

1940

State of Utah v. Paul Olson : Brief of Appellant

Utah Supreme Court

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6241

In The *Original*
SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

PAUL OLSON,

Defendant and Appellant.

Case No. 6241.

APPELLANT'S BRIEF

Lawrence A. Miner,

Attorney for Appellant.

FILED
DEC 13 1940

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

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vs.

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APPELLANT'S BRIEF

Statement.

This is an appeal from the Fourth Judicial District Court of the State of Utah in and for Duchesne County. The defendant was charged in an Information filed by the District Attorney with the crime of carnal knowledge committed upon the body of one Ruth Dhanens. The jury returned a verdict of guilty, and the defendant was sentenced by the

court to serve a term of from one to five years in the State Penitentiary.

The first Assignment of Error relied upon by the defendant for a reversal of said judgment has to do with the alleged error of the trial court in sustaining an objection to a question put to one of the witnesses for the defendant, in which the witness was asked, "Do you know ~~what~~ the general reputation of Ruth Dhanens is for truth and veracity in the neighborhood where she resides?". The objection being that the question was incompetent irrelevant, and immaterial. The Ruth Dhanens mentioned in the question was the prosecutrix.

The second alleged assignment of error has to do with the alleged error of the trial court in denying an offer made by the defendant to prove by certain other witnesses for the defendant that such other witnesses would testify that the general reputation of the prosecutrix

for truth and veracity in the community in which she then resided and in the community in which she had previously resided was bad. These two assignments of error will be argued together.

We assert that the rule of law is that the credibility of any witness is always in issue or at least may be made an issue by either party and particularly is this true in a criminal case.

It is always the duty of a jury to ascertain and determine the credibility of witnesses even though the opposite party has offered nothing to contradict the testimony. All the tests of credibility should be applied to learn the exact truth in the matter.

We submit that the best way to ascertain the truthfulness of a charge such as the one made against this defendant in this case is to determine if possible whether the prosecutrix has told the truth. So that if it can be ascertained that the general reputation of the prosecutrix for truth and veracity is either good or bad, the jury is entitled to hear such testimony, and to

the ultimate truth with respect to the alleged charge is. This being the case it is clear that it was prejudicial error on the part of the trial court to refuse the defendant the right to go into the question of the general reputation of the prosecutrix for truth and veracity.

The trial court seems to have been confused because of the fact that under the charge made in the Information the jury had the right to convict the defendant upon the uncorroborated testimony of the prosecutrix, and because of the further fact that the defendant was precluded from offering any evidence as to what the reputation of the prosecutrix was for chastity. The trial court seems to have been under the impression that because the prosecutrix under the law was not an accomplice with the defendant and therefore need not be corroborated that the jury were entitled to consider her testimony without regard as to whether she was telling the truth.

This Court in the case of the State vs.

defendant was charged with carnal knowledge of a female such as we have in this case, stated on page 75 "the Statute under which the defendant was convicted was adopted to protect young girls between the ages of thirteen and fifteen years regardless of whether such girls are chaste or unchaste. Their characters or moral tendencies respecting the prohibited acts are wholly immaterial. OF COURSE, THAT DOES NOT PREVENT THE DEFENDANT IN SUCH A CASE FROM ASSAILING THE GENERAL REPUTATION OF THE PROSECUTRIX FOR TRUTH AND VERACITY." This court in the same case held that the trial court did not err in permitting a witness for the State to testify as to the general reputation of the prosecutrix for truth and veracity over an objection raised by the defendant.

See also State vs. Baretta, 47 Utah, 479, wherein it was held that "where witnesses who live in the same vicinity stated that they knew the general reputation of defendant, who was charged with larceny, for honesty and integrity they ar

to defendant's

good reputation for honesty.

We also cite the case of State vs. Hilberg 22 Utah 27, wherein this Court in the Syllabus uses this language: "Where the crime charged is sexual intercourse with a prosecutrix under the age of consent, the intercourse constituted the offense whether she consented or not, and her good or bad character or chastity, as affecting the crime charged was not in issue, but her general reputation for truth and veracity was."

In the case of State vs. Marks 16 Utah 204, this Court held "That in impeaching the credibility of a witness, the inquiry must be confined to the general reputation of the witness in the locality referred to." That is exactly what was sought to be accomplished in the question put to defendant's witness, and to which objection there-to was sustained by the trial court.

The court in the case last cited took occasion to point out just how the examination of a witness should be conducted for the purpose of testing the credibility of a witness sought to be impeached. and suggested the following

good reputation for honesty.

to also give the case of State vs. Miller

as Utah 24, wherein this Court in the syllabus

uses this language: "Where the crime charged

and intercourse with a prostitute under the

of consent, the intercourse constituted the

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there should be conducted for the purpose

form of questioning -- "Do you know what the general reputation of John Doe is for truth and veracity in the neighborhood where he resides?" If the question is answered in the affirmative the next question will be, "What is that reputation, good or bad?". If the answer is bad, the further question may be put: "From that reputation would you believe him under oath in a matter in which he is personally interested?"

In view of the offered testimony in the interested case and its rejection by the court, it is manifest that the defendant was greatly prejudiced by the ruling of the court, because in this case, there was a total lack of evidence tending to corroborate the prosecutrix. It was a case merely of the testimony of the Prosecutrix against that of the defendant. So that if the jur had been permitted to receive testimony that the general reputation of the prosecutrix for truth and veracity was bad, it is very likely that their verdict would have been in favor of the defendant.

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We now come to the third and fourth Assignments of Error which have to do with the refusal of the trial court to give defendant's requested Instruction No. 1, and the failure of the trial court to give any cautionary instruction to the jury. The language of this court in the case of State vs. Hilberg, supra, is pertinent. This language is found on page 39, and reads as follows: "We do not overlook the danger attending prosecutions under this act. The rules of law governing trials under this statute are more stringent and less flexible than those applicable in other criminal cases. An accusation under this statute is easily made. The offense, if committed, is generally in secret. The general character of the prosecutrix cannot be attacked. Specific acts of unchastity on her part cannot be shown. Her testimony as in many other cases where she may be an accomplice does not require corroboration in order to obtain full credit, and the woman who participates in the act is not criminally liable therefor. Under such circumstances the charge when made is hard

to disprove and difficult to defend against no matter how innocent the accused may be. While the protection of the honor and chastity of young women is of paramount importance to the state and every effort should be made to fully care for and protect it, yet in such prosecutions full latitude should be given the accused to discover the truth by cross-examination and otherwise, so as to enable him to defend against any unjust accusation."

We admit that defendant's requested instruction No. 1 is not very artfully drawn but we submit that in view of the requested instruction, the trial court should have given a cautionary instruction on its own account, even if it could not give the instruction as requested.

The giving of a cautionary instruction by the court would have been very desirable and would have been a distinct help to the jury, and particularly would this have been true had

the court admitted the evidence offered by the defendant touching the probability of the

prosecutrix, and referred to in Assignments of Error Nos. 1 and 2. It would have been proper for the court to have given an instruction in substantially the following form, to-wit:

"You are instructed that while it is the rule of law that the defendant may be convicted in a case like this, upon the uncorroborated testimony of the prosecutrix, still you are instructed that you should always act upon such testimony with great care and caution, and subject it to careful examination in the light of all other evidence in the case, and particularly is this rule applicable in cases of this character where the charge is easily made and hard to defend against, and you ought not to convict upon such testimony alone, unless, after a careful examination of such testimony you are satisfied beyond all reasonable doubt that it is true."

The propriety and necessity of giving such instruction as the one suggested above in this class of cases is supported by a number of American decisions. Some courts hold however,

that the giving of such instruction is improper because it states no rule of law, but is a mere argument, and constitutes an invasion of the province of the jury.

We cite the following cases in support of these Assignments of Error:

People vs. Benson, 6 Cal. 221, 65 Am.Dec.506;

Cennere vs. State, 47 Wis. 523, 2 NW 1143;

Reynolds vs. State 27 Neb. 90, 42 NW 903; and

20 Am. State Rep. 659;

People vs. Rangod 112 Cal. 669, 44 Pac. 1071 .

This last case holds that the giving of such instruction in a case where the testimony of the prosecutrix is corroborated by other evidence is improper.

This court in the case of State vs. Rutledge 227 Pac. 479 held that the refusal to give such instruction was not error, but in giving its reasons for so holding pointed out the following facts which obtained in that case, namely: 1 - That the case at bar did not rest upon the sole testimony of the prosecutrix.

2- That her testimony was supported by other material facts and circumstances proved by other witnesses.

3- That it was shown that for several months previous to the time of the offense charged the defendant had been paying regular attention to the prosecutrix, visiting with her at her home, and taking her out riding with him on numerous occasions; that he represented himself as unmarried, and conducted himself as a suitor; that he was seen on a previous occasion in an automobile with his arm around the prosecutrix; that he was with the prosecutrix on the day in question; that after the alleged offense the defendant approached the parents of the prosecutrix and offered to "settle the matter by payment of money and marrying the girl."

We submit that in the instant case there is a total lack of any evidence such as that pointed out in the case last cited, with the sole exception of evidence to the effect that the defendant was in the presence of the prosecutrix

on the day in question. So it would seem to us that in view of what this court said in the case of State vs. Ruthledge, supra, it was error for the trial court in the instant case to refuse and fail to give a cautionary instruction.

For the trial court to give its stock instruction to the effect that the jury was the sole judge of the credibility of the witnesses which included the prosecutrix was not sufficient, and particularly in view of the fact that the trial court refused the defendant the right that was his to impeach the credibility of the prosecutrix by showing that her general reputation for truth and veracity was bad.

We come now to our final Assignment of Error, to the effect that the trial court erred in denying the defendant's motion for a new trial, particularly in view of ground No. 3 of said motion, which was, "That the jury had been guilty of misconduct by which a fair and due consideration of the case may have been prevented." Of

course we are aware of the general rule of law

which holds that a juror may not impeach the verdict by his own affidavit.

This court in the case of State vs. Mellor 73 Utah 104, 272 Pac. 635, has held that the granting or refusing a new trial for a juror's misconduct is discretionary with the trial court and will not be reviewed unless abused.

In the case just cited the record showed that the alleged misconduct of the juror consisted of his going to sleep several times for short intervals, but that he was fully aware of all the testimony that was offered, and that he fully understood all the testimony. In the instant case however it appears from the affidavit of the juror, Fred O. Palmer, in support of the Motion for a New Trial, that said juror was the foreman of the jury which tried and convicted the defendant; that he never was at any time convinced that the defendant was guilty of the charge for which the defendant was on trial; that he held out for a verdict of not guilty

as long as his health and strength would permit; that he was not well, being afflicted with a serious heart ailment, and that he was under a doctor's care; that when he gave his vote for guilty in this case there was a doubt in his mind as to the guilt of the defendant; that he would have continued to vote not guilty if it had not been that he was in such a weakened condition, and feared for his own life if he had to continue longer in such deliberation as was being conducted by the said jury; that there is still at this time (the date of the affidavit, October 6, 1939) a doubt in his mind as to the defendant being guilty of the crime for which the jury returned the verdict of guilty.

It seems to us that the conduct detailed by said affidavit constitutes misconduct as defined by the express language of the statute as grounds for a new trial. Section 103-39-3 Subdivision 3 of the R.S. Utah, 1933, reads as follows: "When the jury has separated without leave of the court after retiring to deliberate

upon their verdict, OR HAVE BEEN GUILTY OF ANY CONDUCT BY WHICH A FAIR AND DUE CONSIDERATION OF THE CASE MAY HAVE BEEN PREVENTED."

When a juror states in effect that he was forced or impelled to join with other jurors because he feared for his life if he had to continue further deliberations with the jury and for that reason abandoned his convictions with respect to the defendant's guilt in order that he could conclude his services as a juror and get to his doctor for treatment, he is to our way of thinking, guilty of the worst kind of misconduct. Of course he could have advised the court of his condition, and the court would probably have made arrangements for him to get medical attention, and then permit him to give further consideration to the case. But because he did not adopt the orderly and consistent way of handling the matter should not be visited upon the head of the defendant.

We have made a search of the cases and have been unable to find a case in point, but even so, it does seem to us that this sort of misconduct should be held by this court to constitute such misconduct on the part of a juror as would entitle the defendant to a new trial, and that the failure of the trial court to grant defendant's motion for a new trial should be held to be an abuse of discretion.

Respectfully submitted,

Lawrence A. Mmiller
Atty for Appellant

Received a copy of the above and foregoing Brief
this 19 day of December 1940.

Joseph Chay
Attorney General.
by

Joseph S. Calder
Deputy Attorney General.

ALPHABETICAL INDEX OF CASES CITED IN
THIS BRIEF.

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