that there is no good reason why this man should be put in jail now. There is no reason in my mind why I shouldn't grant your request and I will do so and so you will stand again, Mr. Allen.

In accordance with the motion of your attorney that I suspend execution in this case, and that I continue your bond, whatever that might be, until the opening term of the January term of this Court, I will grant that request which means that you will be free on bond as you have been until such time as the State Supreme Court passes on this case and if I have committed reversible error they will tell me so. That is their job. Does that meet with your approval, Mr. Harvey?

Mr. Harvey: I have no opposition.

The Court: Mr. Allen, do you understand your bond, whatever it might be, is continued upon the same terms and conditions as existed prior to this trial from the time you were bailed until the time of the trial?

page 57 } Mr. Allen: Yes, sir.

The Court: I think that is all. Recess court.

(Recess)

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk

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