

1940

# State of Utah v. Angelo Tellay : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

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State of Utah,

Plaintiff and Respondent,

vs.

Angelo Telly,

Defendant and Appellant.

CASE

NO.

6233

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BRIEF OF APPELLANT, ANGELO TELLAY

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STATEMENT

Angelo Telly, the appellant herein, was charged by the State of Utah of having unlawfully and feloniously committed the crime of carnal knowledge upon one Helen Fulmer, an unmarried female under the age of eighteen years and over the age of thirteen years, to-wit: of the age of fifteen years, who was not the wife of the said Angelo Telly on the 22nd day of May, 1930, the date of the alleged crime.

To this charge the defendant entered a

plea of not guilty, and pleaded former acquittal and former jeopardy. A jury was subsequently selected by respective counsel, and the case was tried to the jury with the Honorable Clarence E. Baker presiding.

Both sides having rested, the court instructed the jury and counsel for the respective parties argued the case to the jury. The jury, at the conclusion of the arguments retired to deliberate upon the case, and, upon completion of its deliberations, returned a verdict of guilty as charged.

Thereafter the defendant and appellant made a motion for a new trial (Dft. Ab. 7-8) which was subsequently denied by the court.

#### ----- ERRORS RELIED UPON

The errors relied upon by the appellant, Angelo Fellay, may be classified and discussed under the following general headings:

1. That the court erred in its rulings upon the admissability of evidence in regard

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to the testimony of one of the State's witnesses (Dft. Ab. 13, 14, 17, 18); also that the court erred in refusing to strike such testimony, and in refusing to instruct the jury to disregard such testimony (Dft. Ab. 14,19).

2. The court erred in rulings on the admissability of evidence (Assignments of Error 1,2,3,4,5,6 and 7).

3. The court erred in refusing to give appellant's instructions as requested by him (Assignments of Error 9,10 and 11).

4. The court erred in permitting the case to go to the jury for their deliberations (Assignments of Error 13 and 14); and in entering judgment upon the verdict (Assignments of Error 15).

5. The court erred in giving instruction No. 5 (Assignments of Error No. 12).

6. The court erred in denying appellant's motion for a new trial (Assignment of Error 16).

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#### ARGUMENT

The principal assignments of error relate, and

may be more conveniently grouped and outlined as

1. To the court's allowing the testimony of Mrs. John Sommers, a witness for the State, to come into evidence, and in refusing to strike the same once admitted.

2. To the receiving in evidence State's Exhibit "A", and in allowing it to be read to the jury.

3. Failure to receive in evidence the defendant's proposed Exhibit "1"; and refusal of defendant's proposed instructions, and to the giving of Instruction No. 5.

4. To the court's permitting the case to go to the jury on the evidence adduced; to the court's entering judgment upon the verdict in view of the insufficiency of the evidence; and the court's failure to grant a new trial.

#### IMPROPER ADMISSIBILITY OF EVIDENCE

The State, in the due course of the trial of the appellant, called Mrs. John Sommers as a witness. From this witness the State elicited certain evidence designed to corroborate the



testimony of Helen Fulmer, and, in addition accumulate more evidence for the ears of the jury from which they might be assured that a heinous crime had been committed on the date in question and in what manner committed.

Compendiously the testimony of this witness was that she found Helen Fulmer, on returning home, on May 22, 1939, the night in question, in a hysterical condition. Her clothes and stockings torn and generally disheveled. That Helen had told the witness what had taken place, where, and why it was that her clothing was torn, and who the persons were who caused the same. All these matters came into evidence in the presence of the jury over the objection of the appellant.

The person injured by the crime is in no sense a party to the prosecution, and, therefore, the witness's statements and testimony as to what Helen Fulmer's statements were on this occasion are not evidence either for or against the accused.

State vs. Ratledge, 21 Del. 91, 88  
Atlantic 944.

Wilburn vs. State, 77 S. W. 3, for

Where a ticket agent sent out word that a ticket of certain type had been stolen, and to take it up, and it was found on the defendant. The court held the evidence was inadmissible.

Also see, Cunningham vs. State, 27 Tex. App. 479,  
11 S. W. 485.

The statements must be relevant on the question of defendant's guilt and made in his presence, or unless they are a part of the res gestae, as dying declarations, or as threats, State vs. Baruth, 47 Wash. 293, 91 Pac. 977; also see,

People vs. Weber, 149 Cal. 325, 86  
Pac. 671.

People vs. Hotz, 261 Ill. 239, 103  
N. E. 1007.

State vs. McNamara, 212 Mo. 150, 110  
S. W. 1067.

People vs. Peek, 43 Cal. App. 638,  
185 Pac. 881.

Bowles vs. Commonwealth, 104 Va. 816,  
48 S. E. 527.

In Jacoby vs. State, 180 N. E. 179, the court held that declarations made by the prosecuting witness, in a robbery prosecution, which were made in the absence of the accused were

improper and should have not been admitted.

In *Shepard vs. United States*, 62 Fed. (2d) 603, the United States government contended that the defendant poisoned the deceased, and attempted to introduce declarations and statements by the deceased that she believed she was being poisoned.

The court held:

That the statements made by the accused was inadmissible as a dying declaration, or for any other purposes or purpose except that it would be admissible for the purpose of rebutting a theory of suicide.

The statements or representations of the injured party relative to his pains, etc., made to a physician or to any other person, may be properly received in evidence, where the particular matter stated is relevant for the sole purpose of showing his physical condition at the time that statement or representation was made. But this rule does not countenance the admission of a narrative statement by the person injured through a witness to whom such remarks were made as to the cause of the injury.



State vs. Uzzo, 22 Del.212, 65 Atl.775.

The rule which allows a witness to testify to a complaint made to the witness immediately after the alleged crime had taken place by the prosecutrix in prosecutions for rape is not admissible in prosecutions for other offenses.

People vs. Soattura, 87 N. E. 372

Commonwealth vs. Harnes, (69 Va. 992

In State vs. Winslow, 30 Utah 403, 85 Pac. 433,

the question was put to the witness as to whether or not complaint had been made to the witness by the victim. The defendant objected to the introduction of evidence as to what the complaint was, and on appeal insisted such a question would be proper in a rape case but not in a case based upon a charge of incest. The court held:

That as the victim was under the age of consent, and had not consented as a matter of fact, she was not an accomplice, and so the fact that she made complaint was admissible, but all the prosecution could shew after the prosecutrix had been a witness was that the com-

plaint was made, when and to whom made, and could be corroborated by the person to whom it was made. It was not a part of the res gestae, and all other matters in the complaint to the witness which the witness testifies to over defendant's objection should be stricken as incompetent and prejudicial.

The testimony of Mrs. Sommers as to what her daughter had complained of the night in question, as, "They got me, there were three of them" and further that her daughter told her, "two of them got me - one didn't," is contrary to the authorities hereinbefore cited, and is also contrary to the decision in *State vs. Winslow*, supra. Appellant contends that such a complaint introduced in a rape case is admissible under all the authorities, but is inadmissible and constitutes prejudicial error when introduced in a carnal knowledge case where no force or fear is alleged or proven. The *Winslow* case, supra, certainly restricts the testimony given by the witness relating that complaint was made to the fact that it was

made and made to the witness, and when and where it was made. The statements allowed to be put in evidence by the court in this connection are not admissible and were highly prejudicial.

The testimony of this witness palpably was not for the purpose of impeachment for the defendant never testified. The main portion of her testimony was that Helen Fulmer was crying and hysterical, her clothes and stockings were torn and dirty, and the statements said to be made by Helen relative to how many were there and who "got" her and who did not. These matters might have been admissible in a rape case, as before conceded, but although the victim stated she put up a struggle, yet the hum of consent and approbation in her testimony, as the court will readily discern in reading the Abstract of the Record or the Bill of Exceptions, and the opportunities Helen had to obtain assistance or make escape, speak the truth of the situation. The State working on the assumption that the members of the jury

were fathers and gentlemen produced this evidence for the sole purpose of influencing them as such to convict the accused because of a supposed brutality and ruthlessness perpetrated upon a young girl unable to defend herself. The truth of the matter was, that the State's attorneys could see for themselves that Helen Fulmer and the appellant were approximately the same age and maturity. And, as they had been unsuccessful in the rape case brought against this appellant for the same unlawful act, this evidence was introduced for the purpose of obviating any sympathetic feeling which might crop out or inure to the benefit of the accused.

TO THE RECEIVING IN EVIDENCE OF STATE'S EXHIBIT "A", AND IN PERMITTING IT TO BE READ TO THE JURY.

During the course of the trial the State offered in evidence State's Exhibit "A", which was the examination-in-chief of the appellant in the former trial of the appellant for the crime of rape alleged to have been committed upon Helen Fulmer, and involves the identical



facts as the case presently against the appellant on appeal, and of which the defendant and appellant was acquitted. Over the objection of the appellant, said Exhibit was received in evidence and read to the jury.

The appellant was originally charged with having committed the crime of Rape under these same facts, and with the same parties involved, the same places, times and date, and the same acts and intent. The State, after having examined all their witnesses including the girl injured by the alleged offense, elected to prosecution the appellant for the greater crime of rape. During the course of this trial the appellant, being forced to defend himself, took the witness stand and so testified as to induce the State, after the jury acquitted him of the crime of rape, to bring the charge here on appeal.

A verdict of not guilty exonerates the defendant on all essential, material matters in issue in the trial of the case. No one can

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say with certainty upon what the jury based its verdict. It may have been that they found that it found there was no penetration, or that there was no force, or that the testimony of the prosecutrix was wholly false, or that the appellant could not have committed the crime on the day in question, or for various other reasons found the appellant not guilty.

It would certainly be true that if the evidence admitted as State's Exhibit "A" could be used the appellant would be compelled to defend himself from a charge of rape down to a charge of simple assault.

Schaefer vs. Commonwealth, 72 Pa. 60,  
13 Am. Rep. 649.

At best, the Exhibit could only be used for the purpose of impeachment showing credibility.

State vs. Johnson, 78 Utah 84, 287  
Pac. 908, 40 Cya2607  
and there must be a conviction in the former trial.

State vs. Thorne, 39 Ut. 208, 117 Pac. 58

State vs. Johnson, supra

State vs. Wells, 35 Ut. 400, 100 Pac. 681

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As follows:

A confession or admission introduced by the State must be shown to be voluntary by the State, and the court must determine whether a prima facie showing of voluntariness has been made, and also, a felony must be shown or admitted.

In State vs. Baruth, 91 Pac.977, the facts were substantially these:

Statements were made by the victim while the defendant was sitting in an adjoining room and the statements were relative to the shooting, its immediate causes and conduct of the victim and the accused. These statements were later admitted on the trial of the case over defendant's objections.

The court held:

Such statements made by the victim may be received as part of the res gestae if the defendant could hear and deny them, but after the door was closed statements so made were hearsay and could not be used over defendant's objections.

FAILURE TO RECEIVE IN EVIDENCE DEFENDANT'S PROPOSED EXHIBIT "1"; REFUSAL OF DEFENDANT'S PROPOSED INSTRUCTIONS, AND TO THE GIVING OF INSTRUCTION NO. 5.

The appellant in the due course of trial offered in evidence Defendant's Proposed Exhibit "1", which was all the pleadings and records pertaining to the appellant's previous

trial on a charge of rape involving the same persons, acts, places, and time as the offense herein charged, and which was in accordance with appellant's pleas of former acquittal and former jeopardy. Such exhibit was objected to by the State and was refused in evidence by the court.

The Constitution of the United States in Amendment V. provides:

\*\*\*nor shall any person be subjected for the same offense to be twice put in jeopardy of life or limb;\*\*\*

The Constitution of the State of Utah Article I, Section 12 provides:

\*\*\*nor shall any person be twice put in jeopardy for the same offense.

The appellant strongly contends that the State should have joined the offense now under consideration with the previous offense of rape, as provided in Laws of Utah, 1935, 105-21-31, which provide as follows:

The information or indictment must charge but one offense, but the same offense may be



set forth in different forms under different counts\*\*\*\*\* provided\*\*\*\*that an information or indictment for rape may contain a count for carnal knowledge of a female under eighteen years of age, and that an information or indictment for rape, or assault with intent to commit rape, or carnal knowledge of a female under eighteen years of age, or a crime against nature upon any person, may be contained also a count for indecent assault.

There can be little doubt after considering the foregoing statute that the legislature intended that certain crimes should be joined under the same information in order that persons charged with the commission of the greater offense would not be put to a defense for the same wrongful act ad infinitum. This is indeed in keeping with our codes of civil and criminal procedure, and with the desires and needs of the courts to expedite, simplify, and lessen the cost of litigation. Otherwise, a defendant, as in this case, would be prosecuted from a charge of rape on down to a charge of simple assault. The statute says

that the information can charge but one offense, and then provides inclusion of causes which necessarily becomes one offense, under the law.

Further, the legislature has provided the following statute pertaining to former jeopardy and former acquittal, which is found in Revised Statutes of Utah 1933, at 103-1-22, which reads as follows:

An act or omission which is made punishable in different ways by different provisions of the code may be punished under one of such provisions, but in no case can it be punished under more than one, and acquittal or conviction and a sentence under one bars a prosecution under the other.

In the case at bar, the appellant is alleged to have committed but one wrongful act, to-wit: he wrongfully and unlawfully had sexual intercourse, which involves one intent and one volition. If the State's allegations are founded in fact, the appellant did have sexual intercourse unlawfully with one Helen Culmer.

The attendant circumstances which would cause

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the State to elect to prosecute the crime as one of rape rather than one of carnal knowledge such as lack or presence or force upon appellant's part or the presence of approbation upon the victim's part, cannot operate in such a manner as to convert the appellant's wrongful conduct into two distinct acts which will permit of dual prosecution therefor.

Although appellant considers that the above statutes govern the matters herein assigned as error, it offers the following cases for the court's reference.

The case of Dook vs. State, 63 S. W. 372, holds that a plea of former acquittal presents a question of fact.

The case of Gelpin vs. State, 124 Ael. 334, holds as follows:

If the lesser offense for which defendant is put in jeopardy is an element of the greater offense of which he has been acquitted, arising out of the same act, the plea is a bar.

State vs. Lismore, 126 S. W. 355 holds:

**Conviction of one crime is a bar**

to a prosecution for any other offense of which defendant might have been convicted under the information or indictment.

Arnett vs. Commonwealth, 109 S.W. (2d) 879

holds:

Where several indictments charge the same person with separate offenses of the same kind, conviction or acquittal of one bars the others if the evidence covers the separate acts.

In State vs. McIntyre, Utah 1937, 66 Pac. 879, the defendant had been acquitted of conspiracy to possess and transport liquor. Mr. Justice Larsen in delivering the opinion of the court said:

To make the offenses the same, the information need not be identical in language. The name of the offenses may differ, and within the constitutional provision, still be the same offense.\*\*\*A series of criminal charges cannot, under our system of jurisprudence be based on the same criminal act or transaction; a single criminal act cannot be put up or divided into two or more distinct offenses and prosecuted as such. If the State elects through its authorized officers, to prosecute the offense in one of its phases or aspects, and on trial defendant is acquitted by a jury it cannot afterward prosecute the same act under a different name.



name.

In People vs. Stevens, 79 Cal. 408, 21 Pac. 856, and in 31 Ca. App. 319, 160 Pac. 1090, it was held:

Prosecution for a single part of a crime is a bar to prosecution for the other part. If the State has through its authorized officers elected to prosecute a crime in one of its phases, it cannot latter prosecute the same act under color of another name.

Conviction is a bar to subsequent prosecution where the first is rape and the latter is fornication, Commonwealth vs. Arner, 149 Pa. 36, 24, Atl. 83; or adultery Commonwealth vs. McLean, 5 Pa. Dist. 175. Acquittal on non-support of illicit child and mother is bar to prosecution for intercourse with female under the age when based upon the same facts, Reed vs. People, 164 Pac. 315. It is said at 15 Am. Jurisprudence at page 63, - Former conviction is a bar to a subsequent prosecution for any offense of which the defendant might have been acquitted or convicted under the first indictment and testimony.

Dec. 763, although obviously there had not been an adjudication of any of the essential elements of the second offense in the first trial, the court held:

Acquittal of one offense is no bar to prosecution for another, offense, unless it appears that some essential element was necessarily adjudicated and determined in the prior prosecution for the first offense.

The cases cited therein, together with the case itself show conclusively that if any material, essential part of one charge must again be adjudicated in a subsequent trial there is double jeopardy. For, as in the present case, the jury may have decided there was no penetration as well as any other material element necessary in both cases. Although that could not be definitely proven, still an acquittal is conclusive on all essential elements of the charge.

In Burton vs. Shannon, 99 Mass. 200, 26

Am. Dec. 733, the court said:

A verdict and judgment are conclusive\*\*\*only as to those facts which are necessarily involved in them, without the existence

and proof of which such verdict could not have been rendered.

If the State had prosecuted the appellant first for assault with the intent to commit rape, then discovered the fact of intercourse, as it believes, then this subsequent charge might not constitute double jeopardy; but in the crime of rape as in the crime of carnal knowledge one essential element prevails, to-wit: a penetration.

TO THE COURT'S PERMITTING THE CASE TO GO TO THE JURY ON THE EVIDENCE ADDUCED; TO THE COURT'S ENTERING JUDGMENT UPON THE VERDICT IN VIEW OF THE INSUFFICIENCY OF THE EVIDENCE; AND THE COURT'S FAILURE TO GRANT A NEW TRIAL.

The last point appellant assigns as error is so elementary that appellant is not desirous of burdening the court with superfluous argument or an unnecessary number of cases.

The State alleged in the information that the alleged intercourse took place between the appellant and Helen Fulmer on May 22, 1939, while Helen Fulmer was under the age of eighteen years and above the age of thirteen years, to-wit: of the age of fifteen years, the said

Helen Fulmer being then and there an unmarried female and not the wife of the defendant.

The court properly instructed the jury, (Dft. Ab.3) they it must find beyond a reasonable doubt that Helen Fulmer, at the time of the commission of the alleged offense, was a female over the age of thirteen years and under the age of eighteen years, and not the wife of the defendant, Angelo Tellyay.

The only question propounded by the State relative to the matter of whether or not the appellant and Helen Fulmer were married or not, is as follows:

Q. Mr. Neesley: Are you married.

A. Helen Fulmer: No, sir.

Of course, the question could mean but one thing, that is, are you married now, at the time you are testifying? The witness responded in the negative. The defendant proposed that the court give Defendant's Instruction No. 3 (Dft. Ab. 7) relative to this matter, which was refused by the court.



In Hamel vs. State, 80 Okl. 119, 126 Pac.

691, the court held:

To sustain a conviction of crime,  
each and every material element  
must be supported by the evidence  
or such conviction will be re-  
versed.

In support of this proposition the cases are obviously unlimited in number, but appellant cites the court to the following cases:

Gorded vs. State, 104 Neb. 35, 175  
N. W. 606

People vs. Nabolette, 82 Pac. (2d) 239

Briston vs. State, 92 Pac. (2d) 254

Alco, 11 Okl. 483, 148 Pac. 683.

The case of Marvil vs. State, 11 Okl. 483, 148 Pac. 683, holds that the burden is never on the defendant to establish an issue beyond a reasonable doubt.

The question propounded by the State and the answer made by Helen Fulmer constitute at best a fatal variance in the necessary allegations and the proof offered in support thereof. Certainly if this girl, Helen Fulmer, had obtained her parents' consent to a marriage with appellant, and the two were in fact husband and wife at the time of the commission of the crime

alleged, there could be no prosecution for carnal knowledge.

In Miller vs. State, 88 Tex. Cr. 69, 225 S. W. 379, the state alleged that a "cashier" of a certain bank had embezzled money, and proved instead that he was a "clerk", on appeal the court held:

That alleging one to be a cashier and proving him to be a clerk is a fatal variance in the allegation and the proof in support thereof.

In State vs. Mahan, 138 Mo. 112, 39 S. W. 465, where an indictment charged collection of money while defendant was a constable and then offered proof that at the time he was a deputy constable, held:

The proof offered in support of the allegations was insufficient and constituted a fatal variance not sustaining conviction.

To the same result are:

Kramer vs. State, 75 So. 185

Gardner vs. State, 197, S. W. 23

People vs. May, 101 N. W. 640

Lee vs. Commonwealth, 18 S. W. 4

## CONCLUSION

From the foregoing argument and authorities appellant contends that the court erroneously allowed the testimony of Mrs. Sommers to go to the jury. That State's Exhibit "A" was prejudicial and erroneously received in evidence by the court.

Further, that appellant has once before been put in jeopardy for this alleged wrongful act, and that the court erroneously refused defendant's proposed exhibit "1", and defendant's instructions in support thereof.

That the State did not prove or offer to prove, a material, essential allegation in its complaint, to-wit: whether the appellant and Helen Fulmer were married at the time of the alleged offense, and consequently, the verdict is contrary to the evidence and contrary to law.

We submit that the above case should be reversed and with directions to discharge the defendant.

Respectfully submitted,  
Robert S. Spooner  
George D. O'Connor, Jr.