

1949

# State of Utah v. Kenneth Joe Barker : Brief of Appellant

Utah Supreme Court

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J. Vernon Erickson; Attorney for Appellant;

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

\* \* \* \* \*

STATE OF UTAH,

Respondent, No.

vs

7351

KENNETH JOE BARKER,

Appellant.

\* \* \* \* \*

BRIEF OF APPELLANT

Appeal from the Sixth Judicial  
District Court of the State of Utah,  
in and for Garfield County.

Honorable John L. Sevy, Jr., Judge.

**FILED**

J. VERNON ERICKSON.  
Attorney for Appellant.

1949

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B

IN THE SUPREME COURT

OF THE

STATE OF UTAH

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STATE OF UTAH,

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Respondent,

\*

VS

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KENNETH JOE BARKER,

\*

Appellant.

\* \* \* \* \*

BRIEF OF APPELLANT

STATEMENT OF FACTS

The Appellant in this action, Kenneth Joe Barker, was tried and convicted upon an information which charged him with the crime of carnal knowledge of one Rosaleen Cope, a female over the age of 13 years and under the age of 18 years, she being

of the age of 17 years, and an unmarried female not the wife of said Kenneth Joe Barker.

The testimony of the prosecutrix at the trial of this action was substantially as follows: That she was of the age of 17 years and 5 months on April 18, 1948, at which time she was residing with her parents in Tropic, Utah, that she was unmarried at said time and knew the defendant, Kenneth Joe Barker somewhat casually in April, 1948. That she knew he was a married man at said time. That on the 18th day of April, 1948 at 7:30 p.m., Allan Clark, Wade Cheynoweth and Joe, (the defendant) came up to her home in a jeep and Allan asked her if she would like to go to the show with him. She accepted the

invitation but when they arrived at the theater Wade left the car, and the others decided to go to Cannonville and get a girl for Joe (the defendant). At Cannonville while they were waiting for Joe, Allan got fresh with her and they quarreled so that when the defendant came back to the jeep she got in the back seat and the defendant and Allan got in the front seat. They were going to drive to Henrieville to get a girl for the defendant, but on the way the defendant got in the back seat with the prosecutrix and started getting fresh with her. She told Allan to stop the jeep that she was getting out and walking back to Cannonville which he did and the prosecutrix got out and started walking. The defendant got out too and

began overtaking her, grabbed hold of her leg and threw her to the ground. She asked Allan to help her but he declined, and then the defendant took her down in a wash and an act of sexual intercourse took place, after which the prosecutrix started crying, the defendant helped her to her feet and out of the wash. They went back to the jeep, and the boys took her home at about 11 o'clock p.m. She told her parents what had happened and her Mother called the Sheriff and later on that night her mother, the prosecutrix, the defendant and Milford Ahlstrom went to Panguitch to consult the Sheriff, at his request. (T. pages 5 to 29)

Allan Clark, a witness for the State, testified that after Rosaleen



and the defendant left the jeep he drove down the road about a quarter of a mile and turned around and drove slowly back to the point where they had left the jeep. They were beside the road and it appeared to him that they were having an act of intercourse. In his opinion it was about 9 o'clock p.m. and a clear moonlight night, so he went up the road about 50 yards and stopped. He saw Rosaleen crawl through a fence and run through the brush. He hollered to her to come and get in the jeep but she answered that she couldn't, he wouldn't let her. Up to this point he hadn't heard Rosaleen call for any help. He went back to the jeep, waited for quite a while and went back down and they were gone, so he came back to the

jeep and drove down in there and shined his lights and hollered, but not finding them, he went back to Tropic where Wade Cheynoweth was attending the show and picked him up and they came back down and hollered some more and then they hiked down there and found Joe and Rosaleen coming back. Neither the prosecutrix or the defendant said anything to the witness Clark as to what had gone on while they were down there. In his judgment it was then about 10:30 p.m. The four of them got back in the jeep and took Rosaleen home, he and Cheynoweth sitting in the front seat and Joe and Rosaleen in the back. They were not quarreling on the way home and Joe got out and walked in to the door of her home

with her. The witness also stated that when Rosaleen and Joe were in the back seat of the jeep prior to the incident, that there was no scuffling and that they got along good as far as he knew, and that when he saw them having what looked to him like an act of sexual intercourse they were quiet, not struggling. (T. pages 29 to 40)

The mother of the prosecutrix, Mrs. Marsha Cope was called as a witness and testified upon direct examination that her daughter came home about 11 p.m. and she got up from her bed and after asking her daughter if she was back from the show, or had been in a wreck, the prosecutrix narrated to her mother what had taken place that evening. This testimony

was objected to by the defendant's attorney as hearsay evidence, but was admitted over the objection of the defense. (T. pages 41 to 46)

There were no witnesses in behalf of the defendant and the defendant himself did not testify.

### STATEMENT OF ERRORS

The statement of errors upon which the Appellant relies for a reversal of the judgment of the Court below, are as follows:

1. The Court committed a reversible error in admitting hearsay evidence over the objection of counsel for the defendant.

2. The Court erred in denying the defendant's Motion for New Trial in this action for the reason that the Court erred in the decision of a

question of law arising during the course of the trial, prejudicial to the substantial rights of the defendant.

## ARGUMENT

### Point 1.

The Court erred in admitting hearsay evidence over the objection of counsel.

The testimony to which the defense objected was that of the mother of the prosecutrix, Mrs. Marsha Cope as set forth on Transcript pages 40 to 46. This testimony under direct examination is in part as follows:

"Q I want you now to tell the Court and the jury, Mrs. Cope, the matters and things--I will withdraw that for a moment--Do you recall about the time of night it was when your daughter returned home on the evening of April 18, 1948?

A Yes, sir, I looked at the

clock and timed it especially, and it was either a very few minutes to 11 or a very few after, but it was approximately 11 o'clock.

Q Now, I want you to tell the Court and the jury the matters and things that were then revealed to you by your daughter and I want you to tell them any observations you made of clothing or the appearance of your daughter, or matters of that sort. Will you kindly tell the jury those things please?

A When Rosaleen came in, she called, "Mother", as soon as she came in and I said "You got back from the show, have you?" and she said, "Come here, I want to talk to you," and I said, "Well, Dad has just got to resting." By the way, her father was bedfast at the time.

By Mr. J. Vernon Erickson: Just a moment, I object to that as incompetent, irrelevant and immaterial.

By Mr. Ferdinand Erickson: What do you mean, the question?

By Mr. J. Vernon Erickson: First it is hearsay. The defendant

wasn't present. To repeat that conversation you would violate the rule of hearsay entirely. She can go so far as say, "Mother I am raped."

By Mr. Ferdinand Erickson: We are not talking about rape at all.

By Mr. J. Vernon Erickson: Well, she might as well say rape.

By Mr. Ferdinand Erickson: You like to get that word "rape" in here. This is our position with reference to that testimony, that the things that are revealed within a close proximity of their happening on the part of a minor child are material as coming in under the rule of res gestae which is, of course, an exception to the hearsay rule. If it were not for that, I wouldn't ask that this testimony be admitted, but a child telling a parent the things that just went on prior to the child's coming on the scene are res gestae and the evidence is material under that one exception to the hearsay rule.

By Mr. J. Vernon Erickson: That isn't, Your Honor, a true statement of the law, because if that were the case, when she came to the jeep that would have been the time to bring out res gestae. This is purely hearsay.



By the Court: Objection overruled .....

By Mr. J. Vernon Erickson: I respectfully except, Your Honor.

Q Tell us now, Mrs. Cope, the things revealed to you by your daughter at about 11 p.m. on the evening of April 18, 1948 at your home please.

A She said, "But mother, I need you now," so I got up at once and went into the room where she was and the minute I saw her I thought that there had been a wreck and I said, "Oh my heavens, Rosaleen, you have been in a wreck."

Q You have been in what?

A In a wreck.

Q Wreck.

A And she said, "Mother, I didn't go to the show. We went down to Cannonville," and she said, "and Allan got fresh with me and we had a quarrel," and went on and said that Joe got in the back with her and she said, "I told him to stop, so I could get out and go home."

By Mr. J. Vernon Erickson: May I interrupt just a minute, Your



Honor, please. I would like to make an objection to that. Now that conversation could not fall within that rule.

By Mr. Ferdinand Erickson: I have argued that matter once before, before this Court. Exclamations disclosed by a child, a minor child, within a reasonable time after an alleged offense are material.

By Mr. J. Vernon Erickson: A girl seventeen and a half years of age?

By the Court: Objection overruled.

By Mr. J. Vernon Erickson: May we have an exception?

Q Tell us, Mrs. Cope, what else went on.

A And she said, "Allan stopped the car," that she got out and she said, "I started going toward Cannonville as fast as I could," and she said, "I heard something behind me, and he grabbed me and threw me on the ground, and instead of helping me up, he took me down through the fields," and she just said, "There he committed the crime," and

Q Incidentally, did she tell you what crime he committed?

A Yes, she did.

Q What was that?

A She told me they had had intercourse.'

Q Tell me, Mrs. Cope, did you examine the clothing that Rosaleen was wearing that evening?

A No, not at that time, I didn't. Her father said, "You go right down to the Sheriff and get him to get Joe Barker and put him under arrest right now," and that's what I did, and,

By Mr. J. Vernon Erickson: May I have an objection to that?

By Mr. Ferdinand Erickson: You can object to it if you want to.

By Mr. J. Vernon Erickson: That is most vicious.

By Mr. Ferdinand Erickson: Now listen, I don't want you to say, "most vicious." If you want to argue that matter, we will excuse the jury.

(Colloquy between counsel)

By the Court: Just a minute, that

part relating to the conversation with her husband may go out.

By Mr. Ferdinand Erickson: I don't want that in the record, it clutters the record. It has no probative value.

By the Court: Objection sustained.

The admission of the foregoing testimony, Appellant contends, was a violation of the rules of evidence and was very prejudicial to him with the Jury. Although the record does not disclose the emotional attitude of the witness during this examination, she wept at times, and appellant contends that the conversations between mother and daughter as related by the mother, were highly prejudicial to him and that the Jury could not help but be swayed by such testimony, and that such conversations made not in the presence of the

defendant, did not come under the rule of res gestae but were purely hearsay and not admissible.

Bouviers Law Dictionary defines Res Gestae as follows:

"Those circumstances which are the automatic and undesigned incidents of a particular litigated act, and which are admissible in evidence when illustrative of such act. Whart. Ev. 96 Cal. 125.

Events speaking for themselves through the instructive words and acts of participants, not the words and acts of participants when narrating the events. 18 Colo. 170."

It is a well settled rule that in order for a declaration to be admissible as part of the res gestae, it must be the spontaneous utterance of the mind while under the influence of the transaction or event, the test being whether the declaration was the facts talking through the party, or

the party talking about the facts.

In the case of Erickson et al v. Edward Rutledge Timber Co., an Idaho case reported in 191 Pacific, page 212, it was held that the lower court committed no error in granting a motion for a new trial upon the ground that certain evidence, which had been admitted as part of the res gestae, was not properly admitted but was hearsay. In that case testimony of the daughter relating the declarations of her father to her of injuries received by him some two hours after such injuries were received, was admitted by the trial court as part of the res gestae but a motion for new trial was granted because such testimony had been admitted. The father was suffering

great pain at the time of the  
declarations and died later.

The Court in this case held:

"The controlling test is, not whether the statement made is probably true, but whether it was made at a time when the declarant was in such a calm, reflective, and deliberate state of mind as to enable him to fabricate a statement, if he chose, thereby constituting the statement a narrative of a past transaction. Where the circumstances, as in this case, show that the statement was made while the declarant was in such a state of mind, it is immaterial whether what he said is true or false. In either event it is hearsay and is not admissible as part of the res gestae, and the error in admitting it is regarded as prejudicial. As was said by the Court of Appeals of New York:

'Whatever we may consider to have been the sufficiency of the other evidence, we could, and should, not assume that a declaration, made under such circumstances, "may not have had its effect upon the jurors' minds." Greener v. General Electric Co. 209 N.Y. 135, 137, 102 N.E. 527, 528 (46 L.R.A. (N.S.) 975); National

In order for statements to be admitted as part of the res gestae, it must be clearly shown that such statements must be so spontaneous as to leave no suspicion that the declarant was in a deliberate or reflective state of mind, or had had time to reflect or deliberate. The prosecutrix in this case had had ample time for deliberation and reflection. According to the testimony of the witness, Clark, it was about 9 p.m. when the prosecutrix and the defendant left the jeep, and it was about 10:30 p.m. when they got back in the jeep. The prosecutrix made no statements then to the other boys in the jeep or on the way home, but got in the back seat with the defendant. She did not

quarrel with the defendant on the way home, and upon arriving home allowed him to accompany her to her gate or door. The evidence shows she acted calmly and deliberately. She arrived home at about 11 p.m. Her conversations to her mother after going in the house as related by her mother and as set forth herein, were in a long drawn out narrative form. She called her mother and said she wanted to talk with her whereupon her mother asked her if she had got back from the show and she replied she did not go to the show and her mother then asked her if she had been in a wreck, and she said no, that Allan had got fresh with her and that she then got in the back seat of the jeep and that Joe got in the back seat with her, and in a narrative and



detailed manner related the events of the evening. Appellant contends that under these circumstances these statements could not be part of the res gestae, and that such evidence was merely hearsay.

In the case of Spears vs. State, an Oklahoma case reported in 207 Pac. 2nd, 363, the Court held:

"The admission of hearsay evidence over the objection of defendant which evidence probably contributed to a verdict of guilty constitutes a reversible error."

Appellant contends that in the case at bar, the testimony of the daughter's conversations to the Mother, related by the mother, was too glaring a violation of the rules of evidence to be termed harmless, for the Jury were certainly influenced and swayed by the

tearful testimony of the Mother relating her daughter's statements, and it had an effect upon them in arriving at their verdict of guilty.

Point 2.

The Court erred in denying the defendant's motion for new trial for the reason that the Court erred in the decision of a question of law arising during the course of the trial, prejudicial to the substantial rights of the defendant.

The Court in overruling defendant's motion for new trial said:

"I am a little in doubt whether the motion should be considered or not, but I will definitely rule that the motion for new trial is overruled and denied. The Court heard the evidence and I feel that it does come within the rule of res gestae and was admissible." T. page 54.

Appellant contends that the Court committed a reversible error in admitting the testimony of the prosecutrix' mother, that such testimony was not admissible under the rule of res gestae, was hearsay evidence, and served only to prejudice the defendant's rights with the jury, and that therefore the defendant's Motion for New Trial should have been granted upon such ground.

### CONCLUSION

In conclusion the Appellant submits that the Court should reverse the judgment of the trial court because of the errors committed in admitting hearsay testimony which was prejudicial to the defendant, over the objection of counsel, because such

testimony was inadmissible under the law and served only to prejudice the jury against the defendant, and further that the Court should have sustained the defendant's Motion for New Trial upon such ground.

Respectfully submitted,

J.VERNON ERICKSON.  
Attorney for Appellant.

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