1939

State of Utah v. Richard Jessup : Brief of Appellant

Utah Supreme Court

Claude T. Barnes; attorney for defendant and appellant.

IN THE

SUPREME COURT

OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

RICHARD JESSUP,
Defendant and Appellant.

CASE
No. 6193

APPEAL FROM THE FIFTH DISTRICT COURT
OF UTAH, WASHINGTON, COUNTY
HON. WILL L. HOYT, JUDGE

Brief of Defendant and Appellant

CLAUDE T. BARNES
Attorney for Defendant
and Appellant

INDEX OF CASES

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STATEMENT

In this action the respondent, a resident of New Harmony, Washington County, Utah, was tried before a jury and convicted of cohabiting with more than one person of the opposite sex. The evidence showed that defendant lived on a ranch, fifty yards or so from his brother's residence; that his wife Ida Johnson Jessup is a cousin of Lola Johnson and also of Mary Carling. On September 2, 1939, the day of the arrest, Mary Carling was visiting her cousin Lydia at the Fred Jessup home; and she stated that Lola Johnson was

visiting at the defendant's home, being a cousin of Mrs. Richard Jessup; and that Lola, who was pregnant, had been there for the two weeks that she, Mary Carling, had been there.

When the Sheriff and his deputy arrested the defendant they saw Mrs. Jessup at the home, also Lola Johnson; and on the way to St. George the defendant told them that they were being persecuted for the same things their fathers had done, and that they believed in living according to the laws of God.

No further testimony was offered; both sides rested; the defendant moved for a directed verdict, and, upon its denial, the case was submitted to the jury.

ARGUMENT

ASSIGNMENTS OF ERRORS NOS. 1, 4, 5 AND 10

The Court erred in overruling defendant's motion to quash the information for the reason:

A. The information fails to state or charge a public offense.

B. Section 103-51-2, Revised Statutes of Utah, 1933, as amended by Chapter 112, Laws of Utah, 1935, is:

1. Unconstitutional for the reason:

   a. It violates the Utah Constitution (Art. 6, Sec. 23) providing that "no bill shall be passed containing more than one subject."

b. The title of the Act does not cover all its subjects.

c. It combines a criminal with a civil statute.

d. It is inconsistent with 105-21-39 and 105-21-40 Compiled Laws of Utah, 1933, as amended by Chap. 118, Laws of Utah, 1935, both of which were passed on the same date and became effective on the same date as the statute in question.

e. It violates Article 1, Sec. 12 of the Utah Constitution, which provides that "a wife shall not be compelled to testify against her husband."

f. It violates Article 1, Sec. 12 of the Utah Constitution, which provides that "the accused shall not be compelled to give evidence against himself."

2. The said section fails to set forth, describe or define a crime.

C. The information fails to comply with Sec. 105-21-8, Compiled Laws of Utah, 1933, as amended by Chapter 118, Laws of Utah, 1935.

A.

The information (Abs. 2) charged: "That the said Richard Jessup on or about the first day of September, 1939, at Washington County, State of Utah, *did cohabit with more than one person of the opposite sex*". (Italics mine). The ancient Greeks expected their legislators *anemolia bazein*—to talk words of wind—but their final enactments to make sense. To cohabit with more than

one person of the opposite sex. (*L. cohabitare*—to dwell) could mean to dwell with one's brothers, sisters, or even one's children; for there is no crime of cohabitation at common law, and even the statutes apply descriptive terms to it to make it so. "It is purely statutory, and it is a new offense in our statutes." (U. S. vs. Cannon, 4 Utah 130). As the statute reads a woman may be guilty by dwelling with her brothers, sons or other relatives; a man, by dwelling with his sisters, daughters, or other relatives; a little boy, by dwelling with his sisters; a little girl, by dwelling with her brothers. It even suggests polyandry, a practice known to the Tibetans and the Nairs, but exotic here. As the statute stands, therefore, it is nonsense, as the word "cohabit" alone is of innocent connotation. As has been well said:

> "in order to give it proper effect in any case regard must be had to the subject matter to which it relates, to the situation and conditions in respect to which it is used, and to the explanatory and qualifying language accompanying it."
>
> 14 C. J. S. 1311.
> King v. U. S., 17 F. 2d 61.
> De Berry v. De Berry, 177 S. E. 440, 115 W. Va. 604.
> State v. Lawrence, 27 N. W. 126, 19 Neb. 307.

There is no qualifying or explanatory language in the statute, though other states, in giving criminal import to the word apparently deem adjectives essential; thus: "cohabit as man and wife" (Le Blanc v. Yawn, 126 So. 789, 99 Fla. 328); "cohabit with any other woman" (State v. Connoway, Tapp. 58—Ohio): "lewdly and las-

civiously associate and cohabit together" (Johnson v. Com., 146 S. E. 289, 152 Va. 965), or lewdly and lasciviously cohabit' (State v. Tuttle, 150 A. 490, 129 Me. 125), or "open and notorious illicit cohabitation" (King v. U. S., 17 F. 2d 545), "cohabiting as husband and wife" (In re Boyington, 137 N. W. 949, 157 Iowa 467) and "cohabiting in a state of adultery" (Martin v. State, 165 N. E. 763, 89 Ind. App. 107). A statutory absurdity is *ipso facto* a nullity; and this one is *nominis umbra*—the mere shadow of the name of a crime. We can see no basis for holding that the legislature in this instance set forth, described or defined a crime.

B 1 a

Section 103-51-2, Revised Statutes of Utah, 1933, as amended by Chap. 112, Laws of Utah, 1935, under which the information was drawn, is unconstitutional for the reason that it violates the Utah Constitution (Art. 6, Sec. 23) providing that "no bill shall be passed containing more than one subject." The statute in reality contains four subjects: 1. Cohabitation; 2. compelling any person to testify; 3. using evidence in civil or criminal proceedings; and, 4. liability to prosecution for giving testimony. The statute reads as follows:

> "103-51-2 — Unlawful Cohabitation. All Persons Except Defendant Must Testify. If any person cohabits with more than one person of the opposite sex, such person is guilty of a felony.
>
> Any person, except the defendant, may be compelled to testify in a prosecution for unlaw-

> ful cohabitation; provided, however, that the evidence given in such prosecution shall not be used against him in any proceeding, civil or criminal, except for perjury in giving such testimony. A person so testifying shall not thereafter be liable to indictment, prosecution, or punishment for the offense concerning which such testimony was given."

The rule against two subjects in enactments is mandatory in "nearly all jurisdictions" (59 Corpus Juris 797), and such statutes are "void" (59 C. J. 799). In fact as stated in Utah State Fair v. Green, 68 Utah 251, concerning such a statute, "every provision thereof is unconstitutional and void", and it should be determined by the court without "reference to economic or moral effect."

The Statute amends Sec. 103-51-2, Compiled Laws of Utah, 1933, on Unlawful Cohabitation, which appears under Chapter 51 of the Penal Code entitled "Sexual Offenses." There was nothing in Sec. 103-51-2 about compelling witnesses to testify—that was added by the 1935 amendments, and was really an amendment of Sec. 105-45-6 of Chapter 45, Compiled Laws of Utah, 1933, on "Witnesses and Evidence", particularly concerning the testimony of a witness not to be used against him. The sections should have been amended separately, and thus a crime would not have been intermingled with testimony, and immunities, civil and criminal, and prosecution aids. Again it was a case of the legislature's covering too much territory.

B 1 b

The title of the Act under which the information was drawn does not express all of the subjects, as required by Art. 6, Sec. 23 of the Constitution of Utah. The title (Chap. 112, Laws of Utah, 1935, reads:

> "An Act Amending Section 103-51-2, Revised Statutes of Utah, 1933, Making Unlawful Cohabitation a Felony, and Providing that all persons Except the Defendant Must Testify in Proceedings Therefor."

In the title there are two subjects: (a) unlawful cohabitation, and (b) all persons must testify; whereas in the act there are four subjects: (a) unlawful cohabitation; (b) all persons must testify; (c) evidence may not be used against witness; (d) non-liability to prosecution for offense on which testimony given.

It is said:

> "All parts of an act which are not within its title are unconstitutional and void."
>
> 59 C. J. 812.
> Utah Fair v. Green, 68 Utah 251.

The word "civil" in the second paragraph of the act enlarges the scope of the act greatly, taking it from the criminal to the civil field, yet no mention of any civil procedure effect is mentioned in the title or, for that matter, even indicated.

B 1 c

The preceding paragraph points out another defect in the act; it combines a criminal with a civil statute. As

stated in State v. Tieman, 32 Wash. 294, 73 P. 375, 98 Am. St. Rep. 854, a statute entitled one relative to crimes and punishments and criminal proceedings cannot lawfully contain any provisions of a civil nature.

B 1 d

The Act is inconsistent with Sec. 105-21-39 and 105-21-40, Revised Laws of Utah, 1933, as amended by Chapter 118, Laws of Utah, 1935, both of which were passed on the same date and became effective on the same date as the statute in question. Thus the cohabitation act was passed on March 14, 1935, and was made effective on May 14, 1935; the inconsistent acts were passed on March 14, 1935, and made effective on May 14, 1935. The cohabitation act exempts "any person" from prosecution for testifying against the defendant even though he be *particeps criminis* whereas the other two sections (105-21-39 and 105-21-40 as amended by Chapter 118, Laws of Utah, 1935) provide:

> "Every person concerned in the commission of an offense, whether he directly commits the offense, or procures, counsels, aids or abets in its commission even though not present, shall be informed against or indicted and tried and punished as a principal."
>
> "An accessory may be prosecuted, tried and punished, though the principal may be neither prosecuted nor tried, and though the principal may have been acquitted."

B 1 e

The Act also violates Article 1, Sec. 12, of the Utah Constitution which provides that "a wife shall not be compelled to testify against her husband." It will be noted that the Act reads: "Any person, except the defendant, may be compelled to testify in a prosecution for unlawful cohabitation", and, of course, "any person" includes the defendant's wife. It is so apparent that the Act is unconstitutional in this respect that it is unnecessary to argue it, even for emphasis. It is obviously, positively and unequivocally unconstitutional.

B 1 d

In similar fashion the Act disregards the Utah Constitutional provision (Art. 1, Sec. 12) and the fifth amendment of the Constitution of the United States providing that "the accused shall not be compelled to give evidence against himself." Unlawful cohabitation involves dwelling with more than one woman, hence in a properly drawn information using names (herein later discussed) it is inevitable that there be an "accused" other than the defendant. The very nature of the crime includes a *particeps criminis,* an accomplice. The statute compells that other one to testify against herself, thus violating the constitutional provision. *Nemo tenetur seipsum accusare* is a highly respected maxim of the common law, not lightly to be disregarded; and, while immunity from prosecution might be granted in State courts it in no way affects Federal prosecution nor mitigates the public disgrace of self-incrimination.

C.

The information fails to comply with Sec. 105-21-8, Compiled Laws of Utah, 1933, as amended by Chap. 118, Laws of Utah, 1935. The section provides that an information may charge:

> "(a) By using the name given to the offense by the common law or by statute.
>
> (b) By stating so much of the definition of the offense, either in terms of the common law or of the statute defining the offense or in terms of substantially the same meaning, as is sufficient to give the Court and the defendant notice of what offense is intended to be charged."

I hope it is not contended by anyone that the reformation of criminal procedure as set forth in Chap. 118, Laws of Utah, 1935, authorizes such abstract charging of public offenses as: "John Doe committed murder"; "John Doe committed robbery", and so on throughout the category of crimes—by merely naming them. Such chargings are meaningless; they disregard a *corpus delicti,* and are just as inane as hanging a man because he says he committed murder when no one has been killed. Nevertheless that is what the information does in this case—it points to nothingness.

> "Did cohabit with more than one person of the opposite sex."

Those are the words. What persons? How did he "cohabit"—as brother with sister, or as man and wife? Even in the "Forms for Certain Offenses" (Sec.

105-21-47 as amended by Chap. 118, Laws of Utah, 1935), permitting the charging of certain crimes by naming them, there is always an object; thus, "A. B. assaulted C. D.", "A. B. committed bigamy with C. D.", "A. B. murdered C. D.", and so on. It would have been thought ridiculous to say merely "A. B. assaulted", "A. B. committed bigamy", "A. B. murdered", etc. The statute did not include "unlawful cohabitation" in the category of short forms; even if it had, it would likely have set forth: "A. B. cohabited with C. D. and E. F. as man and wife." The information, therefore, is an abstraction, a nullity. That such a defect is regarded as fatal is set forth in United States v. Cannon, 4 Utah 131 as follows:

> "If the indictment had charged the defendant with 'cohabiting with more than one woman', without giving the names of the women without time and place, it would have been insufficient in not giving particulars, so as to enable defendant to make proper defense, or to plead the judgment hereafter."

Also at page 130 it is said:

> "To the general rule of describing statutory offenses in the language of the statute there are exceptions, the principal ones being (1) when the statute makes that an offense which was an offense at common law, and (2) when the offense is described in the statute in terms too general."

ASSIGNMENTS OF ERROR NOS. 2, 3

The Court erred in overruling defendant's motion for a directed verdict, for the reason that the evidence is insufficient to justify or sustain the verdict. The evi-

dence merely amounts to this: At the defendant's home his wife was being visited by her cousin who was pregnant, and the cousin had been there for two weeks. (Trans. p. 8 et seq.) Is there anything criminal about that? The scholarly exegesis of *corpus delicti* in State v. Johnson, 95 Utah 572, has application here, except that in the instant case we have no confession to deal with. Nearly every home-owner in the country, from the President down, has at some time or other a female relative visiting the home, probably *enceinte* as often as otherwise.

The jury perhaps cogitated on the basis of a presumption of guilt or on the theory that the defendant would not have been arrested unless guilty. They were not out long enough to read the instructions, for they were back with their verdict while the Court still sat on the bench merely discussing the next day's calendar, a matter of five minutes. Conviction by rumor and local atmosphere was denounced in the last of the early cohabitation cases to reach the existing Utah reports. Thus in State v. Graham, 23 Utah 278 (290) the Court said:

> "the defendant could only be convicted upon proof of affirmative acts upon his part from which the jury might infer guilt. But it would be setting a dangerous precedent to permit the mere belief or thought of acquaintances and neighbors and friends to become an element in any crime."

The Court in another place (p. 288) very aptly made an observation that is most pertinent here:

> "This is so upon the well-established rule that the law presumes a usual and ordinary state of things, rather than a peculiar and exceptional condition; it supposes legality rather than crime; and virtue and morality rather than the opposite qualities."

Applying that rule to the instant case we find that the law presumes that the defendant's wife's cousin was visiting the home lawfully, in the usual manner, for the usual purpose; and there is nothing in the evidence to the contrary.

Another thing: this crime of cohabitation—if indeed it really exists at all; for adultery and bigamy apparently take care of every unlawful situation—is a continuing thing not to be proved by a single visit of the sheriff, or a single observation of anyone else.

> The term cohabit "imports a dwelling together for some period of time and does not include mere visits or journeys."
>
> 14 C. J. S. 1311.
> In re Millers Estate, 78 P. 2d 819 (Okla.)
> Turney v. State, 29 S. W. 893, 60 Ark. 259.
> Jackson v. State, 19 N. E. 330, 116 Ind. 465.
> Calef v. Calef, 54 Me. 365, 92 Am. Dec. 549.
> State v. Connoway, Tapp, 58 (Ohio).
>
> The term "cohabiting" carries with it the idea of a fixed residence rather than that of a transient or single unlawful interview."
>
> 14 C. J. S. 1311.
> In re Mills, 70 P. 91, 137 Cal. 298, 92 Am. St. Rep. 175.
> Comm. v. Calef, 10 Mass. 153.

"It has been said that cohabitation is not a sojourn, nor a habit of visiting nor even remaining with for a time, but that the term implies continuity."

14 C. J. S. 1312.
In re Wray's Est. 19 P. 2d 1051; 93 Mont. 525.

All that the sheriff saw was that a lady besides the the wife of defendant was at the house the day of his visit (Trans. p. 19); and the State's first witness testified (Trans. p. 8) the lady was the defendant's wife's cousin. To argue that such evidence—and that is all there was to it—proved a crime must presume upon the time of the Court, and should not be pursued further.

ASSIGNMENT NO. 6

When counsel for the State asked a witness if she was acquainted with "Lola Johnson, sometimes called Lola Jessup" he involved, in his question evidence that did not exist. (Trans. p. 11) No one had testified that Lola Johnson was known also as Lola Jessup; and, of course, this error greatly harmed the defendant in his rights.

ASSIGNMENTS NOS. 7 AND 9

Likewise, when the Court permitted questions concerning the whereabouts of persons twenty days after the arrest (Trans. p. 16) it illegally prejudiced the defendant in the minds of the jury. In United States v. Cannon, 4 Utah 152, the Court said:

"They must confine their investigation of his guilt or innocence to the proof of facts and cir-

cumstances occurring between the dates." (Alleged in the indictment).

In criminal cases the rule of exclusion is even more important than in civil cases (Lightfoot v. People, 16 Mich. 507, 511).

ASSIGNMENT NO. 8

The Court erred in admitting testimony concerning the pregnant condition of Lola Johnson (Trans. p. 17) because her condition was entirely immaterial. (United States v. Cannon, 4 Utah 122.

For the many reasons herein stated, we can see no escape from the conclusion that the judgment should be reversed.

Respectfully submitted,

CLAUDE T. BARNES,
Attorney for Defendant and Appellant.