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State of Utah v. Clive K. Calder : Brief of Appellant

Utah Supreme Court

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7385

7384

In the Supreme Court of the State of Utah

STATE OF UTAH,

vs.

CLIVE K. CALDER,

Respondent,

Appellant.

Case No. 7384

and

Case No. 7385

BRIEF OF APPELLANT

FILED

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CLERK, SUPREME COURT, UTAH

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In the Supreme Court of the State of Utah

STATE OF UTAH,

vs.

CLIVE K. CALDER,

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Appellant.

Case No. 7384

and

Case No. 7385

BRIEF OF APPELLANT

This is an appeal of two bastardy cases from the decision of the Honorable A. H. Ellett, one of the Judges of the Third Judicial District Court; both cases being identical except as to the child involved, they are combined for the appeal and all statements and arguments made are to apply to both cases as was the case in the trial below.

STATEMENT OF FACTS

The defendant in this case was charged by the District Attorney on the complaint of one Velma Crowley with being the father of a bastard child in two different cases, Case No. 13314 and Case No. 13315. These cases were combined for

trial, the jury was waived, and the Court found the defendant to be the father of the child in question in each case. Pursuant to the provisions of Section 14-2-7, Utah Code Annotated, 1943, the Court on Saturday morning, the 18th day of June (T. 42-67) examined the defendant for the purpose of determining the amount of payments to be made. At the conclusion of the hearing the Court entered its order as follows: "It is further ordered that the defendant pay \$30.00 per month to the office of the County Clerk, \$25.00 of which is to apply on the said support of the two minor children, and \$5.00 of which is to apply on the back support until the back support has been caught up in the amount of \$467.00 after which time payments drop to \$12.50 per month in each case as provided by law; payments to begin on July 5, 1949, in amount of \$15.00 and like payments to be made on the 20th and 5th of each month thereafter. Defendant to be placed on bond for faithful performance and committed to the County Jail until such time as bond is furnished." (T. 15, 66).

The defendant was forthwith turned over to the custody of the Sheriff and committed to the County Jail.

Later that day, the presiding Judge of the Third Judicial District Court, Clarence E. Baker, in the absence of Judge Ellett, granted a stay of execution of said commitment until Monday, June 20, 1949, at 2:00 P.M. (T. 18). Judge Ellett on Monday, June 20, 1949, then transferred the case to Judge Baker. (T. 18).

On June 27th the defendant filed a motion (T. 20) asking leave of the court to offer evidence showing his inability to obtain a bond.

On July 6th Judge Ellett signed Findings of Fact, Conclusions of Law and Judgment and Decree (T. 28-35). Exceptions to the Findings were filed and argued on the same day (T. 21-24). At the time arguments were made on the Exceptions to the Findings of Fact, the Court was asked to hear evidence regarding the defendant's lack of ability to obtain a bond. This he refused to do. The matter of the motion to present evidence on the defendant's lack of ability to post a bond was then presented to Judge Baker (T. 69-71) and he likewise refused to entertain any Motions in the matter.

The only evidence regarding the defendant's ability or lack of ability to furnish the required bond is the examination of the defendant before Judge Ellett on June 18, which revealed the following facts: That defendant had a net income of \$148.50 each two weeks (T. 51); that his income was limited to this salary (T. 52); that the only property the defendant owned was an equity in his home on which he could not borrow (T. 52); that he owed a mortgage on this home of \$3,300.00, carrying monthly payments of \$50.00 (T. 52).

The evidence in the original trial showed that the defendant is a married man living at home with his wife. At the hearing on June 18 evidence was adduced that he had three children. (T. 52). At the hearing of June 18 the evidence showed his monthly expenses to be \$288.40 (Ex. C, T. 78) with outstanding bills of \$958.29 (Ex. C, T. 78). Based upon this showing and notwithstanding the complete lack of evidence of defendant's ability or effort to obtain a bond and in spite of a statement by counsel (T. 47, T-66) to the

effect that defendant could not obtain a bond, the court found (or held) defendant in contempt for failure to post bond and ordered him committed to jail.

ASSIGNMENTS OF ERROR

I

The Court erred in making Finding of Fact number four quoted below in that said Finding does not reflect the evidence and the same imports a proprietorship in the automobile business of Harold Calder whereas in fact the defendant is merely an employee:

"That the defendant has in his name a franchise for a Willys Automobile Agency, and the said automobile agency is being operated at Bountiful, Utah; that the defendant and his brother, Harold Calder, are closely associated together in the operation of said Willys Automobile Agency as well as the operation of the Buick, Pontiac and G. M. C. Truck franchise held in the name of Harold Calder;" (T. 28, 30).

II

The Court erred in making Finding of Fact number five quoted below on the grounds and for the reason that there is no evidence in the record to support the finding that the defendant was able to obtain a bond to secure payment of the payments ordered:

"That the defendant is able to obtain a bond to secure the payment of the foregoing yearly sums to the Clerk of the above entitled Court;" (T. 28, 30).

III

The Court erred in making Finding of Fact number six quoted below, for the reason and on the grounds that there is no evidence to support the finding that said defendant has wilfully failed and refused to obtain a bond to secure payments:

“That said defendant has willfully failed and refused to obtain a bond to secure the payment of the foregoing yearly sums of money;” (T. 28, 30).

IV

The Court erred in refusing to make a finding as to the financial status of the defendant as reflected by the evidence, showing his indebtedness and obligations.

V

The Court erred in making its Conclusion of Law number three quoted below on the ground that it is based on a Finding of Fact not supported by evidence:

“That in willfully failing and refusing to furnish such a bond, the defendant is in contempt of Court and should be incarcerated in the County Jail of Salt Lake County until such bond is furnished.” (T. 29, 31).

VI

The Court erred in refusing to hear the evidence as requested by the defendant in his motion made June 27 (T. 20, 37) wherein he asked the Court to hear evidence as to his lack of ability to obtain a bond.

VII

The Court erred in holding defendant in contempt of Court and in committing him to jail in default of posting a bond guaranteeing the making of payments as ordered by the Court.

ARGUMENT

STATEMENT OF POINT INVOLVED

This is an appeal from an order committing the defendant to jail for failure to post a surety bond in a bastardy case when there was absolutely no evidence showing that the defendant was able to post such bond and the Court later refused to hear evidence offered by the defendant to show his inability to post a bond.

PROPOSITION NO. 1

ASSIGNMENTS OF ERROR NUMBER I AND IV
WILL BE DISCUSSED UNDER PROPOSITION NO. 1.

The Court erred in making finding of fact number four regarding the defendant's true status as an employee and in refusing to make a finding as to the financial status of the defendant, showing his obligations and indebtedness. (Error No. I, No. IV).

The law clearly requires in bastardy proceedings that the Court make an inquiry into the ability of the defendant to

pay, the lack of means of the mother and the health of the parties. A pertinent case involving a bastardy proceeding is that of *State v. Reese*, 43 Ut. 447, 135 Pac. 270, 278 from which we quote as follows:

"It was undoubtedly their intention that the court should fix an amount in each case within that limit, but the amount fixed should be in accordance with the circumstances of each case, taking into consideration the means of the accused, his ability to earn money, the lack of means of the mother, and the health and condition of both. The purpose of the law is to provide means for the support and education of the innocent child. In fixing the amount, the court should not place it beyond the ability of the putative father to respond, and thus defeat the very purpose of the law. The Court, therefore, should in each case take testimony after verdict relative to the means, health, condition, and ability of the putative father to earn money, and fix such an amount as under the circumstances may be fair and just. (13)"

As a basis for holding a party in contempt the Court must hear evidence on all material issues and must make Findings of Fact with Respect thereto. It is manifestly error for a Court to make conclusions unsupported by evidence and without having made a proper finding as to matters that are material and vital to the case. In the Case of *State v. Bartholomew*, 85 Ut. 94, 38 P. (2) 753, 755 held as follows:

"This section, together with 104-26-2, has been before this court in numerous cases, and we have consistently held that "it is the duty of the court to find upon all material issues raised by the pleadings, and the failure to do so is reversible error." *Piper v. Eakle*, 78 Utah, 342, 2 P. (2d) 909, 910. It has also been held that

findings which are only mere conclusions such as that all the allegations of a complaint are true, or that defendant has failed to establish a defense, or that the court finds for plaintiff and against defendant, are wholly insufficient to meet the requirements of the above statutes and cannot support a judgment. *Piper v. Eakle*, supra; *Munsee v. McKellar*, 29 Utah, 282, 116 P. 1024; *Westminister I. Co. v. McCurtain*, 39 Utah, 544, 118 P. 564; *Baker v. Hatch*, 70 Utah, 1, 257 P. 673. (3)''

In the instant case it is obvious that the indebtedness and financial obligation of defendant are definitely material to the issues and that the court erred in failing to make a proper finding with regard to such matters.

All of the evidence at the hearing on June 18 was to the effect that the defendant was a mere employee with not one cent of interest in the business owned, managed and controlled by his brother, Harold Calder. It is true that there was some evidence to the effect that at certain times the defendant was used as a conduit or front for certain business transactions for his brother and in the times mentioned a logical explanation was made to the Court and no showing was made to the contrary.

It would be just as reasonable for a Clerk of the Utah Power & Light Company to say he was associated with the President of that company in the distribution of power in trying to build up his importance. But no matter what fancy terms may be used the defendant, Clive Calder, was a simple employee, earning at the time of the hearing less than \$300.00 per month—to quote a famous author—"a rose by any other name smells just as sweet."

PROPOSITION NO. II

THE COURT ERRED IN REFUSING TO HEAR EVIDENCE SHOWING THE DEFENDANT'S LACK OF ABILITY TO OBTAIN A BOND—ASSIGNMENT OF ERROR NO. VI.

Title 14, Chapter 2, Section 8, Utah Code Annotated, reads as follows:

14-2-8. Id. Failure to Comply with Judgment—Commitment.

"In case the defendant shall refuse or neglect to give such security as shall be ordered by the court, *if able so to do*, he shall be comitted to the jail of the county; there to remain until he shall comply with such order, or until otherwise discharged for insolvency or inability to give bond. (C. L. 17, S. 387.)" (*Italics added*).

The italicized portion of the Utah statute quoted above clearly sets up the financial ability of defendant as a condition to his being ordered to furnish security and also as a condition to his being committed to the County Jail. The holding of this Court in the case of *State v. Reese* referred to above is to the same effect, namely, that the Court is under an obligation to inquire into the financial standing and ability of defendant to pay and also his ability to post a bond.

The Court in commenting on the duty of the Court in the case of *State v. Hammond*, 46 Ut. 249, 148 Pac. 420, 423, held as follows:

"Finally it is contended that the court erred in fixing the amount the appellant is required to contribute toward the support and education of the child in ques-

tion. As intimated in *State v. Reese*, the Court, *before fixing the amount, should carefully inquire into the financial standing and ability of both the father and mother* of the child in question, and fix such sum as, under all the circumstances, may be just and reasonable, not exceeding the limit named in the statute. It is not made to appear that the appellant is not abundantly able to pay the amount fixed by the court, nor that the amount he is required to contribute is not just and reasonable. In view of that we are powerless to review the court's acts in that regard. (12). (Italics added).

The words "if able so to do" of Section 14-2-8, Utah Code Annotated, 1943, *supra*, were added by the Legislature after the decision of *State v. Reese* which held the section as it then read to be void.

In the light of the *Reese* case, the *Hammond* case, as well as Section 14-2-8 of the Code, it is clear that the Court is compelled not only to hear the evidence on the matter of defendant's ability to furnish bond but also to make a finding based on such evidence. The record in the instant case contains not a scintilla of evidence as to defendant's ability to post a bond. On the contrary, counsel for the defendant on two occasions represented to the court that the defendant could not post a bond (T. 47, 65, 66).

The defendant thereafter, having had time to try to post a bond, filed a motion requesting the Court to hear evidence as to his lack of ability to post the required bond (T. 20). The court failed and refused to permit the defendant to offer any evidence on this subject, thus failing to do the very thing required by the statute.

PROPOSITION NO. III

ASSIGNMENTS OF ERROR II, III AND V WILL BE DISCUSSED TOGETHER AT THIS TIME.

The court has made Findings of Fact and based thereon has made a Conclusion of Law to the effect that the defendant was able to post a bond, that he had wilfully failed and refused to post a bond (T. 28, 30) and that he was in contempt for failing and refusing to furnish a bond (T. 29, 31).

The only mention of a bond prior to the order made at the time of the hearing of June 18 is found on Page 46 of the Transcript in which the court says, "I should commit him until he furnishes a bond or gives evidence he can't furnish it." This is followed by remarks of counsel to the effect that the matter of requiring a bond is discretionary. This is followed by further statement of counsel (T. 47) that the defendant's brother could not and would not sign a bond because the bond is a guaranty bond guaranteeing payments. The matter of a bond was not again mentioned until after the testimony of defendant and his brother, whereupon the court made its order that the defendant give bond for faithful performance of the order as made and that he stand committed to the jail of Salt Lake County until he give that bond (T. 64).

This order was made in the face of definite testimony that the defendant had no property or income other than his salary, (T. 52, 58, 59, 60, 62, and 64) and that he had obligations and expenses as great as his income (T. 53, Ex. C. T. 78).

From the foregoing it is obvious that the court disregarded the statute (Sec. 14-2-8, Utah Code Annotated, 1943) in that

he failed to ascertain defendant's ability to obtain a bond. Furthermore, the court was in error in finding that the defendant in fact could furnish a bond, that he wilfully failed and refused to post a bond and that hence he was in contempt.

PROPOSITION NO. IV

THE COURT ERRED IN COMMITTING THE DEFENDANT TO JAIL FOR FAILING TO POST A BOND SECURING PAYMENTS AS ORDERED BY THE COURT. ASSIGNMENT OF ERROR NUMBER VII.

This matter has been very thoroughly discussed by this court in the case of *State v. Kranendonk*, 79 Utah, 239, 9 Pac. (2) 176. In that case the defendant was examined as to his financial status and also as to his efforts to obtain a bond. The defendant testified that he had contacted several persons requesting them to post a bond and that they had refused. He was thereupon held in contempt of court and was ordered committed.

After setting out the evidence in detail the court discussed the holding in the case of *State v. Reese* (supra) regarding the purpose of imprisonment in a bastardy proceedings and pointing out that imprisonment was for contempt only and could not be sustained for any other reason. The court then stated:

"We are therefore constrained to the view that the statute authorizes the imprisonment of the defendant for contempt for his wilful refusal or neglect to give

security as ordered by the court, and limits, in any event, the court's punishment to imprisonment for not exceeding one year. If the defendant wilfully refused or neglected to furnish the bond ordered, then the order as made, must be sustained. If the failure and refusal was not wilful, but due to his inability to comply therewith, the order must be set aside. (8)"

The court ordered the commitment vacated holding as follows:

"For the reasons stated, we are of the opinion that the court was not justified, under the showing made, in finding the defendant guilty of contempt, and that the order committing defendant to jail cannot be sustained. The judgment of the court entered upon the verdict is affirmed. The order of commitment entered on the 25th day of May, 1931, is ordered vacated."

In the instant case the defendant offered to present evidence to the court tending to show the efforts put forth by him in attempting to obtain a bond. The court denied him this right and in the light of the Kranendonk case and the Reese case this is clearly error. The court had before it no evidence whatsoever on the matter as to whether or not defendant's failure to obtain bond was wilful. In the absence of such evidence, the court cannot properly hold defendant in contempt and order him imprisoned.

CONCLUSIONS

It is submitted, therefore, that the judgment of the court should be reversed and the case remanded with instructions to make findings on all material matters in accordance with the

evidence, particularly in regard to the defendant's obligations and that the order of commitment be vacated and set aside.

Respectfully submitted,

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