1949

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

Utah Supreme Court

Clinton D. Vernon; Attorney General; Mark K. Boyle; Assistant Attorney General; Attorneys for Respondent;

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

RESPONDENTS' BRIEF

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INDEX

CASES CITED

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STATEMENT OF FACTS

Inasmuch as we are unable, from reading appellant's Statement of the Case, to separate fact from argument, the following statement of facts is respectfully submitted.

The defendant was charged by information with the crime of grand larceny, in violation of Title 103, Chapter 36, Sections 1 and 4, Utah Code Annotated, 1943, 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;"

The defendant waived trial by jury (R. 10) and was tried before the Honorable A. H. Ellett, one of the judges of the Third Judicial District Court. The defendant was found guilty as charged and was sentenced to the state penitentiary.

Appellant cites as error the trial court's admission of certain testimony which is alleged to be hearsay; the court's action in overruling defendant's motion for a verdict of acquittal and that the judgment of the court is not justified by the evidence. These matters will be treated in the order presented by the appellant.

ARGUMENT

PROPOSITION NO. I

THE COURT DID NOT ERR IN OVERRULING DEFENDANT'S OBJECTION TO THE QUESTION "AND WHAT INFORMATION DID YOU CONVEY TO MR. LINSCHOTEN?"

Appellant urges as assignment of error No. 1 that the court erred in overruling defendant's objection to the question propounded to Mr. Williams, "And what information did you convey to Mr. Linschoten?" In his argument of this assignment of error, appellant seems to have misconceived the facts. On pages 20 and 21 of appellant's brief the following is stated as Proposition No. 1:

"PROPOSITION I. THE COURT ERRED IN OVERRULING DEFENDANT'S OBJECTION TO THE QUESTION PROPOUNDED TO MR. LINSCHOTEN AS TO THE INFORMATION HE RECEIVED FROM MR. WILLIAMS, MANAGER OF THE CAMERA DEPARTMENT OF THE DESERET BOOK COMPANY. R. 54. STATEMENT OF ERROR NO. 1."

Upon examination of the transcript (R. 53), it is seen that Mr. Williams, the man in charge of the Deseret Book Company's camera shop was being interrogated. The question to which appellant objects was propounded to Mr. Williams, regarding what, in substance, he told Mr. Linschoten, an employee of Auerbach Department Store, assigned to their camera department. Mr. Williams merely related that they had lost a camera and had reason to believe it was stolen, as is seen from the following extract from the transcript:

"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."

Appellant takes the position that this constituted hearsay. It would appear that appellant's contention is based on the erroneous assumption as asserted in his argument that Mr. Linschoten was testifying as to what Mr. Williams told him. It is obvious that such was not the case. It may well be hearsay for Mr. Linschoten to testify as to what Mr. Williams told him — but it is manifest that there is no question of hearsay involved in the actual situation under discussion. We are unable to detect the element of hearsay in allowing the witness to relate the substance of what he told Mr. Linschoten.

We submit that the Court did not err in overruling defendant's objection to this question.

PROPOSITION NO. II

THE COURT DID NOT ERR IN OVERRULING DEFENDANT'S MOTION FOR A VERDICT OF ACQUITTAL AND THE JUDGMENT OF THE TRIAL COURT WAS FULLY JUSTIFIED BY THE EVIDENCE.

We will treat assignments of error Nos. 2 and 3 under one proposition inasmuch as we believe that they both involve the same questions of law.

Defendant was charged by information with grand larceny in violation of Title 103, Chapter 36, Secs. 1 and 4, Utah Code Annotated 1943 (R. 5). Section 103-36-1, provides that 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 out a case under this section, the state must prove, (a) the larceny, (b) recent possession by the accused, and (c) that the accused failed to make a satisfactory explanation of such possession. State v. Mellor, 73 U. 104, 272 P. 635 and State v. Potello, 40 U. 56, 119 P. 1023. The cases cited by the appellant are to the same effect. The appellant contends, however, that the evidence in the case at bar is insufficient to warrant a conviction under the statute. With this we are unable to agree.

(a) There can be no dispute as to the fact that the camera in question was duly received in the course of business from the Bell and Howell Company. The invoice on which such camera was listed was also used as a memorandum of shipping (R. 39) and when the camera was received by Deseret Book Company it was checked against the invoice in the normal and regular course of business (R. 40), and if the shipment in question had not been received a notation to that effect would have been made on the invoice, pending inquiry to the Bell and Howell Company. There was no such notation on the invoice; as a matter of fact it carried the Deseret Book Company's "received" stamp dated Nov. 9, 1946, and the serial number of the camera received, i. e. #434168. (R. 40-41)

Mr. A. Hamer Reiser, the manager of the Deseret Book Company testified that on May 17, 1948, he received a report that a Filmo Automaster camera was missing and that there was no record of its being sold, as is seen from the portion of the transcript quoted below.

"Q. Mr. Reiser, did you ever receive any reports of a missing camera, Automaster camera in May of 1948?

A. Yes. Mr. Williams, the —

MR. JENSEN: Just a moment.

Q. Well, the answer can be just 'Yes' or 'No,' Mr. Reiser.

A. Yes. All right.

Q. And when, please?

A. It was a Monday morning after our employees' meeting about May 17, as I recall.

Q. And did you receive information as to what type of camera it was that was missing?

A. Yes.

Q. And will you state what type of camera it was, please?

A. It was a Filmo Automaster turret head sixteen millimeter.

Q. Is that the same type as is indicated on the invoice?

A. Yes.

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 on 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.

Q. Well, have you made any investigation to determine whether there has been a sales slip—

A. Yes.

Q. —made out on that camera?

A. Yes.

Q. And has there ever been?

MR. JENSEN: Same objection.

THE COURT: The objection is sustained. He wouldn't know, Mr. Black, whether one of the agents made out one or not. All he can testify, I suppose—

MR. BLACK: Well, he says they keep copies of them, Your Honor.

THE COURT: He might be able to testify whether they have copy in their record or not, but he can't know—

MR. BLACK: All right, I will reframe the question.

Q. Have you any copies in your records of a sales slip being made out on this particular camera?

A. We have not.

Q. Do you keep copies of sales slips made out on the various types of equipment sold?

A. Yes, we keep them for a period of three years." (R. 41-44)

What more must be shown to make out larceny? We submit that very rarely is a merchant in a position to know the details of a loss such as this. It is for this very reason that our Legislature saw fit to authorize a conviction under the statute in question. If the employees of the Deseret Book Co. had witnessed the asportation there would be no need to proceed under this statute. The question then would be one of identity. As is pointed out in the cases of State vs. Miller and State vs. Potello, supra, this statute was designed to apply when there is no direct evidence of the asportation. We believe that the record amply supports the trial judge's finding that there was a larceny.

(b) The second element necessary to sustain a conviction under the statute is recent possession by the accused. There is no dispute as to this element. In fact counsel for the defendant stipulated with the prosecuting attorney that the defendant brought the camera in question, bearing serial No. 434168, into Auerbach's on June 4, 1948, and showed it to a Mr. Linschoten, who was an employee of Auerbach's. (R. 66-67)

(c) The third element necessary to support a conviction under the statute is an unsatisfactory explanation of such possession by the accused.

Detective Edward Jackson testified that during the course of his investigation of this matter he and Detective Thorpe contacted the defendant on June 7, 1948 in Auerbach's department store and escorted him to police headquarters where the following conversation took place: (R. 75)

"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."

It will be seen that the defendant at first refused to answer the officer's questions, and then gave a story about an "Ed Jorgensen" who allegedly was out of the State. It is important, we think, that "Mr. Jorgensen" never made an appearance and that the police were unable to locate him.

Witness George W. Mason, the buyer for Auerbach's camera department gave the following testimony in answer to a question by the prosecuting attorney regarding a conversation he had with the defendant on June 4th in the department store:

"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."

Now if we examine these statement, it is at once apparent that the defendant's explanation as to where he obtained the camera was "unsatisfactory" to say the least.

On June 4th he told the personnel at Auerbach's that he had "borrowed" the camera from a Salt Lake dealer and that he wouldn't leave it with the store, even though he was trying to negotiate a trade for other equipment.

Then on June 7th he was again at Auerbach's camera department apparently negotiating further when Detective Jackson picked him up. He told Detective Jackson that he loaned the camera to "Ed Jorgensen" who was enroute to Las Vegas, Nevada and that he had originally obtained it from a dealer in Omaha, Nebraska.

Certainly these conflicting stories are not consistent with defendant's innocence. First of all, it does not seem reasonable that the defendant would loan the camera to a man going out of the state while he was negotiating with Auerbach's on a trade therefor. Secondly, what reason, other than defendant's guilt, would prompt him to first say he had been loaned the camera by a Salt Lake dealer, and then say he obtained it from an Omaha dealer. Also, it is important to note that he was unable to produce the registration papers which he claimed to have had.

We do not believe there can be any serious doubt on the proposition that the accused failed to make a satisfactory explanation of his possession. That being so, and the defend-

ant having waived a jury, it was for the trial judge to determine, from all of the evidence, whether or not defendant was believed to be guilty beyond a reasonable doubt. This he did, and we submit, properly so.

CONCLUSION

It is respectfully submitted that the first error alleged, i. e., that the trial court erred in receiving hearsay testimony is without merit inasmuch as the testimony objected to was no more than a statement by the witness as to the substance of the statement previously made by him to Mr. Linschoten. We cannot see the hearsay element in this statement.

Secondly, we submit that the record amply supports the trial court's verdict and that all three of the elements necessary to support a conviction, under the statute in question, were fully proved.

We respectfully urge this Court to uphold the conviction of the defendant.

Respectfully submitted,

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