1949

State of Utah v. Thomas R. Robinson : Brief of Respondent

Utah Supreme Court

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In the Supreme Court
of the State of Utah

STATE OF UTAH
Respondent,

vs.

THOMAS R. ROBINSON
Appellant.

Case No. 7292

RESPONDENT'S BRIEF

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This is an appeal by the defendant, Thomas Ray Robinson, from the verdict finding him guilty of the crime of rape and from the judgment of the trial court and from the whole thereof. Appellant's argument is that there was insufficient evidence to convict, and that there was no lawful evidence to support the judgment of conviction and sentence. The argument is based primarily upon the fact that Avis Barter, a 14-year-old girl with subnormal intelligence, was permitted without

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objection to testify to the necessary facts to establish the corpus delicti of the crime of rape. Respondent takes the position that there was sufficient competent evidence to support the conviction and has organized argument under the following assertions:

ASSERTION NO. 1

QUESTIONS OF COMPETENCY OF WITNESSES AND EVIDENCE CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.

ASSERTION NO. 2

THE PROSECUTING WITNESS HAD SUFFICIENT MENTAL CAPACITY TO BE A COMPETENT WITNESS.

ASSERTION NO. 3

THE TESTIMONY OF THE STATE'S WITNESSES WHO TESTIFIED TO THE ACTS AND DECLARATIONS OF THE PROSECUTING WITNESS WAS COMPETENT EVIDENCE.

STATEMENT OF FACTS

Appellant's brief contains a resume of the evidence and therefore respondent refrains from presenting any independent statement of facts, except where respondent will refer to certain testimony which appellant failed to point out in his brief.

ASSERTION NO. 1

QUESTIONS OF COMPETENCY OF WITNESSES AND EVIDENCE CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.

Appellant's contention, that an objection to the sufficiency of an information may be raised for the first time on appeal, will be disregarded inasmuch as the point is not urged, nor is there any indication of insufficiency of the information in appellant's brief. Respondent, however, challenges appellant's corollary namely, that an objection that there is no evidence to prove the offense charged may be raised for the first time on appeal.

At no time during the course of the trial did defendant's counsel object to the testimony of Avis Barter, nor did he object to the testimony of other witnesses who testified to the acts and declarations made by Avis Barter subsequent to the offense charged and prior to the trial. It is rather obvious that counsel's reason for not objecting to the testimony of these witnesses, including that of Avis Barter, was that he was anxious to have in evidence the time during which the alleged offense occurred so that he could later put on evidence to establish defendant's alibi. In other words, apparently counsel was more interested in the alibi as a defense than he was in the exclusion of the evidence for the state which he might have thought incompetent. Concerning this type of tactics, Jones in his Commentaries on Evidence, at volume 5, page 3904, has the following to say:

> "If, after examination in chief has begun, it (preliminary inquiry into competency) is not made upon discovery, it is waived. A party knowing facts which would disqualify the witness if brought to the attention of the court is not permitted to let the testimony go in while listening thereto to determine whether it will be favorable, and then move to strike out the testimony on the ground that the witness who gave it was incompetent. * * * *
>
> " * * * and plainly error cannot be protected on consideration of the testimony of a witness on the ground that such witness was incompetent where no objection whatever on the score of incompetency as a witness was made at the trial. * * * * "

Jones cites: People vs Evans, 63 Cal. App. 777, 220 Pac. 309; and Carr vs State (Okla. Crim.) 211 Pac. 423.

The general rule is stated in 24 C.J.S. 268, as follows:

> "It is an almost universal rule that questions not raised in the trial court will not be considered on appeal."

An exception is discussed in the same volume at page 307, concerning the matter of jurisdiction.

In discussing the question of competency of evidence and applying the above quoted general rule, Corpus Juris cites a Utah case, State vs. Murphy, 68 Pac. (2d) 188; 92 Utah 382. Similarly, according to Corpus Juris, the rule is applied to the competency of witnesses, and objections thereto, unless raised at the trial, will

not be available on appeal. People vs Collins, 5 Cal. App. 654; 91 Pac. 158.

It is interesting to note that although in the State of Texas the cases seem to have required less evidence of insanity to render a witness incompetent than in other states, the court in the case of Hubbard vs State (1912) 66 Tex. Crim. Rep. 378, 147 S. W. 260, held that unless the questions were raised at the trial, the appellate court could not go into the matter. The court in assigning its reason for dismissing appellants argument that the prosecuting witness was not competent to testify, said:

> "The record shows that the appellant did not object to the testimony of the witness Melissa Jennings at the time she testified nor did he attempt, so far as the record shows, to show on his voir dire examination that she was so insane as to prevent her testifying."

ASSERTION NO. 2

THE PROSECUTING WITNESS HAD SUFFICIENT MENTAL CAPACITY TO BE A COMPETENT WITNESS.

It might be well at this point to quote Section 104-49-2, Utah Code Annotated 1943, so far as it pertains to witnesses of unsound mind:

> "The following persons cannot be witnesses: 1—Those who are of unsound mind at the time of their production for examination."

We find no annotations to this particular provision. However, we cite State vs Williams, 180 Pac. (2d)

551, a case recently decided by this court and cited by appellant as similar to the case at bar. In that case this court held that the admission of testimony of a girl of subnormal intellect over the objection of defense counsel was not an abuse of the trial court's discretion. It is indicated in the court's opinion that there was a difficulty on the part of the complaining witness to understand questions, quite similar to that of Avis Barter, if not worse. Yet the court in sustaining the trial judge's ruling said:

> "Furthermore, the witness, insofar as revealed by the record, had difficulty in understanding questions of an uncomplicated nature propounded to her by counsel. However, the trial judge had the advantage of having the witness before him. He was in a position to observe not only her demeanor but the tempo of question and answer, the attitude and tone of voice of counsel and the probable effect upon the child of the court room environment. Hence, much of importance to his decision respecting the competency of the witness was available to the trial judge which the record does not reveal to us. He exercised his discretion in the light of such additional factors, and we are unable to say with conviction that his ruling thereon was an abuse of such discretion. See State v. MacMillan, 46 Utah 19, 145 P. 833; State v. Morasco, 42 Utah 5, 128 P. 571; State v. Blythe, 20 Utah 378, 379, 58 P. 1108."

Respondent submits that under the Williams case a trial court should find no particular difficulty in per-

mitting a witness of the mental capacity of Avis Barter to testify.

Referring again to Jones' Commentaries on Evidence, Vol. 5, the following is found at page 3971:

> "The general rule, therefore, is that a lunatic or person affected with insanity may testify as a witness if he has sufficient understanding to apprehend the obligation of an oath and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue. Whether he has that understanding is a question to be determined by the court, upon examination of the party himself and any competent witnesses who can speak to the nature and extent of the insanity."

And at page 3948, included in a general discussion on mental capacity, is the following:

> "It is not necessary to discuss the proposition that a witness is not to be excluded as incompetent by reason of the fact that his memory is somewhat defective, or because his means of knowledge may not be equal to that of other persons who might have been called as witnesses. Obviously these are objections which affect the credibility and not the competency of the witnesses."

At the trial, evidence was adduced to the effect that Avis Barter's mental capacity was that of a five year old child. There are many things concerning which a child of five years is competent to testify. Though she may have been confused and had difficulty in un-

derstanding questions concerning distances, time, and number of blocks, etc., she was certainly competent when she came to the matter of describing the interior of the green coupe. Any 5-year old child would remember the ball and flower hanging from the top of the windshield.

The courts recognize that there are many things of which a person of subnormal intellect may testify. An example of this is that in many cases of rape committed against the person of a victim of unsound mind, the victim has been permitted to testify in behalf of the state. An annotation of these cases is found in 148 A.L.R. at page 1153. The general rule is stated as follows:

> "In prosecutions for rape upon a female of unsound or imbecile mind, the mental condition of the victim, even if rendering her incapable of consenting to the act, does not suffice to render her incompetent as a witness against the perpetrator, who must show that she fails to meet the tests of appreciation of the nature of an oath and ability to so answer questions as to express a correct reproduction of facts, in order to exclude her."

ASSERTION NO. 3

THE TESTIMONY OF THE STATE'S WITNESSES WHO TESTIFIED TO THE ACTS AND DECLARATIONS OF THE PROSECUTING WITNESS WAS COMPETENT EVIDENCE.

Appellant argues that the testimony of persons other than the prosecutrix in which they testify to

acts and declarations of the prosecutrix subsequent to the asserted attack on her and prior to the trial is inadmissable, as being heresay. One of the exceptions to the heresay rule, however, is the res gestae rule, which, as applied to this case, means that declarations and acts of the victim, Avis Barter, made soon after the alleged criminal attack upon her, as testified to by third persons, are competent evidence of the corpus delicti. The writer of an annotation in 157 A.L.R. at page 1363, discusses the admissibility of statements of the victim in rape cases as part of res gestae as follows:

> Declarations admitted as res gestae constitute original evidence and are not admitted as corroborative of a witness but on the theory that they are verbal acts connected with the transaction and calculated to illustrate its character. Under this theory, although the victim of rape or a similar offense is not a witness, both the fact that she made complaint and the details thereof are admissible in evidence where her statements and declarations were made under such circumstances as to constitute a part of the res gestae.

Cases are cited where complaints were made several moments after, even as much as an hour and a half after, the offense was committed, and where the admission of such complaints, statements or declarations was not held to be error.

The above quoted annotation also states that although there is a conflict of authority several cases have held that, where the victim is incompetent to testify, evidence of the fact she made complaint is admissible

even though not a part of the res gestae. See page 1361 of 157 A.L.R. citing several cases which support the proposition that if Avis Barter had been barred from testifying as an incompetent witness, the court under the rule of these cases could properly admit, as it did, the testimony of others to the effect that Avis Barter made complaint of the offense.

An inference derived from the above annotation is that if the victim is allowed to testify then there is no question about the admissibility of evidence of her declarations to others as corroborating evidence. Therefore if this court should hold that Avis Barter was properly permitted to testify, it would seem there is no question about the admission of evidence of her declarations and acts subsequent to the offense and prior to the trial.

If, however, this court should rule that the testimony of Avis Barter was improperly admitted, even though no objection was raised at the trial, it then becomes necessary to decide whether or not evidence of said declarations and acts should have been admitted. If the court follows what we submit is the majority rule, that declarations and acts by the victim shortly after the alleged sexual offense are admissible as part of the res gestae, then it is submitted there is sufficient evidence to convict.

Mr. Heath testified to declarations made by Avis Barter in which Avis described the man who attacked her and also the automobile that was involved. (Tr. 105, 106). This was within 15 minutes of the time Avis

arrived at the home of her aunt, Mrs. Brimhall, Avis having arrived there at 1:45 P.M. (Tr. 67) and having commenced her conversation with Mr. Heath at 2:00 P.M. (Tr. 69). About 30 minutes later, after Avis had been returned to her home, a car drove up to the home of Mr. and Mrs. Barter, and Mrs. Barter testified to Avis's declaration as follows:

> **Q.** *Did you see the defendant, who sits at the counsel table on the right hand side of counsel table on that day?*
>
> **A.** *Yes, sir.*
>
> **Q.** *And about what time was it you first saw him?*
>
> **A.** *Well, it was going on for two thirty when they brought him back in front of our house.*
>
> **Q.** *Where was Avis at that time?*
>
> **A.** *She was in the house with us.*
>
> **Q.** *And was Avis with you when you first saw him?*
>
> **A.** *Yes, she was in the front room.*
>
> **Q.** *I will ask you to state whether or not she identified this man?*
>
> **A.** *Yes, sir; she was the first one. We heard the siren on the car and she hollered, "Oh, here they come. They have got him. That is the car and the man." That is just the way she worded it before we all got to the window to see for ourselves.*

It is submitted that this exclamation coming spontaneously and so soon after the offense must certainly be considered as part of the res gestae.

CONCLUSION

The testimony of Avis Barter was properly admitted, and was sufficient for conviction. This testimony was supported by properly admitted evidence of acts and declarations of Avis Barter as part of the res gestae and as complaints corroborating her testimony.

Any questions as to the competency of the witness or evidence should have been raised at the trial, and not having done so, appellant is barred from raising them on appeal. For these reasons it is submitted that your honorable court should affirm the judgment of the trial court.

Respectfully submitted,

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