

1929

State of Utah v. Esther Besares : Abstract

Utah Supreme Court

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Woolley & Holther; attorneys for defendant.

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In the Supreme Court of the State of Utah

October Term, 1929

STATE OF UTAH.

vs.

ESTHER BESARES,

Defendant and Appellant.

DEFENDANT'S ABSTRACT

WOOLLEY & HOLTHER,
Attorneys for Defendant.

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Transcript

In the District Court Of the Second Judicial District

WITHIN AND FOR WEBER COUNTY,

STATE OF UTAH

STATE OF UTAH.

vs. -

ESTHER BESARES.

} DEFENDANT'S
ABSTRACT

} Defendant and Appellant.

001. Complaint before Simon Barlow, City Judge and
Ex-Officio City and Precinct Justice of the Peace,
within and for the City of Ogden, County of Weber,
State of Utah.

002. Warrant of arrest.

003. Subpoena to Thelma E. Bruerton.

004. Transcript of Committing Magistrate.

008. Information No. 2959, filed May 13, 1929.

IN THE DISTRICT COURT OF WEBER
COUNTY, UTAH.

Esther Besares having heretofore been duly com-
mitted by Simon Barlow, a committing magistrate of

Transcript

this County to this Court, to answer this charge, is Accused by the District Attorney of this Judicial District, by this information, of the crime of Murder in the First Degree, a felony committed as follows, to-wit:

The said defendant, on the 9th day of April, 1929, at the County of Weber, State of Utah, wilfully, unlawfully and feloniously, of her own deliberately premeditated malice aforethought, made an assault in and upon the body of one Jack Farish, and then and there wilfully, unlawfully and feloniously, of her own deliberately premeditated malice aforethought, struck and stabbed said Jack Farish with a knife then and there held in the hands of the said defendant, and drove said knife into the body of Jack Farish, and thereby, by thus striking and stabbing the aforesaid Jack Farish with the said knife, as aforesaid, inflicted in and upon the body of the said Jack Farish mortal wounds, of which wounds he, the said Jack Farish, died on the aforesaid 9th day of April, 1929, and so the aforesaid Esther Besares, in the manner aforesaid, unlawfully, feloniously and of her own deliberately premeditated malice aforethought, killed and murdered the said Jack Farish.

- 009. Defendant arraigned.
- 010. Defendant pleads "not guilty." Case set for trial on June 4, 1929.
- 011. State's requests for instructions to jury.
- 016. Defendant's requested instructions, one to twenty-six, inclusive.

Transcript

INSTRUCTION NO. 2

018. I charge you that under the evidence in this case you cannot find the defendant guilty of murder in the first degree.

REFUSED.

GEORGE S. BARKER,
Judge.

INSTRUCTION NO. 3

019. I charge you there is no evidence in this case to find the defendant guilty of murder in the second degree.

REFUSED.

GEORGE S. BARKER,
Judge.

INSTRUCTION NO. 23

039. You are instructed that under the law of this state a homicide is justifiable 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 had actually been committed.

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

Transcript

female has been accomplished when such male person has attempted to have sexual intercourse with such female.

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 fact of the defilement or attempted defilement may exist where the female has given her consent to such sexual relation as well as when she has not given her consent.

If the jury believe from the evidence in this case that the deceased, Jack Farish, had sexual intercourse 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."

And if, from all of the evidence in the case, the jury have a reasonable doubt as to the facts of justi-

Transcript

fication under this instruction, it is the duty of the jury to acquit the defendant.

GIVEN IN PART. REFUSED IN PART. SUBJECT COVERED BY INSTRUCTIONS GIVEN.

GEORGE S. BARKER,
Judge.

043. INSTRUCTIONS TO JURY.

INSTRUCTION NO. 11

052. The court charges you that the killing of a human-being, under our law, is justifiable when committed by any person in either of the following cases:

First: 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.

Second: 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 dependant of the accused, or when the defilement has actually been committed.

The court further charges you that our statute provides that the bare fear of the commission of any

of the offenses mentioned in the first subdivision of the foregoing, to prevent which homicide may be lawfully committed, is not sufficient to justify it, but the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted wholly under the influence of such fear.

Our statute further provides that when a killing appears to be justifiable, the person charged must upon his trial be fully acquitted and discharged.

If, therefore, you find in this case that the killing of the deceased by the defendant was justifiable, within the purview of the foregoing, then I charge you that it would be your duty to acquit the defendant.

INSTRUCTION NO. 12

053. 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.

INSTRUCTION NO. 13

053. You are further instructed that in the enactment of the provisions of the statute providing for the

Transcript

justification of homicide for the defilement or attempted defilement of a female, the legislature designed it to apply only to cases where the accused had come suddenly upon the defiler in the act of defiling or of attempting to defile, or where he had unexpectedly received reasonable, reliable information of the same, and the fatal blow was struck or act done in an uncontrollable passion, suddenly aroused because of the suddenness of the occasion and of the absence of sufficient time for deliberation and for reason to gain sway over the passion. The law was not intended to shield an accused who, because of mere rumors or appearances which he himself deems but to be evidences of undue familiarity between the male and the female, determines to kill one or the other, and then, with that purpose in view, pursues and deliberately and wilfully kills while said persons are in no act of defilement and not in a compromising position.

INSTRUCTION NO. 14

054. If the jury believe from the evidence in the case that the deceased, Jack Farish, had sexual intercourse with the daughter of the defendant, or attempted to have such intercourse with her, 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 heat of passion was caused by the conduct of the deceased, within the purview of the foregoing

Transcript

instructions, then I charge you, the defendant would be justified and you should acquit her.

INSTRUCTION NO. 15

055. You are further instructed that while under the laws of the State of Utah homicide may be justifiable when committed in a sudden heat of passion caused by the attempt of the deceased to defile the wife, daughter, sister, mother or other female relative or dependent of the accused, or when defilement has actually been committed, such sudden heat of passion must be such passion as arises immediately upon the accused discovering the deceased in the actual act of defiling said female, or attempting so to defile her, or upon discovering that said act of defilement has actually been committed, and that a homicide under such circumstances is not justifiable where there has been time for deliberation and cooling off.

072. Verdict in open court June 7, 1929.

“We, the jury empanelled in the above entitled action, find the defendant guilty of voluntary manslaughter as included in the information.”

LORENZO JEPPSON,
Foreman.

073. Notice of motion for new trial served and filed on June 10, 1929.

NOTICE OF MOTION FOR NEW TRIAL
To the State of Utah and David J. Wilson, Esq.,

Transcript

District Attorney:

You and each of you will please take notice that the defendant in the above entitled cause intends to and will move the Honorable Court above named in Department Number One thereof on the coming in of Court on June 10, 1929, or as soon thereafter as counsel can be heard, for a new trial of said cause upon the following grounds:

I.

That the court misdirected the jury in matters of law.

II.

Errors of the court in the decision of questions of law arising during the course of the trial.

III.

Conduct of the court in the case prejudicial to the substantial rights of the defendant.

IV.

That the verdict is contrary to law.

V.

That the verdict is contrary to the evidence.

VI.

Newly discovered evidence material to the defendant and which she could not with reasonable

Transcript

diligence have discovered and produced at the trial.

Said motion will be based upon the files, records and transcript of proceedings had in said cause and affidavits to be hereafter served.

075. Motion for new trial made and denied June 10, 1929.

Defendant sentenced to be imprisoned in the State prison for a term of not less than one year and not more than ten years.

Certificate of probable cause ordered issued.

Defendant's bail on appeal fixed.

077. Certificate of probable cause.

078. Order extending time in which to serve bill of exceptions to August 1, 1929.

079. Order extending time in which to serve bill of exceptions to August 15, 1929.

080. Certificate of Clerk dated July 31, 1929.

2. BILL OF EXCEPTIONS

This cause came on for trial June 4, 1929, before Honorable George S. Barker, with a jury, where the following, among other witnesses, were called and testified:

Transcript

MAX PACE, a witness for the state, testified:

I am living in Ogden at this time. I was in Ogden on the night of April 8, 1929. I knew Jack Farish during his lifetime and saw him on the night of April 8, 1929, at 214 Twenty-fourth Street. It was between 10:30 and quarter to eleven. Others there were Mrs. Besares, the defendant; Arnold Wolsky, Marsh and his wife, Mrs. Bruerton and Jack Farish. Mrs. Besares is the mother of Mrs. Bruerton. When I arrived at the premises Farish was in the kitchen. I sat out in the kitchen for some time talking to Mr. Farish and Mrs. Bruerton and later I went into a bedroom where they had a hound or police dog showing off for the little boy that was in bed. Later I went to the dance hall and danced with Mrs. Marsh once. Mrs. Besares was dancing with Wolsky. I played a hand of "coon-can" with Mrs. Bruerton. After I played that game Farish and myself started to leave the place. While I was there people came into the dance hall and Mr. Robert Wheat came into the kitchen and talked to Mr. Farish, and later Bob Field came. When we started to leave Bob Field was sitting in a chair by the front door.

4. Mr. Farish and Mrs. Bruerton was going to leave and the mother objected. They were in the living room. Mrs. Bruerton went some place and got a coat. After she came back with a coat her and her mother got into an argument. Jack Farish told Mrs. Bruerton not to go. The mother and daughter started fighting. The fight went back into the dance hall and

Transcript

we followed the fight back to the door of the dance hall. I went inside of the dance hall and Wolsky came in there.

6. He came out of the kitchen and said there would be no trouble and so I said to Mr. Field, "Get hold of him," and we took him and put him back in the kitchen.

7. When I saw the (butcher) knife Mrs. Besares had it in her hand. At that time Farish was standing and leaning in the door with his left hand in his hip pocket. His right leg below the knee had been amputated. He was wearing a cork leg or foot.

Q. What, if anything, occurred following the time you saw Mrs. Besares with the knife.

A. She rushed Jack Farish and a look came on Farish's face and he was asked, "Are you hurt, kid?" and he said, "Yes, plenty," and at that Field took hold of one side of him and I took hold on the other side.

8. And we started out of the house with him. He relaxed. I ran for a taxi and we took him to the Dee Hospital. He died on the elevator in the hospital. He had a knife wound right there under his short ribs on his left side.

Transcript

9.

CROSS-EXAMINATION

10. I have known Jack Farish five or six years. On
11. the morning of the 9th or the morning of the 8th, I saw him at the Alexander Hotel in Ogden with Mrs. Bruerton in room number six, sitting on the bed. It was 12:30 or one o'clock in the day time. At ten o'clock of that day I had seen Farish in that room. Mrs. Bruerton was then with him. At about 5:30 in the morning, Sunday night or early Monday morning, Mrs. Bruerton came to his room in the Alexander Hotel.
12. I got up and dressed and went down town and Mrs. Bruerton went in the room as I went away. When I came back at ten o'clock she was still there. It was Farish's room. So far as I know she remained from five o'clock in the night until 12:30 and one o'clock the next day.
13. Farish was a printer. I do not know of him having been employed on any job since I knew him. He lived in Salt Lake.
18. During the most of the time I was in the kitchen. Jack Farish and Mrs. Bruerton were there too, but she was in and out of the kitchen. Farish and I had a couple of drinks of moonshine whisky and beer. There was a bucket of beer setting on the table. After I took a drink of moonshine I took a drink of beer. Farish also drank moonshine and beer. The bottle came out of his pocket.

Transcript

20. The fight or argument between the mother and daughter started in the living room by the front door. I don't remember where I had come from immediately before that. I don't remember whether Farish and Thelma (Mrs. Bruerton) had been in the kitchen together just before that. There was considerable milling around after we got through drinking.

21. Thelma was dressed in a gingham apron. When she started to go out, she got a street coat.

23. Farish and Thelma and I were near the front door and Mrs. Besares came from some place, trying to stop her (Thelma) from going out. Mrs. Besares said something to Jack Farish.

Q. What did she say to him; that is, what did Mrs. Besares say to Jack Farish?

A. She called him a G— d— c— l—. Farish denied it. The daughter said it wasn't right and then she started striking the mother, and next thing I saw was the mother with the butcher knife.

24. I never saw Mrs. Besares leave the room.

28. And the argument between the daughter and the mother didn't quiet down at any time until the stabbing.

29. Q. Now the mother also said to Mr. Farish,

Transcript

"You came down here trying to break up a home didn't you?"

A. Yes, sir.

Q. "And you are not going to take the girl out of the house," did she?

A. Yes, sir.

35. ROBERT FIELD, a witness for the state testified:

I went to the premises No. 214 Twenty-fourth Street, about 12:30 A. M., April 9, 1929.

26. I wasn't there only a second. They were arguing when I went in. Jack Farish said he was going to leave and Thelma said if he left she was going with him. Her mother then said she couldn't go and the mother and daughter started wrestling or fighting, whatever you want to call it. They were just cussing one another and fighting.

37. Mrs. Besares ran down to the kitchen and came back with a knife. She called Jack a home breaker and a G— d— c— l— and she struck him with the knife and backed away.

CROSS-EXAMINATION

38. I had known Jack Farish since about 1921 and

Transcript

- and had chummed with him. My business is a card player. I have been living at 120 Twenty-sixth Street, since I got out of jail. I was in a couple of days this time. I was only just a boy when I first began. The
39. first time I was arrested was about 12 years ago when I stole a barrel of beer and from then on out I was just arrested plenty. One time after another.
50. Farish was by the street door when Wolsky came for him and I grabbed Wolsky by the neck and said "Whoo" and oozed him into the kitchen hallway.
52. Farish was pretty drunk.
54. ESTHER BESARES, a witness for the defendant testified:

My name is Esther Besares. I am 45. I have been in the Weber County jail since April 9, 1929, prior to that I lived at 129 23rd Street. My husband is section foreman for the Rio Grande Railroad Company. I was born and raised in Oxford, Idaho. Have lived in Ogden since 1910. My maiden name was Clements. I have a daughter named, Thelma Bruerton. I have an adopted son. I have raised a good many more children or partly raised them.

55. My adopted son is eleven years old. Thelma was living at 214 24th Street on April 8th this year. Her husband was in jail.

Transcript

Prior to the night of April 8, 1929, I had seen Jack Farish several times, but never spoke to him. I knew of him being in several scrapes.

56. And that he was in the hospital after he got stabbed the last time. I heard my son-in-law talking about it. I overheard others talking and how bad Farish was. I talked to the woman in the Alexander Hotel affair, and she told me about him being cut.

57. I had heard of more than one incident.

On Monday, April 8, 1929, I went to Thelma's about 2:30, then she asked me to go down town and get her some underwear and stockings, then I went home and put my supper on. Mr. Besares wasn't going to be home for supper. I went back over to Thelma's a little while, and then I went to my niece's, Mrs. Eames, and then to my sister's, Mrs. McKee, (Mrs. McCoy). About nine o'clock I went back to Thelma's. I met my little boy there, and he went right into the bedroom and went to bed.

58. On March 28, I went to Wyoming, came back the next day. When I returned, Mrs. Marsh said to me, "I don't like the way Jack Farish is hanging around Thelma."

59. During the course of the evening, I observed Thelma and Farish.

60. Q. Yes, go ahead and tell just what occurred?

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.

Q. State whether or not you were frightened of him?

Transcript

A. I sure was.

Q. What were you afraid of?

A. I was afraid he was going to cut me like he did the rest of them.

CROSS EXAMINATION:

Q. What happened then?

A. They all ran after me. There was Field, Pace and Jack Farish. They chased me into the other room.

60. I don't remember of having a knife. The next thing I remember, Jack Farish was standing outside of the door, and I was hollering for the police.

62. I think I saw the knife in the dance hall lying on the floor. I don't know how it got there.

64. I might have had the knife. I can't remember, whether I ran back into the kitchen or not when they ran after me. I might have gone back into the kitchen when they were after me, I was so excited. They were all after me, and I was excited.

68. I had heard of Jack Farish cutting others. He cut Lemar one night at Thelma's last winter. I wasn't there, but I heard them talking about it.

Transcript

69. I don't remember going toward Farish with the knife. I don't remember anybody else running toward him with the knife. Wolsky came out of the kitchen just about that time and Marsh. They told me I didn't stick him. Wolsky told me I didn't, and Mr. Marsh said I didn't. The last picture I had of Farish, he was standing just inside of the door with his left hand in his pocket.

73. It worried me because Thelma was drinking. I knew Al Bruerton, Thelma's husband, was in jail for bootlegging. I knew they had served whisky at that place, but it wasn't with my wishes. I was begging them all the time not to do it. I stayed there to protect Thelma from Farish.

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

Mr. Woolley. I object to this as being incompetent, irrelevant, immaterial and not cross examination and what difference does it make whether the Marshes went there for bootlegging or not?

The objection is overruled and defendant excepts.

Q. Didn't they go there for that purpose?

A. I didn't know it.

93. MAX PACE recalled by the State in rebuttal.

Transcript

96. Defendant's exceptions.

June 7th, 1929.

Mr. Holther: Comes now the defendant and excepts to the refusal of the court to give the defendant's proposed instruction No. 1.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 2.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 3.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 4.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 6.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 7.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 8.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 9.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 10.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 11.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 12.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 13.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 14.

The defendant excepts to the refusal of the court

to give the defendant's proposed instruction No. 15.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 16.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 17.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 18.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 20.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 21.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 22.

The defendant excepts to the refusal of the court to give the defendant's proposed instruction No. 23, and particularly that part of it constituting the third paragraph of said proposed instruction No. 23, and particularly that part of instruction 23 contained in the fifth paragraph thereof.

The defendant excepts to the giving of the court's instruction No. 3 and the whole thereof.

The defendant excepts to the giving of the court's instruction No. 5 and the whole thereof.

The defendant also excepts to the giving of the court's instruction No. 7, and particularly that part thereof contained in the third paragraph of said instruction 7, and the fourth and fifth paragraphs of instruction No. 7.

ript

The defendant excepts to the giving of the court's instruction No. 9 to the jury, and to the whole thereof.

The defendant excepts to the giving of the court's instruction No. 12 to the jury, and to the whole thereof.

The defendant excepts to the giving of the court's instruction No. 13 to the jury, and to the whole thereof.

The defendant excepts to the giving of the court's instruction No. 14 to the jury, and to the whole thereof.

The defendant excepts to the giving of the court's instruction No. 15 to the jury, and to the whole thereof.

The defendant excepts to the giving of the court's instruction No. 17 to the jury, and to the whole thereof.

The defendant excepts to the giving to the jury of the court's instruction No. 22, and to the whole thereof.

The defendant excepts to giving to the jury of the court's instruction No. 28, and to the whole thereof.

The defendant excepts to giving to the jury of the court's instruction No. 29, and to the whole thereof.

Transcript

XI

That the court erred in giving to the jury its instruction No. 14. (Tr. 504.)

VII

That the court erred in giving to the jury its instruction No. 15. (Tr. 055.)

XIII

That the court erred in denying defendant's motion for a new trial and in refusing to grant to the defendant a new trial. (Tr. 073-075.)

Respectfully,

WOOLLEY AND HOLTHER,
Attorneys for Defendant
and Appellant.

Received copy of the foregoing Assignment of
Errors this day of September, A. D., 1929.

District Attorney

Attorney General.