

In this connection, Judge Roan declared orally from the bench that he was not certain of the defendant's guilt—that with all the thought he had put on this case, he was not thoroughly convinced whether Frank was guilty or innocent—but that he did not have to be convinced—that the jury was convinced and that there was no room to doubt that—that he felt it his duty to order that the motion for a new trial be overruled.

This statement was not embodied in the motion overruling the new trial.

Under our statute, in cases of conviction of murder on circumstantial evidence, it is within the discretion of the trial judge to sentence the defendant to life imprisonment (Code Section 63).

The conviction of Frank was on circumstantial evidence, as the solicitor-general admits in his written argument.

Judge Roan, however, misconstrued his power, as evidenced by the following charge to the jury in the case of the State against Frank:

"If you believe beyond a reasonable doubt from the evidence in this case that this defendant is guilty of murder, then, you would be authorized in that event to say, 'We, the jury, find the defendant guilty.' Should you go further, gentlemen, and say nothing else in your verdict, the court would have to sentence the defendant to the extreme penalty of murder, to-wit: 'To be hanged by the neck until he is dead.'"