1940

George Saltas v. David A. Affleck and Kenneth Butte : Rehearing

Utah Supreme Court

Ralph T. Stewart, Gerald Irvine; attorneys for petitioner and appellant, Kenneth Butte.

In the Supreme Court
of the State of Utah

GEORGE SALTAS,
Plaintiff and Respondent,
DAVID A. AFFLECK, doing business under the name and style of D. A. Affleck Grocery,
Defendant.
KENNETH BUTTE,
Defendant and Appellant.

No. 6190

PETITION OF KENNETH BUTTE, ONE OF THE DEFENDANTS HEREIN, FOR REHEARING IN THE ABOVE ENTITLED CASE AND BRIEF IN SUPPORT THEREOF

RALPH T. STEWART,
GERALD IRVINE,
Attorneys for Petitioner and Appellant, Kenneth Butte.

INDEX

In the Supreme Court of the State of Utah

GEORGE SALTAS,
Plaintiff and Respondent,

DAVID A. AFFLECK, doing business under the name and style of D. A. Affleck Grocery,
Defendant.

KENNETH BUTTE,
Defendant and Appellant.

No. 6190

PETITION OF KENNETH BUTTE, ONE OF THE DEFENDANTS HEREIN, FOR REHEARING IN THE ABOVE ENTITLED CASE AND BRIEF IN SUPPORT THEREOF

PETITION

Comes now Kenneth Butte, appellant herein, and petitions this Honorable Court to grant a rehearing of the above cause for the following reasons:

1. That it appears from the opinion and concurring opinions herein that the court overlooked the fact that appellant had settled a wayside bill of exceptions consisting of the entire record of the first trial and that such record was abstracted in this appellant's abstract of record, pages 3 to 29, inclusive, with complete record of settlement thereof at pages 131 to 133, inclusive of said abstract.

2. That while this Honorable Court correctly states the rule to be that "a new trial may be granted upon the court's own motion 'when there has been such a plain disregard by the jury of the instructions of the court or the evidence in the case as to satify the court that the verdict was rendered under a misapprehension of such instructions or under the influence of passion or prejudice,'" and further correctly held that "the amount the plaintiff might have received from the deceased was speculative," and further held that "the amount of the verdict is a matter exclusively for the jury" and that "on the ground of inadequacy of the verdict alone, the court may not interfere with the jury's verdict," and further held that "it is seldom that the amount of the verdict, standing alone, is so inadequate or excessive as to indicate passion or prejudice," it was, nevertheless, held that the trial court could grant a new trial even though there was no showing of passion or prejudice and even in the total absence of showing that the verdict was rendered under a misapprehension of instructions or evidence.

3. That while the record on the first trial, contained in appellant's wayside bill of exceptions and in the abstract and briefs of plaintiff, George Saltas, discloses no error and the fact is that the only argument in support of a new trial as against this appellant was based upon (a) a quotient verdict, and (b) inadequacy of the verdict, and the trial court, after hearing the sworn testimony of the jurors, Haddow and Kiepe, held that there was no quotient verdict (Dft. Ab. p. 28), and although the court was only "inclined to think at this time that the verdict is too low" but was uncertain as to whether he would "find it too low" (Dft. Ab. p. 28), yet this Honorable court, contrary to the correct rules set forth in its opinion and supported by all of the authorities under statutes similar to those of Utah, permits the order granting the new trial to stand by refusing to order a reinstatement of the original verdict.

4. That while the evidence on the first trial would have justified a verdict for the defendant, and the proof of damages (Dft. Ab. pp. 18 to 20, inclusive) would have sustained a purely nominal verdict, and while the authorities set forth in the brief of appellant (Brief of Appellant, Kenneth Butte, pp. 6 to 26, inclusive) clearly sustain the fact that the verdict was not inadequate, yet this Honorable Court, after correctly stating the rules applicable to the facts, and after correctly pointing out that plaintiff's damage "was speculative," and without plaintiff's counsel either in his abstract or brief justify-

ing the granting of the new trial, failed to set aside the order granting the same.

5. That the opinion and decision of this Honorable Court is not justified by the record or by the law but is contrary to the record duly filed in this court and is contrary to the opinion of the court and the authorities supporting the position of this appellant.

It is believed that a reconsideration of the question of damages and of the granting of the new trial solely upon the claimed insufficiency of the verdict will result in this Honorable Court determining (1) that "the amount the plaintiff might have received from the deceased was speculative" and under all the circumstances a verdict of $800.00 was not inadequate; (2) that there was no showing, or even any contention by plaintiff "that the verdict was rendered under a misapprehension of such instructions or under the influence of passion or prejudice;" (3) that the record (Dft. Ab. p. 28) clearly shows that there were only two questions raised and considered by counsel and the court on the granting of the new trial, and the court, neither in its statement following the arguments nor in its conditional order, indicated that there was any error of law or suggestion of passion or prejudice or misapprehension of the court's instruction; (4) that the trial judge misconceived his duty and erroneously believed he could disregard the jury's finding of damages and set up his own ideas against the unanimous verdict of eight jurors on the first trial and, as it subsequently

developed, against at least two of the jurors upon the second trial.

It is submitted that not only in justice to the rights of this appellant, but as a guide to trial courts in future cases and to promote and aid the administration of justice, this court should clearly define the duties of the trial court as applied to the record in this case and correct erroneous implications to be deduced from the present opinion under the facts disclosed by the record.

RALPH T. STEWART,
GERALD IRVINE,
Attorneys for Defendant Kenneth Butte.

CERTIFICATE

I, RALPH T. STEWART, do hereby certify that I am one of the attorneys for the appellant and petitioner, Kenneth Butte, and that in my opinion there is good reason to believe the judgment in the above entitled cause, and the decision of the Supreme Court insofar as it affirms the order granting the new trial herein, is erroneous and that the cause to that extent ought to be re-examined.

RALPH T. STEWART.

BRIEF AND ARGUMENT

This defendant, Kenneth Butte, settled his wayside bill of exceptions, consisting of the entire record on the first trial, plaintiff's motion for a new trial, defendant's motion to set aside the conditional order granting a new trial and defendant's motion to set aside the second verdict and reinstate the first verdict. (Dft. Ab. pp. 15 to 30, inclusive, and 131 to 137, inclusive).

Appellant, Kenneth Butte, (Dft. Ab. pp. 16 to 28, inclusive) clearly showed that the evidence would have justified a defendant's verdict and that the plaintiff's testimony (Dft. Ab. pp. 18 to 20, inclusive) would have justified a purely nominal verdict.

In presenting his motion for a new trial, plaintiff's principal contention was that there was a quotient verdict. Affidavits and counter-affidavits were filed and evidence was presented in open court by jury foreman, Werner Kiepe, and juror, John Haddow. Their testimony was conclusive that there was no quotient verdict, and the court said (Dft. Ab. 28): "So far as the quotient verdict is concerned I am inclined to hold aganist Mr. Metos." In commenting on the insufficiency of the verdict (the only other question argued) the court was not satisfied that the verdict was insufficient but said (Dft. Ab. 28): "I do not mean to say by that that I will find it too low." Had the court, after hearing the evidence and being familiar with the instructions given and other pos-

sible errors, felt that there had been any misapprehension of his instructions to the jury, or had he believed that the jury was influenced by passion or prejudice, he would have made his position in that respect clear and mentioned any occurrence during the trial or deliberations of the jury or testimony of the jurors at the time of the hearing of the motion, and made record of the fact that he believed the jurors had been improperly actuated or that some error had been committed or that the instructions or the evidence had been misunderstood or misapplied. On the contrary, the court held that there was no quotient verdict; that there was no evidence to go to the jury as against the defendant, Affleck, but that "he was inclined to think that the verdict was too low."

There is no logical reason under our statute, and certainly no appellate decision under a statute similar to that of Utah, to justify the court in invading the province of the jury and directly or indirectly increase the amount of the verdict. This court has repeatedly held that the jury is the sole judge of the evidence and the credibility of the witnesses. It is disclosed in appellant's abstract, and was even more apparent in open court, that the evidence of plaintiff on the question of damages was unsatifactory and subject to question as to its credibility. The jury could have justifiably concluded that plaintiff's testimony relating to pecuniary loss was not worthy of belief and that probably the other sons of plaintiff had helped

to support him while deceased had lived for months away from home and passed the financial burden to plaintiff's other sons, Paul and Pete, earning between them $8.65 a day.

We ask the court to again review the authorities at pages 12 to 26 of the brief of appellant, Kenneth Butte.

Defendant's abstract, page 28, discloses that the application for a new trial was based on "inadequate damages appearing to have been given under the influence of passion or prejudice." No contention to that effect was ever asserted. We pointed out to this court in the brief of appellant, Kenneth Butte, page 27, that the statutes make no provision for the granting of a new trial upon the sole basis of "inadequate damages." We further pointed out that a new trial may only be granted "when there has been a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions or under the influence of passion or prejudice." No such contention was ever or could be made by plaintiff.

Our purpose in settling the wayside bill of exceptions, and particularly in setting forth in our abstract, page 27, the statement of the court at the conclusion of the arguments on the motion for a new trial, was to make perfectly clear to this court that plaintiff did not contend that there was a disregard of instructions or of evidence, but, on the contrary, no such contention was asserted by

plaintiff's counsel or considered by the court. The record repudiates any finding to the contrary.

The opinion of this court, concurred in by Justices Larson and Pratt, correctly states the rule under our statute and under the statutes in other states identical or similar to ours. It is undoubtedly true as this court states "that the amount of the verdict is a matter exclusively for the jury," when inadequacy only is relied upon. It is likewise true, as the opinion states, "on the ground of inadequacy of the verdict alone, the court may not interfere with the jury's verdict." It is also the rule, as stated in the opinion, that "it is seldom that the amount of the verdict, standing alone, is so inadequate or excessive as to indicate passion or prejudice" and "in order to eliminate speculation as to the basis of the exercise of judicial discretion in granting new trials, the record should show the reasons and make it clear the court is not invading the province of the jury."

The trial court, in granting the new trial in this case, not only failed to "indicate wherein there was a plain disregard by the jury of the instructions of the court or the evidence or what constituted bias or prejudice on the part of the jury" but, by his statement following the arguments, affirmatively showed that no error of court or jury was relied on but that he was merely expressing his own personal views concerning the amount as opposed to the jury's finding. In other words, the trial

judge not only failed to make clear any reasons justifying an inference of disregard on the part of the jury, but expressed, inferentially at least, that there was no failure on the part of the jury to do anything other than fail to return a verdict of a size which the court would have found had the trial been to the court.

The prevailing opinion suggests that "it may be there was sufficient in the record of the former trial to justify the trial court in concluding the jury had disregarded or misconceived the instructions given or the evidence." If such be the case why did plaintiff's counsel not argue to the trial court the record justifying such conclusion? If such be the case why did the trial court not point out such record or comment on it either in his statement from the bench following the arguments or in his conditional order increasing the verdict? If such be the case why did not plaintiff's counsel either in his brief or in his argument to this court point out from the record or otherwise justify a conclusion that the jury disregarded or misconceived the instructions or the evidence?

The entire record is before this court. Appellant, Kenneth Butte, takes the position that upon submission of such record and a showing that no questions of passion or prejudice or disregard of instructions or evidence were pointed out or argued either to the trial court or to this court, and in pointing out that on the contrary the trial court did not in any way consider such questions, has cast the burden upon the plaintiff to establish that the

trial court in fact based his ruling upon some grounds justifying his judicial right to interfere with the jury's verdict.

Damages in the sum of $800.00 under the facts in this case are not sufficiently inadequate "to cause the court to think the verdict was the result of bias or prejudice." Probably no two of twenty lawyers, or twenty judges, or twenty jurors, would ever arrive at the same verdict. One judge, on the same evidence, might feel that an $800.00 verdict was excessive, while another might argue that a $2400.00 verdict was inadequate. One judge might say that when deceased's father testified that "deceased was the only one who helped and was his sole support," although admitting on cross-examination that he himself earned $4.25 a day and that two other sons earned $5.00 and $3.65 a day, respectively, was falsifying, while another judge might believe such testimony. As a matter of fact plaintiff did in important respects vary substantially from the truth in testifying concerning financial assistance and approached the truth only when confronted with information from his employer that rental and other expenses were deducted from the pay checks of a son other than deceased.

The jury sitting on the first trial was composed of several level headed, intelligent businessmen, including Mr. Kiepe, former secretary of the Real Estate Board. These jurors saw through plaintiff's effort to make it appear that deceased was the sole financial contributor.

They appreciated that deceased had helped financially until Paul and Pete had secured positions and become able to take over the burden which their elder brother had carried long enough and enable him to purchase an automobile, take a trip to California and, at the age of thirty, be free to plan on marriage. These jurors evidently appreciated that the amount, if any, which deceased would have contributed in the future was purely problematical and, as this court says, "speculative" and, in view of plaintiff's own earnings and earnings of Paul and Pete, it was unlikely deceased would have continued even with such questionable support as he had given his father in the past. No special damages of any kind were pleaded or proved.

Under these circumstances, and with a total absence of any contention that the verdict was the result of prejudice or passion, and without any contention that there was any misapprehension by the jury of the instructions or the evidence, we again urgently insist that the trial court erroneously undertook to set up his feelings or opinion as against those of the jurors and invaded the province of the jury in its exclusive right to determine the credibility of the witnesses and the effect of all the evidence.

If the action of the Honorable Trial Judge, mistakenly taken by him in this case, is sustained, it means, as we firmly believe, that a trial court may in any case,

regardless of the facts, grant a new trial if he is "inclined to think that the verdict is too low."

We respectfully urge the court to read the testimony of plaintiff (Pff. Tr. pp. 322 to 342, inclusive) on the first trial (Dft. Ab. pp. 18 to 20, inclusive); also plaintiff's testimony on the second trial (Dft. Tr. pp. 133 to 252, inclusive; Dft. Ab. pp. 71 to 85, inclusive). Plaintiff first testified that deceased was the only one that helped. He testified that all the rent was paid by or charged to deceased. He testified that deceased lived at home all the time. He later testified on cross-examination that Spero lived at Cyprus Hall for several months. He later testified that Paul paid the rent; that since 1935 the rent was turned to Paul. He also admitted (Dft. Ab. 76) that Utah Copper charged the rent to Paul's check. He also admitted (Dft. Ab. 77) that the coal was deducted from Spero's check and the rent from Paul's, so, in fact, as early as 1937 Paul was paying the largest expense item. Plaintiff did not remember how long deceased lived at Cyprus Hall. He was sure deceased did not live there from April 1, 1935, to March 10, 1936, "because I don't remember so long." Many things plaintiff could not or did not want to remember. In view of such testimony was it not for the jury to determine whether plaintiff should be believed on the question of damages? Was the pecuniary loss, if any, not peculiarly for the determination of the jury, particularly in view of plaintiff's age, the existence of several other children, the fact that plaintiff was

regularly employed and had two surviving sons regularly employed?

WHEREFORE, we respectfully pray that this court grant appellant, Kenneth Butte, the right to orally present this petition for rehearing and that a reconsideration and rehearing be granted him.

RALPH T. STEWART,
GERALD IRVINE,
Attorneys for Appellant,
Kenneth Butte.