1969

State of Utah v. Glen W. Mecham : Brief of Appellant

Utah Supreme Court

Vernon Romney; Attorney for RespondentGlen W. Mecham; Attorney for Appellant

IN THE SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH

Respondent,

VS.

GLEN W. MECHAM

Appellant,

Case No.

~~4664~~
11527

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FOURTH DISTRICT COURT FOR UTAH COUNTY, STATE OF UTAH THE HONORABLE MAURICE HARDING, JUDGE

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BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Reference in Appellant's Brief to the transcript of proceedings will be designated by the letters "TR" and the main record by the letter "R".

STATEMENT OF THE KIND OF CASE

This is an Appeal from a conviction rendered against the defendant for the crime of Indecent Assault in the Fourth Judicial District of Utah County, State of Utah. The Honorable Maurice Harding, Judge, sitting without a jury.

RELIEF SOUGHT ON APPEAL

The Defendant-Appellant seeks a reversal of the judgment and conviction.

STATEMENT OF FACTS

The appellant was tried without jury - being charged with the crime of Indecent Assault, committed as follows, to-wit:

> "That he... at the time and place aforesaid, made an assault upon LuAnn Cordner, a female child of the age of 11 years, and took indecent liberties with the person..." (R-5,11).

On August 2, 1968 Mrs. Shirley Cordner, the mother of the alleged victim, had been putting up cherries, and along in the afternoon she was getting quite tired and poured herself a tall glass of koolaid. The Cordner home at 604 North 980 East, Orem, Utah was quiet, the children were out playing, and Mrs. Cordner sat down in her living room to relax and drink her drink, (TR-16).

Mrs. Cordner testified that she had just got herself seated, when she heard the door open - her back was to the door - and the next thing she knew Lou Ann Cordner ran and threw herself at her mother, and started crying, (TR-17). Mrs. Cordner began to question the child, and the child said "Mr. Mecham." Then several minutes later, in bits and pieces, (TR-17). Mrs. Cordner went on to testify that the child reported that Mr. Mecham had stopped her behind his home at 600 North 980 West in Orem, Utah, while she was passing through there to bring the children's tricycle home, (TR-18).

Lou Ann Cordner testified at the trial that she was eleven years old; that she was acquainted with Mr. Mecham, the defendant, and had known him for about three years, as they lived on the same street, across from each other, (TR-5).

Lou Ann further testified that her little brother had left his tricycle behind the fence in back of the Mecham place, and that she went around to get it, got it, and was heading toward home, when the defendant stopped her, (TR-6), she stopped on the Mecham property just a little bit.

That Mr. Mecham was there at the time, and that it was about 2:00 o'clock p.m. and there was no one else there at the time. That the defendant asked her how old she was, and what grade she was in school. That defendant said she was just the right age and would she be his girl - kissed her on the hand, and was feeling her breasts and around her private area, (TR-7,8); that he put his hand under her clothes and in her panties, and kissed her on the lips.

That she was frightened and went home, went in and pounced on her mother, and cried... and started to tell what happened in bits and pieces, (TR-10).

Lou Ann went on to testify that her mother called the police and they went down to the station in Orem. That a lady examined her, and that she had red marks along her chest area.

Mrs. Shirley Cordner testified that her home and the defendant's home were on the same street; that he lived across and a little south... that on the 2nd day of August, 1968 - her daughter told her about the same as was told in Court and mentioned above; that two to three hours passed from the time her daughter came in the living room and cried and the time they reached the police station in Orem, Utah.

The State's third witness, Margene Tadd, occupation Secretary for Orem City, testified that on the 2nd day of August, 1968, she did see Lou Ann Cordner at around 4:00 o'clock p.m.; that she did examine Lou Ann and that there was a large red spot around the breast area, and it had been rubbed where the zipper was, (TR-25,26,27). The State rested its case.

No Scientific Evidence Was Introduced In Court By Either The State Or The Defense - Except The Chart As Drawn On A Board In Court.

No Expert Or Medical Testimony was Offered, Either By The State Or By The Defense.

A Motion to Dismiss the Complaint was made by the defense at this time, on the grounds and for the reasons that the State had failed to establish a Prima Facie Case. The motion was submitted and denied by the Court, (TR-27).

The defendant testified that August 2, 1968 was his wife's day off from work, and that he and her worked all day in the back of his carport - building a fruit cellar. That his son, Richard Vincent Mecham was home that day, and that a neighbor kid, Mark Syddall, and another kid were both with him and his wife - all day, (TR-28).

The defendant further testified that his house is facing directly to the east - his carport located on the front - North part of the property - there is a garden in back - about 40 X 40 feet, and there is a fence around the south - the West - and the North part of his property; and that he did not see the Cordner girl on the day in question; that he did not go to the back portion of his property at all that day, that he never even seen, touched, or spoke to the Cordner girl on that day; that he was never alone at any time that day; that he did not commit the crime set out in the charge against him, (TR-27,31).

After giving his own testimony, defendant called his wife, Mary Ann Mecham to testify in his behalf.

Mrs. Mecham testified that she was off from work on August 7, 1968; that the defendant was building a fruit cellar in the back of the carport, and that she was with him throughout the day - that he was never out of her sight except for maybe two minutes when he went inside the bathroom; that all day she was working with the defendant; at 2:00 p.m. on that day, and at that time her foster daughter, Susan Moore, came out and offered them coffee, and advised that she was going to

ock the door and wax the floor, (TR-34); that Lou Ann Cordner id in fact pass the defendant's place that day, but that she assed in front - in the middle of the street; that she (Mrs. echam) had spoken sharply to the Cordner children before, nd that Lou Ann would never come on the property, because he was afraid of the defendant's wife.

Mrs. Mecham further testified that she first learned about the accusation against her husband on the day he was arrested, (TR-33); that her husband, the defendant was not at home, not to her knowledge, at the time the officers came to the front door; that he was not on the premises; that her husband did not assault anyone on August 2, 1968

Both defendant and his wife swore he was innocent. In upport of their testimony, the following witnesses testified hat defendant could not have possibly been guilty of the alleged assault:

1. Mr , Mark Syddall, neighbor kid 13 years old.
2. Mr. Richard Vincent Mecham - son, 18.
3. Miss Susan Moore - foster daughter, 17.

Each of the above witnesses testified that defendant did ot commit the assault - each gave supporting evidence to efendant's testimony - each testified to his own presence t defendant's home, and knowledge of the day's events at

the defendant's home and on the premises - each stood firm under the pressure of the District Attorney on cross-examination.

Miss Lou Ann Cordner was recalled by defense counsel and proved to be very apt in reading the displayed diagram of the defendant's premises. She testified that the alleged event occurred in the south-west corner of the property, between an old car and the rabbit pens, which it was established were some twenty feet apart, and both inside the three and one-half foot fence which surrounds the South, West, and North portions of the defendant's property. (TR-61).

Richard Vincent Mecham, defendant's 18 year old son, was called by the defense and testified that he and a young lady, Miss Janice Church, who subsequently became his wife, were out in back of defendant's house, near the old car and rabbit pens, romancing - from the hour of 12:00 noon until about 2:00 p.m. And then from about 2:05 to 3:15 P.M. The witness went on to testify that he came out front to find out the time, and that he did see Lou Ann Cordner riding her bike, out front, (TR-54); the time was around 2:00 p.m. The witness concluded his testimony by saying that on August 2, 1968, in the afternoon, the only place he saw the Cordner

girl was on the road in front of defendant's house. (TR-54).

The District Attorney did everything possible to shake this witness, or impeach his testimony, but the witness stood firm.

Miss Susan Moore was called by the defense and gave the following evidence: That she was 17 years old, and did remember August 2, 1968 because she was scheduled to go horseback riding and she made it a point to clean the defendant's house so she would not have to do it the next day; that the defendant spent the day working on their fruit cellar in the carport. (TR-62,63).

The defense rested its case, (TR-66).

The State called Mrs. Alice Jensen as its first rebuttal witness. Mrs. Jensen gave no direct or concrete information, but testified that she knew one of the defense witnesses Mark Syddall and had known him for two years in her capacity as a School Counselor; and that Mark had talked to her about the alleged assault on Lou Ann Cordner several times, and that he and others in the school clinic were discussing the matter.

Mrs. Jensen went on to state that Mark had told her that

e liked Mr. Mecham, because he had been like a father and hat he was going to court for Mr. Mecham, and; that she was f the impression that Mark loved Mr. Mecham very much, and ould do anything he could for him, (TR-68,69).

Mrs. Jensen was called to make the following statement:

"And he (Mark Syddall) said, 'I am going to court for him.' And whether he said, 'I would lie for him if I had to,' I don't know."

Officer Richard O. Chatterton of Orem City was called by the State and testified that he was one of the officers sent to arrest the defendant, and that upon arrival at the defendant's residence, he went around the house and into the garden where he walked back and forth in order to see both sides of he house; and that he saw a person later determined to be he defendant, crawling out of one of the bedroom windows; hat he told the person to hold it right there and the person ell to the ground, (TR-71). Defendant was placed under rrest.

Defendant was recalled and testified as follows: That he ad been coming home and saw two police cars in front of his ouse, and he knew he was wanted on a driving ticket in merican Fork. Therefore, he went around back and climbed

wr the fence, slipped through the chest-high corn growing
n his garden and was attempting to get into his home through
e window when the Officer ordered him To "hold it" right
re, (TR-73,74). The State rested its case. The defense
sted. Respective Counsel addressed the Court, (TR-79).

STATEMENT OF POINTS

I.

e evidence was insufficient to overcome the presumption
f reasonable doubt, and the verdict is contrary to law
d is not supported by the evidence.

II.

e appellant was denied and deproved of a public trial as
equired and guaranteed by the Utah Constitution and the
onstitution of the United States, and the trial court erred
n ordering the public out of court during appellant's trial.

III.

t was error and abuse of trial court's discretionary power
o ignore the undisputed testimony of five (5) mature, un-
peachable alibi witnesses in trial for assault, where
rdict is based on testimony of an eleven year old complain-
g witness in case where such testimony is contrary to
ientific evidence accepted by trial court.

IV.

Where the finding of trial court is that the event may not have occurred on the date charged in the Complaint and Information, the court erred in matters of law and matters of fact, and a verdict of guilty as charged is not supported by the evidence and cannot be allowed to stand, where the innocence of accused is probable and only defense in trial for assault is defense of alibi.

ARGUMENT

POINT I.

THE EVIDENCE WAS INSUFFICIENT TO OVERCOME THE PRESUMPTION OF INNOCENCE AND OF A REASONABLE DOUBT, AND THE VERDICT IS CONTRARY TO LAW AND IS NOT SUPPORTED BY THE EVIDENCE.

In the process of reaching a verdict in the instant case, the trial court made the following statement(s): (TR-78- Line 11), "I think the little girl was telling the truth."

Line 12: "The event may not have occurred on the 2nd day
" 13: of August, but on some date very close to that time."

AND: The Court Continued,

Line 18: "... It may have been a different day that this (Alleged Assault) occurred.
" 19: I don't know."

AND: In violation of all logic and law, and obviously in error,

Line 20: "The Court finds the defendant guilty as charged."

the instant case the appellant was alleged to have committed
elony, to-wit: "Indecent Assault, committed as follows, to-wit: That he, the said Glen Mecham, at the time and place aforesaid, made an assault upon Lou Ann Cordner, a female child of the age of 11 years...."

The appellant respectfully submits that he was expressly
harged to have assaulted Lou Ann Cordner on the 2nd day of
ugust, 1968 - between the hours of 2:00 p.m. and 3:00 p.m.
Lou Ann Cordner testified that her brother had left his
ricycle behind the fence in back of the Mecham place, there
ere some kids going to throw rocks on the other side and she
as going up and around towards the Fausetts. And that she got
er tricycle... and was headed toward home, when the appellant
apped her. That the time was "about two o'clock." (See TR -
ages 6, 7).

Appellant respectfully invites this Honorable Court's
ttention to the conflicting, and impossible testimony given
y Lou Ann Cordner upon being recalled at (TR-61): Witness
as directed to the blackboard, and had no difficulty whatso-
ver reading and understanding a diagram of the appelant's
remises, and as innocent as it may first appear, Lou Ann
estified to an utter impossibility when she stated at (TR-61)
hat the event in question occurred in the space between the

old car and the rabbit pen. After locating the place on the diagram by pointing to it for the trial judge, Lou Ann Cordner took a piece of chalk and marked an "X" there on the Mecham property between the old car and the rabbit pens. Directing the Court's attention to the diagram of the premises, your appellant submits that it is a physical impossibility for a girl of only eleven years growth on her frame to get herself through or over the fence that surrounds the appellant's property. There is only one possible way for the girl to get herself and her "little brother's" tricycle on to the premises, and that would be to pass through or around the carport and around the corner of the house and back along a foot path through the garden. And even if the girl could have managed to get herself up and over the rugged fence, then how about the tricycle that she started home with, after she had been going up and around towards the Fausetts? Your appellant submits that in order to get onto his property one must come in from the front of the house; that the old car and rabbit pens are inside the fence, as was shown by the diagram in the trial court, and only a strong adult could possibly lift a portion of the fence and crawl under.

Appellant submits that he himself has in times past gone

through under the fence, but not even he could do it with a bicycle... thus the question how did Lou Ann Cordner manage to get herself into the back corner of appellant's garden.. there is no vacant lot inside the fence. There is a vacant lot directly in back of the garden - outside the fence - that vacant lot is also in plain sight of at least four other houses. With all due respect to the young and innocent, appellant submits that Lou Ann Cordner told a direct lie, and testified to an impossibility that she was not physically capable of getting into the garden or between the car and pens as pointed out and marked in the trial court.

Appellant submits that he should never have been convicted upon such immature testimony, and that he was deprived of an adequate defense at the trial court because his attorney of record felt that it would be bad psychology to make a liar of a girl only 11 years old.

Appellant submits that there were five mature adults giving evidence under oath - all against the testimony of Lou Ann Cordner - in effect the girl said that she found a ladder or something and managed to get herself over a fence for no reason at all, got assaulted and then climb back over, take her ladder or whatnot and tuck it away, and then run home

crying, if in fact she did run home crying.

(TR-78): The trial judge said at line 19;

"I don't know."

appellant agrees. The Honorable Maurice Harding did not know, because his final verdict was a wrong conclusion. Where there is doubt it goes to the favor of the defendant. The presumption of innocence requires that all doubt be resolved in favor of the accused, (Schluter vs. State, 37 NW 2d 396, 151 Neb. 284.)

> "In a criminal case, reasonable doubts on questions of law as well as on questions of fact must be resolved in favor of the accused."
> State vs. Levy, 113 P. 2d 306, 8 Wash. 2d 630

> "And it has been held that the presumption is sufficient to turn the scale in favor of the accused where the case is doubtful."
> People vs. Hill, 175 P. 2d 45, 77 Cal. 2d 287.

> "The court must resolve the facts and evidence on the theory of innocence rather than guilt if that can reasonably be done."
> People vs. Lowe, 286 P. 2d 697, 209 C. 199.

POINT II

APPELLANT WAS DENIED AND DEPROVED OF A PUBLIC TRIAL AS REQUIRED AND GUARANTEED BY THE UTAH CONSTITUTION AND BY THE CONSTITUTION OF THE UNITED STATES, AND THE TRIAL COURT ERRED IN ORDERING THE PUBLIC TO LEAVE THE COURT ROOM DURING THE APPELLANT'S TRIAL.....

It is respectfully submitted that the trial court could not have found appellant guilty in the instant case, had the public been allowed to see and hear what went on behind the closed doors.

With all due respect to the innocent and to the eleven year old Lou Ann Cordner, appellant submits that there was not a single word or alleged sexual act brought out that would not have been brought out in a public trial; and the fact that appellant's trial counsel failed or refused to disagree with the trial court is immaterial and does not in and of itself excuse the gross violation of appellant's Constitutional and Statutory Rights and Guarantees to due process and equal protection of the laws.

This writer will agree that many times there are cases of rape and/or sexual assault where the public spectators should be excluded for the sake of the innocent, but in the instant case, there was never even alleged to be any sexual perversion or anything that would make it difficult for one to explain under oath.

In the instant case the exclusion of the public is an obvious violation of appellant's constitutional rights and guarantees, in that this case is direct proof that any number of injustices and prefudicial decisions can be made behind closed doors. No public official, no mature person could have made such a decision on such evidence and still be respected if such decision was made public. Your appellant submits that his cause and defense was prejudicially affected by the trial court's action and decision to clear the court of spectators and friends of the people on trial as happened in this case. This writer is indeed "grabbing straws," and trying to save himself from a long term in prison for an injustice

and prejudicial decision he was given behind closed doors. If we are going to have public trials, then there is no other kind. If its a sometime thing, then who is to decide.

POINT III.

IT WAS ERROR AND ABUSE OF TRIAL COURT'S DISCRETIONARY POWER TO IGNORE THE UNDISPUTED TESTIMONY OF FIVE (5) MATURE, ADULT, UN-IMPEACHABLE ALIBI WITNESSES IN TRIAL FOR INDECENT ASSAULT, WHERE VERDICT IS BASED ON TESTIMONY OF ELEVEN YEAR OLD COMPLAINING WITNESS IN CASE WHERE SUCH TESTIMONY IS CONTRARY TO SCIENTIFIC EVIDENCE ACCEPTED BY TRIAL COURT.

Appellant respectfully submits and contends that trial court may not lawfully ignore such a legal and valid defense as was offered in the instant case.

There was no evidence whatsoever offered by the State against defendant. It was just a matter of everyone there making an eleven year old girl sound heartbreaking; but if an accused cannot prove his innocence with the knowledge of his family and neighbors, then what must be brought into a court of law to constitute evidence? When a man has five peop knowing that he did not commit a crime, he should be able to go to sleep knowing that no court is going to call him in behind closed doors, and tell him a wrong has been done and it ma as well be him that pays as anyone else.

Your appellant contends and submits that he has never been given a fair and public trial, and that his conviction should be reversed.

During the trial of appellant, testimony was given to the effect that Richard Vincent Mecham, and a certain young lady were out by the rabbit pens during the time Lou Ann Cordner was allegedly assaulted, and therefore, it is submitted that the testimony of that young lady should have and would have been introduced at the trial had the appellant been afforded an opportunity to have an adequate defense introduced in his behalf.

At this time it is submitted that under the rule of law as laid down in the following case by the United States Supreme Court, appellant should be allowed to introduce for the first time in this Supreme Court additional evidence in support of his innocence.

"Constitutional rights in serious criminal cases rise above mere rules of procedure... Errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal."
Brooks vs. State, 209 Miss. 150, 155, 46 So. 2d 94, 97.

CONCLUSION

Appellant respectfully submits that the prosecution, in the light of the foregoing, has failed to prove appellant's guilt of the Indecent Assault charged beyond a reasonable doubt, and it is respectfully submitted that the best interest of justice will be served by reversal of the judgment of conviction or, in the alternative, that the appellant's cause be remanded for new trial.

Respectfully submitted,

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