1948

The State of Utah v. Ivella Hutchison : Brief of Respondent

Utah Supreme Court

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7177

In the
SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

-vs-

IVELLA HUTCHISON,
Defendant and Appellant.

Case No. 7177

Brief of Respondent

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STATEMENT OF THE CASE

This case is a companion to Case No. 7176, State of Utah vs. Howard S. Byington. Upon stipulation of counsel, and good cause appearing therefor, an order was

entered by the Chief Justice, permitting consolidation of the cases for argument before this Court.

The Appellant, Ivella Hutchison, having been tried before the District Court of the First Judicial District, County of Cache, State of Utah, was found guilty by verdict of jury of Perjury in Second Degree, fined $250.00 and sentenced to 90 days in the county jail,-the sentence to be suspended upon payment of the fine. Appellant has requested that this Honorable Court set aside the verdict and sentence and that the fine be refunded to her.

Under Section 103-43-1.10 U.C.A. 1943, it is provided in part:

> "A person is guilty of perjury who (1) Swears ***that he will testify ***in or in connection with, any action ***in which an oath is required by law ***and who in such action, ***willfully and knowingly testifies, ***any matter to be true which he knows to be false."

Section 103-43-10 U.C.A. 1943 reads in part as follows:

> "A person is guilty of perjury in the first degree who commits perjury as to any material matter in or in connection with any action or special proceding, ***."

Perjury in the second degree is designated by the Legislature, in Section 103-43-11, as follows:

> A person is guilty of perjury in the second degree who commits perjury under circumstances

not amounting to perjury in the first degree."

The record discloses, by State's exhibit "C", that a Decree of Divorce was entered on the 9th day of May, 1947, absolving the bonds of matrimony existing between one Howard S. Byington and one Lavina Byington; and that by the provisions of the Decree, Mrs. Byington was awarded custody of the four children of the parties and $50.00 per month for their support and maintenance, payable on the 20th day of May 1947 and each month thereafter. A further sum of $1.00 per year was awarded to Lavina Byington as alimony, payable June 1, 1947 and annually thereafter.

State's exhibit "C" further reflects that on or about the 26th of November 1947, Lavina Byington filed an affidavit in which she set forth as a fact, the failure of Howard S. Byington to make the payments as ordered and further that "His failure to pay said sums has been willful and intentional." Lavina Byington, in the aforesaid affidavit prayer that the Court enter an order directing him to show cause why he should not be punished for contempt for failure to make the aforesaid payments. The order was issued by the Court on or about the 26th day of November 1947 and was regularly heard by the Court on the 8th day of December. At the hearing Lavina Byington appeared personally and was represented by her counsel. Howard S. Byington appeared without counsel. The Court heard the testimony of Lavina Byington as to her information concerning Howard S. Byington's income since the entry of the

decree. Byington also was questioned at that time by counsel for Mrs. Byington and by the Court in respect to his earnings and failure to pay alimony.

It was during the course of these proceedings on the Order to Show Cause that Byington, among other things, was questioned as to whether or not he had remarried. Byington answered "yes." He further testified that he was married in the state of Montana but that he did not know of the exact time or place. His recollection concerning the marriage was so hazy that the Court asked:

> "Where is your wife?"
>
> Answer: "Home."
>
> Court: "Hasn't she been able to tell you where you got married?"
>
> Answer: "Well, I guess she could."
>
> Court: "Then I'm going to give you just about five minutes to get down thre, Mr. Byington, and bring her back here. We'll take a recess for about ten minutes so far as this case is concerned, and you may go with the Sheriff and bring her back."

(Page 56, State's Exhibit "B")

Byington returned to Court with the Appellant who when called to the stand testified as follows:

> "Q What's your name?
>
> A Ivella Hutchison.
>
> Q Will you say that again?
>
> A Ivella Hutchison.

Q How do you spell it? I-v-e-l-l-a?

A Yes.

Q Hutchison?

A Yes.

Q Don't you go by the name of Byington?

A Yes.

Q How long have you been going by that name?

A Well, I've been going by it, too, for the last month.

Q You've been what?

A Going by it definitely for the last month.

Q Well, how long--

A But we weren't married until the first of December.

Q How long did you go by it indefinitely?

A Since last October.

Q When were you married?

A First of this month.

Q Where?

A Montana

Q What?

A Montana.

Q Where at in Montana?

A Can't tell you.

Q Have you got a marriage license?

A Did have, yes

Q Where is it?

A. It is either in my personal belongings at my mother's home or somewhere between Buel, Idaho, and Blackfoot and here."

Based upon the foregoing testimony, the Appellant was charged and convicted of the crime of perjury in the second degree.

PROPOSITION NO. 1

THE QUESTIONS CONCERNING MARRIAGE WERE PROPER AND PERTINENT TO THE COURT.

As set forth in Proposition No. 1 of the Respondent's Brief, Case No. 7176, it is the Respondent's position that questions to Byington concerning his marriage were relevant to the final determination and disposition of the case then before the Court. Counsel for Appellant argues that testimony concerning marriage was irregularly received and immaterial to the issues and that the only reason that could be given for the Appellant to testify was either "to have her perjure herself or incriminate herself." There is nothing in the record to support this contention or such a premise. Byington testified that he was married to the Appellant but was very vague concerning the time or place of the marriage and it was the suggestion of the Court that he return with Appellant in order that his memory in these particulars could be refreshed. When Appellant was asked to take

the stand and questioned concerning her marriage with Byington, there was no reason for the Court to believe that she would falsify. It would appear to be Counsel's position that the Court had every reason to believe Appellant to be Byington's wife; that she could not be compelled to testify against her husband; and therefore that she should not be called as a witness. On the other hand, the Appellant claims the Court compelled her to perjure herself because he had every reason to believe her not to be the wife of Byington. Such arguments are not consistent.

In 48 C.J. 864, the following appears:

> "A privileged witness, such as a defendant in a criminal trial or a person whose testimony may tend to incriminate him may be prosecuted for perjury or false swearing if he waives his privilege and testifies falsely. A fortiori, where there is no privilege, the witness cannot escape liability for false testimony. But, if he has the privilege and does not waive it but testifies because illegally compelled to do so, he is not liable for perjury so committed."

PROPOSITION NO. 2

THE STATEMENTS INVOLVED WERE VOLUNTARILY MADE

Appellant urges in her brief that the question of marriage was incriminating and in violation of the protection afforded a witness under Article 1, Section 12 of the Constitution of the State of Utah, and Section 105-1-10 Utah Code Annotated 1943.

Therefore, could it not be well argued that had Ivella Hutchison told the truth before the Court, and a prosecution for the acts revealed by her testimony was thereafter instituted, she would be immune from such prosecution by establishing that the matter originated through testimony and evidence she was compelled to produce by order of Court.

As far as the Appellant is concerned there can be no question that the provisions of the Code of Criminal Procedure, to the effect that "the accused shall not be compelled to give evidence against self," is not pertinent to this matter. Ivella Hutchison was not accused of a crime. She was called as a witness to testify in civil proceedings pending before the Court.

The determination as to whether or not the questions were self-incriminating presupposes a further proposition of law that in the event Ivella Hutchison had truthfully answered the questions submitted she would subject herself to criminal prosecution. It may be that it could be well argued that a truthful answer to the questions would have been an assurance of immunity from prosecution.

There is a line of well accepted authority to the effect that a person who is brought into Court under subpoena or otherwise and compelled to testify on subjects which may prove self-incriminating, has thereby gained immunity from prosecution concerning such matters.

In the case of People vs. Schwarz, 248 Pac. 990, 78 Cal App. 561, the following was stated:

"The weight of authority clearly supports the proposition that one who is brought into court under a subpoena and testifies pursuant thereto acts under compulsion. In People vs. Courtney, 94 N.Y. 490, 493, it was said, 'The Constitution primarily refers to compulsion exercised through the process of the courts,' and not to the supposed moral coercion which impels a person to testify lest adverse inferences might be drawn from his silence. In Boyd vs. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746, it was said:

> 'Constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficasy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.'

"And in United States vs. Kallas (D.C.) 272 F. 742-752, it was said, further:

> 'How can it be said that, if a court required an accused to answer upon the witness chair, with the alternative of going to jail if he refused, it was such compulsion as to invalidate the evidence so obtained, and, at the same time, that a prisoner questioned in jail by his captor was not compelled to give evidence against himself.'
>
> 'Such a course would be to very nearly, if not quite, blind oneself as to what constitutes compulsion. As above pointed out, the compulsion forbidden by the amendment--or

> at least included in its prohibition--is compulsion exercised through the process of the court. The commitment by which the petitioner in the present case was held in jail is no less a compelling process than were he in court and ordered upon the witness chair for examination. ***While it may be that many know of their rights, and, even when in prison, have the will and courage to stand upon them, there certainly are others who do not.'

"In Re Simon, 297 F. 942, 34 A.L.R. 1404, it was contended that a bankrupt who had failed to obey a subpoena was not guilty of having violated an order of court. But it was said by the Circuit Court of Appeals:

> 'It cannot be denied, however, that a subpoena is a writ. ***It will not be denied that a writ is a mandatory precept issued by a court. Commanding the person to whom it is addressed to do or refrain from doing some act therein specified. Because it is mandatory, and is issued by a court, it is an order of the court. ***The time was when a witness could not be compelled to go to court and testify, and if he attended and gave testimony his action was thought to bear the semblance of maintenance, and he ran the risk, if he came forward to testify, of being afterwards sued for maintenance by the party against whom he had spoken. *** A subpoena is a writ or process, and is mandatory in its nature, being a positive command. A writ of subpoena, like a writ of scire facias, fieri facias, habeas corpus, certiorari, supersedeas, and the various other writs, 'are all commands or orders of court that something

> be done.' *** In Burns vs. Superior Court, 140 Cal. 1, 3, 73, P. 597, 598, the court said that the very etymology of the word 'subpoena' signifies 'an order with a penalty for disobedience.' In the case of Scott vs. Shields, 8 Cal. App. 12, 96 P. 385, a subpoena is said to be: "A writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness.' "

"The California cases cited in the foregoing quotation involved questions of certiorari and contempt, and therefore are dissimilar from the one here presented. But they are in harmony with the consensus of general authorities that a subpoena is a writ, an order, for the disobedience of which the person named therein may be punished according to the expressed will of the Legislature.

"It has been suggested that the benefit of the immunity clause is not available to these defendants because they failed to 'claim the privilege.' It is obvious, however, that under such statutes there is no privilege. In Bradley v. Clark, 133 Cal. 196, 65 P. 395, the Supreme Court construed an identical provision in the Purity of Elections Law (St. 1893, p. 12). It was there said:

> 'If the matter sought to be elicted by the questions was matter embraced within the purview of any of the sections ***and if, with the defendant as a 'person offending,' the witness himself was also a 'person offending,' then by the express provisions of section 32, and by the authority of this court in Ex parte Cohen, 104 Cal. 524, 43 Am. St. Rep. 127, the witness could not claim immunity, and should not have compelled to testify.'

> "We think, therefore, that the appellants Frankfort and Goldner were 'compelled to testify under oath' concerning the acts, transactions, matters, and things constituting the offense alleged in the indictment herein, and that by the express inhibitions of the statute they were thus guaranteed immunity from prosecution therefor. For the reasons stated, the judgments, as to these two appellants, must be reversed."

The simple fact remains that Appellant falsified under oath. How and in what manner she was brought into Court as a witness is wholly immaterial to the issues.

14 Am. Juris. 371, par. 171, discusses the "inherent powers of courts." The text states that these powers are such as result from the very nature of its organization and are essential to its existence and protection and to the due administration of justice. Among the powers discussed therein, the following appears:

> "Another illustration of the inherent powers of courts is the power to administer oaths in the trial of cases. This power is implied in the jurisidction to try cases and to receive the testimony of witnesses under oath, and it need not be conferred by statute. The power to maintain order, to secure the attendance of witnesses, to the end that the rights of the parties may be ascertained, and to enforce process to the end that effect may be given to judgments must inhere in every court or the purpose of its creation fails. Without such power no other could be exercised."

PROPOSITION NO. 3

TRIAL JUDGE WAS NOT DISQUALIFIED

According to the record, as set forth in Appellant's Brief, prior to the trial of this case, attorney for Appellant filed application and petition for a change of judge upon the affidavit of appellant to the effect that the presiding judge, before whom the action was pending, was prejudiced against her and that she believed said judge would not grant her a fair and impartial trial.

It is respectfully submitted that this is the only indication of record that there was any doubt concerning the ability of the Court to hear the matter fairly. The affidavit, which at the most states a conclusion of appellant, is the only evidence that the judge was either biased or prejudiced.

A review of the record and pages 3 to 15 of the transcript disclosed that in the selection of the jury the court absolutely insured that Ivella Hutchinson would be afforded a fair trial. Nowhere in the proceedings does it appear that this attitude changed during the course of the trial. This Court has repeatedly held that the motion seeking to disqualify a trial judge on the ground of bias and prejudice is addressed to the discretion of the judge and he must decide the motion the same as any other matter which comes before him. Musser vs. Third Judicial District Court, 106 Utah 373, 148 Pac. (2d) 802. An affidavit stating that the judge is biased and prejudiced does not show disqualification. Cox vs. Dixie Packing Co.,

72 Utah 236, 269 Pac. 1000. See also Haslam vs. Morrison, ... Utah ....., 190 Pac. (2d) 520 and Willie vs. Local Realty Co., ... Utah (April 28, 1948).

CONCLUSION

It is respectfully submitted that the Appellant was found guilty upon evidence which conclusively establishes her guilt. To say that the manner in which she was brought into Court exonerates or condones her delinquency as a matter of law, would be a travail upon Justice. The verdict and the sentence below must stand.

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