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State of Utah v. Esther Besares : Brief of Respondent

Utah Supreme Court

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4927

In the Supreme Court of the State of Utah

October Term, 1929

STATE OF UTAH,
Plaintiff and Respondent,
vs.
ESTHER BESARES,
Defendant and Appellant.

Respondent's Brief

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STATE OF UTAH,
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vs.

ESTHER BESARES,
Defendant and Appellant.

Respondent's Brief

This case came on for hearing on appeal without any brief having been filed on behalf of respondent, due to the fact that the brief of appellant was not filed until three or four days prior to the time this case was reached on the calendar. The appellant informed the Court at the hearing that he had nothing further to add to what was said in his brief.

The defendant in this case was charged in an information filed by the district attorney of the Second Judicial District in and for Weber County with the crime of Murder. The defendant in this case is a married woman. She had a daughter who was also married. The record discloses that the mother visited the home of the

daughter on the day of the homicide. It appears that the husband of the daughter was at the time confined in the Weber County jail. The record further discloses that there was considerable carousing and drinking going on at the home of the daughter on the evening of the homicide. The deceased and the daughter had been drinking and the evidence shows that on the day preceding the homicide that the daughter of the defendant had spent several hours in the room of the deceased at one of the hotels at Ogden.

The assignments of error argued by the appellant in his brief relate to the refusal of the Court to give certain requested instructions and to certain instructions as given by the Court, and it is contended that said assignments of error involve the construction of a part of section 8032 of the Compiled Laws of Utah, 1917. This section reads in part as follows:

> Sec. 8032 Homicide is also justifiable when committed by any person in either of the following cases:
>
> 1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person;
>
> 2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony; or against one who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to enter the habitation of another person for the purpose of offering violence to any person therein;

3. When committed in the lawful defense of such person, or of a wife, husband, parent, child, master, mistress, or servant of such person, when there is a reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and there is imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed.

4. When committed in a sudden heat of passion caused by the attempt of the deceased to commit a rape upon or to defile the wife, daughter, sister, mother, or other female relative or dependent of the accused, or when the defilement has actually been committed."

It is assumed by counsel for appellant that the testimony of the defendant as given at the trial, is that the defendant came upon the deceased in the act of committing what he terms "cunnilingus" with the daughter of the defendant, and one of the defenses to the charge contained in the information is predicated upon subdivision 4 of said section 8032, and counsel has assigned as error the refusal of the trial court to instruct the jury that cunnilingus constitutes a defilement within the meaning of said section 8032.

The testimony given by the defendant, which it is assumed by counsel for appellant in his brief, discloses a commission of cunnilingus, as follows:

"A. First Jack Farish kept following her around from one room to the other, and I said,

'Thelma, please ask him to go'. He kept going around all the time, and they kept drinking and drinking; and finally everything was quiet in there, and I was playing solitaire, and when I got through with the game, I walked into the kitchen, and Jack Farish had her sitting on the table, and he had his head in between her legs. I grabbed hold of her and said, 'My God, Thelma, get off the table, and you, Jack Farish, get out'. Jack Farish got up and wiped his mouth and went out in the other room, and I ordered him out, and he went to the front door and stood there. And when Thelma went out, I said, 'Come here, Thelma' and he was trying to coax her to go with him when she walked over there.

Q. What happened after that?

A. When he came up, coaxing her and was going, I walked over to the door, and I said to him 'Jack Farish, you beast, you get out of this house, you dirty home-breaker; you are not going to break up Al's home,' and then he struck me in the eye, and I struck back at him, and he threw his hand to his hip, and I broke and run.''

The term ''cunnilingus'' is defined as follows:

''A carnal copulation consummated by the mouth and the female sexual organ.'' 66 So. 963; 17 C.J. 402.

From the testimony of the defendant which we have quoted above and which is the only testimony in the record describing the conduct of the deceased in that direction, we are not prepared to concede that the offense of cunnilingus was in fact committed and for that reason we submit that the court did not err in refusing to give the

requested instruction of the defendant covering this particular matter and that the Court did not err in its instructions to the jury because it did not take into consideration and did not define the term cunnilingus. If it shall be assumed by the Court that the testimony of the defendant shows the actual commission of the offense of cunnilingus, we would also be willing to concede that the assignments of error relied upon by counsel for appellent in this connection are well taken. This for the reason that the term "defile" as used in said section 8032 is defined as follows:

> "To pollute, to corrupt the chastity of, to debauch, to violate."
>
> State vs. Fernold, 88 Ia. 553; 55 N.W. 534;
> State vs. Montgomery, 79 Ia. 737; 45 N.W. 292;
> 18 C.J. 465:

The term "debauch" one of the synonyms for the word "defile" is defined as "to carnally know" in State vs. Reeves, 97 Mo. 669, and "carnal knowledge" is defined as sexual intercourse and sexual bodily connection by a man with a woman in 9 C.J. 1293. In view of these definitions it occurs to us that the offense of cunnilingus is included within the term "defile" as used in said section 8032, and that instruction No. 12 given by the Court, reading as follows: "the defilement of a female as meant by these instructions is accomplished when any male person not the husband of such female has had sexual intercourse with such female and the attempt to defile a person has been accomplished when such male person has

attempted to have such intercourse with such female. The fact of the defilement or attempted defilement may exist where the female has given her consent to such sexual intercourse, as well as when she has not given her consent'' would not be sufficiently broad if the testimony given by the defendant is held to be sufficient to designate the commission of the offense of cunnilingus. As we have already stated, there was testimony brought out on cross examination of one of the state's witnesses to the effect that the daughter of the defendant had occupied the same room with the deceased the day preceding the homicide and the evidence also discloses that the deceased and the defendant engaged in some altercation and that the defendant was struck by the deceased, and that it was upon her being struck by the deceased that she struck the deceased with a knife which produced the wound from which he died. In view of this testimony and the evidence the Court instructed the jury as to the law with reference to justifiable homicide in its instructions Nos. 12, 13, 14, 15, 16, 17, 18 and 19. If it is held that the evidence as given by the defendant with respect to the conduct of the deceased with the daughter of the defendant is sufficient as a matter of law to show that the offense of cunnilingus had been committed, then it would be the duty of the Court to instruct as requested by the defendant but where much must be left to the imagination in order to determine just what transpired between the deceased and the daughter of the defendant and where the conduct of the deceased with the defendant does not show the required details constituting the of-

fense of cunnilingus as hereinbefore defined, then we submit that it was not error for the Court to refuse to instruct as requested and that the Court did not commit error in the giving of its instructions to the jury in which the term "defiled" as used in said section 8032 was explained. As a matter of fact we are of the opinion that the Court was eminently fair with the defendant and that the instructions given by the Court go perhaps further than the defendant was really entitled to, because there was no direct evidence that the accused had had any sexual intercourse whatever with the daughter of the defendant and none whatever to the effect that the mother of the daughter had any knowledge of the fact that her daughter had had sexual intercourse with the deceased, and this being the case the mother could not have killed the deceased while in the sudden heat of passion caused by her acquiring knowledge of the defilement of her daughter by the deceased.

In conclusion we simply have this to say that in our opinion the evidence is insufficient to show that the offense of cunnilingus was committed upon the daughter of the defendant by the deceased and in the absence of evidence tending to show that this particular offense had been committed, the Court was not justified in giving the instructions requested on behalf of the defendant. On the other hand we want to be understood as taking the position that in a proper case, that is where there is evidence to the effect that the offense of "cunnilingus" has been committed and that the defendant killed the male participant therein while in the sudden heat of

passion that it would be error for the Court not to instruct the jury that the term defile as used in said section 8032 is sufficiently broad to include that particular act.

Respectfully submitted,

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