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State of Utah v. Jack L. Clark : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

STATE OF UTAH,

vs.

JACK L. CLARK,

Respondent,

Appellant.

} Case No. 7371

RESPONDENT'S BRIEF

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STATE OF UTAH,

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JACK L. CLARK,

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Appellant.

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

This is an appeal by the defendant, Jack L. Clark, from the verdict of the jury and the judgment of the court convicting him of the crime of involuntary manslaughter arising out of an automobile accident which occurred on December 16, 1948, at approximately 11:30 p.m.

Appellant's brief summarizes very completely the evidence and testimony which was presented to the Court and jury upon which the conviction was based. Respon-

dent will therefore refrain from making an independent presentation of the facts at this time but will do so where necessary in view of the fact that appellant relies for a reversal of the judgment of conviction partly on the ground that, as he contends, the evidence was insufficient to show that defendant was guilty of "reckless conduct or conduct evincing a marked disregard for the safety of others."

STATEMENT OF POINTS

- I. The evidence was sufficient to sustain the verdict.
- II. The Court did not prejudicially instruct the jury concerning the alleged acts of willful or wanton misconduct.
- III. The Court properly refused to give defendant's requested instruction No. 2.

ARGUMENT

I.

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE VERDICT.

In his brief appellant argues that there was insufficient evidence from which the jury could conclude either:

- (a) That the defendant drove his automobile at a speed greater than was reasonable and prudent, having

regard for the actual and potential hazards then existing; or

(b) That the defendant drove his automobile to the left of the center of the highway in an attempt to overtake and pass another vehicle proceeding in the same direction.

In determining whether or not defendant drove his car at a rate of speed greater than was reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing, it must be remembered that regardless of the actual speed of defendant's car, which was never accurately determined because the speedometer was not working, the uncontroverted testimony in the record shows that the highway was icy and slippery and that the defendant drove his car knowing this and also that the rear tires were worn smooth, and consequently he did not have good traction. Furthermore, the defendant admitted he had been drinking some beers earlier in the evening, which fact could certainly be considered in determining the reasonableness or unreasonableness of the rate of speed at which defendant was driving under the circumstances. In addition, the physical evidence at the scene of the accident could properly be considered, together with all the other evidence and testimony, in determining whether or not, under the circumstances, the speed at which defendant was driving was reasonable or unreasonable.

It is respectfully submitted that there was ample and sufficient testimony and evidence presented which justi-

fied the Court in submitting the issue of speed to the jury.

With reference to the matter of submitting question of issuable fact to the jury, it is stated in 61 *C. J. S.*, beginning at page 800, that:

“* * * in prosecutions for homicides occasioned through the operation of motor vehicles and for assault with intent to kill or murder, ordinarily it is the province of the court to determine questions of law, and that of the jury to determine, under proper instructions, issues of fact, such as the weight to be given the evidence and the credibility of the witnesses. Where there is evidence on which th jury may justifiably find the existence or nonexistence of any material facts in issue, and the evidence is conflicting or of such a character that different conclusions may reasonably be drawn therefrom, the issues should be submitted to the jury.

“In numerous cases various issues have been held questions of fact for the jury, such as * * *; the speed or excessive or unlawful speed of accused's motor vehicle; whether accused was driving on the wrong side, or over the center line, of the highway, * * *”

Also, in 5 *Am. Jur.* at page 882 it is stated that:

“* * * It is generally for the jury to decide whether the speed of the vehicle proximately contributed to the accident, and whether such speed was excessive, considering in connection therewith the hazards of the surrounding circumstances.”

This Honorable Court held in *State v. Lake*, 196 P. 1015, 57 Utah 619, a case which involved a prosecution

for involuntary manslaughter, that the question of whether or not the defendant's automobile was running at a dangerous or excessive rate of speed at the time it struck and killed deceased was *exclusively* a jury question. In the course of the opinion it was said:

“Whether or not the defendant's car was running at a dangerous or excessive rate of speed was a question exclusively for the jury under the facts of the instant case. The witness O. C. Anderson, after duly qualifying as to his competency to express an opinion, testified that in his opinion defendant's car, when it struck the boy, was running at a speed of 40 miles an hour. Defendant's witnesses testified tht the speedometer on the car indicated only 23 or 24 miles an hour. Under these circumstances we are not prepared to hold as a matter of law that there was no substantial evidence to support the charge that the speed was in excess of 25 miles an hour. Besides this, there was also evidence to the effect that the boy was thrown by the impact a distance of 25 or 30 feet, and that the car continued on its course for a distance of 200 feet before it was stopped. These circumstances had a bearing upon the question of speed and were no doubt considered by the jury in arriving at a conclusion.”

See also *Steffani v. State*, 45 Ariz. 210, 42 P. (2d) 615; *People v. Flores*, 83 CA 2d. 11, 187 P. (2d) 910; *Cowart v. Lewis*, 151 Miss. 221, 117 So. 531, 61 A.L.R. 1229; *Whiting v. Andrus*, 173 Ore. 133, 144 P. (2d) 501.

With reference to the matter of sufficient evidence to prove that defendant drove his automobile to the left of the center of the highway it is respectfully submitted

that this too was a question for the jury, which the jury decided adversely to the defendant. It will be noted that the jury was instructed in Instruction No. 7 that:

“Before you are warranted in convicting the defendant the State must prove beyond a reasonable doubt * * *

(2) that * * *, or that he drove his automobile to the left side of the center of the roadway
* * *,”

And again in Instruction No. 14 that:

“* * * to warrant you in convicting the defendant, the evidence must, to your minds, exclude every reasonable hypothesis other than that of the guilt of the defendant. That is to say, if after an entire consideration and comparison of all the testimony in the case, you can reasonably explain the facts given in evidence on any reasonable ground other than the guilt of the defendant, you should acquit him.”

In considering the evidence as to whether or not the defendant drove his automobile to the left of the center of the roadway, in the light of the aforesaid instructions the jury must necessarily have convinced themselves beyond a reasonable doubt that the defendant did in fact drive his automobile to the left of the center of the roadway.

As stated in the case of *Wallis v. Nauman*, 61 Wyo. 231, 157 P. 2d 285: “* * * The burden is upon the driver on the wrong side of the road to excuse or justify the violation of the law of the road.”

It is respectfully submitted that this was a jury question and that the defendant failed to meet the burden of proof placed upon him to excuse or justify the presence of the automobile he was driving at the time of the accident on the wrong side of the highway. In this connection see also the cases of *State v. Birch*, 183 Wash. 670, 49 P. (2d) 921; *State v. Riddle*, Utah, 188 P. 2d 449; *Howard v. State*, Okla., 199 P. (2d) 240.

It is submitted likewise that the Court did not commit prejudicial error in denying defendant's motion for a dismissal on the grounds that the evidence was insufficient to submit to the jury. As held by this Honorable Court in the case of *State v. Thatcher*, 108 Utah 63, 157 P. (2d) 258:

“The rule which must be applied upon a motion to dismiss a criminal case is that all reasonable inferences are to be taken in favor of the state, and only if the record itself reveals that no reasonable man could draw an inference of guilt therefrom is the trial court justified in taking the case from the jury.”

Respondent respectfully submits that no such case is presented here but that there was sufficient evidence to submit to the jury on the question of whether defendant operated his automobile at an excessive rate of speed in view of the actual and potential hazards then existing, and also sufficient evidence to submit to the jury on the question of whether the defendant operated his automobile on the wrong side of the highway.

II.

THE COURT DID NOT PREJUDICIALLY INSTRUCT THE JURY CONCERNING THE ALLEGED ACTS OF WILLFUL OR WANTON MISCONDUCT.

It is argued by the appellant that the verdict of the jury cannot be sustained because the Court failed to instruct the jury that before they could find the defendant guilty, they must unanimously determine that he was guilty of willful or wanton misconduct as to one or both of the alleged grounds of negligence set forth in the Court's instructions. Instruction No. 7, the one complained of, reads as follows:

“Before you are warranted in convicting the defendant, the State must prove beyond a reasonable doubt the following:

(1) That the defendant, Jack L. Clark, drove an automobile on or about the 16th day of December, 1948, upon a highway in Salt Lake County, State of Utah.

(2) That he drove the automobile at a rate of speed greater than was reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing, or that he drove an automobile to the left side of the center of the roadway while overtaking and passing another vehicle proceeding in the same direction at a time when the left-hand side of the highway was not free of oncoming traffic for such a sufficient distance ahead as to permit him to complete the pass and return to the right-hand side of the highway in time to avoid a collision with an automobile proceeding in the opposite direction. That in committing one or both of the

acts set forth herein the defendant was guilty of criminal negligence as defined herein.

(3) That as a result of the manner in which the defendant unlawfully drove his car, if you so find, John D. Cutler was killed without malice.

(4) That the manner in which the defendant drove his automobile as set forth in paragraph (2) was the proximate cause or proximately contributed to the death of John D. Cutler.

It is not enough that the State prove one or more of the elements set forth above, but it is necessary in order to justify a verdict of guilty that each of the four elements set forth above be proved to your satisfaction and beyond a reasonable doubt."

Appellant admits that no request for a clarifying instruction was submitted but attempts to justify this on the ground that under his theory of the case there was insufficient evidence to go to the jury, particularly on the matter of whether defendant was attempting to pass other vehicles. The general rule with reference to the necessity of requesting more explicit instructions is set forth in 53 *Am. Jur.* at page 414 as follows:

"Even though the trial court may be required to give general instructions on the issues without request from counsel, it is generally considered to be the duty of counsel to assist the court in the function of instructing the jury. It is an established general rule that when a party is of the opinion that the instructions given by the court are not explicit enough upon certain points or do not cover all phases of the case, he should call the attention of the court to that fact, and tender

other and fuller instructions or request the court to give such further instructions as he desires; otherwise he cannot predicate error upon omissions in the charge as given."

As to the application of this general rule in homicide cases see 26 *Am. Jur.* 522, Homicide, Sec. 528.

It is submitted that if appellant was entitled to the type of instruction concerning which he now complains, it was the duty of counsel for appellant to have presented such an instruction to the court and asked that it be given. His failure in this respect, regardless of the reason now proffered for such neglect, precludes appellant from now complaining of the failure of the Court in not giving such an instruction. Moreover it is respectfully submitted that the cases cited by appellant in support of his Point No. 2 do not substantiate the principle relied upon to set aside the verdict.

A careful reading of *State v. Johnson*, 76 Utah 84, 287 P. 909, cited by appellant, reveals that the case was reversed, among other reasons, not because it could not be determined whether or not the jurors unanimously agreed upon one or more of the several acts of negligence with which defendant was charged, but because the trial court submitted the question of intoxication to the jury. The Court held that this was prejudicial and reversible error because there was not sufficient evidence to show that the defendant was under the influence of intoxicating liquor at the time of the automobile accident and therefore that that issue should not have been submitted to the jury.

While a casual reading of *State v. Rasmussen*, 92 Utah 357, 68 P. (2d) 176, and *State v. Bleazard*, 103 Utah 13, 133 P. (2d) 1000, the other two cases cited by appellant in support of his Point No. 2, would appear at first blush to support the principle for which appellant argues, a careful reading of those cases and the later cases of *State v. Roedl*, 107 Utah 538, 155 P. (2d) 741, and *State v. Thompson*, 110 Utah 113, 170 P. (2d) 153, discloses that this Honorable Court did not enunciate that principle. In the course of the opinion in the Thompson case (*supra*), involving a question of first degree murder, it was said:

“The case was submitted to the jury on two theories of murder in the first degree: 1. That the killing ‘was intentional, deliberate and premeditated and done with malice aforethought.’ 2. That the killing ‘was perpetrated by an act greatly dangerous to the lives of others, evidencing a depraved mind regardless of human life.’ After the evidence was in the defendant moved the court to require the state to elect on which one of these theories of murder in the first degree it would stand, and assigns as error the court’s refusal to grant that motion. Counsel, however, does not argue that it was error to submit both of these theories to the jury, but contends that under the instructions given the jury was authorized to find the defendant guilty of murder in the first degree, if all jurors were satisfied that he was guilty thereof, even though some of them believed him guilty only under one theory and others believed him guilty only under the other theory. To the effect that such instruction would be erroneous he quotes from *State v. Roedl*, 107 Utah

538, 155 P. 2d 741, 747, where referring to *State v. Rasmussen*, 92 Utah 357, 68 P. 2d 176, we said:

‘While we held in that case in a prosecution for involuntary manslaughter wherein several unlawful acts, such as driving at an unlawful rate of speed, driving without a proper lookout, and others, were alleged to have been committed resulting in death, the jury must unanimously agree on one or more of the specified unlawful acts and they may not combine their conclusions on different specified acts so as to converge on an ultimate verdict of guilty.’

There is doubt that the Rasmussen case really holds what we in the Roedl case said it did. In the opinion first appearing in the Rasmussen case, written by Mr. Justice Moffat and concurred in by Mr. Justice Ephraim Hanson, it was stated as their opinion that the jury must agree unanimously on one or more of the specified unlawful acts, and that the judgment of the trial court should be reversed on that account but that was not the opinion of a majority of the court. Each of the other three Justices wrote a separate opinion but none of such separate opinions definitely holds that all of the jurors must unanimously agree on one or more of the specified unlawful acts but simply hold, without deciding that question, that even if that is the law the jury was sufficiently instructed to that effect in that case. Nor was that question determined in the Roedl case. There we held that regardless of what the law is on that question no prejudicial error was committed because the evidence was so conclusive on the question of a deliberate and premeditated killing that the jury could not have been misled thereby.

It is also not necessary for us to decide that question and we therefore do not decide it here. Counsel, to sustain his contention that the court authorized the jury to find the defendant guilty of murder in the first degree, even though some found him guilty only under one theory and others found him guilty only under the other theory, relies on the following instruction:

‘Before you may find the defendant guilty of murder in the first degree, all of the jurors must concur as to either one or the other of the kinds of murder above referred to * * *’

That statement says in effect that before the jury is authorized to find the defendant guilty of murder in the first degree all of the jurors must concur in finding him guilty under one theory or all of them must concur in finding him guilty under the other theory. Almost the exact words used in this instruction are used with that meaning in some of the opinions in the Rasmussen case. It is clear that this is the correct construction when we consider the fact that the court is cautioning the jury that: *Before they may find the defendant guilty of murder in the first degree ‘all of the jurors must concur as to either one or the other of the kinds of murder above referred to.’*

On the other hand, a different meaning would have been indicated had the court said: That all that is necessary in order to find the defendant guilty of murder in the first degree is that *‘all of the jurors must concur as to either one or the other of the kinds of murder above referred to.’*

The italicized portions of the above sentences, as indicated, are directly quoted from the instruction, and are the same in both sentences but by

the change in the previous context and a change in the emphasis placed on the words, a different meaning is obtained. The fact that the court is cautioning the jury, that in determining its verdict, it must observe the limitations therein stated, rather than suggesting that such limitations are unimportant clearly indicates an intention to limit the jury in finding the defendant guilty of murder in the first degree to a situation where all the jurors unanimously concurred in such finding on the same theory of such murder. Thus the instructions of the court were in accord with what the defendant contends they should have been."

In connection with this same matter, the attention of this Honorable Court is invited to the holding of the Supreme Court of the State of Montana in the recent case of *State v. Souhrada* (1949), Mont., 204 P. (2d) 792. The case involved a prosecution of a motorist for involuntary manslaughter in which he was charged with several acts of specific negligence in the operation of his automobile. In the course of its opinion the court said:

"The trial court denied several instructions requested by defendant, to the effect that, in this case all twelve of the jurors would have to find beyond a reasonable doubt upon a specific act, or the specific acts, or omission, or omissions, which constituted criminal negligence and which proximately caused the deaths of the persons named, in order to find the defendant guilty, or, in other words, that some of the jurors could not agree on one or more of the acts alleged, and others of the jurors, upon other acts, or act, omission, or omissions, and find the defendant guilty. In urging as error the trial court's failure to so

instruct, the defendant relies upon several cases decided by the Supreme Court of Utah, namely: State v. Bleazard, 103 Utah 113, 133 P. 2d 1000; State v. Rasumussen, 92 Utah 357, 68 P. 2d 176; State v. Johnson, 76 Utah 84, 287 P. 909.

A reading of these cases and the later Utah cases of State v. Thompson, 110 Utah 113, 170 P. 2d 153, and State v. Roedl, 107 Utah 538, 155 P. 2d 741, discloses that the Supreme Court of Utah did not so decide. *It is not necessary that a jury, in order to find a verdict, should concur in a single view of the transaction disclosed by the evidence.* If the conclusion may be justified upon either of two interpretations of the evidence, the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation, and part upon the other. Murray v. New York Life Ins. Co., 96 N.Y. 614, 48 Am. Rep. 658; People v. Sullivan, 173 N.Y. 122, 65 N.E. 989, 63 L.R.A. 353, 93 Am. St. Rep. 582; State v. Flathers, 57 S.D. 320, 232 N.W. 51, 72 A.L.R. 150, annotation at 154." (Italics added.)

It is respectfully submitted that no prejudicial error was committed by the Court by the manner in which it instructed the jury as to the alleged acts of criminal negligence and that in any event appellant may not complain because of his failure to request the Court to give a clarifying instruction. By his own neglect the appellant may not lead the Court into an alleged prejudicial error concerning which he later complains.

III.

THE COURT PROPERLY REFUSED TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 2.

Defendant's Requested Instruction No. 2 was as follows:

"You are instructed that the fact that an automobile skids or slides while proceeding along a wet or slippery street is no evidence that the party is operating the same at an excessive rate of speed or in a careless or negligent manner."

It is respectfully submitted that the requested instruction was properly refused because it does not embody a correct statement of the law. While skidding in and of itself and in all circumstances does not necessarily constitute evidence of negligence, it is a factor to be considered along with all the other factors in arriving at a determination as to whether or not the motorist was guilty of negligence. A correct statement of the doctrine generally accepted in cases of skidding is that set forth in 5 *Am. Jur.* at page 654, as follows:

"Skidding, at least on a slippery pavement, is not necessarily due to negligence. The mere fact, therefore, that an automobile skids does not, of itself, constitute evidence of negligence upon the driver's part so as to render the doctrine of *res ipsa loquitur* applicable. Such skidding is not an occurrence of such uncommon or unusual character that, unexplained, it furnishes evidence of the driver's negligence.

The inquiry in cases of skidding is as to the driver's conduct previous to such skidding. The

speed of the automobile prior to the skidding and the care in handling the automobile, particularly in the application of brakes, are factors to be considered in determining whether or not there was an exercise of due care. This is particularly true where statutory provisions are involved. Extremely slippery streets require correspondingly greater care in operation.”

In the case of *Wallis v. Nauman*, 61 Wyom. 231, 157 P. (2d) 285, the Supreme Court of Wyoming announced the following doctrine with reference to skidding across the center line of the highway:

“ ‘It is likewise true that the skidding itself is not ordinarily evidence of negligence, where it skids across the center line of the road to the left side thereof and collides with another; but *the burden is upon the driver on the wrong side of the road to excuse or justify the violation of the law of the road.* Berry on Automobiles (4th Ed.); 1 Blashfield, Encyl. of Automobiles, page 414; Chase v. Tingdale Bros., 127 Minn. 401, 149 N.W. 654; Petersen v. Pallis, 103 Wash. 180, 173 P. 1021; Thomas v. Adams, 174 Wash. 118, 24 P. 2d 432; Wilson v. Congdon, 179 Wash. 400, 37 P. 2d 892; Leonard v. Hey, 269 Mich. 491, 257 N.W. 733; Johnson v. Freemont Canning Co., 270 Mich. 524, 259 N.W. 660.’

Both 2 Blashfield, Cyc. of Automobile Law, Perm. Ed., Sec. 916, p. 58, and 3-4 Huddy, Cyc. of Automobile Law, Sec. 109, p. 176, announce the rule that skidding to the left side of the road cannot be excused ‘if the skidding is due to the negligent acts or omissions of the motorist’.” (Italics added.)

The attention of this Honorable Court is also invited to the extensive annotations on this same subject in 58 A.L.R. 266 and 113 A.I.R. 1022. It is respectfully submitted that no prejudicial error was committed by the Court in refusing to instruct the jury in accordance with defendant's Requested Instruction No. 2 which was not a correct statement of the law.

CONCLUSION

Respondent respectfully submits that a review of the entire record and the proceedings reveals that the defendant, Jack L. Clark, was afforded a fair trial, in accordance with established legal principles, which was free from prejudicial error. A careful reading of the transcript will reveal also that there is ample and sufficient evidence contained therein upon which the verdict of the jury and the judgment of the court was based and that therefore his conviction for the crime of involuntary manslaughter should be affirmed by this Honorable Court.

Respectfully submitted,

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