1970

State of Utah v. Charles Allen Mccarthy : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

vs.

CHARLES ALLEN McCARTHY,
Defendant-Appellant.

Case No. 12260

BRIEF OF APPELLANT

Appeal from Judgment of the District Court of Salt Lake County, Utah Honorable Aldon J. Anderson

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BRIEF OF APPELLANT

NATURE OF THE CASE

Appellant, Charles Allen McCarthy, appeals from a finding of guilty of attempted grand larceny and the sentence imposed thereon in the Third District Court, Salt Lake County, State of Utah.

DISPOSITION IN LOWER COURT

On April 29, 1970, appellant Charles Allen McCarthy, having been convicted by a jury, was sentenced

and committed to the Utah State Prison for the offense of attempted grand larceny.

RELIEF SOUGHT ON APPEAL

The appellant seks a reversal of the conviction and dismissal of the case against him, or, in the alternative, to have the case remanded for a new trial.

STATEMENT OF FACTS

Witnesses observed the appelant and another unidentified individual both in the meat department of a grocery store at the same time. There was no further evidence connecting the two men. The other man was stopped in the parking lot with a box of nineteen unpurchased hams in his possession. The appellant never left the store and was not stopped with any hams in his possession, but was detained as he was purchasing a package of potato chips and a six-pack of beer at the cash register. A second box of four hams was found in the rear of the store. The trial court instructed the jury as to the offenses of grand larceny, petty larceny, and attempted grand larceny, but failed to submit appellant's requested instruction and verdict of attempted petty larceny. After the appellant's exception was not remedied, the appellant moved for a new trial because of the omitted instruction. The motion was not granted.

POINT I

THE COURT ERRED BY FAILING TO INSTRUCT THE JURY REGARDING THE ELEMENTS OF ATTEMPTED PETTY LARCENY AND FAILING TO SUBMIT TO THE JURY A VERDICT INCLUDING THE OFFENSE OF ATTEMPTED PETTY LARCENY.

The court in this case instructed the jury as to grand larceny, petty larceny, and attempted grand larceny, but declined to give the proposed instruction regarding attempted petty larceny. Neither did the court submit to the jury the proffered verdict that included the offense of attempted petty larceny. Counsel for the appellant took proper exception to this omission (T. 66) and later made a motion for a new trial on the grounds that the omission prejudiced the jury (R. 30). The lower court erred in failing to instruct and submit a verdict as to this lesser offense, and further erred by not granting appellant's motion for a new trial.

The most articulate expression of the Utah rule governing the question of when instructions on lesser offenses are necessary is found in the recent case of *State v. Gillian*, 23 Utah 2d 372, 463 P.2d 811 (1970). In *Gillian*, the trial court refused to give the requested instructions on the lesser offenses of second degree murder, voluntary and involuntary manslaughter in a homicide prosecution. The Utah Supreme Court reversed the appellant's first degree murder conviction stating:

> One of the foundational principles in regard to the submission of issues to juries is that where the parties so request they are entitled to have instructions given upon their theory of the case; and this includes on lesser offenses if any reasonable view of the evidence would support such a verdict. This is in accord with the authorities generally, [See *State v. Castillo*, 23 Utah 2d 70, 457 P.2d 618 (1969); *State v. Hyams*, 64 Utah 285, 230 Pac. 349 (1924); *State v. Thompson*, 110 Utah 113, 170 P.2d 153 (1946); *Stevenson v. United States*, 162 U.S. 313 (1896).] and with the adjudications of this court, as stated in a number of cases dealing with instructions on lesser offenses: In the case of *State v. Johnson* [112 Utah 130, 185 P.2d 738 (1947)] it is said:
>
> That the *defendant is entitled* to have the jury instructed on *his theory of the case* if there is any *substantial evidence* to justify giving such an instruction.
>
> Of similar import is *State v. Newton* [105 Utah 561, 144 P.2d 290 (1943)]:
>
> We have held that *each party is entitled to have his theory of the case* which is supported by competent evidence *submitted to the jury* by appropriate instructions; and the failure to present for the jury's consideration a party's theory by appropriate instructions constitutes reversible error. [Cases cited.]

The standards by which the court must determine if instructions on lesser offenses is necessary is very clearly expressed by the *Gillian* opinion. If any *reasonable* view of the evidence would support a verdict on the lesser offense, the court must instruct the jury on that offense.

The fact that his standard only requires "any reasonable view of the evidence" reflects the policy that judges should be very hesitant to refuse to instruct and submit verdicts as to lesser offenses. In *State v. Hyams*, 64 Utah 285, 230 Pac. 349 (1924), the Utah Supreme Court, while reversing a conviction because instructions on a lesser offense were refused, declared:

> It is, however, always a delicate matter for a trial court to withhold from the jury the right to find the accused guilty of a lesser or included offense, and determine the question of the state of the evidence as a matter of law. *That should be done only in very clear cases.* 230 Pac. at 349. (Emphasis added.)

In light of the *Gillian* standard, such a clear case would only be present when no reasonable view of the evidence would support a lesser verdict.

The reason the courts are so hesitant to uphold convictions achieved without instructions on lesser offenses is that decisions by a trial court to withhold from the jury the possibility of convicting for a lesser offense significantly limits the jury's function, and, in effect, forces the defendant to prove his innocence.

In *Gillian*, this court quoted with approval from Justice Straup's concurring opinion in *State v. Ferguson*, 74 Utah 263, 279 Pac. 55, 57 (1929).

> If in a case of different degrees of the offense there is sufficient evidence to submit the case to the jury of the charged greater offense, I do not see wherein it is the prerogative of the court to

> direct the jury of what degree only the jury may find the defendant guilty, or to direct them that, if they do not find him guilty of the charged greater offense they must acquit him. *To permit the court to do that is to permit it to be the judge of the facts.* 463 P.2d at 813 (Emphasis added.)

State v. Barkas, 91 Utah 574, 65 P.2d 1130 (1937), in reversing a conviction obtained without instructions on lesser offenses, considered this issue thoroughly.

> Should the trial court have instructed the jury as to lesser or included offenses? The appellant requested such instructions and after the court's charge was read to the jury, the district attorney called the attentions of the court to the fact that the court had not included in the charge any lesser or included offenses. The trial court replied that in its judgment there was no evidence to justify a verdict on a lesser offense and submitted the cause to the jury on only two possible verdicts, "guilty of assault with a deadly weapon with intent to do bodily harm," or "not guilty." . . . This theory, however, clashes with two fundamental rules in trial of criminal cases: *It has the effect of the court weighing the evidence and, in effect, limiting the jury to a consideration of only part of the evidence (the defendant's); and it, in effect, casts upon the defendant the burden of proving his innocence or justification.* 65 P.2d at 1132. (Emphasis added.)

In our judicial system we presume a man innocent until proven guilty. By withholding the possibility of convictions for lesser offenses from the jury, a judge permits proof of guilt of a lesser offense to suffice for proof of the higher offense. Rather than putting the bur-

den on the state to prove the highest degree of offense that it can, this practice merely requires the state to establish evidence of some guilt in order to obtain a conviction for the greatest offense. If the jury is convinced that the defendant is guilty of something and the only choice presented to it is guilty or not guilty of a greater offense, only injustice can result. Either the jury is going to be repulsed by the implication of a penalty far greater than what it feels the defendant's action warrants, and therefore set a man free whom they feel is really guilty. Or the jurors are going to be repulsed by the latter idea of freeing a guilty man and convict for a crime beyond which they feel the evidence justifies.

Of course, if no reasonable man could view the evidence to permit a conviction for the lesser offense, the court is justified as a matter of law in refusing to submit to the jury instructions and a potential verdict for a lesser offense. It is therefore crucial in the instant case to apply the *Gillian* standard and determine "if any reasonable view of the evidence" would support the lesser verdict of attempted petty larceny.

The most significant single fact of this case is that the trial court found it proper to submit instructions and a verdict on the crimes of *petty larceny* and *attempted grand larceny*. The judge in this case felt the evidence could support either of these crimes. The fact that the offense of larceny perhaps was not complete and that the jury could find only an atempt is not in dispute. Neither can it be disputed that the judge concluded the evidence

put the value of the goods at issue. By submitting and instructing on the crime of petty larceny the court demonstrated that it felt the jury should determine if the state had proved the value of the hams was beyond fifty dollars (R. 17). It is untenable to argue that evidence of the value of the goods in question would support a conviction for the crime of petty larceny, and not support a conviction for attempted petty larceny. The value of the goods does not change merely because an attempt to take them is not completed.

The testimony in this case indicated that the grocery store manager and one of his employees noticed two individuals in the meat department (T. 6). One of them, whom we only know as "the other individual," picked up a box of hams and walked out the front door of the store (T. 8). The manager testified that he stopped this man in the parking lot and that there were nineteen hams in the box in his possession (T. 8-10). The appellant never left the store but was seen heading in the opposite direction of the individual stopped in the parking lot after the two were observed together in the meat department (T. 8). About five minutes after the other man was apprehended, the appellant was detained as he went through the check-out counter. He had no hams in his possession and was at the time purchasing some potato chips and beer (T. 12). A second box, containing four hams, was discovered a short time later in the back of the store (T. 10).

The store butcher testified that he thought the value of the nineteen hams taken from "the other individual"

were valued at about eighty dollars (T. 50). Of course, the value of ham is not that easy to determine and the jury should have the choice to accept or reject the butcher's opinion. In this case the judge allowed the jury to make this choice when they considered the offense of larceny, but determined the butcher's assessment of the value correct as a matter of law for the offense of attempted larceny. Removing this element of the offense from the jury is not only improper, it is logically inconsistent.

In addition, there was no direct evidence that the appellant and the individual apprehended with the nineteen hams were collaborators. The only evidence that connected them at all was that they were both seen in the meat department at the same time. Clearly, it is for the jury to determine if these two men acted together or separately. It is reasonable to conclude that the jury felt the evidence did not prove (beyond a reasonable doubt) that the appellant acted in concert with the other man, but that they were convinced (beyond a reasonable doubt) that the appellant had tried to take the four hams found in the back of the store. Indeed, given the lack of any evidence of a conspiracy, the fact that the four hams were found in the general area where the appellant was observed, and the rather suspicious actions of the appellant after he was apprehended, this is a very likely conclusion for the jury to reach.

This theory only connects the appellant with four hams and would only support a conviction of attempted petty larceny. Yet, because of the failure to instruct as

to this offense any juror reaching this conclusion would be forced to either acquit or convict for the greater offense.

In summary, the jury concluded in this instance that the offense of larceny had not been completed, and returned a verdict of attempt. The evidence clearly put the value of the goods at issue, and the trial court recognized this by instructing the jury on petty larceny. Since the jury found only an attempt, and the value of the goods was questionable, it is not only reasonable, it is likely that the evidence supported a verdict of attempted petty larceny. The court failed to instruct and submit as to this verdict and the only proper remedy in this situation is to reverse and remand. *State v. Gillian*, 23 Utah 2d 372, 463 P.2d 811 (1970); *State v. Barkas*, 91 Utah 574, 65 P.2d 1130 (1937); *State v. Hyams*, 64 Utah 285, 230 Pac. 349 (1924).

CONCLUSION

For the foregoing reasons it is respectfully contended that the conviction against appellant should be reversed, or, in the alternative, that the case should be remanded for a new trial.

Respectfully submitted,

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