

1940

State of Utah v. Angelo Tellay : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Joseph Chez; Attorney General; Zelf S. Calder; Assistant Attorney General;

Recommended Citation

Brief of Respondent, *Utah v. Tellay*, No. 6233 (Utah Supreme Court, 1940).
https://digitalcommons.law.byu.edu/uofu_sc1/637

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

No. 6233

In
The Supreme Court
of the
State of Utah

STATE OF UTAH,
Plaintiff and Respondent.

vs.

ANGELO TELLAY,
Defendant and Appellant.

Appeal From Third Judicial District State of Utah
Salt Lake County
Hon. Clarence E. Baker, Judge

RESPONDENT'S BRIEF

JOSEPH CHEZ,
Attorney General.
ZELPH S. CALDER,
Assistant Attorney General.
Attorneys for the State of Utah,
Plaintiff and Respondent.

FILED

TABLE OF CITATIONS

14 Am. Juris. 957....	6
15 American Jurisprudence, Section 390 at Page 65:	8
27 American Jurisprudence at Page 29	8
Hall v. State, (Ala.), 32 S. 750.	7
L. R. A. 1915A, at Page 257	8
L. R. A. Annotation at P. 1205.	7
New Code of Criminal Procedure, Laws of Utah, 1935, at Page 222. ..	10
People v. Moore, 276 Ill. 392; 114 N. E. 906.	3
State v. Barone, 92 Utah 571; 70 Pacific (2d) 735.	9
State v. Cox, 74 Utah 149; 277 Pacific 974,	9
State v. Rose, 106 N. E. (Ohio) 50.....	8
State v. Winger, (Minn.), 282 N. W. 819; 119 A. L. R. 1202.	7
Underhill's Criminal Evidence, Fourth Edition, Sec. 275, P. 545..	4

In
The Supreme Court
of the
State of Utah

STATE OF UTAH,
Plaintiff and Respondent.

vs.

ANGELO TELLAY,
Defendant and Appellant.

Appeal From Third Judicial District State of Utah
Salt Lake County
Hon. Clarence E. Baker, Judge

RESPONDENT'S BRIEF

STATEMENT

This case is unusual in that there is no question but that the defendant (hereinafter called the appellant) is guilty of the crime charged. He so confesses. (Tr. 68). The record shows that he introduced no testimony to the contrary.

State's Exhibit A is a transcript of a former trial before Judge McConkie, wherein the appellant was

defendant, involving the same incident of intercourse as alleged in the instant information. Apparently (although not clearly revealed by the record) appellant was charged in the former trial with rape of one Helen, committed on the 22nd day of May, 1939, and as a defense to the prosecutrix's testimony of force, appellant testified in substance that he had sexual intercourse with Helen as alleged and proved, but that such intercourse was not with force. (Tr. 68). Apparently the jury believed his testimony and acquitted him of rape.

The testimony of the prosecutrix shows that she was fifteen years of age (Tr. 42) and that about 9:00 P. M., May 21, 1939, she left her home at 104 Yale Avenue and went for an auto ride with appellant and two other boys; that they went to a beer garden and thence to a secluded place along Redwood Road (Tr. 44). That the two other boys left the parked car; and, that appellant, by force and against her will, had sexual intercourse with her. (Tr. 45). That she was not married. That she returned home about 1:30 P. M. May 22nd and reported the affair to her mother (Tr. 46).

Her mother testified in substance that her daughter Helen came home about 1:30 P. M. May 22nd and reported to her that: "They got me." That her hair was mussed up, her face was dirty; her dress was torn and her stockings were torn.

ARGUMENT

I

Appellant contends on the first proposition that it was error to allow the introduction of the testimony of the mother. We have searched appellant's brief for his merits to the above contention. We fail to find any good reason for his position. We have also searched most of the cases he has cited and fail to find them analogous to the instant case. His cited case of *State v. Winslow*, 30 U. 403; 85 P. 433, seems to be more against his contention than in favor of it. For the court held that the testimony of the complaint of the incident by the prosecutrix to the witness was admissible.

There seems no doubt but that a doctor's examination of the female organs of the prosecutrix immediately after the commission of the alleged crime is admissible. Surely then the physical condition of the prosecutrix immediately after the alleged commission of the crime as related by her mother is admissible even though such testimony contains the unsolicited words of the prosecutrix that "They got me." The rule is:

"In a prosecution for rape a complaint made by the prosecutrix is admissible as corroborative of her testimony, because it is the natural and spontaneous expression of feelings, but such complaint made in answer to questions is inadmissible."

People v. Moore, 276 Ill. 392; 114 N. E. 906.

II.

The appellant contends secondly that the court erred by allowing State's Exhibit A to be introduced. Said exhibit is the transcript of record of

a former case, wherein appellant confessed to the same act of intercourse under a charge of rape.

Appellant's cited cases do not seem to pertain to his questioned error. They deal with incriminating questions on cross-examination of the accused, (State v. Thorne, 76 Ut. 84; 287 P. 909) and with the question of whether or not a confession was voluntarily secured. (State v. Wells, 35 Ut. 400; 100 P. 681).

In the instant case appellant never took the stand. Hence a question of improper cross-examination is not applicable.

In the former trial appellant freely and voluntarily testified that he had sexual intercourse with the prosecutrix at the time and place as charged but that said intercourse was not through force as was testified by the prosecutrix. Thus appellant is foreclosed from denying that this confession, Exhibit A, was received involuntarily.

If appellant is compelled to testify in a judicial proceeding then we concede his statements made at such judicial proceeding is not voluntary. But in the instant case appellant being charged with rape did not have to testify. His taking of the witness stand was his free and voluntary act.

“The testimony of an accused voluntarily given as a witness on a prior trial of himself or another person, for the same crime with which he is being prosecuted may be introduced against him.”

Underhill's Criminal Evidence, Fourth Edition, Sec. 275, P. 545.

III.

Appellant's next contention is that he was once in jeopardy. This he contends arises out of the trial court's refusal to allow him to introduce into evidence the records of the former case of rape wherein he was acquitted; and also the trial court's instruction No. 5, to disregard the appellant's plea of once in jeopardy. He says that the Legislature, through Section 105-21-31, at page 226, Laws of Utah, 1935, made it mandatory for the prosecuting officials in charging rape to also put in a count charging carnal knowledge. That is to say, a charge of the crime of rape also includes the crime of carnal knowledge. Said section as pertinent provides:

"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 use of different means, the means may be alleged in the alternative in the same count; provided . . . that an information or indictment for rape *may* contain a count for carnal knowledge . . ."
(Italics ours).

The plain wording of the above quoted provision makes it discretionary whether or not a count in carnal knowledge may be added to the crime of rape. It is fundamental that where the language of a statute is plain it is not susceptible to judicial interpretation.

The main point at issue under appellant's once-in-jeopardy contention is whether or not carnal knowledge is an included offense within the crime of rape. Appellant offered Exhibit 1 which was

the records and files of the former case of rape, wherein appellant was acquitted. The trial court apparently examined said records and files and found as a matter of law that rape was not an included offense. Appellant contends that the once in jeopardy question should have been submitted to the jury. It seems that such a contention is correct when there is a question of fact raised as to the former jeopardy. In the instant case, there is no question of fact. The appellant himself confesses to carnally knowing the prosecutrix at the same time and place, the transactions being one and the same, so that all that was left to decide was a question of law as to whether or not carnal knowledge is an offense included within the crime of rape.

“The plea (once in jeopardy) is very simple in its structure and consists partly of matter of record and partly of matter of fact. The matter of record is the former indictment and trial, while the matter of fact is the averment of the identity of the offense and of the defendant as the person named in the former indictment.”

14 Am. Juris. 957.

Rape is a forced carnal knowledge. It may be committed upon any female person. Carnal knowledge is limited only to female persons between the ages of thirteen and eighteen. The former is much more of a heinous crime. Our statute imposes for rape the maximum penalty of life imprisonment. It thus follows that the intent is entirely different in each of the crimes, the former being an intent to ravish with force, the latter being an intent only of carnally knowing the female under the age of consent. It would be impossible to commit the crime of carnal knowledge upon a female over eighteen years of

age. Thus it clearly appears that carnal knowledge is not an included crime within the crime of rape.

The Constitution provides that one cannot be put in jeopardy twice for the same offense. That constitutional provision does not mean that one cannot be put twice in jeopardy for the same transaction.

“The words ‘same offense’ mean same offense, in the same transaction, in the same acts, in the same circumstances or the same situation.”

State v. Winger, (Minn.), 282 N. W. 819;
119 A. L. R. 1202.

See also

L. R. A. Annotation at P. 1205.

We have searched the judicial authorities in an effort to find a case on all-fours with the instant case. Strictly speaking, we have been unable to find such a case. However, we did find authority holding that

“an acquittal of rape is not a bar to subsequent prosecution for seduction, based on the same single act of sexual intercourse.”

Hall v. State, (Ala.), 32 S. 750.

The test laid down in the said Hall case is as follows: A former acquittal is no bar to a subsequent prosecution, unless the accused could have been convicted upon the first indictment upon proof of the facts averred in the second. Such a test seems to cover thoroughly the instant case in that it is clear that the information and proof of carnal knowledge could not warrant a conviction of rape.

From our search of the authorities, we believe that the general principle of law is best stated in

15 American Jurisprudence, Section 390 at Page 65:

“A putting in jeopardy for one act is no bar to a prosecution for a separate and distinct act merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them on the trial for the one of them first had; consequently, a plea of former jeopardy will not be sustained where it appears that in one transaction two distinct crimes were committed . . . ”

27 American Jurisprudence at Page 29 says:

“According to the weight of authority an acquittal of rape is no defense to a prosecution for incest based upon the same act of sexual intercourse.”

The last quoted general statement is found annotated in

L. R. A. 1915A, at Page 257, under the case of

State v. Rose, 106 N. E. (Ohio) 50.

Said Rose case, as pertinent, reads:

“It is not enough that some single element of the offense charged may have a single element of some other offense as to which the defendant has theretofore been in jeopardy, but the constitutional provisions require that it shall be the ‘same offense’.”

IV.

Appellant's next contention is based on the insufficiency of the evidence. His contention is centered around the testimony of the prosecutrix when she was asked by Mr. Neeley: "Are you married?" answer: "No, sir." Appellant contends that such an answer did not prove that she was not married at the time of the commission of the offense.

The above quoted question and answer immediately followed (Tr. 45) the testimony of the prosecutrix wherein she related the act of sexual intercourse committed by the appellant. The reading of the transcript shows that the question of marriage was related to the time of the alleged act and not to the time the witness was being examined by the District Attorney. Therefore the element necessary in proving carnal knowledge, that the prosecutrix must be unmarried, we believe is well proved.

CONCLUSION

As stated before this case is unusual in that there is no question of the appellant's guilt of carnal knowledge. Such overwhelming evidence, with no evidence to the contrary, with the appellant's confession to that effect, even if prejudicial error arises, we believe such evidence wipes out all error.

Prejudicial error is overcome, dissipated and wiped out where the evidence of guilt is overwhelming. This doctrine is announced in the case of

State v. Cox, 74 Utah 149; 277 Pacific 974,
and is later followed in the recent case of

State v. Barone, 92 Utah 571; 70 Pacific
(2d) 735.

We believe that it would be a miscarriage of justice to allow this appellant to escape punishment through a technicality of law or otherwise.

New Code of Criminal Procedure, Laws of
Utah, 1935, at Page 222.

We further believe that he had a fair and impartial trial and that the trial court's judgment should be affirmed.

Respectfully submitted,

JOSEPH CHEZ,

Attorney General.

ZELPH S. CALDER,

Assistant Attorney General.

Attorneys for the State of Utah,
Plaintiff and Respondent.