1941

State of Utah v. Sid K. Spencer : Brief of Appellant

Utah Supreme Court

Harley W. Gustin; Attorney for Defendant and Appellant;

No. 6223

In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Respondent.

vs.

SID K. SPENCER,

Defendant and Appellant.

Appeal From the Third Judicial District Court of Salt Lake County
Hon. Oscar W. McConkie, Judge

APPELLANT'S BRIEF

HARLEY W. GUSTIN,
Attorney for Defendant
and Appellant.

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APPELLANT'S BRIEF

STATEMENT OF THE FACTS

Appellant was convicted of the crime of Perjury in the First Degree. (Tr. 141; Ab. 17). The statute apparently involved is

Section 3 of Chapter 134, Session Laws of Utah, 1937, which reads as follows:

"A person is guilty of perjury in the first degree who commits perjury as to any

> material matter in or in connection with any action or special proceeding, civil or criminal, or any hearing or inquiry involving the ends of public justice or on an occasion in which an oath or affirmation is required or may lawfully be administered."

By the complaint of Arthur B. Bringhurst filed May 31, 1939, and in the charging portion of the same it is alleged:

> "That the said Sid K. Spencer, at the time and place aforesaid, committed perjury by testifying as follows:
>
> 'I have not driven a car at any time since my license was revoked for drunken driving'."

Both appellant and his wife were charged with driving an automobile without a driver's license. Apparently both charges were made by the same arresting officer and based upon the same set of circumstances. The charge against Mrs. Spencer was later dismissed.

In Judge Bringhurst's court Sid K. Spencer took the witness stand and denied that on the 21st day of April, 1939, he was operating or driving an automobile, but admitted that his license to drive an automobile was revoked by the State Tax Commission approximately a year previously. While testifying in Judge Bringhurst's court and upon a query not alleged, it is contended that he made a statement specifically as set forth in the Information and Bill of Particulars. Appellant contends

that he did not make such statement. Assuming a proper interrogatory, which the record does not show, then it is contended that the statement was wholly irrelevant and immaterial to any matter then pending before Judge Bringhurst.

Spencer was charged with driving an automobile without a driver's license. It was not relevant nor material to inquire why he did not have a driver's license, and any statement that he might have made to attempt to explain as to why he did not have a license was wholly immaterial to the issue. *If Spencer had testified that he did have a driver's license, when as a matter of fact he did not, that would have been the basis of perjury.*

The Information (Tr. 6; Ab. 1) filed by the District Attorney adopts verbatim the complaint of Bringhurst insofar as the charging part is concerned. Thereafter the District Attorney filed a Bill of Particulars as follows: (Tr. 15-16; Ab. 5-6).

> "Comes now the State of Utah and pursuant to Section 105-21-9, Chapter 118, Laws of Utah, 1935, and hereby makes the following Bill of Particulars, towit:
>
> "That on the 23rd day of April, 1939, the defendant herein was charged with the crime of violating Section 29, Chapter 45, Laws of Utah, 1933, in that he had on the 21st day of April, 1939, in Salt Lake County, driven and operated a motor vehicle, to wit: an automobile upon a highway within the County of Salt Lake, State of Utah, towit, in the 3500 block on High-

land Drive; and that at said time that said defendant did not have a driver's license, the same having been revoked on the 14th day of June, 1938. Said charge was made against the defendant by a complaint sworn to by E. L. Jensen and filed before Arthur B. Bringhurst, the duly elected, qualified and acting Justice of the Peace within and for the Third Precinct Salt Lake County, State of Utah.

"That thereafter the said defendant pleaded NOT GUILTY to said charge, and on the 31st day of May, 1939, said case was being tried before the said Justice of the Peace, and the defendant was sworn on his oath, and on said day was called as a witness in said case, and at said time and place testified, while so under oath, as follows:

'I have not driven a car at any time since my license was revoked for drunken driving'

and said testimony was material to the issues of said case, and said testimony was then and there untrue and not the fact; and the driver's license of the said defendant had been revoked on the 14th day of June, A. D. 1938."

(Signed) CALVIN W. RAWLINGS.
Calvin W. Rawlings,
District Attorney."

The question as to whether or not Spencer is guilty of the crime charged depends upon the fallibility or infallibility of the recollection of not only appellant, but of Judge Bringhurst presiding over a court not of record and the materiality of the statement alleged to have been made.

STATEMENT OF ERRORS RELIED UPON

This brief is written and filed after, but the appeal taken before, the new rules of this Court, in effect March 1, 1941, which do away with an abstract of the record and the filing, by separate document, of assignments of error. Assignments, however, have been filed and are included in the abstract of the record in this case. The abstract having been filed prior to the new rules of procedure, we assume that to reiterate the assignments of error would not be necessary.

PARTICULAR QUESTIONS INVOLVED

Whether or not the Complaint and the Information as amplified by the Bill of Particulars state facts sufficient to constitute a public offense, and whether the evidence supports the same.

ARGUMENT

Prior to the new code of criminal procedure adopted by the 1935 Legislature, it was necessary, by reason of

Section 104-11-1 Revised Statutes of Utah, 1933

that the complaint before a committing magistrate must state "the acts or omissions complained of as constituting the crime or public offense named," and by reason of

Section 104-21-5, R. S. U. 1933,

the Information must be direct and certain as to

"the particular circumstances of the offense, when they are necessary to constitute a public offense."

Neither the Complaint nor the Information on file herein state the particular circumstances of the alleged offense nor the acts or omissions complained of. To merely charge that appellant committed perjury by testifying that "I have not driven a car at any time since my license was revoked for drunken driving" and particularly without stating *the question or the circumstance* under which the answer was given, is not a statement of any offense.

Under the Revised Code, the District Attorney could have been permitted to state the crime of perjury by reference to the particular statute defining such crime, or should have amplified the same by a Bill of Particulars upon request, which was so made.

The crime of perjury, according to

Chapter 134, Session Laws of Utah, 1937,

is of two degrees with specific and different penalties for each. Appellant was convicted in this case of the crime of perjury in the first degree and yet neither the Complaint, the Information nor the Bill of Particulars stated the characteristic nature of the crime charged against him.

The demand for Bill of Particulars was as follows:

> "To the State of Utah and to the Attorneys, Calvin W. Rawlings and Brigham E. Roberts:
>
> "Demand for a Bill of Particulars is hereby made upon you for the following:
>
> "The date or dates and places or locations that the defendant, Sid K. Spencer, is alleged to have driven an automobile since

his license was revoked for drunken driving; the name of the witness or witnesses alleged to have seen the defendant driving an automobile since his license was revoked; *the questions asked the defendant* and the answers given by him upon which questions and answers the defendant is charged with having committed the crime of perjury.

"Dated this 13th day of September, 1939.

HARRY GOLDBERG,

Attorney for Defendant."

(Tr. 14; Ab. 5). (Italics ours).

In the case of

State v. Solomon, 93 Utah 70; 71 Pac. (2d) 104,

this Court carefully considered the purpose of a Bill of Particulars and while holding that a Bill of Particulars need not be in the same nicety of form as heretofore required must, nevertheless, apprise the defendant of the basic and fundamental thing with which he is charged. We quote from the decision as follows:

"The pleader had been too often held to strict nicety in stating the elements of the crime and the particulars thereof. The Legislature further intended to fully safeguard the rights of defendants by providing that the court shall direct the filing of a Bill of Particulars where the Information does not give the defendant the particulars of the offense sufficiently to enable him to prepare his defense or give such information as he is entitled to under the Constitution of the State."

The Demand for a Bill of Particulars required a statement of the purported question asked by the county attorney, to which the purported answer

was made and this information was not given or supplied.

Sometime ago, a book was written under the title of "Respectable Sins." The book is out of print and is not presently available so far as the writer of this brief knows, but we quote from what we understand to be an excerpt from the same of a sermon of the Reverend John Watson, under the title of "False Tongues:"

> "Given a little skill, a little malice, no scruples, and anything can be done with facts. Allow me to select from among the words and actions of the best of men just what I choose and to use what I have selected in a way I please, and I could make a man's character like that of Judas; I could poison the minds of his friends against him, and I could convict him before a jury of honest men. Just a sentence without the whole letter; just a saying without the circumstances; just an action without the reason; just the text without the context; just some judicious selection and some judicious omission, and out of man's innocence you can create the plausible evidence of his wickedness. I heard him say it with mine own ears; quite true! But what else did you hear him say before and after? I saw him do it with my own eyes; quite true! But you do not say why he did it. There was nothing on earth so mean or so clever as the evil tongue working deceitfully, decently, politely. What a course a single slander may run; and who is safe from the light, swift arrows of a calumniating tongue? Neither position, nor service, nor even character can afford to bid it defiance."

How can it be said that Spencer committed per-

jury without it being known at least the purport of the question to which he is alleged to have made the answer? Certainly, if a Bill of Particulars serves any purpose in this particular kind of a case, it should have indicated the question and by whom and under what circumstances, direct or cross examination, propounded.

The record shows that this case was prosecuted at a time when ethical practices of an attorney of this bar were being questioned and with whom appellant was allegedly connected in an unprofessional way.

In re: McCullough, 97 Utah 533; 95 Pac. (2d) 13.

The record does not indicate what ultimate disposition was made of the case of the State of Utah against Sid Spencer on the charge of driving an automobile without a driver's license. It should be presumed, and we think that the fact is that the case has never been determined. With the utmost of respect to Judge Bringhurst, even though he may not be a member of this bar, we suggest that perhaps unwittingly he fell into a situation analogous to the philosophy so aptly expressed by the quotation above.

CONCLUSION

There are other assignments made and raised as to whether or not the evidence shows that appellant was actually driving the automobile in question on the date and at the time alleged in the Bill of Particulars. These assignments, however, while not waived, deal largely with matters pertaining to questions of fact. We contend that the crime of perjury has neither been pleaded nor proven.

Respectfully submitted,

HARLEY W. GUSTIN,

Attorney for Appellant.