1941

State of Utah v. Paul Olson : Brief of Respondent

Utah Supreme Court

Grover A. Giles; Attorney General; Calvin L. Rampton; Assistant Attorney General; Attorneys for Plaintiff and Respondent;

In the Supreme Court

OF THE

State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

PAUL OLSON,
Defendant and Appellant.

No. 6241

RESPONDENT'S BRIEF

GROVER A. GILES,
Attorney General.
CALVIN L. RAMPTON,
Assistant Attorney General.
Attorneys for Plaintiff
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STATEMENT OF FACTS

On the 30th day of July, 1939, a complaint was filed with a Justice of the Peace in Duchesne County, charging Paul Olson with the crime of carnal knowledge as follows:

> "That the said Paul Olson, at the time and place aforesaid, one Ruth Dhanens, a female over the age of thirteen years and under the age of eighteen years, to wit: of the age of fifteen years, then and there wilfully, unlawfully, and feloniously did carnally and unlawfully know and abuse, the said Ruth Dhanens being then and there an unmarried female and not the wife of the said Paul Olson."

Olson was regularly bound over to the District Court for trial and an information was filed by the District Attorney as follows:

> "Wm. Stanley Dunford, District Attorney for the Fourth Judicial District, accuses Paul Olson, that on the 30th day of July, A. D. 1939, he had sexual intercourse with the body of Ruth Dhanens, a female of the age of fifteen years and not the wife of him, the said Paul Olson."

The case came up for trial before a jury in the Fourth Judicial District Court of the State of Utah in and for Duchesne County on the 29th day of August, 1939. The testimony of all of the witnesses, including the defendant and the complaining witness, is practically the same up to the point of the commission of the act of intercourse. The evidence shows that the complaining witness, Ruth Dhanens, was a minor of the age of 15 years, and that she had resided in Vernal for some two years prior to the 30th day of July, 1939. During this time she had known the defendant, Paul Olson, only slightly. On the afternoon of July 30, 1939, Ruth Dhanens met the defendant, Paul Olson, together with one Walter Baese and a woman by the name of Violet Jensen on the street at Vernal, Utah, and Miss Dhanens was either invited, or asked that she be allowed, to accompany the group to Duchesne, Utah. The trip was made in an automobile belonging to Mrs. Jensen. The group left Vernal in the late afternoon and arrived at Duchesne some time later. Upon arriving at Duchesne, they consumed a number of glasses of beer at two different cafes located there. According to the testimony of the complaining witness, the defendant, Paul

Olson, and Walter Baese drank some gin in the automobile while they were enroute to Duchesne.

Following the drinking of beer in the cafes in Duchesne, the defendant and Ruth Dhanens left the others of the group and walked down the streets of Duchesne to an alleyway beside a building owned by the Dry Gulch Irrigation Company. The testimony of both the defendant and the complaining witness is that they entered this alleyway. Here, however, there in a conflict in the testimony. The defendant maintains that they entered the alleyway to sit down because the complaining witness was sick and that they merely sat on the weeds in the alleyway for some few minutes until she felt better.

The testimony of the complaining witness, on the other hand, which evidence was evidently believed by the jury in the case, is to the effect that while they were in the alleyway, the defendant forcibly, and against her will committed an act of sexual intercourse with her. After they left the alleyway, the defendant and Miss Dhanens rejoined the others of the group, at which time they drank more beer and after attending a movie started to return to Vernal. On the way to Vernal they stopped the automobile. Miss Dhanens and Walter Baese left the defendant and Mrs. Jensen and walked down the road, at which time, according to the testimony of the complaining witness, an act of sexual intercourse occurred between her and Walter Baese.

Upon their arrival at Vernal, the parents of Miss Dhanens, together with the sheriff of Uintah County and the night watchman at Vernal, accosted the group, and upon being told the story of the evening's occurrences

by Miss Dhanens, took her to the office of Dr. Ralph B. Hegsted, who performed an examination upon her. Dr. Hegsted testified that the vagina of the complaining witness was irritated and inflamed and that it contained live sperm cells, both of which, the doctor testified, indicated conclusively that an act of sexual intercourse had occurred between the complaining witness and some other party or parties within the preceding 24 hours.

The clothing which was worn by Miss Dhanens on the afternoon in question was introduced in evidence and the testimony of Miss Dhanens' mother was to the effect that the dress, the slip and the bloomers which the complaining witness had put on clean on the afternoon of the 30th were, on the early morning of the 31st when she was examined at the doctor's office, torn and very badly soiled.

ARGUMENT I

The defendant's first argument is in support of his first and second assignments of error which relate to the exclusion of evidence as to the reputation of the complaining witness for truth and veracity. The State recognizes the fact that this court in the case of State vs. Hilberg, 28 Utah 27, and in the case of State vs. Burns, 51 Utah 73, held, in a prosecution for carnal knowledge, that although the reputation of the complaining witness for chastity was not in issue, testimony might be given as to her general reputation for truth and veracity in the community where she resides. The statement of the trial court in this case that this is bad law and should be changed is submitted for the decision of this court without argument.

Whether or not testimony as to the complaining witness's reputation for truth and veracity should generally be received in evidence, the testimony offered in this case was properly rejected because of the fact that the witnesses alled to testify in this matter were never properly qualified. The only witness who was placed on the stand for he purpose of qualifying her testimony in this regard was . Mrs. Julia A. Lewis. She testified that Ruth Dhanens ıad lived at her place for more than a year, but had left ıbout nine months preceding the trial of the action and hat she had not been around "much" since that date. In ɔrder to qualify a witness, who testifies to the general eputation of truth and veracity of another witness, it must ɔe shown that such witness has a knowledge of the general eputation of the person sought to be impeached at a time ıear enough to the time of trial to throw some light upon he reliability of the testimony given by the witness who is ɔeing impeached.

70 C. J. 828 says in this regard:

> "The inquiry as to the character or reputation of a witness affecting credibility relates primarily to the time when he testifies. While the view has been expressed that impeaching testimony as to the character or reputation of a witness should be directed to the time of trial or of the giving of testimony by such witness, or to reasonable period prior thereto, or should be confined to the reputation of such witness at or about the time when he testifies, there is no definite limit as to the time prior to the time of trial to which the impeaching testimony may refer; the determination in this regard depends largely on the facts of the particular case."

On page 831 of the same volume the following appears:

> "The question as to what period the impeaching testimony should refer is largely within the discretion of the trial court."

In this case Mrs. Lewis's knowledge of the truth and veracity of the complaining witness, whatever it may have been, was based upon an acquaintance which ended some nine months previous to the trial. In the case of an adult whose character is matured, this would not be too remote a time from the time of trial to have some bearing on the reliability of testimony given by the complaining witness. However, it must be remembered that the complaining witness in this case is a fifteen-year old girl whose character is in a formative stage, who is developing rapidly, and in whom a change could take place in a period of nine months or a year.

Whether or not the time regarding which the testimony as to truth and veracity is being taken is near enough to the time of trial is a matter, as stated above, which depends on the particular facts of the case and upon the discretion of the trial judge. In this case the time appears too remote to cast much light upon the reliability of Miss Dhanens' testimony and the trial court was within its right in excluding such testimony on this ground, whether or not it was right in excluding it upon the ground that the reputation of the complaining witness was not in issue.

Even if the testimony of Mrs. Lewis and the other witnesses who were called to testify as to the truth and veracity of the complaining witness, but who were never qualified to testify was improperly rejected, the ruling of

the trial court in rejecting such evidence would not prejudice the substantial rights of the defendant in this case. While the only direct evidence as to the occurrence of the act of intercourse is the testimony of the complaining witness, herself, there is a wealth of circumstantial evidence which corroborates the occurrence of this act. The testimony of all the defense witnesses who testified as to the occurrences on the night of July 30, including the testimony of the defendant, himself, supports the story of the complaining witness up to and including the point where the opportunity for the commission of the act occurred. Furthermore, the fact that an actual act of sexual intercourse by some person with the complaining witness did occur, sometime during the evening or early morning, is conclusively established by the testimony of Dr. Hegsted.

The only question left open is: Did the complaining witness have sexual intercourse with Walter Baese, with the defendant, Paul Olson, or with both? Her testimony is that she had it with both. This is the story which she told the officers and the doctor on the early morning of July 31, immediately after she returned from Duchesne, and it is the story which she told on the witness stand.

That she would have invented this story on the spur of the moment and stuck to it over this length of time is unthinkable. The facts which surround the occurrence lend as much support to her story as if she were corroborated by a dozen actual witnesses to the act of intercourse. The complaining witness could not be proud of the fact that she had had sexual intercourse with two men in one evening. Every natural tendency would be to conceal the fact that she had had intercourse at all, and then when fright drove

her to reveal the facts to her parents and to the officers, her natural tendency would be to minimize the thing as much as possible and not to invent additional men who had taken advantage of her during the evening and early morning. It is even conceivable that had she had intercourse with one man she might have tried to lay the blame on another because of some attachment she might have for the guilty party; but there is no possible or conceivable motive which could have existed for her to reveal the name of the man who had taken advantage of her and then try to implicate, in addition, a man who was innocent. The credibility of her testimony does not here rely upon her character for truth and veracity but upon the facts surrounding her story. There are circumstances under which the word of even the most habitual liar cannot be doubted.

ARGUMENT II

Defendant's argument number 2 is in support of his third and fourth assignments of error. The third assignment of error relates to the refusal of the trial court to give defendant's requested instruction, number 1, which is a cautionary instruction directing the jury that in view of the type of case they should scrutinize the testimony of the complaining witness with unusual care. The fourth assignment of error charges that the trial court, if it refused the defendant's cautionary instruction number one, should have given a cautionary instruction of its own.

The matter of the need for a special cautionary instruction in cases such as the one now being considered has been considered by a number of courts in the United States,

among them this court. A few decisions, among them People vs. Benson, 6 Cal. 221, Connors vs. State, 47 Wis. 623, and Reynolds vs. State, 42 N. W. 903, have held that such a cautionary instruction should be given in cases of this kind where the prosecution relies entirely upon the testimony of the complaining witness.

The majority opinion, however, and the opinion which is followed by this court in State vs. Shaw, 59 Utah 536, and in State vs. Rutledge, 63 Utah 546, is that the general instruction given regarding credibility of witnesses is sufficient. This view is also followed by numerous other courts, among them the Supreme Court of California in People vs. Rangod, 44 Pac. 1071, and Loose vs. State, (Wis.) 79 N. W. 526. The latest expression of a court of final resort in the United States appears to be in the case of Stran vs. State (Wyoming) 252 Pac. 1030, which case cites with approval the holding of this court in State vs. Rutledge and holds that failure to give such a cautionary instruction is not error.

The defendant in his brief attempts to distinguish the case of State vs. Rutledge from the case at issue in that he claims the decision in that case was made on the basis that the State did not rely upon the evidence of the complaining witness alone but that her evidence was corroborated, whereas he claims in this case that situation does not exist. A comparison of the facts in the two cases clearly shows, however, that this attempt at distinction is not well founded. In both cases the evidence of the actual commission of the act of intercourse depends solely upon the evidence of the complaining witness. The only corroborating

evidence in the case of State vs. Rutledge is evidence of a circumstantial nature which is not nearly so strong as the circumstantial evidence which we have in this case. In that case it was shown that the defendant had courted the prosecutrix and had taken her out riding on several occasions, that he had represented himself as unmarried, that he had been seen on one occasion with his arm around the girl, that he had been seen with the girl at about the time the act had occurred, and that he had later tried to settle the matter by payment of money or by marrying the girl. In the case at bar we have the actual admission of the defendant that he was with the complaining witness at the time the act occurred at the place she claimed the act had occurred, that no one else was with them, that no one saw them, and that all of the conditions existed as alleged by the complaining witness, except as to the act of intercourse itself.

We further have the evidence in this case that the defendant had been drinking and that the complaining witness had also been drinking, and most telling of all we have the evidence given by the doctor that she actually had had sexual intercourse at about the time she claimed. Under these facts, we have in this case much stronger corroborating evidence than we had in State vs. Rutledge. In that case the court said:

> "The weight of authority is that such instructions are improper because they state no rule of law but are mere arguments and constitute an invasion of the province of the jury."

The court then cites numerous decisions from other states to support this position.

Instructions numbers 10 and 12 given to the jury by the trial court in this case fully inform the jury regarding the credibility of witnesses and regarding the degree of proof necessary to convict the defendant. Any additional truction would have been surplusage and, as stated by : court in State vs. Rutledge, mere argument.

ARGUMENT III

In his third argument, the defendant charges that the al court erred in denying the defendant's motion for a w trial on the ground that the jury had been guilty of sconduct, by which a fair and due consideration of the se may have been prevented. In support of this motion, e defendant introduced an affidavit from one of the jurors the effect that this juror had concurred in the verdict ndered in the case only because of the fact that he was in or health, and had to have a doctor's attention and could t hold out longer; but that he was not and never had been nvinced beyond a reasonable doubt of the guilt of the fendant.

It is strange, in view of the defendant's admission, that : is aware of the general rule of law which holds that a ror may not impeach his own verdict by affidavit, that he ould ever have assigned this error. This case is so clearly ithin the general rule that it requires little comment.

Revised Statutes of Utah, 1933, 104-40-2, lists among e grounds for a motion for a new trial the following:

> "Misconduct of the jury; and whenever any one or more of the jurors have been induced to

> assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance, such misconduct may be proved by the affidavit of any one of the jurors."

This statute has been interpreted by numerous Utah cases to hold that affidavits of jurors will be received to show that a verdict was reached by chance *but for no other purpose.*

See People vs. Richie, 12 Utah 180; Black vs. Rocky Mountain Bell Telephone Company, 26 Utah 451; People vs. Flynn, 7 Utah 378.

In the case of Ogden L. & I. Railroad Company vs. Jones, et. al., 51 Utah 62, the same question, with which we are here confronted, was presented. There the court said:

> "It is elementary that a juror may not be heard to impeach his own verdict. If that were permitted, one, or perhaps more, of the jurors could be found in every case who for the sake of appeasing the wrath or soothing the feelings of the losing party would disclose something, for which it could be claimed the verdict should be set aside. Indeed, a juror or even a number of them might agree to a verdict with that end in view. The law, therefore, wisely provides that a juror may not disclose facts which would go in impeachment of his verdict."

In treating the contention of the appellant that the affidavit should not be rejected because it was not objected to by counsel in the lower court, the court goes on to say:

> "The evidence contained in the affidavits, however, was not admissible upon the ground of sound public policy. The district court was, therefore,

> bound to disregard the evidence although no objection was interposed thereto by respondent's counsel. Indeed, in the case of Siemsen vs. Oakland Railway Company, the Supreme Court of California reversed an order of the trial court granting a new trial which was based upon such evidence. The Supreme Court of California held that the evidence could not be considered for the reason that it was against public policy, and upon that ground alone reversed the order granting a new trial."

Under the ruling of this court in the case of State vs. Mellor, 74 Utah 104, to the effect that the order of a trial court granting or refusing a new trial is discretionary and will not be reviewed unless such discretion is abused, there is certainly no reversable error on this point. In fact, quite the contrary, as there was not one iota of competent evidence before the court in support of this motion for a new trial, if the court had granted it, under holding of the court in Ogden L. & I. Railroad Company vs. Jones, supra, the granting of the motion would have constituted an abuse of discretion and reversable error. For other cases holding that a juror cannot impeach his own verdict by affidavit see Bryan vs. Mancrief Finance Company, (Ga.) 149 S. E. 424; Jordan vs. St. Joseph Ry. Light, Heating & Power Company, (Mo.) 73 S. W. (2d) 205; Newton vs. Brassfield, (N. C.) 152 S. E. 499; Schnalz vs. Arnwin (Ore.) 246 Pac. 718.

An examination of the record can leave little doubt of the guilt of the defendant in this case. The facts which were proved by undisputable evidence lends such staunch corroborating support to the story told by the complaining witness that the mind is forced to but one conclusion. The

defendant was given every right which could possibly be granted for him to prove his innocence, but the jury, after fair deliberation, found him guilty.

The State submits that this verdict should not be disturbed.

Respectfully submitted,

GROVER A. GILES,
Attorney General.

CALVIN L. RAMPTON,
Assistant Attorney General.
Attorneys for Plaintiff
and Respondent.