

1941

State of Utah v. John Markham : Brief of Respondent

Utah Supreme Court

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Grover A. Giles; Attorney General of Utah; Zar E. Hayes; Assistant Attorney General; Attorneys for Plaintiff and Respondent;

Recommended Citation

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6249
No. 6249

In
The Supreme Court
of the
State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

JOHN MARKHAM,
Defendant and Appellant.

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

RESPONDENT'S BRIEF

GROVER A. GILES,
Attorney General of Utah
ZAR E. HAYES,
Assistant Attorney General
Attorneys for Plaintiff
and Respondent.

FILED

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In
The Supreme Court
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State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

JOHN MARKHAM,
Defendant and Appellant.

RESPONDENT'S BRIEF

STATEMENT OF FACTS

The facts of the case are quite fully set forth in Appellant's Brief and, with a few exceptions which will be later set forth, are agreed to by the respondent. Because, however, there are some points of fact which are considered important and which are not emphasized in Appellant's Brief, and because the nature of the question raised on appeal is such that the facts are of paramount importance, and further since Appellant's Brief is typewritten, it is deemed advisable to, at least briefly, restate the facts here in printed form.

The defendant was convicted of the crime of murder in the first degree, with a jury recommen-

dation of life imprisonment. The court, however, in the exercise of its statutory judicial discretion, declined to follow the recommendation of the jury and rendered judgment sentencing the defendant to death.

The crime was committed, and all of the other acts mentioned in this statement of fact occurred, in Salt Lake City, Salt Lake County, State of Utah, except where otherwise herein specifically indicated.

The State obtained a written confession in defendant's own handwriting, (Exhibit O) and another confession by way of questions propounded by Salt Lake County Attorney Harold E. Wallace, and answers given by the defendant (Exhibit P). There was also testimony given by W. E. Eggleston, a Salt Lake City police officer, concerning several conversations had with the defendant, wherein defendant admitted the commission of the crime and described how he had accomplished it.

The State's evidence showed that the defendant, a male, 24 years of age, had worked at various times during a period of about two years from 1937 as a porter and shoe-shiner in the McIntyre Building and in a shoe-shine parlor near that building. During this period, defendant became acquainted with the deceased, J. G. Smith, who, for about five years prior to his death, was the owner and operator of a candy and cigar counter in the lobby of the McIntyre Building. On the afternoon of November 25, 1939, defendant was in the vicinity of the McIntyre Building, although he was not working there. It was during this time that he conceived the idea and formulated his plans to rob Mr. Smith. The defendant was seen leaving the McIntyre Building at about 6 P. M., on the date mentioned. From his

approximately two years' acquaintance with Mr. Smith and from his work in the McIntyre Building, defendant was well acquainted with the habits of Mr. Smith. He knew that Smith would close his stand at about 8 P. M., place the day's receipts in a money sack, place this sack in his lunch box and walk to his home in a direction easterly on South Temple Street to "J" Street and then north on "J" Street.

The robbery was deliberately and coldly planned and having determined to commit that crime, the defendant went to his home where he had something to eat and then went to the rear of his home for the particular and special purpose of searching for and obtaining a weapon. (Tr. 259). Deliberately he chose for this purpose an iron pipe, (Exhibit G) — a weapon which, if used, might easily be expected to kill. Having procured this lethal weapon, he placed it in his pocket. He then proceeded to "J" Street between 1st and 2nd Avenues, where he lingered in the darkness until about 9 P. M., when he saw Mr. Smith turn off South Temple and walk north on "J" Street. Defendant then concealed himself behind a tree. When Mr. Smith had passed slightly beyond this tree, the defendant lunged for and seized hold of the lunch box carried by Mr. Smith. The latter refused to release his hold on the lunch box and a struggle ensued, during the course of which the defendant took the iron pipe from his pocket and with it struck Mr. Smith over the head three or four times. Mr. Smith then fell and the defendant seized the lunch box and ran from the scene of the crime to a vacant lot on Sixth East Street between Third and Fourth South Streets, where he removed the money, about \$20.00, from the lunch box. Mr. Smith was picked up by two persons and taken to the Emergency Hospital,

later being removed to the Holy Cross Hospital, where he died on November 28, 1939. According to testimony of Dr. Charles F. Pinkerton, the cause of death was cerebral hemorrhage and pressure caused by a skull fracture, resulting from blows with a blunt instrument. (Tr. 193). Defendant was apprehended and at first denied commission of the offense but later repudiated his denial and signed the written confessions (Exhibits O and P) on December 2, 1939.

During the course of the trial, defendant did not deny responsibility for the homicide, and no evidence toward such denial was introduced or proffered in his behalf. In fact, his counsel frankly admitted that the homicide was committed by the defendant (Tr. 329). The evidence in behalf of the defendant related almost entirely to the background, past history and degree of mentality of the defendant. It was shown that the defendant was one of six children whose father died when the defendant was thirteen years of age. In Appellant's Brief (page 4) it is indicated that from the time the defendant's father died, defendant's mother was forced to work for the support of herself and her children, thus leaving the children, including the defendant, more or less to shift for themselves and to do as they pleased. The evidence, however, shows that the defendant continued his schooling at the West Jordan elementary school for three years after his father's death and until he was 16 years of age, and that until that time, his mother did not work for wages, except intermittently, and hence was not forced to neglect her children during that period. (Tr. 301). The defendant was taken from either the 7th or 8th grade at the West Jordan

School and placed in the State Industrial School at Ogden, Utah. (Tr. 309).

While it appears to be true that the defendant was deprived of many of the good things of life, we can find nothing in the record to show that the defendant had at any time lacked or wanted for the necessities of life, and the assertion that the defendant's life was one of want and deprivation is not warranted by the record. It is true the testimony indicated that, after his marriage, defendant's principal source of income was from shining shoes and work on W. P. A., but the amount of money received from those sources is not shown. Certainly there is nothing in the record to indicate that the defendant's family life, either before or after his marriage, was such as to cause him to consider lightly and underestimate the duties of citizenship and the responsibility and consequences incident to breaking the laws of the society in which he lived. The defendant, himself, did not contend that the robbery was planned or committed because his family was in want. He stated he did it to obtain money with which to pay for a washing machine, which he had previously purchased. The defendant remained in the Industrial School for a period of about 18 months. Shortly after his release from that institution, he got into trouble and was charged with burglary, to which charge he pleaded guilty, and was confined at the Utah State Penitentiary for six months. When released from the penitentiary he was 21 years of age. He then married and was living with his wife and two children at the time this offense was committed.

The question of insanity was not an issue in the case, and it was not contended that the defendant was incapable of having the necessary criminal in-

tent; or that he did not know right from wrong; or that he was motivated by some cause that he could not resist. (Tr. 323).

Mr. Mark K. Allen, Psychologist of the Utah State Training School and Dr. H. H. Ramsey, Superintendent of that institution, testified concerning defendant's degree of mentality. The qualifications of both of these men to testify concerning that subject is admitted. Mr. Allen uses the New Stanford Revision of the Binet Analysis Test, and previously had given this test to over 1,000 persons. According to Mr. Allen, the normal mental age of an individual twenty-four years of age, chronologically, is fifteen, and an individual, in taking this intelligence test, would have to achieve an intelligence quotient (i. q.) of 100 in order to be classed as normal. Dr. Ramsey testified that an intelligence quotient of 90 to 110 is normal. Mr. Allen gave the defendant one test and concluded that he has an intelligence quotient of 67, indicating that his mental ability, as compared with that of a normal individual was 67 percent of what it should be; that his mental age was ten; and that he would be classified as a moron. In other words, that his mental development was retarded about one-third.

In making these tests no symptoms of insanity were found. (Tr. 351). Dr. Ramsey gave the defendant no test but did spend some time with defendant in observing him, and from such observation, coupled with his knowledge of the results of the test given by Mr. Allen, reached substantially the same conclusions as did Mr. Allen. These witnesses expressed the opinion that the defendant's degree of mentality was the same on the day of the crime as it was on the day the intelligence test was given.

ARGUMENT

As a basis for appeal the defendant assigned two errors, one of which, however, was abandoned, the only assignment of error argued in Appellant's Brief being as follows:

“The trial court abused its discretion and erred in refusing and failing to follow the recommendation of the jury contained in their verdict that the defendant be imprisoned in the State Prison at hard labor for life.”

It may be here stated that the case is one of first instance in this Court bearing upon the question here presented.

Section 103-28-4, Revised Statutes of Utah, 1933, provides:

“Every person guilty of murder in the first degree shall suffer death, or upon the recommendation of the jury, may be imprisoned at hard labor in the State Prison for life, in the discretion of the court . . .”

Counsel for appellant concede that where a defendant is convicted of murder in the first degree with recommendation of life imprisonment, it is not mandatory upon the trial court to follow such a recommendation. The language of the statute above quoted is so clear that it admits of no doubt in this respect. Furthermore, this Court in

State v. Morris, 44 Ut. 31; 122 P. 380,
in commenting upon the right of the jury to make a recommendation of life imprisonment, states:

“If such a recommendation is made, the

court has the discretion to impose the death penalty or such an imprisonment.”

In the face of the clear right of the trial court in its discretion to disregard the jury’s recommendation, appellant urges that the trial court in this case abused its discretion in so doing to such an extent that this Court has the power to, and should, interfere by reversing and reducing the sentence imposed from death to life imprisonment. With regard to the power of this Court to so modify the sentence, appellant refers to

Section 105-43-3, Revised Statutes of Utah, 1933, which reads as follows:

“The Court may reverse, affirm or modify the judgment or order appealed from, and may set aside, affirm or modify any or all the proceedings subsequent to or dependent upon such judgment or order, and may, if proper, order a new trial.”

That statute, too, is clear, and the State concedes that this Court has the power to reverse or modify a judgment of a lower court, where proper legal cause exists for such reversal or modification; but it is our contention, and we sincerely and firmly urge that the power to so reverse or modify a judgment is limited to cases wherein it clearly appears from the record on appeal that prejudicial error was committed by the court below. It is the State’s further belief and contention that the exercise of a discretion specifically and clearly vested by statute in a lower court, in the manner exercised by the court in this case, is not and cannot be such an error as would warrant an interference by this Court, even though this Court might be inclined to

disagree in principle with the action of the court below.

In considering the general question of appellate review of judicial discretion exercised by lower courts, the rule is well established that an Appellate Court cannot interfere with discretionary powers of a court below and decisions made pursuant to the exercise of such powers, unless it clearly appears from the record that the trial court abused the discretion vested in it.

Brittain v. Gorman, 42 Utah 586; 113 P. 370.

As stated in

Konold v. Rio Grande W. Ry. Co., 21 Utah 379; 60 P. 1021.

where this Court was considering the refusal of the lower court to permit an experiment:

“The presiding judge exercised a discretionary power, and his decision, except in cases of palpable abuse of discretion will not be reviewed by an Appellate Court.”

See also

Jensen v. D. & R. G. R. R. Co., 44 Utah 100; 138 P. 1185.

State v. Webb, 18 Utah 441; 56 P. 159.

Flinders v. Hunter, 60 Utah 314; 268 P. 526.

In Re Yowell's Estate, 75 Utah 312; 285 P. 285.

Naisbitt v. Herrick, 76 Utah 575; 290 P. 950.

And where, in connection with a question involving an exercise of discretion, reasonable minds might

draw different conclusions, then the finding of the District Court is binding.

Knight v. Wessler, 67 Utah 354; 248 P. 132.

The Oklahoma Supreme Court, in

State v. State ex rel. Shull (1930), 286
P. 891,

defined "abuse of judicial discretion," as follows:

"Abuse of judicial discretion is a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence."

In Jaggy, et ux. v. Rooney, et ux., 112 P.
367,

the Supreme Court of Washington stated:

"The Court's action upon discretionary and advisory matters is not subject to review is this Court, since we have no way of determining the effect of such matters upon the mind of the Court, or to what extent, if any, his judgment has been influenced or based upon such matters."

Conceding the power of an Appellate Court to review and modify decisions made by a lower court in the exercise of a discretionary power, where it can be clearly established from the record that the court's decision is arbitrary and clearly against reason and the evidence, in order to determine whether or not there has been such an abuse of discretion as to warrant interference by an Appellate Court, the facts developed and adduced at the trial must be carefully and thoroughly examined. It is upon the facts that such a question must be determined. With this in mind, let us consider the cases cited and discussed in appellant's brief in the

order in which they there appear. It is believed that an examination of the cases so cited will disclose that the facts in those cases are such as to make them clearly distinguishable from the case here before this Court and to make the decisions in such cited cases inapplicable in the instant case.

Appellant's brief (page 8) refers to the case of
Fritz v. State, 128 Pac. 170,

wherein the Oklahoma Court set forth the proposition that the power of the Appellate Court to modify a sentence from death to life imprisonment is in no sense a power of commutation, and hence does not conflict with the executive prerogative of granting of clemency. There is no doubt that these two powers are, in their nature, entirely different and separate, and it is the State's belief that they should be kept separate in fact. When, upon the record, it appears that error has been committed by the court below prejudicial to the defendant's rights, it may be proper for the Appellate Court to modify a judgment. However, it seems too obvious to admit of argument that, in the absence of error of record on the part of the court below, any reduction by an Appellate Court of a sentence imposed below is, in fact, an exercise of the power of commutation, call it what you may. It is the facts in the case which must determine whether a modification of a judgment below is a proper exercise of Appellate Court power or whether such modification is, in fact, an improper exercise of the power of commutation.

With respect to the action of the Oklahoma Court in reducing the sentence in the case of

Fritz v. State, supra,

it is pertinent to note that the facts in that case were very different from those in the case now

before this Court. The words of the Court therein indicate that after considering all the evidence, the Court had some small doubt as to whether or not the defendant was actually guilty of the murder, and hence the possibility existed that an innocent man had been condemned to die. The Court said:

“We think that under all the circumstances, as shown by all the evidence, Thelma and Jeff Morgan were accomplices of the defendant and when we consider the fact that the murder of Watson occurred on September 14, and in 14 days from that time the defendant was put upon trial, and that the order appointing counsel to defend him was made only two days before the trial, and the fact that the deceased was a white man and the defendant a negro, and the further fact that although Watson, the deceased, lived until the following day, he failed to make any statement or declaration as to how his injuries were received, it is our opinion, taking all these circumstances of the case into consideration, that it would be an injustice, the Morgans having been allowed to go free, to affirm the judgment and sentence.”

In the case of *Owen v. State*, 163 Pac. 548, referred to on page 9 of appellant's brief, the Oklahoma court modified the sentence to avoid reversing or remanding the case for a new trial because of error committed in the lower court, which error was prejudicial to defendant's rights. The case, therefore, is clearly distinguishable from the instant case and is inapplicable here.

In *Chambers v. State*, 182 Pac. 714, the Oklahoma case mentioned on page 10 of appel-

lant's brief, the Court, in reducing the penalty from death to life imprisonment, stated:

“ . . . The undisputed facts are that the defendant and the deceased were at all times intimate and familiar with each other; there was no evidence of any animosity between them. While the defendant's intoxication is no excuse for the crime committed, it is a fact tending to throw light on other facts and circumstances in the case, and at most the evidence tending to show premeditated design to take life is very weak and unsatisfactory.”

There, again, we have a case where the Court after considering all the evidence expressed some doubt as to whether or not all the elements of the crime charged had been completely established. No such circumstances prevail in the case now before this Court.

In *Anthony v. State*, 159 Pac. 934, cited on page 10 of appellant's brief, the Oklahoma Court, in modifying the sentence, stated:

“It is fair inference from the facts and circumstances in evidence in this case that the defendant was provoked by the conduct of his wife, the probable effect of which conduct would be to cause their daughter to lead an immoral life, as the defendant believed. While the provocation was not sufficient to reduce the homicide from murder to manslaughter in the first degree, yet, considering the state of the defendant's mind at the time the homicide was committed, and it appearing

that the testimony of the two eye-witnesses involved inconsistencies and contradictions which it is needless to point out, we are of the opinion that the jury abused its discretion in assessing the death penalty, and that for this reason the judgment and sentence should be modified to imprisonment in the penitentiary for life, at hard labor.”

Again we have a case where the Appellate Court, after considering the evidence, indicated a doubt as to the credibility of important testimony, plus the additional element of great provocation, and hence the possibility existed that an innocent man had been condemned to die. In the case here before the Court neither of these elements are present.

In *Peters v. State*, 211 Pac. 427, cited on page 10 of appellant's brief, the facts showed that defendant had previously been convicted of manslaughter in the first degree and sentenced to ten years in the penitentiary. He was dissatisfied with that sentence and sought and obtained a new trial, the result of which was the verdict of murder and the sentence of death. In his brief, the Attorney General of the State of Oklahoma referred to these facts and recommended reduction of the penalty. Hence, here again we find extenuating circumstances and reasons for reduction of the sentence which are not present in the instant case.

It will be observed that all of the cases cited by appellant and thus far herein commented upon came from the Oklahoma Appellate Courts. It is therefore pertinent to call attention to the language of the Criminal Court of Appeals of Oklahoma in

Barnett v. State (Okla., 1923), 219 P. 726,

which is a later case than any Oklahoma case cited by appellant, towit:

“Before this Court would be authorized to modify the judgment, some substantial error of law should be shown.”

Ray v. State, 67 S. W. 553,

which is relied upon strongly by the appellant, is a Tennessee case wherein the defendant was convicted of murder in the first degree, the jury, however, finding mitigating circumstances. The court disregarded the recommendation of the jury and sentenced the defendant to death. The Appellate Court modified the judgment and reduced the sentence to life imprisonment. It is pertinent to point out, however, that in that case, the evidence showed a possibility of provocation and also the possibility that the deceased had threatened the life of the defendant.

In State v. Ramirez, 203 Pac. 279, (cited on page 12 of appellant's brief as State v Ramuez), the Idaho Court stated:

“The verdict was based to a great extent upon the testimony of one Garcia, whom the appellant charged with murder. The testimony, actions, and statements of the witness, as shown in the record, are of such character that we have grave misgivings about the infliction of the death penalty.”

Here again is an instance where, because of doubt as to the credibility of a witness at the trial, the possibility existed that an innocent man had been sentenced to death.

In the case of

Commonwealth of Pa. v. Garramone, 161
Atl. 733,

referred to in appellant's brief on page 13, the
Court said:

"It is clear that this was not an atrocious murder, planned and committed in cold blood, or one committed in the perpetration of robbery or other grave crime, though, by saying so, we do not intend to enumerate all possible examples of the class that should receive sentence of death, or otherwise attempt to distinguish one class from another; definition may come, as cases present themselves. This is the case of an industrious man without criminal record, whose character as a peaceful, law-abiding citizen was testified to by a number of persons. After he returned from his day's work and found his wife and son in the condition described, he committed the crime under the resulting provocation, and in circumstance which, we think, place him within the legislative classification, requiring the milder of the two possible sentences."

This, then, is another case where the defendant acted under the stress of great passion and provocation. Also the Court indicates that had the murder been committed while attempting a robbery, leniency would have been denied. Clearly the case differs from the one now under consideration in this Court. This same Pennsylvania Court in the later case of

Commonwealth v. Sterling (Pa., 1934), 170
Atl. 258,

where defendant committed murder while attempting a robbery, distinguished that case on the facts from

Commonwealth v. Garramone, supra, and refused to reduce the penalty from death to life imprisonment.

In the case of

Muzik v. State, 156 N. W. 1056,

the evidence upon which the Court commented showed that the defendant had, for about a year prior to the commission of the crime, been acting queerly, and that he behaved in a most unusual manner after the crime was accomplished. The Court in addition to the language quoted in appellant's brief, stated:

“Owing to the defendant's mental condition, there may be great doubts as to his responsibility for his actions at the time of the tragedy, and yet he is neither an idiot, an imbecile nor a maniac.”

There is no evidence in the case now before this Court that the defendant's mental condition was such that he was not responsible for his actions at the time the murder was committed, and neither the defendant nor his counsel contended at the trial that such was the case.

In the case of

Cryderman v. State, 161 N. W. 1045, referred to on page 15 of appellant's brief, the Nebraska Supreme Court stated, referring to defendant:

“He testified that he had been in the hospital for several weeks and was ‘taken in charge for being crazy.’ . . . The crime

was not committed for profit or gain. No rational motive appears. . . . If his mind was not wholly deranged, it was not normal, and was not entirely reliable as a regulator of his conduct.’’

In *Schwartz v. State*, 225 N. W. 766, cited on page 15 of appellant’s brief, the facts show that the defendant was a drug addict. He had been without drugs for a considerable time and his need for drugs was so intense that he was very ill. He entered a drug store for the purpose of obtaining drugs by robbery. Deceased was shot and killed during the attempted robbery. The jury imposed the death penalty. Without endeavoring to condone the use of drugs or to excuse the crime committed by the defendant, the Nebraska Appellate Court discussed in detail the great need of defendant for some drug to alleviate his suffering and the almost irresistible force which urged him to procure drugs at any cost. The Appellate Court accordingly felt the penalty was too severe and reduced it to life imprisonment. In the instant case, no such circumstances existed and no irresistible pressure compelled John Markham to rob and murder J. G. Smith.

It is believed the foregoing discussion will serve to show that the cases cited by appellant are inapplicable and not binding upon this Court in determining the question presented in the instant case. Let us, therefore, now consider further the question of appellate review of discretionary findings and acts of lower courts, and examine some cases wherein Appellate Courts have declined to interfere with such findings and acts.

With respect to the general question as to whether an Appellate Court will review or revise the trial

court's rulings concerning matters within the latter's discretion, it is stated in

Corpus Juris Secundum, Vol. 5, page 472:

“As a general rule, if there has not been a clear abuse of discretion resulting to the complaining party's prejudice, the Appellate Court will not review or revise the trial court's action or rulings with reference to matters resting in the latter's judicial discretion. Great weight is accordingly given to the judgment of the trial court on discretionary matters . . .”

(Citing numerous cases including the Utah case, *Campbell v. Union Savings & Investment Company*, 63 Ut. 366; 226 Pac. 190).

In the same works and volume at page 476, it is stated:

“In determining whether the lower court has abused its discretion the question is not whether the reviewing court agrees with the court below but rather whether it believes that a judicial mind, in view of the relevant rules of law applicable to the particular case and on due consideration of all the circumstances, could reasonably have reached the conclusion of the court below. The mere fact that the Appellate Court would have decided otherwise does not establish that the discretion has been abused, nor does a mere mistake or error of law.”

Where there is a question of abuse of judicial discretion an Appellate Court should resolve the doubt in favor of the proper exercise of the trial court's discretionary power, and the complaining

party has the burden of showing a prejudicial abuse of discretion which must plainly appear from the record. See

Wilder v. Wilder, 7 Pac. (2d) 1032; also
City of Victor, et al, v. Halstead (1928
Col.), 271 Pac. 185.

In an annotation at

89 A. L. R. 299, the following language appears:

“Before the Appellate Court is authorized to modify a judgment or conviction by a reduction of the punishment imposed, it must clearly appear that the punishment imposed is excessive or probably the result of passion and prejudice on the part of the trial jury, or else that some substantial error of law has occurred at the trial prejudicial to the defendant in the amount of punishment imposed.”

Citing Barnett v. State, supra.

The record shows that the trial court was exceptionally lenient in admitting evidence in behalf of defendant, to assure that nothing would be kept out which might possibly have a bearing upon the degree of defendant's guilt. In permitting such testimony a good deal of evidence was given concerning defendant's background, antecedent life and degree of mentality. Our law recognizes insanity as a defense to criminal acts, but there is nothing in our laws which distinguishes, for purposes of punishment, between persons of high mentality and those of low mentality, short of insanity. Any recommendation of the jury made upon the basis of defendant's background or degree of mentality

must have been based upon sympathy for him. A jury should not recommend the defendant to the leniency of the court because of mere sympathy.

State v. Lee, (Del.), 171 Atl. 195.

At Page 526, Vol. 4, Warren on Homicide,
this statement appears:

“Regarding the matter of recommending life imprisonment, the jury should consider the evidence bearing upon his guilt and innocence. Evidence relating to his past life and antecedent background should be excluded.”

In State v. Barth, 176 Atl. 183,
the Court stated:

“ . . . The evidence offered necessarily was aimed at showing that the defendant in his family life had been habituated to an atmosphere of violence, firearms and crime, and being so habituated, should not be put to death for committing murder in the attempted perpetration of a robbery. The necessary results of such reasoning is that the worse the early training, the stronger the argument for a recommendation of mercy; and the professional gangster reared and schooled in crime, perhaps convicted of crime a dozen times previously, should be spared because of an unfortunate early training, where others, more tenderly reared, go to the electric chair.”

Such an argument does not have the quality of reasonableness, good judgment or common sense. On the contrary it places a premium upon a previously bad record and strikes a blow at a funda-

mental principle of our form of government, i. e., equality of all persons under the law.

Our statute under which the defendant, Markham, was sentenced,

Section 103-28-4, Revised Statutes of Utah,
1933,

was no doubt written as it is to guard against just such a situation as existed at the trial of this case. In framing and adopting this statute, it was no doubt recognized that cases might arise wherein the jury would misinterpret the evidence or its purpose or permit mere sympathy to sway their judgment, thus causing them to recommend leniency when the evidence in the case did not warrant such a recommendation. For this reason provision was made giving to the court the discretion to determine what the sentence should be, irrespective of any recommendation which the jury might make. It is true that the jury's recommendation places a great burden upon the trial judge to give it his most careful and thoughtful consideration. But having made a thorough study of the facts and evidence of the case, and given due weight to the jury's recommendation, it is not merely the right but it is the duty of the trial judge, if he is convinced in his own mind that such recommendation is improper, to ignore it and impose such sentence as, in his best judgment, he feels proper. The statute places upon the trial court the ultimate burden of determining what the sentence shall be.

It is true that, in the instant case, the court disregarded the jury's recommendation but, there is no showing that he acted arbitrarily, capriciously, or that his decision and judgment was contrary to reason or the evidence. Hence, it is difficult to conceive how it can properly be contended that the

court erred simply because he fearlessly performed a duty placed upon him by the statute, in the manner which his judgment and conscience dictated.

Bearing in mind that, because of the nature of the question presented by this appeal, the facts are the things from which it must be ultimately determined whether or not a court below has abused a discretionary power, it is believed the Court's attention should be called to a number of cases wherein defendants have complained of excessive sentences imposed by lower courts and wherein the Appellate Courts have refused to interfere with and reduce the sentences of the trial courts; and because of the importance of the facts in determining whether there has been an abuse of discretion, we have endeavored to give a comprehensive picture of the facts in the cases cited, in addition to the rulings of the courts. For the same reason, it has been deemed advisable to cite and set forth a considerable number of cases so as to assist this Court in obtaining for purposes of comparison a more broad insight into the various circumstances and conditions under which Appellate Courts have held that the facts were not sufficient to warrant the conclusion that trial courts had been guilty of an abuse of judicial discretion.

In the case of

State v. Olander, (Iowa, 1922), 186 N. W. 53, the facts showed that the deceased, while engaged in his duty as a merchant was killed by a shot from a revolver held in the hands of the defendant while he and two confederates were perpetrating a robbery. Defendant pleaded guilty to a charge of murder and was sentenced to death. His confederates had jury trials, were convicted and given sentences of life imprisonment. The background of the defendant in that case was remarkably similar to that

of the defendant, Markham. He was 28 years old. When he was quite young his father deserted the family. When the defendant was about 15 years of age, he stole some property of small value and was sent to Industrial School, where he remained for two or three years. When paroled from that institution he worked at various places. He married and had three young children. The Appellate Court declined to reduce the sentence but concerning its power to do so, said:

“This power will be exercised only when the court below has manifestly visited too severe a penalty — one disproportionate to the degree of guilt as shown by the proof. To justify the exercise of such power, it must be made to appear that the punishment is excessive. There must be some legal duty upon which to base its action in reducing the sentence.”

In *State v. Houston*, 50 Iowa 512, defendant was convicted of murder in the second degree and sentenced to 25 years imprisonment. The victim was the defendant's father-in-law and the relationship between them had been very unfriendly. Defendant's wife went to the victim's house, where she was followed by the defendant, who was refused admittance to the house, whereupon he broke through the door and killed the victim. The Appellate Court refused to reduce the penalty imposed. Because it contains what we believe to be a good statement of the proper function of an Appellate Court in such cases, the following is quoted from a concurring opinion in the *Houston* case:

“In the absence of a jury trial and upon a plea of guilty, the duty is cast upon the dis-

trict court to fix the penalty. The penalty thus fixed in this case by the district court was warranted by the record before it. The record presented to us disclosed no mitigating facts. . . . Our jurisdiction in this case is appellate only. We are not justified in modifying the judgment below, unless there be some reason for it apparent on the record. . . . Our function is judicial; it is ours to determine the guilt or innocence of the defendant, and, if he is guilty, to apply the penal statute in such case provided. We have no function of executive clemency. Unless upon the record we can differentiate the offense therein disclosed from one of extreme cruelty, and can find in the record mitigating reasons why the extreme penalty should not in this case be imposed, then we are without authority to interfere at all with the judgment of the trial court.

In *State v. Smith* (Iowa, 1905), 103 N. W. 769,

defendant was charged with murder, entered a plea of guilty and was sentenced to death. He appealed, asserting only that the penalty was excessive. Said the Court:

“Code Section 4728 provides, in substance that whoever is guilty of murder in the first degree shall be punished with death or imprisonment for life, as determined by the court, if the defendant pleads guilty. Manifestly, a large discretion is vested in the trial court in such cases, and we should not interfere in the absence of a showing of abuse of that discretion.”

In *Alder v. State* (1932, Okla.), 12 Pac.
(2d) 545,

defendant was tried for murder, interposed the defense of insanity, but was convicted and his punishment fixed at death. He appealed, urging no error at the trial but contending that the punishment should be reduced to life imprisonment because of his mental condition. The Court declined to modify or reduce the penalty, using this language:

“Under the provisions of Section 2820 — Comp. St., 1921, there is conferred on this Court power to reverse, affirm or modify the judgment appealed from. The right of modification, however, is not unlimited. It must, as a matter of law, be within the limits of the punishment fixed by the statute for the offense for which the accused was convicted. It must further be the exercise of a judicial power, as distinguished from the executive power of commutation, reprieve, pardon or parole . . . Upon what consideration then shall this Court modify the judgment? Having regard for the law, we cannot do so for reasons of sentiment or sympathy; we can do so only if we can say judicially that under the entire record the punishment is too severe and that justice requires it be modified to life imprisonment.”

See also the later Oklahoma case,

Oliver v. State (1933), 23 Pac. (2d) 718.

In *State v. Van Waters* (Wash., 1904), 78
Pac. 897,

defendant was convicted of rape upon a person under the age of consent and sentenced to imprison-

ment for a term of 25 years in the State penitentiary. In refusing to reduce the sentence, the Court stated:

“The sentence imposed by the court, while within the limitations of the statute, seems to us unnecessarily severe in the light of the evidence. If we felt that it was within our recognized powers, we would direct a modification of it, reducing the period to five years. But our investigation led us to doubt the authority of an Appellate Court to reduce or modify a sentence which is within the discretion of the trial court to impose, and we mention the matter here in the hope it may aid the appellant in inducing the pardoning power to exercise its clemency in his behalf after he has served a reasonable time.”

See also, to the same effect,

May v. People (Colo., 1925), 236 Pac. 1022
and

Briola v. People (Colo., 1925), 232 Pac. 924.

In the case of

Marshall v. State, 74 Ga. 26,
defendant was convicted of murder and sentenced to death. On appeal it was urged that the sentence was excessive and should be reduced. Said the Appellate Court:

“It is discretionary with the judge, where the jury fail to recommend otherwise, and where the conviction is had solely upon circumstantial evidence, to sentence to death or to imprisonment in the penitentiary for life, (Code Sec. 4323) and this Court will rarely, if ever, interfere with

the exercise of this discretion. The case must be an extreme one to induce or even warrant the interference of this Court."

See also

Daniel v. State, 118 Ga. 16; 43 S. E. 861, holding that the refusal of the trial judge to follow the recommendation of the jury, that one found guilty of assault and battery with intent to murder be punished as for a misdemeanor, is not cause for a new trial, such recommendation being entirely subject to the approval of the Court under the Georgia Penal Code of 1895, Section 1036.

Lancaster v. State, 18 S. W. 777, is a Tennessee case wherein defendant was convicted of murder, the verdict of the jury being "guilty of murder in the first degree with mitigating circumstances." Under the Tennessee statute then in effect (Code Mill. and V., Section 6098) where such a verdict was given the court was authorized to "adjudge a punishment short of death." The trial court, however, sentenced the defendant to die. Appeal was taken, one ground urged being the abuse of discretion by the trial judge. The Court in refusing to disturb the sentence said:

"After properly overruling motions for a new trial and in arrest of judgment, the trial judge pronounced sentence of death upon the defendant, notwithstanding the finding of mitigating circumstances by the jury. He was authorized to do that, or to commute the punishment from death to imprisonment for life, as in his sound discretion and upon an unbiased and discriminating survey of the whole case, the hands of justice might seem to demand. (Citing

Code Section and cases.) There was no abuse of that discretion in this case. No mitigating circumstances are disclosed in the record before us.”

The Tennessee statute referred to, Section 6098, Milliken and Vertrees, Code of Tennessee, provides:

“The Court may also, where any person is convicted of a capital offense, and the jury who convicted him state in their verdict that they are of the opinion that there are mitigating circumstances in the case, commute the punishment from death to imprisonment for life in the penitentiary.”

The same Court, in

Leach v. State (Tenn., 1897), 42 S. W. 195, wherein defendant was found guilty of murder “with mitigating circumstances,” used this language:

“The jury’s finding of ‘mitigating circumstances’ devolved upon the trial judge the important duty of deciding whether the defendant should suffer the death penalty, or undergo imprisonment in the State Prison for life. Whether one sentence or the other should be pronounced was a matter of legal discretion with him. (Citing Code Section and cases). Being of the opinion that the proof disclosed no mitigation of the crime, he, rightfully, pronounced the sentence of death; and this Court, concurring in that opinion, affirms the judgment.”

See also to the same effect,

Louis v. State, 40 Tenn. (3 Head) 127.

Forrest v. State, 81 Tenn. (13 Lea) 103.

In State v. Dooley (Iowa, 1894), 57 N. W.
414,

defendant, a 16-year old boy was convicted of the crime of murder and sentenced to die. His case was appealed and among other matters his counsel urged that the penalty was excessive, considerable stress being placed upon the character, background and past history of defendant. Said the Court:

“He was not an apt pupil, and his mental development from lack of opportunity or of natural ability seems to be a little inferior to the average development of boys of his age. . . . In view of the youth of the defendant, his lack of mental development, and his almost uniformly good conduct before the crime was committed, we should have been better satisfied had the jury designated imprisonment in the penitentiary for life as his punishment; but in a legal sense, the evidence was sufficient to authorize the punishment designated and there is no sufficient ground upon which we can prevent it.”

In Muller v. State (Wis., 1932), 243 N. W.
411,

defendant was convicted of embezzlement and making false entries with intent to defraud. On appeal he contended that the sentence of three to six years which was given him was excessive but the Court declined to reduce the penalty, saying:

“Complaint is made that the sentences imposed are excessive. They are clearly within the statutes which provide punishment for embezzlement and false entries. Section 343.20 and 321.39. While there are circumstances which might have justified

greater leniency, we are without power to reduce the sentence.”

The Wisconsin statutes empower the Appellate Court, where it believes that there has been an injustice done, to

“reverse the judgment and direct the trial court to make the proper judgment in the case.”

To the same effect are

Caldwin v. Comm. (Ky., 1933), 57 S. W. (2d) 487, and

State v. Johnson, (S. C., 1930), 156 S. E. 353.

In State v. Casey (Ore., 1923), 217 Pac. 632, defendant was convicted of murder in the first degree. He appealed, admitting the evidence was sufficient to establish his guilt but called attention to the fact that another defendant was acquitted on the same evidence upon which defendant was sentenced to death. He requested that the penalty be reduced. The Court said:

“The defendant, in effect, asks us to commute his sentence from the extreme penalty of the law to life imprisonment. We are not empowered to commute or to pardon. Such authority is vested by our Constitution in the executive power, and not the judiciary. Casey’s crime has been measured by the law of the land, and that law condemns him.”

The Oregon statute, governing the power of the Appellate Court,

Section 557, Olson’s Oregon Laws, 1920, reads:

“Upon the appeal the Appellate Court

may affirm, reverse or modify the judgment or decree appealed from.”

In *State v. Schaffer* (Mont., 1921), 197 Pac. 986, defendant was convicted of sedition, the jury leaving the penalty to be fixed by the court which assessed a fine of \$12,000. Defendant appealed, contending among other things, that the penalty was excessive.

Section 8805, Revised Codes of Montana, 1921, states with regard to Appellate Powers of the Supreme Court:

“The Supreme Court may affirm, reverse or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had.”

In refusing to reduce the penalty imposed in the *Schaffer* case the Court stated:

“That the punishment placed upon the defendant a burden greater than he ought to have been made to bear is a matter we may not consider. The record being free from error, this Court has no power to revise the sentence nor to modify the judgment, though the penalty imposed may seem greater than the offender deserved. Relief can only be had through the executive branch of the government.”

To the same effect is

State v. Fowler (Mont., 1921), 196 Pac. 992.

Gurera v. United States, 40 Federal (2d) 338,

decided by the Circuit Court of Appeals, Eighth Circuit, expresses the Federal rule with regard to

reduction by an Appellate Court of a sentence of a lower tribunal, in these words:

“If there is one rule in the Federal criminal practice which is firmly established, it is that the Appellate Court has no control over a sentence which is within the limits allowed by statute.”

The final case to which we desire to call the Court’s attention is:

State v. Junkins (1910, Iowa), 126 N. W. 689,

wherein defendant was convicted of murder in the first degree and sentenced to die. In appealing to the Iowa Supreme Court, defendant’s counsel contended that the punishment was too severe and limited their plea to a request for reduction of the sentence to life imprisonment, the argument urged in support thereof being that defendant was a degenerate who, because

“of a defective organization moulded by pre-natal limitations and developed in vicious environments for which he is not responsible, is also incapable of appreciating moral or social obligations.”

Because the contentions of the defendant’s counsel in that case are so similar to those of counsel for appellant in the case now before this Court, and because the views of the Iowa Court coincide so closely with the contentions and belief of the State in this case, I quote at length from the decision of the Court:

“Nor does the evidence make such a showing of appellant’s defective mental and

moral capacity as to permit this Court to interfere with the verdict. He had received some degree of education and was able to read and write. He appears to have known how to perform acceptable manual labor when disposed to do it. While a slave to drink and drugs, his faculties were not so obscured on the evening of his awful crime but that he remembered and related the circumstances attending it, and the disposition made by him of the booty taken from the body of his victim. It may be, as counsel suggest, that he is the natural and inevitable product of 'Smoky Row' and the slums of the city . . . As now constituted, the law ordinarily observes only the overt criminal act of the rational individual and punishes it without attempting to trace the criminal impulse or inclination to its origin. People are born and reared under circumstances varying from wealth, comfort and wholesome examples and influences on the one hand, to poverty, misery, and surroundings of the most unfavorable and corrupting character on the other, but all are made subject to the same law and each must render to it the same measure of obedience. This is so because such are our human limitations that a finer discrimination and a juster apportionment of responsibility is apparently impossible, until we have reached a higher plane of civilization than has yet been achieved. The appellant has been fairly tried under the law as it exists, and we find nothing in the general merits of the case as disclosed by the record which

authorizes us to disturb the verdict or judgment.”

That the Iowa Supreme Court has the power to reduce punishment inflicted by the district court is asserted by that Court in

State v. Allen & Allen, 32 Iowa 248.

State v. Freeman, 27 Iowa 333,

in both of which cases the Court refused to reduce the sentences imposed by courts below. See also

State v. Wilmoth, 63 Iowa 380.

State v. Davenport, 149 Iowa 294.

State v. Nolte, 218 N. W. 144.

State v. Bamsey, 223 N. W. 873.

wherein the Iowa Supreme Court refused to reduce punishments imposed by lower courts.

The case here before this Court then resolves itself simply into this situation:

Appellant, John Markham, a man whose degree of mentality may be below normal, deliberately planned to rob the deceased, a man whom he had known for some time and with whom his relations, so far as the record shows, were friendly. Defendant had no provocation to commit the crime, was under no irresistible pressure to do so, and had no motive except to enrich himself. He armed himself with a lethal weapon — an iron pipe — so that he was prepared to kill if necessary to the accomplishment of the robbery. There is no pretense that he armed himself for protection. His purposes were wholly aggressive. The robbery was perpetrated, though with some difficulty, during the course of which defendant did murder his victim.

Section 103-28-3 Revised Statutes of Utah,
1933,

provides that every murder committed in the perpetration of or attempt to perpetrate any robbery is murder in the first degree.

Section 103 28-4, Revised Statutes of Utah,
1933, provides that:

“Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the State prison for life, in the discretion of the court. . . .”

So that in the last analysis, it is clearly and unmistakably the province of the trial judge to determine what the sentence shall be, regardless of the recommendation of the jury. The defendant admits this right exists in the trial judge but he comes before this Court and says, in effect:

“I killed a man while in the perpetration of a robbery; a jury found me guilty of the crime of murder and recommended life imprisonment. But the judge, in exercising a right given him by statute, sentenced me to die. If I were a person of normal and average intelligence, then it would be proper that I die for my crime. I am not insane; I was not compelled by any irresistible force to commit the crime; I knew the difference between right and wrong; but I am not quite so bright as the average individual. Hence, I should not suffer a penalty so severe as death, and the action of the trial court, which would have been proper if I were of normal

mentality, shows such an abuse of judicial discretion as to amount to error, warranting interference of this Court.”

It is our sincere belief that there is nothing in law nor in common sense to support such a contention of the defendant Markham. Defendant asks this Court to be merciful, where he showed no mercy for his victim or his victim's family. However defective he may be in the attributes which make up a normal human being, he is not so lacking in capacity to distinguish between right and wrong or in power to resist the pleadings of criminal impulses as to justify a mitigation of the punishment which would justly be imposed upon him if he were the equal of the average man in respect to those qualities. If punishment by death may ever be justified, a more fitting case for such punishment than the one before this Court is difficult to imagine.

The case is one wherein the trial judge, after carefully considering the facts and evidence produced at the trial, concluded that the recommendation of the jury was improper and in the exercise of a discretion specifically given him by statute, passed a sentence contrary to such recommendation. It must have been a difficult thing for the court to do. Perhaps this Court might not have done the same thing under similar circumstances, but there is nothing in the record to show that the court abused its discretionary powers by acting arbitrarily, capriciously and without reason, or contrary to the evidence in the case. It is, therefore, the con-

tention of the State, which we believe is abundantly fortified by the record in this case and the rules laid down in the cases referred to in this brief that it is not a matter with which this Court can interfere.

Accordingly, we respectfully submit that no error was committed by the court below; that this Court cannot properly disturb the judgment of the court below; and that such judgment and sentence should be affirmed.

Respectfully submitted,

GROVER A. GILES,
Attorney General of Utah
ZAR E. HAYES,
Assistant Attorney General
Attorneys for Plaintiff
and Respondent.