

1929

# State of Utah v. Esther Besares : Brief of Appellant

Utah Supreme Court

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Woolley & Holther; attorneys for defendant and appellant.

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**In the Supreme Court  
Of the State of Utah**

**\*FILED**  
OCT 9 1929

**STATE OF UTAH,**  
**vs.**  
**ESTHER BESARES,**  
**Defendant and Appellant.**

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**APPELLANT'S  
BRIEF**

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**WOOLLEY & HOLTHERR,**  
**Attorneys for Defendant and Appellant.**

# In the Supreme Court Of the state of Utah

STATE OF UTAH.

vs.

ESTHER BESARES.

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APPELLANT'S  
BRIEF

## STATEMENT

The defendant, charged with first degree murder, was convicted of voluntary manslaughter on June 7, 1929, by a jury in the District Court of Weber County, Utah, Judge George S. Barker presiding, and appeals.

The victim, one Jack Farish, was stabbed with a butcher knife at a bootleg joint in Ogden, after midnight, April 8, 1929, and died on the way to the hospital.

Thelma Bruerton, a daughter of the defendant, was in charge of the place. Algernon Bruerton, Thelma's husband, was then in the county jail under sentence for violating the liquor law. The house is an old residence situated on Twenty-fourth Street near the Post Office and has been remodeled for the illicit use. Entrance is into a living room in the middle of the structure. On the east is a sewing room; on the west are two bedrooms; north of the living room is the dance hall; east of the dance hall, reached by a narrow hallway, is the kitchen.

The situation at the joint was evidently getting out of hand on account of Thelma's looseness, and the mother—

a large, plain, hard-working, matronly woman—exasperated and outraged at the carryings on, went there in the evening of the night of the tragedy to try to hold things down and see that no greater harm should come to her errant daughter. Thelma, the blubbery type, a starry-eyed blond gone fat, is nevertheless a mother's only child.

Farish and the daughter had been on a debauch for a couple of days and nights and were still going strong. Moonshine whisky, with home-brew for chasers, was freely imbibed by all except the mother. This concoction, in mixed company, behind closed shutters, is the devil's caldron. Farish was pretty full and Thelma was sloppy drunk. Farish furnished the hard liquor and the house supplied the beer.

Nine persons were on the premises when the stabbing occurred, but only three were produced as witnesses at the trial. Mr. and Mrs. Marsh, who lived in a room in the house, and a Mr. Wolsky had left the State for parts unknown. Thelma, although present in court throughout the trial, under subpoena by the State, was not sworn by either side. An adopted son of the defendant was sleeping in the bedroom.

Max Pace, weasel faced, cook and barber, who did not work much at either, and Bob Field, card sharp and a battle-scarred veteran of the Ogden Police Court, pals of Farish (habitues of the underworld all three), were witnesses for the State, and the defendant testified in her own behalf. Sundry doctors, undertakers, plain clothes men, deputy

sheriffs and character witnesses added bits of formal fact here and there, but are not included in the record on appeal since nothing of significance to our point appeared from their contributions.

The theory of the prosecution was that since the defendant was there and held the knife that did the deed she ought to be found guilty of something. The jury, seemingly, took that view also and returned a verdict for the lowest grade of homicide permitted under the court's instructions.

The record reveals a nasty mess. The only orchid on the dung hill is the mother instinct which flared into livid flame in defense of a daughter's tattered soul.

The testimony which we bring up on the appeal covers less than a hundred pages of transcript (Tr. 2-95) and is condensed to ten pages of abstract (Abs. 11-20).

Pace, for the State, testified that Farish and he started to leave the house and that Thelma said she was going too; that as these three were at the street door going out together, the mother forbade Thelma to go; she called Farish vile names and the daughter struck the mother and the two women engaged in a scuffle; that they fought across the room into the dance hall; that Farish followed the melee to the other doorway; that Field and Pace grabbed Wolsky, who started toward Farish, and "oozed" him into the kitchen; that the defendant broke away from her daughter and ran into the kitchen and returned with a long butcher knife and stuck it through Farish under the left ribs as he was standing in the doorway between the front room and the dance hall. Fields said he came in after the argu-

ment started and witnessed the affair, taking part only to the extent of aiding in the "oozing" of Wolsky.

The defendant gave a different version. The reading or the relating of it is nauseating. She testified that the party had quieted down about midnight and Farish and Thelma were in the kitchen alone. The mother was playing solitaire in the front room. The couple had been exhibiting amorous tendencies as the evening wore on and the mother became alarmed at the length of the period of quiet which followed the racket of the brawlers. She went into the kitchen to see what might be going on, and came upon Farish in an unnatural act with Thelma. The abstract quotes her testimony in description of the debasing scene and recital of the ensuing events. (Abs. 18-20.)

It pictures a whirlwind of passion, aroused by the sudden confrontation of the horrid defilement of her daughter, and the slaying in the heat engendered by the sight of the deceased's perverted deed.

Our position at the trial was, and is now, that the taking of life under these circumstances is justifiable homicide for which the mother must be fully acquitted and discharged under the high law of nature and the statutes of this State.

## ARGUMENT

### POINT I

Assignment of Errors Nos. IV. V. VI. VII, VIII, IX, X, XI, and XII (Abs. 25-28).

This appeal presents a point of first impression in this jurisdiction, or elsewhere, so far as we have been able to find from the books, namely:

*Is an act of sexual perversion by the male a defilement of the female?*

It involves the construction of Subsection 4 of Section 8032. Compiled Laws of Utah, 1917. This provision reads:

8032. Homicide is also justifiable when committed by any person in either of the following cases:

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.

This Utah statute defining justifiable homicide contains provisions that are wholly unique, and this is perhaps the first case to be appealed in which these unusual provisions have had a direct application since their adoption into the body of our Code.

This provision is more than the "unwritten law" enacted into statute, and it is not a declaration of the common law, which merely reduced the slaying from murder to manslaughter, and it seems to go far beyond the limits of the

statutes of any other State. Somewhat similar statutes are in effect in New Mexico and Texas.

The New Mexico statute reads:

Code 1915, Section 1468. Any person who kills another, who is in the act of having carnal knowledge of such person's legal wife, shall be deemed justifiable; provided, that said husband and wife are not living separate but together as man and wife.

This section has been interpreted by the Supreme Court of that State in two cases:

State vs. Carabajal, 193 Pac. 406, 17 A. L. R. 1098.

State vs. Greenlee, 269 Pac. 331.

The Texas statute reads:

Homicide is justifiable when committed by the husband upon the person of any one taken in the act of adultery with his wife; provided, the killing takes place before the parties to the act of adultery have separated. Penal Code, Article 567.

Cited in:

Price vs. State, 18 Texas Appeals 474, 51 Am. Rep. 322.

And:

46 S. W. 369.  
 67 S. W. 411.  
 74 S. W. 307.  
 94 S. W. 1041.  
 165 S. W. 583.  
 160 S. W. 465.  
 180 S. W. 254.  
 243 S. W. 1093.



See also:

**Biggs vs. State, 29 Georgia 723, 76 Am. Dec. 638.**

The Common Law is stated by Blackstone:

“So if a man takes another in the act of adultery with his wife, and kills him directly upon the spot, though this was allowed by the laws of Solon, as likewise by the Roman civil law (if the adulterer was found in the husband’s own house), and also among the ancient Goths, yet in England, it is not absolutely ranked in the class of justifiable homicide as in the case of a forcible rape, but it is manslaughter. It is, however, the lowest degree of it; and therefor in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation. 4 Bl. Com. (Chitty) side page 191.”

And Bishop states the common law rule thus:

“If a husband finds his wife committing adultery, and provoked by the wrong instantly takes her life or the adulterer’s \* \* \* the homicide is only manslaughter. But if on merely hearing of the outrage he pursues and kills the offender, he commits murder. The distinction rests on the greater tendency of seeing the passing fact, than of hearing of it when accomplished, to stir the passions; and if a husband is not actually witnessing the wife’s adultery, but knows it is transpiring, and in an overpowering passion, no time for cooling having elapsed, he kills the wrong-doer, the offense is reduced to manslaughter.” 2 Bish. Crim. L. (7th ed.) Sec. 708.

It would seem that at common law the rule reducing the offense from murder to manslaughter was limited to the case of a cuckold. The statutes of Texas and New

Mexico, it will be observed, likewise apply only to the situation of a husband who is confronted with the adultery of his spouse.

In some cases, however, the principle has been applied where a father or brother kills one whom he detects in adultery or sexual intercourse with his daughter or sister or where one kills a man detected in sexual intercourse with his betrothed, and in like cases.

29 C. J. 1143, notes 66, 67, 68, and 69.

One of the citations in the annotation is referred to as "an unnatural offense with defendant's son."

Reg. vs. Fisher, 8 C. & P. 182, 34 E. C. L. 679.

We do not have access to this report. It is the only citation we have been able to find in which the circumstance of an unnatural act is considered in connection with the principle involved.

The Utah statute has twice been before this court in cases on appeal.

People vs. Halliday, 5 Utah 467, 17 Pac. 118.

State vs. Botha, 27 Utah 289, 75 Pac. 731.

In each of these cases, the slayer was the husband, and sought to justify under the Utah law.

The reason for the statute is well stated in State vs. Greenlee, *supra*.

"The purpose of the law is not vindictive. It is humane. It recognizes the ungovernable passion which possesses a man when immediately confronted with his wife's dishonor. It merely says the man who takes life under those circumstances is not to be punished; not because he has performed a meritorious deed; but because he has acted naturally and humanly. We in New Mexico have enacted, as has been enacted in Texas, that, instead of mitigating the homicide to manslaughter, as at common law, such circumstances justify the act. Such is the holding of the Texas, Utah, and Georgia decisions cited, and such is appellant's contention here."

A reading of the Utah statute at once discloses that it is not limited to the case of husband slaying wife or paramour as are the enactments in Texas and New Mexico. By its terms the statute applies where the defilement is of the wife, daughter, sister, mother or other female relative or dependent of the accused; and the justification runs in favor of any person who stands in the relationship of husband of the defiled wife, father or mother of the defiled daughter, brother or sister of the defiled sister, son or daughter of a defiled mother, and in fact any relative of a female who is defiled. The statute goes even to the extent of justifying homicide where there is no relationship by blood or marriage, but merely the fact of dependency. No distinction is made between father and mother; parenthood alone invokes the rule. A mother may take the life of the defiler of a daughter in the same circumstances as will shield the father, and with like immunity.

A question that is not laid by the terms of the statute itself is the meaning of the word "defile." Here judicial

construction and interpretation is necessary in its application. This court in the Botha case considered and approved an instruction defining defilement as it related to the facts of that case. There was no question of an unnatural act. The claim of justification was simple adultery with the accused's wife.

The trial court in our case adopted the instruction considered in the Botha case and gave it as the definition of defilement. It is instruction No. 12, reading as follows: (Abs. 6.)

“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 sexual 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.”

This instruction as well as instructions No. 13, No. 14, and No. 15 (Abs. 6-8), limit defilement to sexual intercourse.

Instruction No. 12, as given, is good as far as it goes. The defendant requested this instruction as well as an amplification of the definition of defilement contained therein to cover all of the facts in the case and particularly defendant's defense. Defendant's requested instruction No. 23 is divided into six paragraphs. The court endorsed it as follows: “Given in part, refused in part, subject covered

by instruction given." The latter part of the endorsement is hardly a correct statement. The whole subject of our request was not covered in the instructions as given. No where in the charge to the jury is there any statement that our statute applies to a situation of sexual perversion such as was disclosed as the cause of this homicide.

The court's attention was specifically directed to this matter in the third paragraph of requested instruction No. 23 (Abs. 4), which reads:

"Likewise, an act of sexual perversion, or an attempt to commit an act of sexual perversion, such as *cunnilingus*, is a defilement, within the meaning of these instructions."

The instructions as given by the court entirely evade and avoid this whole issue. It was defendant's principal justification. Her testimony is not seriously disputed on the record. The deceased's affront to decency provoked the transport of passion which resulted in the stabbing. It was not an act of sexual intercourse; it was an act of sexual perversion upon the person of this defendant's daughter. A situation more calculated to arouse, outrage and inflame could scarcely be conceived by the normal mind. Coming upon a daughter in the act of nature may or may not provoke a parent to the desperation of homicide; but it can hardly be imagined that any father or mother could restrain the compelling impulse to slay on being confronted with the revolting posture of indecency which was exposed to the view of this defendant on entering the kitchen.

The trial judge, for some inexplicable reason, did not

touch the subject in his instructions. Either such an act is a defilement within the meaning of the statute or it is not, and it was the plain duty of the court to inform the jury as to what the law was upon this matter, indelicate though it may have been. The law must sometimes deal with life in the raw. A mere squeamishness will not excuse a failure to face unpleasant facts. The jury was not informed and was left wholly uninstructed upon the crux of defendant's justification and in the argument we were not permitted to state the law to be other or different from what the court had said it was in the instructions as given; and so the defendant's defense could not be adequately and fully presented and she was prevented from having a fair trial upon the facts of her case and the law applicable thereto.

Will any court in Christendom say that the unnatural act is not a defilement of the victimized female? If it is a defilement within the purview of our statute, then this case ought to be reversed and the defendant given a trial to a jury that is informed as to what the law is upon the facts of her defense.

## POINT II

### Assignment of Errors VI (Abs. 26).

Another part of our requested instruction No. 23, which was refused and not given by the court reads as follows (Abs. 4) :

“If the jury believe from the evidence in this case that the deceased, Jack Farish, had sexual in-

tercourse with the daughter of the defendant, or attempted to have such intercourse with her, or was about to take her away from her home for that purpose, *or that the deceased committed an act of sexual perversion, or attempted to commit an act of sexual perversion, upon the daughter of the defendant.* and if the jury further believe from the evidence that the defendant killed the deceased, Jack Farish, in a sudden heat of passion, and if the jury further believe from the evidence that said sudden heat of passion was caused by the said conduct of the deceased, then the jury should find the defendant 'not guilty.' "

Here again by the italicized portion of the request, the Court's attention was directed to the proposition that an act of sexual perversion, or an attempted act of perversion, upon the daughter of the defendant, was sufficient to invoke the statute and justify the homicide, if seeing it caused the heat of passion which resulted in the slaying.

The whole charge in this case upon the question of defendant's defense of justification under the statute is shot through with the vice so frequently condemned by this court in former decisions; namely, that the instructions are mere abstract statements of principles of law, and not specific as to the facts of defendant's defense.

State vs. Anselmo, 46 Utah 137, 148 Pac. 1071.

### POINT III

Assignment of Errors VII (Abs. 27).

The concluding sentence of requested instruction No.

23 reads (Abs. 4) :

And if, from all of the evidence in the case, the jury have a reasonable doubt as to the facts of justification under this instruction, it is the duty of the jury to acquit the defendant.

No where in its instructions to the jury did the trial court give this or a similar statement of the law upon the subject of justification due to the passion aroused from catching the daughter and the deceased in the illicit act. Such an instruction was given by the court as applied to justification on the ground of self defense, which also appeared from the evidence. This court in several decisions has approved the proposition that where the evidence of justification raises a reasonable doubt of guilt, it is the duty of the jury to acquit the defendant.

State vs. Vacos, 40 Utah 169, 120 Pac. 497.

State vs. Dewey, 41 Utah 538, 127 Pac. 275.

State vs. Harris, 58 Utah 331, 199 Pac. 145.

It is not the burden of the defendant to prove the circumstances of justification beyond a reasonable doubt. We sought to have this undisputed proposition applied to the other circumstance of justification in this case. It is respectfully submitted that the failure of the court to so instruct the jury was prejudicial error and that the judgment ought to be set aside on this further ground.

#### POINT IV

Assignment of Errors II and III (Abs. 25-26).



The defendant requested a binding instruction that she could not be found guilty of murder in either the first or second degree, and the refusal of these requested instructions is assigned as error. Any examination of the testimony in this case, we believe will convince the court that, even wholly disbelieving and disregarding the defendant's story and considering only the version given by Pace and Field, the case is at most one of voluntary manslaughter. It was unfair to the defendant to put her to the jeopardy of a finding of guilty on the murder charge. If the jury had been instructed that they should consider only the question of manslaughter or not guilty under the plea of justification, we have no doubt but that they would have come to the decision of "not guilty."

To permit the verdict by compromise to stand in this case would be a stark denial of justice.

## POINT V

### Assignment of Errors I (Abs. 25).

We also assign as error a question of evidence. The cross-examination of Mrs. Besares took a wide field and the District Attorney was permitted to engage in the tactic of unlimited harassment and repetition on repetition. He finally proceeded to examine the defendant as to the purpose of other people being in the premises. Over objection, the defendant was compelled to answer the following question:

"Mr. Marsh went there for the express purpose of carrying on the booze business there, didn't he?"

We submit this question had no place in the case; that it was not cross-examination; that it was wholly incompetent, irrelevant and immaterial, whether Marsh went there for the purpose of carrying on the booze business or not. The defendant was not on trial for nuisance and Marsh was not on trial at all. The question was manifestly calculated to stir the prejudice of the jury against the defendant for being in the place and we submit the ruling constitutes another prejudicial error.

The argument made covers the grounds relied upon for the motion for new trial, the denying of which is likewise assigned as error. (Abs. 28.)

Respectfully submitted,

**WOOLLEY & HOLTER,**  
Attorneys for Defendant and Appellant.