

1929

State of Utah v. Monta D. Johnson : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *State of Utah v. Johnson*, No. 4931 (Utah Supreme Court, 1929).
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4931

the Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,
vs.
MONTA D. JOHNSON,
Defendant and Appellant.

FILE
OCT 14 1912

Respondent's Brief

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In the Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Respondent.

vs.

MONTA D. JOHNSON,

Defendant and Appellant.

RESPONDENT'S
BRIEF

STATEMENT OF FACTS

On the evening of December 24, 1928, Clifford Cooper and his wife and daughter, Mary Maxine Cooper, Clair Christensen and a baby sister of Clair Christensen's were crossing the street from the southeast corner of Second East and Fourth South to the northeast corner of said intersection. While they were crossing the street and just before they had reached the north side of said intersection, an automobile driven by the defendant, crashed into some of these people. As a result of this crash, Clair Christensen was struck and died an hour or so later. The baby sister of Clair who was being carried by Mrs. Cooper was thrown through the windshield of the car driven by the defendant and it died the next day. The evidence in this case shows that the defendant was driving in an

easterly direction and that he was on the north side of the street going east. In other words, he was on the wrong side of the street. The evidence further shows that the car in which the defendant was driving was traveling at a rate of speed in excess of 30 miles per hour when it crossed the intersection and at the time it ran into these people. The defendant was arrested that evening at the home of his father and later on he was charged with involuntary manslaughter in an information filed by the district attorney for Salt Lake County. The jury returned a verdict of guilty as charged in the information.

ARGUMENT

The appellant in this case has assigned forty-three alleged errors of law, most of which are argued under fifteen different heads in the brief filed by the appellant herein.

Assignment of Error No. 15 reads as follows:

“That the judgment and conviction is contrary to and against law.”

The argument made in the brief of the appellant in support of this assignment of error is that the court instructed the jury that they should find the defendant guilty, and subdivision “K” of Instruction No. 11 is cited in support of this proposition. Said instruction No. 11 contains what are usually denominated “the stock instructions” and are divided into subdivisions “A” to “K” inclusive. Subdivision “K” of said Instruction No. 11 reads as follows:

“When you retire to deliberate you should appoint one of your number foreman. Your verdict must be in writing, signed by your foreman, and when found must be returned by you into Court. Your verdict in this case must be guilty of involuntary manslaughter as charged in the information, or *as charged in the information,* or *guilty of* *as charged in the information,* or *guilty of* *as charged in the information,* or not guilty, as your deliberations may result. In criminal cases it requires a unanimous concurrence of all jurors to find a verdict.”

The portions of said printed instruction which are italicized above, represent the parts of the instruction that were crossed out of the instruction as it was given to the jury.

The party responsible for preparing said instruction No. 11 of Subdivision “K.” when crossing out that portion of the instruction that was not to be included therein, extended the line running through that portion of said instruction commencing with the word “charged” in the next to the last line thereof, and running it through to and including the word “information” and then the line continues above the words “or not guilty as your.” So that the instruction as actually given by the court charges the jury as follows.

“When you retire to deliberate you should appoint one of your number foreman. Your verdict must be in writing, signed by your foreman, and when found must be returned by you into court. Your verdict in this case must be

guilty of involuntary manslaughter as charged in the information, or, as, or not guilty as your deliberations may result.”

If the instruction given by the court was given in the language indicated by the appellant in his brief, there would be much to be said in support of assignment of error No. 15, but as shown herein the facts are that the court did not direct a verdict in this matter.

The next assignment of error which we will discuss is assignment No. 2. The court erred in denying appellant's motion to quash the information (Tr. 42). In discussing this assignment of error, we desire to call the court's attention to certain of the statutes of this state. Section 8880 Compiled Laws of Utah, 1917, which forms a part of chapter 24, the heading of which is entitled “Setting Aside Information or Indictment” reads as follows:

“Motion to set aside the information or indictment, must be in writing, subscribed by the defendant or his attorney, and it must specify clearly the ground of objection to the information or indictment, and such motion must be made and filed contemporaneously with the filing of a demurrer and plea, or the defendant will be deemed to have waived any objection which could be raised by such motion.”

This court in the recent case of State vs. Bohn, 67 Utah 362 held that

“Right to plead former conviction or acquittal or former jeopardy is waived unless made at time of entering plea, or at such other time as the court may permit in view of the Compiled Laws of Utah, 1917, sections 8898 and 8899.”

We quote herewith sections 8898, 8899 and 8901, **Compiled Laws of Utah**, 1917, as follows:

Section 8898:

“**Pleas of four kinds.** There are four kinds of pleas to an information or indictment, a plea of:

1. Guilty.
2. Not guilty.
3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty:
4. Once in jeopardy, which may be pleaded with or without the plea of not guilty.”

Section 8899:

“**Plea must be oral.** Form of entry. Every plea must be oral, and entered upon the minutes of the court substantially in the following form:

1. If the defendant pleads guilty: ‘The defendant pleads that he is guilty of the offense charged:’

2. If he pleads not guilty: ‘The defendant pleads that he is not guilty of the offense charged;’

3. If he pleads a former conviction or acquittal: ‘The defendant pleads that he has already been convicted (or acquitted) of the offense charged by the judgment of the court of (naming it) rendered at (naming the place) on the.....day of.....;’

4. If he pleads once in jeopardy: ‘The defendant pleads that he has been once in jeopardy for the offense charged (specifying the time, place, and court).’ ”

Section 8901 :

“Issue on plea of not guilty. The plea of not guilty puts in issue every material allegation of the information or indictment.”

The record in this case discloses the fact that the amended information upon which the defendant herein was tried and convicted, was filed April 27, 1929. A demurrer to this amended information was filed May 11, 1929. On the same date, May 11, 1929, the demurrer was argued and taken under advisement by the court. On May 15, 1929, the demurrer was overruled and it was further ordered that the arraignment of the defendant be continued to May 16th at ten a. m. On May 16, the record shows that the defendant was not present, but through his attorney, waived reading of the amended information and entered a plea of “not guilty.” On the same day, May 16, 1929, the trial of the case was ordered set to follow case No. 8324. On May 27, 1929, there was filed the motion to quash the amended information on the grounds that the amended information was not filed in time and that there was no order directing that said amended information be filed. On the same day, May 27, 1929, defendant entered the plea of former jeopardy and on the same day, May 27, 1929, the motion to quash was denied and the plea of former jeopardy was denied. Thereupon, to-wit: May 27, 1929, the amended information was read to the jury and defendant entered his plea of not guilty. It will be observed from the foregoing recital that the demurrer to the information was filed and argued and that the same was denied

and that the plea of the defendant of "not guilty" was entered more than ten days prior to the time of the filing of the motion to quash. So that under the statutes hereinbefore referred to and under the authority of State vs. Bohn, supra, it was not error for the court to deny the motion to quash.

We shall now discuss the first assignment of error relied upon by the appellant, which is based upon the court's overruling the demurrer to the amended information.

Section 8027 of the Compiled Laws of Utah, 1917, defines "Involuntary Manslaughter" (the crime charged in the amended information) as follows:

"Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

1. Voluntary, upon a sudden quarrel or heat of passion;

2. Involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

Section 8834 Compiled Laws of Utah, 1917, reads in part as follows:

"But one offense to be charged. Different counts permitted. The information or indictment must charge but one offense, but the same offense may be set forth in different forms under different counts; and when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count. * * *"

As shown by said section 8027, defining “involuntary manslaughter,” this offense may be committed by the use of different means, and under the express provisions of section 8834, *supra*, all the means by which this offense may be committed may be alleged in one count in the alternative, and that is what was done in the amended information. The question as to what the proof would show in respect to the charge, is not material in view of the express language of the statute authorizing this particular crime to be charged in the alternative in one count.

We now take up appellant’s assignment of error No. 14, which is based upon the denial of defendant’s motion in arrest of judgment. Appellant relies upon the assignments advanced in support of his assignment No. 1 relating to the demurrer to amended information and his assignment No. 2 relating to the motion to quash the information. We have already shown that the motion to quash the information was not taken in time, and that under the statutes a failure to make such motion at the proper time constitutes a waiver on the part of the defendant to raise any objection to the information that could have been included in such motion. The grounds of the motion in arrest of judgment were the same as those contained in the information to quash and therefore the denial of the motion in arrest of judgment was proper.

We shall now refer to assignments of error Nos. 16, 17, 18, 19 and 20. These assignments of error are all based upon the sustaining of objections made by the

district attorney to certain questions asked the witness Burbidge. Mr. Burbidge, Chief of Police, had testified that he received a telephone call advising him of the accident in question on the evening of December 24th, and that he immediately went to the home of the defendant, or rather to the home of the father of the defendant at which home the defendant was living; that he did not see the defendant at the home at that time; that the wife of the defendant turned over to the witness a young baby and that the witness immediately took the baby to the emergency hospital and left it there in care of the doctors; that he then went back to the home of the defendant and saw the defendant there for the first time that evening; that he asked the defendant what he knew about the accident and testified that the defendant did not appear to be willing to talk about it; that the defendant seemed to be very excited. He further testified that he detected the odor of whiskey on the defendant's breath; that the defendant was taken in custody on the night of the 24th and was in jail up until December 26th; that on the morning of the 26th, he had one of the jailers bring the defendant into his office. He then asked the defendant to tell him what he knew of the accident. The witness was then asked to state the conversation he had with the defendant in his office on the 26th of December. Objection was made by the attorney for the defendant to the question calling for his conversation. The court permitted the witness, however, to answer the

question. Prior to the answering of the question, however, the following testimony was elicited by the district attorney from the witness, Burbidge:

“Q. How did he come to your office?

A. I had one of the officers bring him in from the jail to my office, to talk to him.

Q. So he was in jail, or brought from the jail, and was under arrest at the time he was brought into your office?

A. Yes sir.

Q. And he was brought there at your request?

A. Yes sir.

Q. For the purpose of questioning him about this accident?

A. Yes sir.

Q. Did you promise him any immunity, or anything of that kind?

A. I did not.

Q. Did you in any way threaten him, or any of his family, or any of his relatives?

A. I did not.

Q. Did you hold out any inducement to him, whatever?

A. No sir.

MR. VAN COTT: We submit the question.

MR. JAMES: I think I am entitled to lay the foundation on cross examination.

THE COURT: You may.

MR. JAMES:

Q. Mr. Burbidge, the night of the accident you placed a bond on the defendant, did you?

THE COURT: The question here is as to this conversation.

MR. JAMES: I will lay the foundation how this man was treated from the time he was arrested.

THE COURT: The only question is as to the competency of this evidence at the present time. You may cross examine as to those matters, when you come to cross examine him.

MR. VAN COTT: We insist he confine himself to the competency of this witness to testify.

MR. JAMES: That is what I am going to do. Does your Honor sustain the objection to that?

MR. VAN COTT: We object to anything except questioning him on voir dire.

MR. JAMES: What I want to do is to make my record.

MR. VAN COTT: We object to it as incompetent, irrelevant and immaterial, anything except to show the facts and circumstances surrounding this conversation.

THE COURT: The purpose of this question now is to ascertain whether or not the particular evidence offered is admissible, and kindly confine yourself to that."

Counsel for defendant then proceeded to ask several questions of the witness Burbidge with reference to the defendant being in jail and with reference to efforts that had been made to get him out of jail. The court sustained objections made by the district attorney to all these questions and instructed the attorney for the defendant to confine himself to the question pertaining to the competency of the testimony given by Chief Burbidge. Mr. James, attorney for defendant then examined the witness as follows:

“Q. Now, Mr. Burbidge, when you said that no threats or no promises were made to this man, what did you mean?

A. I meant just what I said, there was no offer or remarks as alluded to at all.

Q. Directly to him?

A. To anybody.

Q. The fact of the matter is, there was something said by you and some of the other policemen there that he could not get out of jail until someone had had a conversation with him?

A. There was never any such conversation had with me at any time.

Q. With anyone?

A. No sir.

Q. Why was he held from the 24th of December until the 26th of December, without bail?”

To this last sentence the district attorney again objected on the ground that it was incompetent, irrelevant and immaterial, and the objection was sustained. The court then, at the request of attorneys for defendant, excused the jury, and the defendant in this action took the stand and was questioned by his attorney. His testimony is as follows:

BY MR. JAMES:

“Q. State your name.

A. Monta Johnson.

Q. You are the defendant in this action?

A. Yes sir.

Q. On the 26th day of December were you taken from the city jail of Salt Lake City into Chief Burbidge’s office?

A. Yes.

Q. When you were ushered in did you tell the Chief that you wanted either your father or your attorney in the office before the conversation?

A. I did.

Q. Did he give you any privilege of getting in communication with them?

A. He did not.

Q. What did he say?

A. He told me that he wanted to do the right thing; that he did not want to see me get into any more trouble than was necessary; that he would not do anything that would get me into trouble, but he would like to help me if he could.

Q. Is that about all he said?

A. Well, shall I go on with the rest of the conversation?

Q. From what he said did you draw any conclusion?

MR. VAN COTT: Just answer yes or no.

A. Yes.

Q. What was that conclusion?

A. That I would be released.

Q. If what?

A. If I gave some information.

Q. Did you feel that if you did not you would be sent back to jail?

A. I felt that I would get more attention than if I did say something.

Q. How long had you been in jail?

A. From the night of the 24th.

Q. You had been held as a regular prisoner out there, among all the others?

A. Yes sir.

Q. You were shown no courtesies in the jail?

A. No sir.

MR. JAMES: That is all.” (Tr. 227).

The defendant was then cross examined as follows:

BY MR. VAN COTT:

“Q. Where did Chief Burbidge make those statements to you?

A. In his office.

Q. Were you and he alone?

A. Yes sir.

Q. No one else was present?

A. No sir.

Q. What time of day was it?

A. I don't know exactly. I think it was possibly eleven o'clock.

Q. The morning of the 26th of December, 1928?

A. Yes.

Q. You had seen your father that morning?

A. No sir.

Q. Before going in?

A. No sir.

Q. Had you seen any of your relatives that morning?

A. No sir.

Q. You had not?

A. No sir.

Q. What was the first thing which he said to you when you came in?

A. I don't remember the exact conversation, but he asked me to sit down, and told me that he would like to hear what happened; he would like to have me tell what happened; that he would do what he could to help, and he would

not do anything that would injure me in any way; and then he went on to ask some questions.

Q. So what he said to you then was that he would like to have you say what happened at this accident?

A. Yes.

Q. And he said he would like to have you tell how this accident happened, and what you knew about it?

A. Yes.

Q. And did you say you would be glad to tell it to him?

A. No sir.

Q. You did not say that?

A. No sir.

Q. What did you say when he asked you that, or told you that he would like you to tell him what happened? What did you say to him?

A. I did not say anything. I did not know what to say.

Q. You did not know what to say?

A. No.

Q. You say he then stated to you that he did not want to injure you?

A. Yes.

Q. Did he use the words "I don't want to injure you?"

A. I don't know, but it was to that effect, that is, as I understood it.

Q. What words did he use?

A. I could not tell you exactly, other than I just gave them to you. I would not say exactly what words he used.

Q. But that is as nearly as you recall what he said, was that he did not want to do you any harm or injury?

A. He gave me that impression.

Q. No. Answer the question. I say, as nearly as you remember, his words were to the effect that he did not want to do you any harm or injury?

A. Yes, that was implied. That is the way I understood it.

Q. That is the impression you got from what he said?

A. Yes sir.

Q. What did he say about helping you?

A. He said he would do what he could for me.

Q. That he would do what he could for you?

A. Yes.

Q. That was about what he said?

A. Yes.

Q. And then you told him certain things?

A. No.

Q. Or he asked you certain questions?

A. Yes.

Q. And you answered certain questions?

A. Partially.

Q. Partially?

A. Yes.

MR. VAN COTT: That is all.

RE-DIRECT EXAMINATION

BY MR. JAMES:

Q. You had been told, had you not, by your counsel and your father, not to talk with any one unless they were present?

A. Yes, sir.

MR. JAMES: That is all.

RE-CROSS EXAMINATION

BY MR. VAN COTT:

Q. So you had full warning from your counsel, before you went into this conversation with Chief Burbidge, not to talk with any one unless your counsel and your father were present?

A. Yes.

Q. When did you get that warning from your counsel?

A. I had it the night of the 24th, and also on the 25th.

Q. From Mr. James?

A. From Mr. James on the 25th.

Q. So you got advice from Mr. James on Christmas Day not to talk with any one unless your counsel or attorney was present?

A. Yes sir.

Q. What time on the 25th was it you got that advice or warning from your counsel?

A. It was on the afternoon of the 25th.

Q. Late in the afternoon?

A. Yes, rather late.

Q. And on the 24th whom did you get that warning, counsel and advice from, not to talk with any one unless counsel was present?

A. Mr. Pierce told me that I had better not talk at that time.

Q. And he was an attorney?

A. (Continued) Till I collected myself and knew what to say.

Q. And he was an attorney? Mr. Pierce was an attorney?

A. I knew he was, yes, sir.

Q. And he is connected with Mr. James' office?

A. Well,——" (Tr. 228-231).

Further on in the examination of the Witness Burbidge, the following occurred:

BY MR. VAN COTT:

"Q. Chief Burbidge, will you please state what you did say to the defendant before or at the time you began the conversation with him in your office, when you and he were alone?

A. I told Mr. Johnson that I thought that his mind was a little more clear on that day than it was before, and I would like to have him tell me, if he would, all that he remembered about the accident. He hesitated for a second, and finally told me——

MR. JAMES: Now, if the court please, we want our objection to this.

Q. BY MR. VAN COTT: I am not going to ask you for the conversation at that point or at this time. I want to ask you another question:

State whether or not you told him that you would not hurt him.

MR. JAMES: I object to that as leading.

THE COURT: The objection is sustained.

MR. VAN COTT: Well, we would have a right to ask that. That is a question in rebuttal.

THE COURT: Yes, but that was taken outside of the presence of the jury, and the court does not feel that any impeachment matters should be presented that were not presented to the jury. I think you should proceed with the examination of this witness as though there had been no examination of the defendant.

MR. VAN COTT: All right, if your Honor so rules. Perhaps I will **ask** leave to put that in later, so it will be in the record.

Q. Proceed then and state the conversation.

MR. JAMES: If the court please, we object to it as incompetent, irrelevant and immaterial, the proper foundation not having been laid.

THE COURT: The objection may be overruled.

MR. JAMES: State an exception.

A. Mr. Johnson said that he had borrowed his father's car about twelve o'clock on the 24th day of December, to go to Ogden to arrange for a position with the Stirling Furniture Company there, and that he returned from Ogden about five o'clock in the afternoon, and had driven to his mother's home, brought his mother down town to do some shopping, and was to have met her again at Auerbach's store, 3rd South and State: that he drove down at the time that he was to have met his mother, but she was not there, so that he just started to driving around. I asked him with reference to a report of his car going through the red light at 4th South and State, and he said he did not remember of going through any red light at 4th South and State. I asked him how close he was to the parties—

MR. JAMES: If the court please, we object to that. I have a case here that holds that any conversation under those circumstances, by question and answer, where the officer has to ask the question and draw it out, is not a voluntary statement. We object to it as incompetent, irrelevant and immaterial. We object to it as incompetent, irrelevant and immaterial, and the

proper foundation not having been laid, and it is not shown that this was a voluntary statement.

THE COURT: The objection is overruled.

MR. JAMES: State an exception.

A. That he was within about four feet of the people when he ran into them at 2nd East and 4th South; that he continued on to 8th East with the child in the seat alongside of him, that had come through the wind-shield; that he turned around at 8th East and 4th South and came back over the same ground where the accident had happened, and from there he went on to his home, 73 North 7th West. His wife was not at home, but she came presently, and he told her what had happened. They put the child in a bed, washed it up a little, he said, and then his wife called his father, and his father came, and then in turn called me at my home. That was about the substance of the conversation.

MR. JAMES: Now, if the court please, at this time we will ask to strike it, as it is not shown that this was a voluntary statement, but that it was made under duress; that it is incompetent, irrelevant and immaterial.

THE COURT: The motion may be denied.

MR. JAMES: State an exception." (Tr. 237-240).

From the foregoing testimony, it is evident that the testimony of Chief Burbidge, in which he related the conversation that he had had with the defendant on the morning of December 26th, was entirely competent, and that the objections interposed by the district attorney to the questions asked the witness by defense attorney, were well taken and that the court

did not err in sustaining the objections of the district attorney. The only matter before the court was the competency of the testimony of Chief Burbidge relative to the conversation he had with the defendant and the questions to which objections were made and which were sustained, had no bearing whatever on the competency of such testimony. The only purpose of such questions to which objections were made and which said objections were sustained, would only go to the weight of the testimony and it is evident from the testimony of the defendant himself as to what took place at the time he had the conversation with Chief Burbidge: that the admissions made by the defendant to Chief Burbidge respecting the accident were entitled to great weight because the record shows that this conversation had with the Chief as testified to by the Chief, was not in any way contradicted and counsel for defendant was given every opportunity by the court to cross-examine Chief Burbidge at the proper time for the purpose of showing whether or not the conversation of the defendant had with Chief Burbidge was voluntary or not.

We shall now refer to assignments of error Nos. 8 and 9. These are based upon the refusal of the court to give defendant's requested instructions 3, 4 and 5. These requested instructions are as follows:

Requested Instruction No. 3:

“You are instructed, gentlemen of the jury, that oral statements made by the defendant while under arrest, in jail, or in custody, should

be received and considered by you with great caution, not because the declarations are not entitled to be heard inherently, but that experience fears that the same may be induced by hope of reward or fear of punishment, or that those interested in the prosecution of the prisoner may not have fairly reproduced, obtained, or presented what was said or done by him."

Requested Instruction No. 4:

"You are further instructed, gentlemen of the jury, that before any admission made by the defendant while under arrest, in jail, or in custody should be considered by you, must be convinced that said admission was made freely and voluntarily by the defendant without the slightest hope of benefit or the remotest fear of injury."

Requested Instruction No. 5:

"You are further instructed, gentlemen of the jury, that confessions or admissions are prima facie involuntary and it must be satisfactorily shown to you that they are voluntary. That is, that they were made when the mind of the accused was free from influence of hope, or fear before they can be received by you, and any hope excited by encouragement that the defendant would be more favorably dealt with if he confessed or made a statement is sufficient for you to exclude them, and this is true not only to confessions, but to inculpatory admissions in the nature of confessions, that is, directly relating to the facts or circumstances of the crime or tending to connect the defendant therewith."

We submit that these requested instructions were properly refused because they are argumentative. They

are on a par with the requested instructions referred to in the case of *State vs. Romeo*, 42 Utah, page 58, which instructions in said case are held to have been properly refused on the ground that the same were argumentative. The court in the case of *State vs. Romeo* discusses the rules relative to the admissibility of evidence relating to the admissions made by the defendant, and the court in commenting upon such rules and testimony in that case, said:

“There, however, is no claim made that the admissions or confessions were not deliberate or voluntary or that they were in any manner induced or influenced. The defendant merely denied making some of the statements and insisted that because of their imperfect knowledge of and their inability to understandingly speak the English language, those to whom the statements were made, misunderstood them. On the other hand the persons to whom the statements were made, testified that the statements were made deliberately and voluntarily and that they distinctly understood, remembered and related them. But the requests asked did not correctly state the rule. They are argumentative and invade the province of the jury with respect to the weight to be given that kind of evidence. It is not true as stated in the requests that all confessions of prisoners out of court are of a doubtful species of evidence or that all confessions when freely made are the weakest and most suspicious of all testimony, ever liable to be obtained by artifice, false purpose, promise of favor or menaces, etc.”

Further on in the same decision, this court said:

“In view of the conflict as to what was said by the defendants and as to their imperfect

knowledge of our language and of their inability to speak it readily, the court well could have admonished the jury to receive with caution and to view with scrutiny the testimony in respect of the claimed confessions or admissions.”

In the instant case, however, as before pointed out, there is no conflict in the testimony with respect to these admissions, and for that reason the court did the proper thing in not giving any instruction at all with respect to the matter in which evidence of this kind should be considered. On the other hand it would have been improper for the court to have instructed the jury relative to the rules under which this kind of testimony is received, because it would have had a tendency to have singled out this particular testimony very probably to the detriment and prejudice of the defendant.

Assignment of Error No. 24 is based upon an objection which was interposed to the reading of a portion of Chief Burbidge’s testimony by the reporter. The record of the proceedings in this connection are to be found on pages 241-243 of the transcript. Mr. Van Cott, district attorney, directed this question to the reporter—“Will you read the answer of Chief Burbidge, where he speaks of four feet, right in there, so that I may see whether or not his answer left a gap?” The reporter in attempting to locate the part of the answer, read the entire answer. When this objection was made to the reading of this portion of the testimony the court instructed the jury as follows:

“The jury will understand, and you are admonished the reading of this testimony is not for the purpose of giving any greater weight to the testimony, or to emphasize it. It probably should not have been read so extensively, but is evident from the reporter’s notes that he must at least locate the part of the testimony that the district attorney is asking for.”

In view of the fact that this evidence was already before the jury we are convinced that the defendant was not prejudiced by the reading of this particular portion of the testimony of Chief Burbidge, particularly in view of the court’s charge to the jury advising them that it was not done for the purpose of impressing it upon the jury but merely for the purpose of aiding the district attorney in following his line of thought.

There remains but one assignment of error that we care to refer to in this brief, namely, assignment of error No. 10. This is based upon the alleged error of the court in giving instruction No. 7. This instruction reads as follows:

“You are instructed that before you can find the defendant guilty as charged you must be convinced from the evidence beyond a reasonable doubt that the defendant Monta D. Johnson, did kill a human being, to-wit: Clair J. Christensen, without malice while in the commission of a lawful act not amounting to a felony or while in the commission of a lawful act in an unlawful manner or without due caution or circumspection as outlined in these instructions.”

We concede that the instruction should have read, "while in the commission of an unlawful act not amounting to a felony" instead of "while in the commission of a lawful act not amounting to a felony." We submit, however, that the defendant could not possibly have been prejudiced by the inadvertent use of the word "lawful" instead of the word "unlawful." The jury could not have been misled, if they had considered the instructions as a whole, which it was their duty to do.

In the case of *Loofbourow vs. Utah Light and Ry. Co.*, 31 Utah 355, it was held by this court:

"That instructions should be considered as an entirety and if as a whole they correctly and fairly present the law even if some particular instruction or portion thereof standing alone may be erroneous, it would be no ground for reversal."

The verdict which the jury returned shows that the defendant was not prejudiced by the giving of said instruction because the verdict of the jury was guilty of involuntary manslaughter as charged in the information and there was no charge in the information that the offense was committed while in the commission of an unlawful act not amounting to a felony but while in the commission of a lawful act in an unlawful manner or without due caution or circumspection.

We submit that the defendant had a fair trial, and that there are no errors in the case resulting in prejudice to the defendant, and therefore the judgment made and entered herein should be affirmed.

Respectfully submitted,

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