

1941

The State of Utah v. C. H. Chealey : Brief of Appellant

Utah Supreme Court

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IN
THE SUPREME COURT
OF THE
STATE OF UTAH

THE STATE OF UTAH,

Plaintiff and Respondent

VS

C. H. CHEALEY,

Defendant and Appellant

APPELLANT'S BRIEF

Appeal From the Third District Court of
Utah, for Salt Lake County
Honorable Will L. Hoyt, Judge

J. LAMBERT GIBSON
CHARLES WELCH, JR.

Attorneys for Defendant and
Appellant.

FILED
JAN 21 1941

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	Page
1. STATEMENT OF THE CASE	1
2. COMPLAINT	2
3. STATEMENT OF POINTS ARGUED	3
4. ARGUMENT	5
(a) ON CHALLENGE OF JUROR	5
(b) MOTION FOR DISMISSAL FOR LACK OF CAUSAL CONNECTION	10
(c) MOTION FOR DIRECTED VERDICT	14
(d) OBJECTION TO TESTIMONY OF WIT- NESS WILLIAMS	16
(e) ON ADMITTING IN EVIDENCE STATE'S EXHIBIT "A"	18
(f) THE CONVERSATION BETWEEN WITNESS SMITH AND KINLEY WAS HEARSAY AND SHOULD NOT HAVE BEEN ADMITTED	19
(g) THE COURT ERRED IN REFUSING TO GRANT THE DEFENDANT'S PROPOSED INSTRUCTION NUMBER TWO	20

(b) THE COURT ERRED IN REFUSING
TO GRANT DEFENDANT'S PROPOSED
INSTRUCTION NUMBER THREE

22

(1) THAT THE COURT ERRED IN RE-
FUSING TO GRANT DEFENDANT'S PRO-
POSED INSTRUCTION NUMBER FOUR

23

TABLE OF CASES

	Page
STATE VS HILL 23 Utah 541, 63 Pac 494	7
STATE VS LINGMAN 54 Utah 221, 236 Pac 425	8
STATE VS HUFFMAN 89 Mont 181, 296 Pac 789	8
STATE VS ASSHALL 73 Mont 24, 235 Pac 712	9
PORTER VS STATE 100 Ind. 218, 70 N E 129	13
PEOPLE VS BARNES 112 Mich 127, 143 N W 400	14
STATE VS LINGMAN 97 Utah 180, 91 Pac 2nd 457	14
STATE VS LINGMAN 97 Utah 180, 91 Pac 2nd 457	20
STATE VS LINGMAN 97 Utah 180, 91 Pac 2nd 457	22

STATUTES AND TEXT BOOKS

Page

STATUTES OF THE STATE OF UTAH--

Revised Statutes, 1933,

Section 101-1-10 7

Revised Statutes, 1933,

Section 103-1-19 10

20 CORPUS JURIS, PAGE 1150 10

JONES CONCERNING THE EVIDENCE, 368 17

20 CORPUS JURIS, 1150 22

BLASPHEMY CYCLOPEDIA OF AUTOMOBILE

LAW AND PRACTICE, PAR. 371, PAGE 48 25

IN THE SUPREME COURT

OF

THE STATE OF UTAH

THE STATE OF UTAH,

Respondent,

vs

Case No.

C. A. CHURLEY,

Appellant

Appeal from the District Court of the Third
Judicial District of the State of Utah, within
and for Salt Lake County.

WILL L. HOYT

A P P E L L A N T ' S B R I E F

J. LAMBERT GERRON - CHARLES WELCH JR.

ATTORNEYS FOR APPELLANT

OPENING BRIEF OF DEFENDANT AND APPELLANT

I

STATEMENT OF THE CASE

The appellant was charged in the Information with the crime of involuntary manslaughter, said alleged crime arising out of the operation of an automobile; to which charge the appellant entered a plea of not guilty; the appellant was charged by the State with operating a motor vehicle in a northerly direction near the Draper crossroads on U. S. Highway number 91. The evidence tended to show that the defendant had picked up certain hitchhikers, among whom was the deceased, who was riding in the bed of the truck which defendant was driving; that while so driving, the defendant along with another occupant of the car drank some alcoholic beverages; that as the car approached the above mentioned place, the defendant ran his car off the road to the right, the defendant claiming that this was done to avoid a head-on collision and in doing so overturned the truck throwing the deceased against a telephone pole, the resulting impact causing the death of the deceased.

The case came on regularly for trial on the twenty second day of January, 1940, before the Honorable Will L. Hoyt, District Judge. The jury after hearing the evidence and considering the same brought in a verdict of guilty of the crime charged in the information. Thereafter, appellant was sentenced "to imprisonment in the County Jail, of Salt Lake County for a term of one year, "provided however that there be a stay of the last four months of the sentence, "subject to the further order of the Court." The appellant appeals from such judgment and conviction.

II

COMPLAINT

The complaint, omitting the title of the Court and cause and preliminary matters reads as follows, to-wit:

"That the said C. M. Schooley, at the time and place aforesaid, killed Earlan Junior Kofold without malice; contrary to the provisions of the Statute of the State aforesaid, in such cases made and provided, and against the peace and dignity of the State of Utah.

III

The appellant relies upon the following errors alleged to have been made by the Trial Court during the conduct of the trial below:

A. That the Trial Court erred in refusing to disregard appellant's challenge for cause against Edwin Bliss, juror, after the said Edwin Bliss had expressed a prejudice and bias towards drinking of intoxicating liquors when there occurred an automobile accident in which intoxicating liquor was involved.

(Trans 62-67, Abs. 7)

B. That the Trial Court erred in denying the motion of the defendant for the dismissal of the case at the conclusion of the State's evidence for the reason that there was no causal connection shown between any unlawful act and the death of the deceased.

(Trans. 149, Abs. 39)

C. That the Trial Court erred in refusing the defendant's motion for a directed verdict at the end of the case for the reason that there was no causal connection shown between the drinking and the accident which resulted in the death of the deceased, and

once there was no joint act or intent or act of
negligence as is required by the law of the State
of Utah. (T 137 - A 60)

D. That the Court erred in permitting the
witness Leroy D. Williams to testify as an expert.
(T 131 - A 22)

E. That the Trial Court erred in admitting
into evidence State's Exhibit A over objection.
(T 144 - A 37)

F. That the court erred in overruling the
defendant's objection to the conversation between
Luther L. Smith and Leta Kinney at a time when the
defendant was not present, for the reason that said
conversation was hearsay as to the defendant.
(T 137)

G. That the Trial Court erred in refusing to
grant defendant's proposed instruction regarding
the term "ALIBI NEGLIGENCE."

H. That the Trial Court erred in refusing
to grant defendant's proposed instruction number
3 regarding proximate cause.
(T A 62)

I. That the Trial Court erred in refusing to
grant defendant's proposed instruction number 4

regarding the emergency rule, which is as follows: "If the jury finds that the defendant acted as a reasonable prudent man would act under the circumstances to avoid an accident then he is not liable for the unforeseen consequences of his act and is not guilty." (T 62)

IV

ARGUMENT

The above set out assignments of error upon which the appellant relies will be discussed in the sequence heretofore given.

A

THAT THE COURT ERRED IN REFUSING TO DISMISS THE JURY, AGAIN, AFTER ON CHALLENGE FOR CAUSE.
(T 62-7 - A 97)

The situation that brought about the challenge was as follows: The jury had been questioned by the Court when J. Lambert Gibson, one of the appellant's attorneys asked the following question:
(T 62)

MR. GIBSON A: I would like to have another question asked, whether they have any prejudice in or
itself to a man taking a drink, or any religious

scruples against it."

THE COURT: You have heard the question stated by counsel, whether any of you do have an religious scruples or strong antipathy against a man taking a drink of liquor.

A JUROR: (This man was Juror Edwin Bliss, see T. page 67.) I would if an automobile accident was involved, that was relating in any way to an automobile accident, I would be very strong against it, not a religious matter, otherwise.

THE COURT: Do you mean by that if the evidence in this case showed that a man, although he had taken a drink or two of beer and was not in any way intoxicated, would you still have a strong antipathy against the habit of drinking, so that it might influence you, although you believed from the evidence that his faculties were not disturbed or upset. Any of you.

A JUROR: I distinctly believe a man should not drink that drives an automobile.

Following the above questions and answers, Mr. Midgley was excused from the jury for stating a definite prejudice. Counsel then asked that Mr.

Bliss be excused. Mr. Hawlings resisted the challenge. Mr. Bliss then in contradiction with his previous answer said that he would not be prejudiced. The challenge was refused. (T 65-7)

Juror Bliss clearly indicated in his answer to the first questions propounded to him that he was biased to the extent that he could not fairly consider the evidence presented before the Court. The situation comes clearly within 105-31-13, Revised Statutes of Utah, 1933, the subdivision relating to when jurors may be challenged for cause for indicating actual bias as follows:

"A particular cause of challenge is:

(1) For the existence of a state of mind on the part of the juror which leads to a just inference in reference to the case that he will not act with entire impartiality, which is known in this code as actual bias."

Mr. Bliss had formed the opinion prior to trial that he could not give a fair decision if there had been an automobile accident in which the drinking of intoxicating liquors was an element.

Utah 541, 62 Pacific 494, which holds that a juror was properly excused upon a showing that he had formed an opinion of the merits of the case.

In the case of State of Utah vs Morgan, 54 Utah 225, 236 Pacific, the subject of actual and implied bias is discussed at length and supports appellant's contention that Juror Bliss should have been dismissed because of the statements he made in response to the first questions propounded to him by the Court.

In the case of State of Montana vs Huffman, 89 Montana, 194, 296 Pacific 789, at page 790, the Court discussed the point of a juror admitting bias and prejudice in the early questioning of the juror and then under later questioning stated that he, juror, could and would consider the evidence impartially. A portion of the decision is quoted:

"Further, the trial court is the judge of the weight to be given to the testimony adduced on a voir dire examination, and if the trial Court has any doubt as to the existence of such a state of mind as would disqualify a juror, the court should sustain a challenge to such a juror in the interest

of justice (State v. Russell, 73 Mont. 240, 235 P 712), and, where a juror admits bias, his subsequent statement that he can consider the evidence impartially should be received with caution, for, "Even though a juror be biased, he will, it is said seldom admit inability to act impartially" (18 Cal. Jur 439, and cases cited.); on the record, we are of the opinion that the court properly exercised its discretion in excusing juror Boslaugh."

Juror Bliss had exhibited such bias that he most certainly could not have considered the case impartially. The situation presented before the Court was exactly the same as was presented before the court in the case of State vs Huffman supra. The denial of the challenge for cause made it necessary that juror Bliss be excused from the jury by one of the defendant's peremptory challenges. This was prejudicial to the defendant inasmuch as the peremptory challenge so used might have been used otherwise.

WAS THE COURT ERRING IN REFUSING MOTION FOR DISMISSAL FOR LACK OF CAUSAL CONNECTION BETWEEN UNLAWFUL ACT AND DEATH OF DECEASED.

The appellant contends that to convict him of involuntary manslaughter the state must show that, "death must have been the natural and probable consequence of the unlawful act, and the act the proximate cause," (39 Corpus Juris Page 1150) of the death of the deceased, Harlan Kofold.

No place in the State's evidence does it appear that the appellant had not been able to handle the truck in a proper manner, neither is there any evidence to show that the appellant was drunk or under the influence of liquor prior to the time of the accident.

Le Roy High, the boy who rode the truck from Cove, Utah to the place of the accident was not questioned by the prosecuting attorney on the matter of the appellant's drinking or on his ability to drive the truck. (T 78-22, Abst. 11-13)

The testimony of Donald Beek fails to show that the appellant acts a far more than normal though

it did show that the appellant imbibed some liqu

MR. GIBSON asked the following questions on cross examination, concerning the appellant's actions immediately following the accident. (Trans. 95)

Q. Did he seem anxious about how you were feeling at all?

A. I believe he acted like it.

Q. He seemed to be didn't he?

A. Yes.

The only other testimony on this point was the testimony of the investigating officers.

This testimony is in conflict.

Mr. Scheib in response to questions propounded by Mr. Rawlings, the District Attorney, states that he had a conversation with the appellant at the County Jail and further testified as follows:

A. "yes, sir, I talked to him when I got to the County Jail. It was asked if I knew him; knew who he was. I said, yes, that I knew him. I said his name, then I talked to him. I asked him a few question of him, he was very incoherent; he couldn't talk very plain; he couldn't hold himself very erect, he was very relaxed; he had a glassy stare in his eyes, and was very obviously drunk." (T 122-123.)

Subsequently, witness Scheib (T 102-7) stated appellant gave mixed up and incoherent answers.

The witness, Kinney, another County Officer who has with Mr. Scheib at the County Jail at the time above mentioned (T 103) testified as follows on cross examination:

Q. At the time you talked to the defendant how many times did you have to repeat the questions to him?

A. I don't know--there was just one point on which he had some difficulty.

Q. Otherwise he could give you coherent answers?

A. Yes, I understood him perfectly.

(T 102-7, A 60.)

The evidence as set out above did not show that the appellant was drunk. The investigating officers who saw and interviewed the defendant soon after the accident gave contradictory statements as to the appellant's condition and reaction. Mr. Kinney said that he was coherent, that the he understood

him perfectly. Donald Red, stated in substance that the appellant seemed anxious about him, which is the action of a normal man and not the action of one so intoxicated that he would run a truck off the road without reason.

The state did not show by the time and State rested that the death of Harlan Kofold was a "natural and probable consequence of the unlawful act, and the proximate cause."

In the case of *Wetter vs State* 162 Ind. 213-70 N.E. 129. The defendant carried a gun contrary to statute. He got into a scuffle with his friend. The friend was killed by the discharge of the gun. The defendant was convicted of involuntary manslaughter. The Supreme Court in the State of Indiana said (at Page 131) "It is undoubtedly true as a general rule of law, that a person engaged in the commission of an unlawful act is legally responsible for all of the consequences which may naturally or necessarily flow or result from such unlawful act." The Indiana case was reversed. Since the death was not "a natural or necessary result." In the case at hand, the death of Harlan

Kofold, ruling on the bed of the appellant's
crucial was not a "natural and necessary result"
of the previous acts of the appellant.

See also the case of People vs Barnes, 182
Mich, 179, 140 N. W. 400. In the case the defen-
dant drove at a greater speed than was allowed
by law. His automobile ran over and killed a
person who was in the street. The defendant was
convicted of involuntary manslaughter. This
case was reversed by the Supreme Court of Michigan
on the ground that death did not necessarily
ensue as a direct and natural result.

See also case of State vs Lingman, decided
by the Supreme Court of Utah on June 5, 1939,
97 Utah Reports, page 180, 92 Pacific 2nd 457.
This case will be referred to under later sections.

C

THAT THE COURT ERRED IN REFUSING THE DEFEND-
ANT'S MOTION FOR A DIRECTED VERDICT.

(T 197 A 60)

Counsel for the defense moved after all the
evidence was in for a directed verdict in two

grounds, to-wit:

1. That there had been shown no causal connection between the drinking on the part of the appellant and the death of Harlan Kofold.

2. That there was not shown any joint act and intent, or criminal negligence as is required by the laws of the State of Utah.

1.

Lack of causal connection

Consideration was given to this point under (c) supra. There was no further testimony given by the defense to substantiate the State's position that the accident was caused by the drinking of the appellant prior to the accident. Evidence presented by the defense tended to show that the defendant turned off the road to avoid an oncoming vehicle. See Section I ante. Also T 100 A 23.

(T 104 A 41)

2.

Lack of a showing of joint act and intent or criminal negligence.

The necessity of a union of act plus intent or criminal negligence is fundamental in criminal law.

The provision in our Utah Code is as follows:

Revised Statutes of Utah 1933 1-5-1-19, "In every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence."

In this case there was not enough evidence to show that the appellant was drunk. There was no evidence of speeding or other negligent act. The evidence presented by those who were in the cab of the truck (the only witnesses who actually saw the whole of the accident) was to the effect that the defendant and appellant acted reasonably to avoid a head-on collision with an oncoming car.

See the discussion under I, also T 130 A 32.

(T 14 A 41)

D

THAT THE COURT ERRED IN ADMITTING THE WITNESS
LE ROY D. WILLIAMS TO TESTIFY AS AN EXPERT ON
HANDWRITING FOR THE REASON THAT HE WAS NOT PROPERLY
QUALIFIED AS AN EXPERT ON HIS OWN TESTIMONY. (T 191)

The appellant contends that Le Roy Williams
by his own testimony disqualified himself as an
expert in handwriting, and so his testimony in

which he proports. to identify the handwriting on the State's proposed exhibits E, F, and G, should not have been admitted.

MR. GIBSON on voir dire examined the witness as to his qualifications. The questions and answers were as follows: (T101 A 22-23)

Q. Mr. Williams, what was your occupation before four years ago when you started to work for the Liquor Control Commission?

A. Traveling salesman.

Q. Have you gone to school or taken any course of study in handwriting?

A. No, I never had any course at the university. I had occasion to use it very extensively when I had charge of the files for the U. P. Railroad for six years.

Q. You had no special training, just picked it up, and say this is the same, or isn't the same writing?

A. Yes.

Jones Commentaries in Evidence, page 388, quotes Mr. Justice Lee in Jones vs Tucker 41 N. D.

546 "An expert must have been the subject upon w.
he gives his opinion a matter of particular, study,
practice, or observation, and he must have part-
icular and special knowledge on the subject."

It is apparent from the answers witness made
to the questions propounded to him that he did
not have "particular and special knowledge on
the subject."

E

THAT THE COURT ERRED IN ADMITTING INTO EV-
DENCE STATE'S EXHIBIT "A" OVER OBJECTION.

(T 14: A 77)

The court admitted into evidence a bottle
of whisky found yards away from the accident in
a beet field. The only evidence tending to tie it
with the accident is the testimony stating that
the defendant had purchased that brand of liquor
and the testimony of the witness Bjoblon who
stated that he saw a bottle of whiskey at that
accident that looked like Exhibit A but he didn't
know whether or not it was the same bottle. This
is not enough of a connection to tie Exhibit A
with the accident. There are thou ands of bottles

of Gold and Whiskey should in this State. No instruction was given concerning the weight the jury should place on the evidence so admitted.

(T 144 A 3)

P.

THAT THE COURT ERRED IN OVERRULING THE DEFENDANT'S OBJECTION TO THE CONVERSATION BETWEEN LUTHER M. SMITH AND LOTE KINNEY AT A TIME WHEN THE DEFENDANT WAS NOT PRESENT, FOR THE REASON THAT SAID CONVERSATION WAS HEARSAY AS TO THE DEFENDANT.

(T 176)

Any conversation had between the witness Luther Smith and Lote Kinney in the absence of the defendant was hearsay. That is elementary law. The only excuse for admitting such conversation into evidence is that it comes within one of the exceptions to the hearsay rule. The state did not claim to be using this testimony as such exception but for the purpose of impeaching the witness Luther M. Smith. No attempt was made to try Smith for perjury, nor was there any intention to do so. The only reason the State followed

this line of reasoning was to discredit the defendant and to make him responsible for the witness's statements.

(T 167)

0

THE COURT ERRED IN REFUSING TO GRANT
DEFENDANT'S PROPOSED INSTRUCTION NUMBER TWO.

(T. 141 A 61). The written instruction which
was requested is as follows:

"You are instructed that the term, Criminal
Negligence, under the laws of the State of Utah
does not merely mean the failure to exercise
ordinary care or that degree of care which an
ordinary prudent person would exercise under
like circumstances. It means gross negligence.
It is such negligence as shown a to a reckless
disregard of the consequences and of the rights
and safety of others." (A 86).

The appellant contends that the above pro-
posed instruction is clearly within the court's
ruling in the case of State vs. Lingman, decided

97 Utah Reports 1st, 2d Pacific 2nd 457 at
Page 201, Utah Reports.

The Supreme Court in instructing the lower Court as to the proper instruction in the Linman case said the following: "In consequence the instruction of the Court on this question in this case may be substantially as follows: If the jury find that Mrs. Layton was killed by the impact and the impact was caused by the driving of the defendant in a reckless manner or with reckless disregard for the safety of others as charged" in the information, then such driving being unlawful and in violation of the provision of Title 57 as set forth sustains a conviction of manslaughter." The underlined portion in the quotation is ours.

The Court in the same case at Page 198 Utah Reports said "We think the unlawful act, that is the infraction must be done in such a manner as to more than constitute a mere thoughtless omission or slight deviation from the normal prudent conduct. It must be reckless or in marked disregard for the safety of others. The underlining is ours.

The Court will observe that some of the wording in the proposed requested instruction is identical to the wording of the Court in the above quotation.

THAT THE COURT ERRED IN REFUSING TO GRANT
DEFENDANT'S PROPOSED INSTRUCTION NUMBER THREE

The written instruction which was requested is as follows: "You are instructed that in order to find the defendant guilty, you must find that the death was the direct and proximate result of the criminal negligence of the defendant."

(A 97)

The appellant contends that the proposed instruction is within the language of the Kingman case 97 Utah Reports 150, Pacific 2nd 457.

See also on this point 2d Corpus Juris 1150 and cases cited.

The author of Corpus Juris at page 1150 says "Death must have been a natural and probable consequence of the unlawful act and the act of

see also in this connection complete discussion under section "1" as it is our opinion that both instructions are closely related, and the discussion is applicable under this section also.

The burden was on the State to prove that the drinking which the defendant had been doing prior to the time of the accident was what caused him to drive the truck off the road.

This, the State wholly failed to do. No evidence of bad conduct or poor driving on the part of the defendant was presented. The jury should have been instructed under proposed instruction number "1" or some similar instruction so that it could have considered the possibility of something other than the defendant's drinking, being the proximate cause of the accident.

I

THAT THE COURT ERRED IN REFUSING TO GRANT
DEFENDANT'S PROPOSED INSTRUCTION NUMBER FOUR.

The written instruction which was requested is
as follows:

"If the jury finds that the defendant
a reasonable prudent man would act under the cir-
cumstances to avoid an accident then he is not lia-
ble for any unforeseen consequences of his act and is
guilty." (A 97)

The appellant contends that the instruction
requested in a statement of the law of ordinary
negligence. That instruction as the same is predicated
on an automobile accident and has a relation of the
cause of the accident was given by the defendant
while he testified on his own behalf, and was sub-
stantiated by the testimony of the man who occupied
the front seat of the truck with the appellant at
the time of the accident, that the jury should have
been instructed as requested so that it might have
properly considered the explanations given by the
defendant and the witness. The testimony of the
defendant and the appellant on the point involved is
as follows: (T 180)

A. Well, just before I approached the Draper
Crossroads there was a large truck coming down the
highway, and all at once there was a car shot out
from behind the truck directly in my line of traffic

It was either a matter of hitting the truck head-on or going off the side into the narrow pit, and I chose to go off the road.

(T 13 A 52)

The testimony of witness Luther Smith is in explaining how the accident occurred as follows:

Q. Did you see what caused the accident?

A. Yes.

Q. What was it?

A. It was a truck coming towards us and a car come around the truck, a car that had a California license.

Q. You say there was a car coming south.

A. It was a truck.

Q. A truck coming south, and there was a car came around the truck?

A. Yes.

(T 134 A 41)

See also the cross examination of the witness on page 156 and 157 of the transcript.

If the appellant in turning off the road acted as a reasonable prudent man in doing so then he's not

was not a proximate cause of the death of the deceased. The jury should have been instructed to consider the point. The failure to so instruct the jury tended to prevent the jury from considering the appellant's only defense.

See Blackfield's "Cyclopedia of Automobile Law and Practice Volume 1 Paragraph 671, Page 48 on the question of the legal responsibility of a driver of an automobile acting under the "emergency rule."

Respectfully submitted,

J. LABELLE GIBSON

CHARLES BOLCH JR.

Attorneys for Carroll

and Chealey, Defendant

and appellant.