

1949

State of Utah v. Robert Bruce Gillespie : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

ROBERT BRUCE GILLESPIE,
Defendant and Appellant.

Case No.
7364

FILED
FEB 19 1949

BRIEF OF APPELLANT

APPEAL FROM THE
THIRD JUDICIAL DISTRICT COURT,
STATE OF UTAH

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BRIEF OF APPELLANT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH

STATEMENT OF THE CASE

The defendant was accused by the information of the crime of Grand Larceny as follows: That the said Robert Bruce Gillespie on or about the 17th day of May A. D. 1948, at the County of Salt Lake, State of Utah, stole from the Deseret Book Company, a corporation of the State of Utah, a Bell & Howell Automaster

camera having a value in excess of \$50.00. Inasmuch as one of the assignments of error is the failure of the court to grant defendant's motion for a verdict of acquittal, appellant believes that a detailed statement of fact covering the testimony of all the witnesses will enable the court to properly evaluate this assignment of error.

The case was tried without a jury before the Honorable A. H. Ellett, one of the judges of the Third Judicial District Court, in and for Salt Lake County, State of Utah. Mr. Wayne Black, the Assistant District Attorney, appeared for the State of Utah, and Messers. E. C. Jensen and John Snow appeared as attorneys for the defendant. The exclusion rule was invoked by the court. Hamer Reiser was the first witness for the State. He is the manager of the Deseret Book Company having supervision of each department in that store since and including the year 1946. Lamar Williams, during the month of May, 1948, was in charge of the department that deals in cameras and various other types of photographic equipment. The store deals in Bell & Howell cameras and products. State's Exhibit "A" is an original invoice by which the Bell & Howell Company charged the Deseret Book Company on October 26, 1946, with one Automaster camera with a 1 inch F-25 coated lens. R. 36. The invoice came to the store in the usual course of business a short time before a shipment of cameras was received from the Bell & Howell Company. The invoice is not only a charge for cameras but is also in the nature of a memorandum for

shipping. The invoice was prepared by Bell & Howell Company in Chicago. The witness had no specific recollection of having received the invoice in question. He does not check the invoices. That work is left to a receiving clerk. The witness had no personal knowledge of whether the camera was received by the store and the invoice checked upon the arrival of the camera. This work is done by a receiving clerk and the witness had no personal knowledge as to what may have been done with reference to the camera described in Exhibit "A". R. 39-40. The invoice, Exhibit "A", carries the receiving department's "received" stamp with the date of November 9, 1946, upon it. The serial number on the invoice in question is 434168. He received a report of a missing Filmo Automaster turret head sixteen millimeter camera after an employees' meeting on or about May 17, 1948. R. 42. It is the same type of camera as described in Exhibit "A". The witness testified as follows:

"Q. Mr. Reiser, are you able in the course of your business when an article such as this camera turns up missing, are you able to check to determine what the serial number of the missing article is?

A. Yes.

Q. How would you do that?

A. Our practice when we sell a camera is to give the customer a sales slip. If it's a cash sale, it's one type of form, and if a charge sale, it's another. In either case, our practice is to identify the article sold, especially when

it bears a serial number, by indicating the serial number upon the sales slip, so that the purchaser may have it in the nature of a bill of sale and have evidence of his ownership of it.

Q. Do you keep copies of those sales slips?

A. Yes.

Q. I will ask you to state whether or not there has ever been a sales slip made up on the camera that bears the serial number 434168.

MR. JENSEN: Just a moment. I object to it as calling for his conclusion, Your Honor.

THE COURT: The objection is sustained." R. 42-43.

He never met the defendant formally but has known him by sight for a period of about three years, during which time the employees of the camera department did business with him. He did not personally have any direct contact with the defendant.

(Cross Examination) The last stock inventory was taken in the store on June 30, 1948, and the one prior to that time was December 30, 1947. This camera would be on the inventory of December 30, 1947. R. 45. The witness did not testify it was actually listed on that inventory. The cameras are kept in cases and when a customer expresses interest in such equipment, we always bring it out and let him handle it. He does not know when the camera was first missed from the store. May 17, 1948, was the first time its loss was reported to

him. He never did see this particular camera at any time. R. 47.

LAMAR S. WILLIAMS works for the Deseret Book Company in charge of the camera department. He has held the position of manager of the camera department since October, 1947. As such manager he has charge of all sales in that department and all sales tickets pass through his hands. He does not inspect each individual sale. There are about 6 or 7 employees in his department (R. 48) and more than 50 employees in the store who have free access to the display cases where the cameras are kept. In the month of May, 1948, the 6 employees in the camera department had access to all cameras in stock. R. 60. During the month of May, 1948, and prior thereto the Deseret Book Company dealt in Automaster Filmo turret Bell & Howell cameras. In the first part of May, 1948, there were approximately a half-dozen such cameras in stock. In the month of May, 1948, two of these cameras were on display in the display case. One of these had a 2.5 lens on it and the other had three lenses in it. The lenses were interchangeable between the two cameras on display. The witness testified as follows on direct examination:

“Q. Have you made a check to determine whether any of these type cameras were sold in your department in May of 1948?

A. I have no record of it at all.

Q. Have you examined the records in that regard?

A. *I couldn't go down through all the sales that*

we have made since that time, but as far as I know we didn't make one then. Neither have we made one since. They are rather an expensive camera and are rather hard to sell.

Q. Now, did you ever discover any of these cameras missing during May of 1948?

A. Yes.

Q. And when did you first discover such a camera to be missing?

A. It was in the fore part of May, around the eighth or ninth or near the middle of the month.

Q. And which camera did you discover missing at that time?

A. The one with the 2.5 lens.

Q. And did you later discover any other cameras missing?

A. A week or two later we lost one with the three lenses on it. That disappeared.

Q. In other words, both of the cameras you have mentioned as being on display are the two cameras that you mention as being missing?

A. Yes, both of them disappeared with the lenses, as far as I know." R. 50-51.

On cross examination the witness testified as follows:

"Q. Now, you made some statement on direct examination, Mr. Williams, that you had no record of a sale of this camera, but then you

qualified that by saying that you could not go down through your records. Now, how far back through the records did you check?

A. *Didn't check any of the sales of the records.*

Q. *As a matter of fact, you don't know of your own knowledge whether or not one was sold, do you?*

A. *Not that one, no, because there is too many sales during the day to take the time to go through a month's sale."* R. 60-61.

That the reasonable market value of the camera in question is approximately \$307.08. R. 52. He reported the camera missing to his employer, Mr. Reiser. About a week later, on or about the 14th or 15th of May, 1948, he contacted Mr. Linschoten of the camera department of Auerbach's store. The witness testified as follows:

"Q. And what information did you convey to Mr. Linschoten?

A. That we had lost a Filmo—

MR. JENSEN: Just a minute. If Your Honor please, we object to it as hearsay.

THE COURT: The objection is overruled. You may not tell me just what you said, but you can tell the substance of the information you gave; that is, what it was about.

A. I told him we had lost an Automaster camera with such a lens, 2.5 lens, and to be on the lookout for it, that we suspected it had been stolen.

Q. Did you indicate the name of any suspects?

A. Yes. As I recall, I indicated that we suspected Mr. Gillespie.

Q. Now, were you acquainted with Mr. Gillespie during the month of May, 1948?

A. Yes.

Q. And I will ask you to state whether or not during that month you ever saw Mr. Gillespie in your business establishment.

A. Right now I don't recall whether I did or not. I believe that the information was given to me by one of the clerks that he had been in the day before.

Q. I see.

A. I remember that occasion.

MR. JENSEN: Well, now, if Your Honor please, the information passed to him I think should be stricken.

THE COURT: It may go out." R. 53-54.

On cross examination the witness testified as follows:

"Q. Now, you have said that Mr. Gillespie had been in your store sometime the forepart of May. Is that right? Is that what your testimony is?

A. Well, you mean prior to the time of the camera being stolen?

Q. Well, I don't know when. That is what I am trying to find out. When was it that he was in the store, if he was?

MR. BLACK: Now, just a minute. I object to

that question on the grounds that he's making a statement of testimony which wasn't this witness's testimony. The witness said he didn't remember.

THE COURT: Wait, wait; don't prompt the witness. Read me the question, Miss Parker.

(Reporter reads the question.)

MR. BLACK: That is a misstatement of counsel.

THE COURT: The objection is overruled. You may answer if that is what you testified to. You can answer it "Yes" or "No".

A. At this moment I can't remember whether he was in personally myself or not. I gave you the testimony of another person. I was taking his word for it.

Q. You had occasion to do quite a bit of business with Mr. Gillespie in the two or three years or the year prior to this occurrence, did you not?

A. That's right.

Q. He was a representative for a film company, was he not?

A. That's right.

Q. And, as such, sold you merchandise?

A. That's right.

Q. And generally dealt in film and other photographic supplies?

A. That's right.

Q. Do other people in this area deal or sell Bell and Howell cameras, or are you the only ones?

A. What was the first part of the sentence?

Q. I say do other stores or dealers in this area sell Bell and Howell cameras?

A. Yes.

Q. How many, if you know?

A. I couldn't tell you how many, but there are several." R. 61-62.

The camera display cases were not locked and camera fanciers were permitted to handle and manipulate the cameras hours at a time. About a month or two before the cameras were missing we moved the camera display cases from the main floor upstairs. The witness had charge of moving these display cases. He testified as follows:

"Q. Did you ever see the serial number of either of those cameras of your own knowledge?

A. Not before they were stolen.

Q. At any time?

A. Yes, since.

Q. The one camera?

A. Not on the camera.

Q. Not on the camera?

A. Oh, no. I didn't see them on the camera. I may have seen them on the camera, but I didn't take note of what the serial number was.

Q. You had about a half a dozen of these cameras in stock you said about May 1. Is that right?

A. Yes.

THE COURT: I am not sure that you said you had a half dozen of this type camera or not. Did you?

A. Yes, that's what I had reference to. I didn't know the exact number.

Q. About May 1, you say?

A. About May 1.

Q. Now, of those half dozen, you don't know which ones were in the case, do you?

A. No, I don't." R. 57-58.

He did not participate in taking the inventory of December 31, 1947. That work was delegated to other employees in his department. R. 59. The witness testified as follows:

"Q. What date is it that you are trying to tell us about now when you say that you know within a day or two when this particular camera with this particular serial number was in that case?

A. I can't tell you that with that particular number.

Q. So actually you don't know when it was you last saw that camera in the case, do you?

A. No, not with that serial number, when you put it that way.

Q. That's the way I am putting it. How many employees have access to these cases and to the display of merchandise?

A. You mean to come and go around our equipment?

Q. Yes.

A. Freely?

Q. Yes.

A. I presume any employee in the store.

Q. And how many employees in the store?

A. I couldn't tell you how many they have there.

Q. In excess of fifty?

A. In that neighborhood." R. 59-60.

(Redirect examination) He received information from Auerbach Company that they had located a Bell & Howell camera with the serial number 434168. He checked the inventory and the camera bearing that serial number was not present on their inventory or in their stock. He then went to their files and from the purchase orders from Bell & Howell he located the invoice bearing the aforesaid serial number. R. 63-64.

ELDON LINSCHOTEN—direct examination. He is twenty-two years of age and is employed in the camera department of the Auerbach Company. His superior officer is Mr. George William Mason. At the outset of this witness's testimony Mr. Edgar Jensen, attorney for the defendant, stipulated that the witness is employed by Auerbach Company; that on June 4, 1948, while he was on duty the defendant, Mr. Gillespie came in with a camera which this man saw and in some fashion obtained the serial number and it is the serial num-

ber contained on invoice "A"; that the camera had a 2.5 lens. That he reported the matter to the manager who called the Deseret Book Company. That the witness talked to Mr. Gillespie about securing that type of camera in question and about an hour later Mr. Gillespie brought a Bell & Howell camera of the type in question to the Auerbach Store.

GEORGE WILLIAM MASON is the buyer for the camera and stationery departments in Auerbach store and in charge of the camera department. He was present in the month of May, 1948, when the defendant came to his department with a Bell & Howell Automaster turret camera with a 2.5 lens. R. 69. The witness testified as follows:

"Q. Now, will you relate the conversation that took place regarding the matter as to where he had obtained the camera?

A. I asked Mr. Gillespie at the time—I told him I had a customer that was interested in the camera—

MR. JENSEN: Now, if Your Honor please, for the purpose of the record I would like to have this testimony subject to an objection that it is immaterial and irrelevant and incompetent at this time.

THE COURT: The objection will be overruled. You may go ahead.

A. I asked Mr. Gillespie—I told him at the time that we had a customer who was interested in the camera and if he could supply it to me at any time so that this customer could take

a look at it and purchase it, and Mr. Gillespie said yes, that at any time he could get me the camera. I asked him if he would leave it with us, and he said no, that he had borrowed it from a dealer here in town and that he didn't think it would be fair to this dealer to take that camera because in the meantime he might have a chance of selling it.

Q. Was that all of the conversation as you recall it?

A. Oh, I asked him if we could purchase it for cash. That was at the time, and he said no, that it belonged—oh, no, he said that we—that he wanted to trade it for other movie equipment rather than take cash for it. He wanted a Movie Mite and some other merchandise that we had.

MR. BLACK: I see. That's all, Mr. Mason, thanks.

THE COURT: Did he name the dealer that he said it belonged to?

A. No, he didn't." R. 69-70.

EDWARD JACKSON—direct examination. He was a detective in the Salt Lake City Police Department in the month of May, 1948. He was detailed on June 6, 1948, to investigate an alleged theft of a camera from the Deseret Book Company. He saw the defendant at Auerbach's store on the 7th day of June, 1948. He was accompanied by Detective Thorpe. He had a conversation with the defendant at Auerbach's. After disclosing their identity, they asked the defendant to accompany

them to the Detective Bureau at police headquarters. The witness testified as follows:

“Q. Will you relate the conversation as accurately as you can that took place at the time indicated, Officer.

A. As I remember, it was over the theft of a Bell and Howell Automaster movie camera, which I asked him if he had that particular camera in his possession, and he stated no, that he did not have; and I asked him what become of it. He refused to answer my questions, but later on he stated that the camera was then loaned out to a man by the name of Ed Jorgensen along with Mr. Gillespie's car and that this man Jorgensen was then in Las Vegas, Nevada.

Q. Did you have any conversation with him regarding where he had procured the camera?

A. Yes, I did. He stated that he had secured the camera from a dealer in Omaha, Nebraska.

Q. And when did he say he had procured it, if he said at all?

A. I don't believe that question was asked, Mr. Black.

Q. Was there anything else said at that time?

A. Yes. I asked him if he had registration papers to this particular camera, and he said he did and that he would take us to his home and procure the same for us, in which event we went to his home, and he was unable to dig them up out of his brief case.

MR. JENSEN: What you mean by that is he didn't?

A. Sir?

MR. JENSEN: He didn't produce any papers?

A. He didn't produce any.

Q. Was there any—who accompanied him to his home?

A. Both I and Thorpe.

Q. And was there anyone else present when you talked at his home?

A. Yes, his little wife, Mrs. Gillespie.

Q. And have you related all of the conversation that took place at that time?

A. Well, I couldn't relate all of it.

Q. Can you recall anything else that was said at the time?

A. Yes. He says, 'You are welcome to go through the house and look for the camera if you still think I have it.'

Q. Did you retain him in custody after you had talked to him at his home?

A. Oh, no." R. 75-76.

On the 8th of June, 1948, at 9:00 A.M. o'clock, the witness and Detective Thorpe had a conversation with the defendant in the city jail. The substance of the conversation was involved around the theft of a camera and what became of it. The witness testified as follows:

"Q. Well, just relate the conversation, Officer.

A. We went back over it again, and I asked

him—I says, ‘Have you been able to get in touch with Mr. Jorgensen?’ He said no, that he hadn’t come back. I said, ‘Do you have the camera at this time?’ And he says, ‘No, I do not.’

Q. Was there further talk about Mr. Jorgensen?

A. No, not on that date that I remember of.”

R. 80.

On cross examination Detective Jackson testified that the defendant showed them a great amount of cameras and camera equipment which he had in his possession; that none of the cameras or equipment had been reported to the police department as having been stolen. When the witness’s attention was called to the fact that defendant was booked on May 8th at 12:30 P.M. hold for investigation of larceny, he changed his testimony that it must have been in the afternoon of the 8th when he talked to the defendant on the following morning. Mr. Jensen, attorney for the defendant, moved that the witness’s conversation with the defendant after he was incarcerated in the city jail be stricken on the grounds stated in the original objection. R. 87. The matter was argued pro and con and the motion was granted. R. 89. The State then recalled the witness Jackson for further re-direct examination at which time the witness changed his testimony to the effect that the defendant was taken into custody at 12:30 P.M. on the 8th of June, 1948, and that he, Jackson, interrogated him at approximately 4:00 P.M. on the same date. The court did not reverse his previous ruling but did permit the witness Jackson

to testify that in his first conversation with the defendant before he was incarcerated in jail, the defendant told him that due to his connection with Ponder and Best Company on the west coast it was his business to go to the Deseret Book Company as a prospective customer. The witness said the defendant told him he had been there a number of times but did not indicate the month or time he was there. R. 92. The State rested.

VAUGHN L. HAMMOND was called as a witness for the defendant. He runs the camera department of the Anderson Jewelry Company. That the defendant Bruce Gillespie was a representative of Ponder and Best Company and through him they had purchased many of their photographic items. The witness attempted to testify as to the honesty and integrity of the defendant from his personal experience but the court rightfully excluded the testimony.

ROBERT M. SCHUBACH was called as a witness for the defendant. He is in the optical and photographic business located at 31½ East Broadway and has known Bruce Gillespie for about three years. That he purchased photographic supplies and equipment through him from time to time. That his reputation in the community for honesty, integrity and the qualities of a law abiding citizen was good. He had never heard anything derogatory against the defendant until his present trouble. On cross examination the witness testified that he had discussed with others the honesty and integrity of the defendant prior to the time of his arrest. That the occasion for this investigation was the fact that they

were entrusting \$12,500 in cash to the defendant to go to New York and buy film when the same could not be procured in the open market here. That after the investigation they entrusted him with \$12,500. R. 107. The defendant rested. The defendant, through his attorney, made the following motion:

“MR. JENSEN: For the purpose of the record at this time, if Your Honor please, I move for a verdict of acquittal as to the defendant on each of the following grounds:

‘First, that there is no substantial testimony in the record that shows that the camera which was in Bruce Gillespie’s possession at Auerbach’s on the day shown was actually a stolen camera.

‘Next, there is no substantial evidence in record to show that even though it was a stolen camera that the defendant was the thief of that particular camera.’ ”

STATEMENTS OF ERROR

1. THE COURT ERRED IN OVERRULING DEFENDANT’S OBJECTION TO THE QUESTION “AND WHAT INFORMATION DID YOU CONVEY TO MR. LINSCHOTEN” AS SET FORTH IN THE FOLLOWING TESTIMONY ON PAGE 53 OF THE RECORD, WHICH READS AS FOLLOWS:

“Q. And what information did you convey to Mr. Linschoten?

A. That we had lost a Filmo—

MR. JENSEN: Just a minute. If Your Honor please, we object to it as hearsay.

THE COURT: The objection is overruled. You may not tell me just what you said, but you can tell the substance of the information you gave; that is, what it was about.

A. I told him we had lost an Automaster camera with such a lens, 2.5 lens, and to be on the lookout for it, that we suspected it had been stolen.

Q. Did you indicate the name of any suspects?

A. Yes. As I recall, I indicated that we suspect Mr. Gillespie." R. 53.

2. THE COURT ERRED IN OVERRULING DEFENDENT'S MOTION FOR A VERDICT OF ACQUITTAL AS TO THE DEFENDANT ON EACH OF THE FOLLOWING GROUNDS:

"First, that there is no substantial testimony in the record that shows that the camera which was in Bruce Gillespie's possession at Auerbach's on the day shown was actually a stolen camera.

Next, there is no substantial evidence in the record to show that even though it was a stolen camera that the defendant was the thief of that particular camera." R. 108.

3. THAT THE JUDGMENT OF THE COURT IS NOT JUSTIFIED BY THE EVIDENCE.

ARGUMENT

PROPOSITION I. THE COURT ERRED IN OVERRULING DEFENDANT'S OBJECTION TO THE QUESTION PROPOUNDED TO MR. LINSCHOTEN AS TO THE INFORMATION HE RE-

CEIVED FROM MR. WILLIAMS, MANAGER OF THE CAMERA DEPARTMENT OF THE DESERET BOOK COMPANY. R. 54. Statement of Error No. 1.

The objection to the question was made on the ground that it was hearsay. The defendant was not present and to permit the information conveyed by one manager of a store to the manager of another store selling similar merchandise as to the loss of a camera and the fact that he suspected it had been stolen and that he suspected the defendant, Mr. Gillespie, of having stolen it, is the rankest kind of hearsay. The error is obvious and the reception of such improper evidence would naturally influence the erring court against the defendant. The defendant contends there is no evidence in the record that the camera was stolen, as will hereinafter appear, yet the court permitted hearsay testimony to be received that the officials of the Deseret Book Company suspected it had been stolen and that they suspected Mr. Gillespie of stealing it. There is not a scintilla of evidence in the record to justify this erroneous suspicion that Mr. Gillespie had stolen anything from the Deseret Book Company. Mr. Williams could not testify that he had seen Mr. Gillespie anytime during the month of May of 1948 in the Deseret Book Company. When he attempted to testify that he believed that information was given to him by one of the clerks, the court struck the answer from the record. There is no significance in the fact that Mr. Gillespie may or may not have been in the store in the month of May, 1948. He had been selling this firm cameras and photographic equipment

and supplies for a long time and his presence in the store certainly would not raise any suspicion that he stole a camera that may or may not have been stolen from the particular store. How can it be argued that a trial judge who errs in receiving hearsay information would be uninfluenced by such testimony?

The defendant is a young man of unimpeachable character whose honesty and integrity justified Schubach Optical Company to advance him \$12,500.00 cash to go to New York to purchase films and photographic materials for that company. R. 107. Surely the flimsy evidence submitted by the State to convict such a defendant should not be supported by hearsay testimony which contained no facts but incriminating suspicions and unwarranted conclusions of a person who could not and did not testify that the camera in question was actually stolen or that defendant had stolen it.

PROPOSITION II. THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A VERDICT OF ACQUITTAL AND THE JUDGMENT OF THE COURT IS NOT JUSTIFIED BY THE EVIDENCE. Statements of Error Nos. 2 and 3.

Appellant contends that there is no competent evidence in the record which would justify a finding by the trial court that the Bell & Howell automaster camera in question had been stolen by the appellant, Robert Bruce Gillespie, from the Deseret Book Company as alleged in the information. In the first part of May, 1948, there were approximately half a dozen of such cameras in the stock of the Deseret Book Company. Two of these

cameras were on display in the display case. R. 48. Six employees in the camera department had access to all cameras in stock and more than fifty employees in the store had free access to the display cases where the cameras were kept. No one testified that the camera containing the serial number in question was ever in the display cases during the month of May, 1948. The only evidence which links the Bell & Howell camera bearing serial number 434168 to the Deseret Book Company is an invoice, Exhibit "A". There is not a scintilla of evidence of anyone connected with the Deseret Book Company that such a camera bearing serial number 434168 was received or seen by them in the store of this company. When it was reported that a camera was missing, they did not or could not check the missing camera until they were furnished the serial number of a camera of the same type by the manager of the camera department of the Auerbach store, who testified that he saw it in the possession of appellant. It was then that the manager of the Deseret Book Company checked over their invoices and found Exhibit "A" which contained the serial number 434168 on that type of camera. This invoice bore a receiving stamp with the date of November 9, 1946. R. 39-40.

This pertinent fact must be conceded, that there is no direct testimony of any witness that a Bell & Howell camera bearing serial number 434168 was ever in the Deseret Book Company in the month of May, 1948, or any other time. The manager of the store testified that the last stock inventory was taken in the store on June

30, 1948, and the one prior to that time was December 30, 1947. He further testified that the camera in question would have to be on the inventory of December 30, 1947, but no such testimony was ever offered that it was on that inventory and the very fact they could not find that such a camera was ever in their stock except by a serial number on an invoice (Exhibit "A") indicates irregularity and confusion which should not be tolerated in a criminal case. If the camera in question was in stock in the month of May, 1948, it certainly should have been in the inventory of December 30, 1947, as the receiving department's stamp indicated that such a camera was received on November 9, 1946. The testimony of Lamar S. Williams, manager of the camera department is significant. He testified that he actually did not know when such a camera with that serial number was seen by him or anyone else in the Deseret Book Company. R. 59.

The next pertinent inquiry is to determine if the camera in question was ever stolen from the Desert Book Company even assuming this particular camera was actually in its stock. Mr. Reiser, the general manager of the Deseret Book Company testified as to the practice of the store in selling merchandise. The following testimony is pertinent:

"Q. Mr. Reiser, are you able in the course of your business when an article such as this camera turns up missing, are you able to determine what the serial number of the missing article is?

A. Yes.

Q. How would you do that?

A. Our practice when we sell a camera is to give the customer a sales slip. If it's a cash sale, it's one type of form, and if a charge sale, it's another. In either case, our practice is to identify the article sold, especially when it bears a serial number, by indicating the serial number upon the sales slip, so that the purchaser may have it in the nature of a bill of sale and have evidence of his ownership of it.

Q. Do you keep copies of these sales slips?

A. Yes.

Q. I will ask you to state whether or not there has ever been a sales slip made up on the camera that bears the serial number 434168.

MR. JENSEN: Just a moment. I object to it as calling for his conclusion, Your Honor.

THE COURT: The objection is sustained." R. 42-43.

In view of the foregoing statement, the natural and logical proceeding would be to check the sales slips of the store to determine if such a camera had been sold during the period in question, but what do we find in the evidence. Mr. Lamar S. Williams, manager of the camera department testified as follows on direct examination:

"Q. Have you made a check to determine whether any of these type cameras were sold in your department in May of 1948?

A. I have no record of it at all.

Q. Have you examined the records in that regard?

A. I couldn't go down through all the sales that we have made since that time, but as far as I know we didn't make one then. Neither have we made one since. They are rather an expensive camera and are rather hard to sell." R. 50.

On cross examination the witness testified as follows:

"Q. NOW, YOU MADE SOME STATEMENT ON DIRECT EXAMINATION, MR. WILLIAMS, THAT YOU HAD NO RECORD OF A SALE OF THIS CAMERA, BUT THEN YOU QUALIFIED THAT BY SAYING THAT YOU COULD NOT GO DOWN THROUGH YOUR RECORDS. NOW, HOW FAR BACK THROUGH THE RECORDS DID YOU CHECK?

A. DIDN'T CHECK ANY OF THE SALES OF THE RECORDS.

Q. AS A MATTER OF FACT, YOU DON'T KNOW OF YOUR OWN KNOWLEDGE WHETHER OR NOT ONE WAS SOLD, DO YOU?

A. NOT THAT ONE, NO, BECAUSE THERE ARE TOO MANY SALES DURING THE DAY TO TAKE THE TIME TO GO THROUGH A MONTH'S SALE." (R. 60-61.

In view of the foregoing testimony, how could the trial judge make a finding that the camera in question had been stolen from the Deseret Book Company? The

very fact that the sales slips were not checked for the month of May, 1948, or any other period for sixteen months prior thereto leaves a strong implication that the camera was sold during the period by one of the 56 employees who were authorized to do so. Six clerks in the camera department could have made the sale and as far as the records are concerned fifty other clerks in the store had free access to this merchandise for the purpose of sale. We have no testimony that the sales records of the Deseret Book Company did not disclose that the camera bearing the serial number in question was sold since the time it was alleged to have been received on the 9th day of November, 1946, as shown by the department's received stamp on Exhibit "A". Is there any reason why this camera could not have been sold in the year 1946, or the year 1947, or in the months of January, February, March and April of 1948? There is no testimony in the record to show that such a camera was not sold. The sales slips were never checked and there is no direct testimony from any of these clerks and employees that they did not sell such a camera during the period indicated. If it was necessary for the officials of the Deseret Book Company to get the serial number of a Bell & Howell camera from a competitor in order to find out if such a camera was ever received by them and then it was further necessary to rely upon an invoice which was received sometime in the early part of November, 1946, to ascertain if such a camera was in the stock of the Deseret Book Company, then how can we say that this same camera was not sold dur-

ing the period from November 9, 1946, to May 17, 1948? A year and four months has elapsed since this camera was supposed to have been received by the Deseret Book Company. Surely the appellate court is not going to confirm a criminal conviction of the appellant on testimony which is so inconclusive and fragmentary as we find in this record. A fair examination of the evidence does not justify a finding that this camera was ever stolen from the Deseret Book Company. It is a more reasonable conclusion that if the camera was ever in the Deseret Book Company, that it was sold in the ordinary course of business.

Section 103-36-1, Utah Code Annotated, defines larceny as follows:

“Larceny is the felonious stealing, taking, carrying, leading or driving away the personal property of another. Possession of property recently stolen, when the person in possession fails to make a satisfactory explanation, shall be deemed prima facie evidence of guilt.”

TO MAKE A PRIMA FACIE CASE UNDER THIS SECTION, IN ABSENCE OF DIRECT EVIDENCE OF THE TAKING, THE STATE MUST PROVE THE LARCENY, RECENT POSSESSION BY THE ACCUSED, AND AN UNSATISFACTORY EXPLANATION. *State v. Bowen*, 45 Utah 130; 143 P. 134. See also *State v. Potello*, 40 Utah 56; 119 P. 1023; and *State v. Converse*, 40 Utah 72; 119 P. 1030.

The record fails to disclose the crime of larceny having been committed. The only evidence that such a

camera was ever in the Deseret Book Company was the fact that an invoice was produced containing the serial number 434168. The record fails to disclose one line of direct testimony from any person that a camera bearing this serial number was ever in the Deseret Book Company. The sales records were never checked to determine if such a camera was ever sold by this store from the receiving date on the invoice, namely, November 9, 1946, to the time that the camera was supposed to have been missing, namely, May 17, 1948. Appellant contends that there is absolutely no proof of any larceny. It was stipulated that the defendant had a Bell & Howell camera with the serial number 434168 at the Auerbach store on June 4, 1948; that George William Mason, the buyer for the camera department at the Auerbach store testified that he had a conversation with the defendant, Mr. Gillespie, in which he told him that he had a customer who was interested in a Bell & Howell camera and if Mr. Gillespie could obtain this type of camera for him he thought he could make a sale. He requested that Mr. Gillespie leave the camera with him so he could show it to the customer. Mr. Gillespie stated that he did not want to do that as the camera belonged to a dealer who, in the meantime, might have a chance to sell it. Mr. Gillespie told Mr. Mason that he wanted to trade it for some Movie Mite equipment and some other merchandise rather than take cash for it. Mr. Gillespie did not tell Mr. Mason the name of the dealer that the defendant said the camera belonged to.

EDWARD JACKSON, a detective in the Salt Lake

Police Department, testified that he and Detective Thorpe saw the defendant at the Auerbach store on the 7th of June, 1948, and asked defendant to accompany them to police headquarters where the following conversation occurred:

“Q. Will you relate the conversation as accurately as you can that took place at the time indicated, Officer.

A. As I remember, it was over the theft of a Bell & Howell Automaster movie camera, which I asked him if he had that particular camera in his possession, and he stated no, that he did not have; and I asked him what became of it. He refused to answer my questions, but later on he stated that the camera was then loaned out to a man by the name of Ed Jorgensen along with Mr. Gillespie's car and that this man Jorgensen was then in Las Vegas, Nevada.

Q. Did you have any conversation with him regarding where he had procured the camera?

A. Yes, I did. He stated that he had secured the camera from a dealer in Omaha, Nebraska.

Q. And when did he say he had procured it, if he said at all?

A. I don't believe that question was asked, Mr. Black.

Q. Was there anything else said at that time?

A. Yes. I asked him if he had registration he did and that he would take us to his home and procure the same for us, in which event

we went to his home, and he was unable to dig them up out of his brief case.

MR. JENSEN: What you mean by that is he didn't?

A. Sir?

MR. JENSEN: He didn't procure any papers?

A. He didn't produce any.

Q. Was there any—who accompanied him to his home?

A. Both I and Thorpe.

Q. And was there anyone else present when you talked at his home?

A. Yes, his little wife, Mrs. Gillespie.

Q. And have you related all of the conversation that took place at that time?

A. Well, I couldn't relate all of it.

Q. Can you recall anything else that was said at the time?

A. Yes. He says, 'You are welcome to go through the house and look for the camera if you still think I have it.'

Q. Did you retain him in custody after you had talked to him at his home?

A. Oh, no." R. 75-76.

On the 8th of June, 1948, at 9:00 A.M. o'clock, the witness and Detective Thorpe had a conversation with the defendant in the city jail. The substance of the conversation was involved around the theft of a camera and what became of it. The witness testified as follows:

“Q. Well, just relate the conversation, Officer.

A. We went back over it again, and I asked him—I says, ‘Have you been able to get in touch with Mr. Jorgensen?’ He said no, that he hadn’t come back. I said, ‘Do you have the camera at this time?’ And he says, ‘No, I do not.’

Q. Was there further talk about Mr. Jorgensen?

A. No, not on that date that I remember of.”
R. 80.

On cross examination Detective Jackson testified that the defendant showed them a great amount of cameras and camera equipment which he had in his possession; that none of the cameras or equipment had been reported to the police department as having been stolen.

We have quoted all the evidence which was introduced with reference to the defendant’s explanation of a camera bearing the serial number in question. There is not a single culpatory or incriminating circumstance in connection with the defendant’s explanation of his possession of a Bell & Howell camera with the serial number 434168. Not a scintilla of evidence was offered by the State to show that the statements of the defendant made to Messers. Mason, Jackson and Thorpe were untrue and false.

Your Honorable Court has held in the case of *State v. Kinsey*, 77 Utah 348 at 352; 295 P. 274:

“If only the larceny is shown and recent possession in the accused, that is not sufficient to justify a submission of a case, and does not warrant a conviction.”

The court further held in this case, "That mere or bare possession when not coupled with other culpatory or incriminating circumstances, does not alone suffice to justify a conviction." This case repeated the rule made in *State v. Barrett*, 47 Utah 479 at 488; 155 P. 343 at 346.

The defendant did not take the stand but his explanation of the possession of the camera with the serial number in question was satisfactorily shown by the conversations with Detective Jackson and the other witnesses. The truth of his explanation is sustained by the unimpeached reputation of the defendant as testified to by Mr. Robert M. Schubach, whose company had entrusted \$12,500 cash to him to purchase film and camera equipment in New York City. Mr. Schubach testified that he had known the defendant for some three years and that during that time he had purchased photographic supplies and equipment through him from time to time; that his reputation in the community for honesty and integrity and the qualities of a law abiding citizen was good, and that he had never heard anything derogatory against the defendant until his present trouble.

CONCLUSION

In conclusion appellant submits that the trial court erred (1) in receiving hearsay testimony from Mr. Reiser, the manager of the Deseret Book Company, pertaining to information which he conveyed to Mr. Linschoten of the Auerbach Company, in which he stated that he suspected that an Automaster camera had been stolen and that he suspected the defendant of having

stolen it. Appellant contends that the trial judge who erred in receiving such hearsay information would naturally be influenced thereby; (2) that the court erred in overruling defendant's motion for a verdict of acquittal and the judgment of the court was not justified by the evidence; that no competent evidence was offered and received to show that larceny had ever been committed of a camera bearing serial number 434168. There is no evidence of the asportation by the accused or any direct evidence to connect him with the taking of the property, and the mere possession of a camera bearing the serial number in question, in absence of culpatory and incriminating circumstances, does not justify a finding of guilt by the trial court. That the explanation of the possession of the camera with the serial number in question is unimpeached and satisfactory to any fair-minded person who studies the entire evidence offered in this case. That the unimpeached reputation of the accused for honesty, integrity and the qualities of a law abiding citizen lends the utmost credence to the defendant's innocence of the crime charged.

Respectfully submitted,

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