1949

State of Utah v. Kenneth Joe Barker : Brief of Respondent

Utah Supreme Court

Clinton D. Vernon; Attorney General; Quentin L. R. Alston; Assistant Attorney General; Attorneys for Respondent;

7351

IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,
Respondent,

vs.

KENNETH JOE BARKER,
Appellant.

RESPONDENT'S BRIEF

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TEXTS

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RESPONDENT'S BRIEF

STATEMENT OF CASE

The appellant was convicted of the crime of carnal knowledge before the Sixth Judicial District Court of the State of Utah, in and for Garfield County, and it is from this conviction that he appeals.

STATEMENT OF FACTS

Appellant's brief contains a detailed summary of the proceedings and evidence presented to the court and jury upon which the conviction was based and it is felt that a recapitulation of the facts at this time would serve

no useful purpose to this Honorable Court. Where necessary, however, reference will be made to the testimony in the transcript which respondent feels may aid this Honorable Court in properly interpreting the facts in accordance with its theory of the case. The Assignments of Error and Arguments in support thereof will be answered in the order presented by the appellant.

ASSERTION NO. I

THE COURT DID NOT ERR IN ADMITTING TESTIMONY ELICITED FROM THE MOTHER OF THE PROSECUTRIX.

ASSERTION NO. 2

THE COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

The only claim of appellant, in his two assignments of error, is that the court committed prejudicial error to the substantial rights of the accused, in admitting over objection by counsel for the accused, the testimony of Mrs. Marsha Cope, mother of the prosecutrix, whose testimony appellant contends was purely hearsay and not admissible as part of the "res gestae." It is the contention of the respondent on the other hand that the disputed testimony of Mrs. Cope was properly admitted under any one of several exceptions to the "hearsay" rule, or that in any event, if her testimony was erroneously admitted, it was harmless error and certainly did not adversely affect the rights of the accused.

This Honorable Court has on numerous and repeated occasions reiterated the unanimous holding of the courts

that in rape cases the testimony of the prosecuting witness, or that of other witnesses, is admissible for the purpose of showing that the prosecutrix made complaint of the outrage soon after its commission. See *State v. Halford,* 18 Utah 3, 54 Pac. 819, *State v. Neel,* 21 Utah 151, 60 Pac. 510; *State v. Imlay,* 22 Utah 156, 61 Pac. 557; *State v. Christensen,* 73 Utah 575, 276 Pac. 163; *State v. Roberts,* 91 Utah 117, 63 P. (2d) 584, *State v. Tellay,* 100 Utah 25, 110 P. (2d) 342. Although there is not unanimity among the courts, it is generally held in this connection that the details and circumstances of the complaints or declarations of the prosecutrix are not usually admissible in evidence unless they are part of the "res gestae," but the testimony is limited to the fact that such complaints or declarations were made. Wharton's "Criminal Evidence" Vol. 1 Sec. 521; Wigmore on Evidence, Third Edition Vol. 14, Sec. 1135 and see the Utah cases cited supra.

Recognizing the above rules, respondent respectfully submits that Mrs. Cope's testimony in effect revealed nothing more than that her daughter at a certain time and place and under certain circumstances made complaint that an outrage had been committed upon her. It is felt that this testimony was no more than was reasonably necessary to show the time and place where the complaint was made, the circumstances under which it was made, the person to whom made, and the conduct of the prosecutrix at the time she made complaint and that she exhibited physical indications that an outrage had been committed upon her as confirmatory of her testi-

mony, which evidence is always admissible. 22 R.C.L. Sec. 49, page 1214.

A similar line of testimony was elicited by the district attorney in the case of *State v. Roberts,* 91 Utah 117, 63 P. (2d) 584, when the witness was asked:

> "Q. What did she say with reference to that and what had happened?
>
> A. Why she says Mr. Roberts had taken her out on the highway some place and . . .
>
> Mr. Larson: I want to object to that question for the reason it is hearsay, no part of the res gestae, a statement made out of the presence of the defendant at a time when he wasn't present, a considerable length of time after the alleged occurrence."
>
> The objection was overruled. The witness thereupon anwered:
>
> "She said he had taken her out on the highway and forced intercourse. She says: 'I am almost ripped to pieces.' "

In affirming the judgment of conviction this court held in the course of its opinion:

> "Aside from her having named the defendant, the statement of the prosecutrix in the instant case did not attempt to describe details. It simply tended to show that the act of intercourse had been consummated by force and violence. A case somewhat similar is People v. Rotello, 339 Ill. 448, 171 N.E. 540. We think that under the authority of these cases no reversible error was committed in receiving this testimony."

Even assuming, for purpose of argument, that the

district attorney may have probed further into the details and particulars in the instant case than ordinarily would be condoned by the authorities, it is respectfully submitted that this testimony was properly admitted under either one of two other theories as exceptions to the hearsay rule. Counsel for appellant concedes that the spontaneous declarations of a prosecutrix are admissible as part of the "res gestae" but argues that in this instance they did not come within that exception because they were made calmly and deliberately in a long drawn-out narrative form after she had had ample time for deliberation and reflection. It is the contention of respondent that these declarations were properly admitted as part of the "res gestae." The transcript will definitely show that only thirty minutes elapsed from the time the prosecutrix left the scene of the offense until she, in a semi-hysterical state, still suffering from the humiliation and emotional upset of the outrage which had been committed upon her, made the declarations to her mother (Tr. p. 36-37).

In discussing the remoteness of time from a particular event as to when the declarations of a party may be considered part of the "res gestae," it is said in Jones "Commentaries on Evidence," Second Edition, Sec. 1204 at page 2210:

> "It is impractical to fix, by general rule, any instant of time at which it may be said to be too late for an act or declaration to be part of the res gestae and so as to preclude debate and conflict of opinion in regard to this particular point. So long, however, as suspicion of fabrication is ab-

> sent, and no taint of preconceived action or suggestion of design is present the fact that there is a slight interval between the declaration and the principal transaction, and that they are not entirely synchronous, does not affect its admissibility as part of the res gestae."

There are numerous cases cited in 2 A.L.R. 1525 as supplemented in 157 A.L.R. 1359 where the admission of such compaints, statements or declarations made several minutes after, and even as much as an hour and a half after the offense was committed was held not to be error. It would appear that under the circumstances of this case the statements and declarations were properly admitted because there could certainly be no "suspicion of fabrication" or "taint of preconceived action or suggestion of design." To deny the admissibility of the statements and declarations in this case would in effect be an attempt to "exclude everything from the res gestae which did not occur on the very instant of the grinding of the flesh and bones" to borrow a phrase quoted in *Peirce v. Van Duren*, 78 Fed. 707, 24 C.C.A. 280; 69 L.R.A. 705.

It is respectfully submitted likewise that the disputed testimony of Mrs. Cope, even if not considered part of the "res gestae," was properly admitted under the principle, generally accepted by the authorities, that such evidence may be received whenever the details or particulars are inquired into on cross-examination or whenever an attempt is made to impeach the credibility of the testimony of the prosecutrix. As said in *State v. Orlando*, 119 N.J.L. 175, 194 Atl. 879, in which the court

admitted the testimony of a physician who examined the prosecutrix within an hour or two after the alleged attack concerning the details of her complaint against defendant:

> "We think that the testimony was properly admitted for the purpose of rehabilitating the credibility of the prosecutrix in the circumstances of the case.
>
> * * * *
>
> "Now it is widely held in rape cases that evidence of the details of the complaint of the prosecutrix as made to another is admissible for the purpose of 'rehabiliting the credibility' of the prosecutrix after, as here, she has testified as a witness and has been impeached and the credibility of her testimony has been attacked on cross-examination. 2 Wigmore on Evidence (2d Ed.) Sec 1138, Sec 1760; 22 R.C.L. 1215, par. 48, n.i.; 3 Greenleaf on Evidence (16th Ed.) Sec. 213; Underhill Crim. Evidence (4th Ed.) Sec. 668, and cases cited there."

Furthermore, see the striking statement of the court in *Griffin v. State*, 76 ~~A.L.R.~~ Ala. 29, wherein it was held:

> "When the complaint constitutes no part of the res gestae, and is received only as corroborative of her testimony, neither the particulars detailed by her, nor the name of the person whom she mentioned as the offender, can be given in evidence in the first instance. *But the defendant may, on cross-examination, inquire into the particulars of the complaint, and thus make admissible evidence relating thereto by both parties; or, if the defendant introduces evidence to impeach the prosecutrix, the prosecutrix may sustain her*

by showing that her statements in making the complaint, and her testimony on the trial, correspond. Scott v. State, 48 Ala. 420; *Nichols v. Stewart,* 20 Ala, 358; *Thompson v. State.* 38 Ind. 39; *Baccio v. People,* 41 N.Y. 265; 3 *Greenl, on Ev.* sec. 213; 2 Birch. Crim. Proc. sec. 963.

It is finally the contention of the respondent that even if the trial court improperly admitted the disputed testimony of Mrs. Cope, it was harmless error and did not adversely affect the substantial rights of the accused. The rule is too well recognized to need citation of authority that an error committed in the court below will not warrant a reversal of the judgment of conviction unless it has in some way prejudiced the substantial rights of the accused. In the present case, it will be seen that the very testimony concerning which appellant complains was gone into in minute detail in the cross examination of the prosecutrix. (Trancript pages 21-24) It seems rather improbable that the testimony of Mrs. Cope, concerning the declaration made to her by the prosecutrix, could have prejudicially influenced or swayed the jury in view of the type of testimony which was so colorfully portrayed for them in the cross examination of the prosecutrix by counsel for appellant.

CONCLUSION

It is respectfully submitted that the testimony of Mrs. Cope was properly admitted in evidence under any one of the theories propounded above and that even if it should be determined by this Honorable Court that the trial court erroneously admitted this testimony, that it

was harmless error and did not prejudice the rights of the accused so as to warrant a reversal of the judgment. It is submitted that the eveidence in the record established justification for the unprejudiced verdict of the jury rendered below, and that it should therefor be affirmed by this Honorable Court.

Respectfully submitted,

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