

1978

State of Utah v. Rex Glen Foust : Brief of Respondent

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- :
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No.
15786

REX GLEN FOUST, :

Defendant-Appellant. :

----- :
BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE SECOND
JUDICIAL DISTRICT COURT, IN AND FOR DAVIS
COUNTY, STATE OF UTAH, THE HONORABLE
J. DUFFY PALMER, JUDGE

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FILED

AUG 22 1978

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No.
REX GLEN FOUST, : 15786
Defendant-Appellant. :

----- : -----
BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant was charged by information with Incest, Utah Code Ann. § 76-7-102 (1953), as amended, a felony of the third degree. The information alleged that he had sexual intercourse with a person he knew to be an ancestor or descendant.

DISPOSITION IN THE LOWER COURT

The appellant was tried and convicted by a jury on November 15, 1977, in the Second Judicial District Court, in and for Davis County, before the Honorable J. Duffy Palmer.

RELIEF SOUGHT ON APPEAL

The respondent seeks an affirmance of the jury verdict reached in the trial court.

STATEMENT OF FACTS

The testimony of the victim, Kathryn Foust, was not controverted at trial. The victim was the step-daughter of the appellant, and was legally adopted by him when she was eight years of age (T.5). The incident complained of took place shortly before Christmas of 1976 (T.6), when the victim was sixteen years of age (T.4).

About a week and a half prior to a dance at Viewmont High School, the victim approached her mother to seek permission to attend the dance (T.7). The victim's mother told her she would have to ask her step-father (T.7). Sometime later, while the victim and her step-father were in the kitchen doing dishes, the victim sought her step-father's permission to attend the dance (T.8). At that time, the other members of the family were not in the house (T.8). After asking the victim "how bad she wanted to go" to the dance (T.8), the appellant approached the victim and began fondling her breasts while she was at the sink doing the dishes (T.9). The victim moved away, but the appellant approached her again (T.9). At that point he asked if she "wanted to play." (T.9). The victim responded that she did not, and the appellant angrily left the room (T.9,10). She again asked the appellant in

the living room if she could attend. He said no, and responded in part by again placing his hand on her breast(T.10). The appellant again inquired if she "wanted to play." (T.11). After repeating her request to go to the dance, and being told no, the victim accompanied the appellant to his bedroom, where the sexual intercourse occurred (T.11).

The victim testified that on several occasions she was admonished not to tell anyone about the incident, because of the effect it would have on her mother and her family (T.21).

At trial, the victim was the only witness, who testified during the State's case in chief. The appellant offered three witnesses, two of whom knew him only at work (T.25,27). The third witness testified that his reputation for moral standards in the community was good (T.22).

The State then offered a witness in rebuttal, who testified that the appellant and the victim's mother moved to Maryland at one point and lived together before they were married (T.38).

At the close of the State's case in chief, the appellant moved for a dismissal on the theory that the

victim was an accomplice, and that her uncorroborated testimony was insufficient to warrant a conviction (T.19,45). It is the denial of that motion that brings this case before the Court.

Respondent calls the Court's attention to a misstatement of the facts in appellant's brief at page 4, lines 2, 3 and 4. The transcript (T.19,20) does not reflect that at the time the judge denied the motion to dismiss, he also entered a guilty judgment.

ARGUMENT

POINT I

AS A MATTER OF LAW, A SIXTEEN YEAR OLD VICTIM OF INCEST CANNOT BE AN ACCOMPLICE.

The issue presented by this appeal, whether a sixteen year old female can legally consent to or be an accomplice to the crime of incest, has not been addressed by this Court since the Utah Criminal Code was amended in 1973.

The crime of incest presents unique problems in that it is a serious crime usually committed in the privacy of the home with no witnesses, thus making corroboration of the victim's testimony most difficult. Also, a child's

concern for family security and respect for parental authority often result in the child's silent submission to such a crime. The usually concomitant facts present in rape, such as torn and disarranged clothing, wounds and bruises, or outcries, neither necessarily nor ordinarily appear.

Incest is not a common law crime. It was punished by the ecclesiastical courts of England as an offense against good morals. Therefore, the crime of incest is purely statutory.

Prior to the revision of the Utah Criminal Code, which became effective in 1973, the crime of incest and adultery were included in a general grouping of crimes entitled sexual offenses, which included, among other crimes, rape and sodomy. Utah Code Ann. § 76-53-19 (1953), repealed, stated: "Any person who carnally and unlawfully knows any female over the age of thirteen years and under the age of eighteen years is guilty of a felony." In line with this statute are numerous cases holding that a female under the age of eighteen could not consent to an act of illicit sexual intercourse. State v. Wade, 241 Pac. 838 (Utah 1925); State v. Hilberg, 22 Utah 27, 61 Pac. 215 (1900).

In the new draft of the code, the section on carnal knowledge was omitted entirely. In addition, the legislature saw fit to distinguish the crimes of incest, bigamy, and adultery from the crimes of unlawful sexual intercourse, rape, sodomy, forcible sexual abuse, and aggravated sexual assault by placing them in Chapter 7 of Title 76, entitled Offenses Against the Family. The latter crimes are included in Chapter 5 of Title 76, Offenses Against the Person. Although it is not clear at what age a female can consent to all of the sexual offenses included in Chapter 5 of Title 76, Section 76-5-401 provides: "A male person commits unlawful sexual intercourse if he has sexual intercourse with a female, not his wife, who is under sixteen years of age." In addition, Section 76-5-406(7) states that no victim under the age of fourteen can consent to sexual intercourse, sodomy or sexual abuse. It is significant that no section of Chapter 7 of Title 76 makes any reference to an age of consent for crimes against the family. In view of the fact that incest is a purely statutory crime, we are left to speculate as to what the age of consent is as it applies to incest. In his brief, the appellant attempts to borrow the age of consent stated in offenses against the person. Nowhere has the legislature indicated that this is

what it intended to occur. It is of particular significance that the age of consent to this crime in Utah has historically been eighteen years of age, the general age of consent.

However, Professor Wigmore states:

"Whether a participant in an incestuous relationship is an accomplice or a victim must depend upon the facts in each case. Obviously the relationship will not submit to a rigid rule. 7 Wigmore on Evidence (3d ed. 1940). Sec. 2060(b) f.n. 7." Lusby v. State, 217 Md. 191, 141 A.2d 893 at 897 (1958).

There is a very real difference between consent and assent. Consent refers to a voluntary agreement and implies some positive action. Assent "means mere passivity or submission, which does not include consent." Lusby at 898.

In the crime of incest, the term accomplice, as it is generally referred to, does not have a place. In the case of father-daughter incest where the act is committed at the suggestion or the insistence, whether physical or coercive, of the father, the more appropriate term for the daughter is a victim. Her role can hardly be referred to as one of aggressive participation, but would more safely be characterized as one of fearful submission to a domineering figure in her life. The potentially coercive control of a father upon a daughter who lives at home cannot be ignored.

"The cooperation in the crime must be real--not merely apparent," before a person can be deemed an accomplice. State v. Hornaday, 122 Pac. 322 at 323 (Wash. 1912).

The Kentucky court, in Kinslow v. Carter, 282 S.W.2d 141 (Ky. 1955), referred to the daughter as a victim, not an accomplice. ". . . In cases involving incest between a father and his minor daughter, the presumption is that the daughter involuntarily participated in the sexual intercourse. . . ." 282 S.W.2d at 144. The California courts have also taken note of the consent-assent distinction. People v. Conklin, 10 P.2d 98 at 101 (C.A. 1932). The evidence in this case, which was not challenged, is that the father, after making indecent advances to his daughter, conditioned her attendance at the school dance on her willingness to engage in incestuous conduct. Under these circumstances, even though no violent force was used to gain submission, the more likely conclusion is that the daughter passively assented to the act. The mere fact that she was presented with a choice does not fortify the conclusion that her submission indicated consent. The choice and her decision reflect nothing more than her moral immaturity. In view of the victim's lack of consent:

the commission of the crime, she cannot be deemed an accomplice. The more appropriate term is that she was a victim. The trial judge, in denying the defendant's motion (T.19) to dismiss at the close of the State's case, in effect ruled that the victim, in light of the evidence presented, was not an accomplice.

This court recently had the opportunity to discuss the statute, Section 78-31-18, which appellant asserts supported his motion to dismiss, in State v. Helm, 563 P.2d 794 (Utah 1977). In that appeal, as in the present case, the appellant viewed the evidence in a light most favorable to his position. This is done in contradiction of the general rule of law that on appeal the evidence must be viewed in the light most favorable to the verdict. This Court, in determining the propriety of the trial judge's denial of the motion to dismiss, must view the evidence presented as to the victim's assent in the light most favorable to the victim.

Assuming, arguendo, that this Court finds that the victim consented to the act, this Court must then also determine that the victim could have been indicted for the offense herself. "The general test to determine whether a witness is an accomplice is whether he himself could have been indicted for the offense. . . If he could not have been

so indicted, he is not an accomplice." 19 A.L.R.2d 1354. There is no statutory definition of an accomplice in Utah, "but the court has construed the word to refer to one who is or could be charged as a principal with the defendant on trial." State v. Bowman, 92 Utah 540, 70 P.2d 458 at 461 (1937). The court also defined an accomplice in State v. Coroles, 74 Utah 94, 277 Pac. 203 at 204 (1929), as one ". . . who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of the crime. The cooperation in the crime must be real, not merely apparent." See also Utah Code Ann. § 76-2-202 (Supp. 1977), and State v. Davie, 240 P.2d 263 (Utah 1952); State v. Fertig, 233 P.2d 347 (Utah 1951); and Helm, supra. "The burden of proving the witness to be an accomplice is . . . upon the party alleging it. . . ." 7 Wigmore on Evidence (3d ed. 1940), § 2060(e). Under the test presented in Coroles, supra, the defendant has not shown that the victim acted voluntarily or with a common intent.

Another problem presented by the defendant's claim that the victim is an accomplice is the fact that under Utah law she could not have been criminally punished for her role in the act, even if she had given her consent and was old enough to do so. Utah Code Ann. § 78-3a-16

(1953), as amended, states:

"Except as otherwise provided by law, the [juvenile] court shall have exclusive original jurisdiction in proceedings: (1) concerning any child who has violated any federal, state, or local law or ordinance, or any person under 21 years of age who has violated any such law or ordinance before becoming eighteen years of age, regardless of where the violation occurred."

If the victim had been charged with incest in any other court, that court would have had to transfer the case to the juvenile court pursuant to Utah Code Ann. § 78-3a-18 (1953), as amended, and the juvenile court would then proceed under the act. Incest is a third degree felony; therefore, the juvenile court would have to conduct an investigation or hearing, and would have to find "that it would be contrary to the best interests of the child or of the public to retain jurisdiction," Utah Code Ann. § 78-3a-25 (1953), as amended, before it could certify the case to the district court. There is no indication in the record that the victim had a prior record of delinquency or that the case could have been certified by the juvenile court had she been charged with incest. In short, she would have been tried in juvenile court, and the proceeding would have been civil, not criminal in nature.

"The theory of the District Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in corpus juris. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and society rather than adjudicating criminal conduct." (Emphasis added.) Kent v. United States, 383 U.S. 541 at 554 (1966).

As a practical matter, the victim in this case would not have been charged with or convicted of incest, and the test enumerated by the court in Bowman, supra, and advanced by the appellant in his brief, page 5, is not met.

This argument reflects not only the fact that the victim could not be an accomplice, People v. Johnson, 2 P.2d 216 (Cal. 1931), but the policy of the State of Utah to protect minors from the consequences of criminal acts.

The thrust of this appeal is directed at the judge's ruling that the victim was not an accomplice. The appellant concedes that the question is one of law for the judge to determine whether the party could have been prosecuted for the same offense (appellant's brief, pages 5 and 6), and therefore be an accomplice.

"It is generally recognized that whether or not a witness is an accomplice is a question of law for the court when there is no conflict in the evidence in regard to the acts of the witness in connection with the crime, if his confession is admitted." 19 A.L.R.2d 1353.

See also State v. Stalker, 151 N.W. 527 (Iowa 1951);
Alexander v. State, 72 S.W.2d 1080 (Texas 1930);
Matherly v. State, 71 P.2d 1094 (Okla. Cr. 1937).

"The essential characteristic of an accomplice is therefore criminal guilt." Wade, supra, 838 Pac. at 839. The effect of the trial judge's ruling on page 45 of the transcript was that the victim here was not an accomplice. In view of the uncontradicted testimony at trial, his ruling was appropriate and should not be reversed.

POINT II

A DEFENDANT IN AN INCEST CASE MAY BE CONVICTED
ON THE UNCORROBORATED TESTIMONY OF THE VICTIM.

"It is now an accepted rule of law in Utah that a conviction may be sustained upon the uncorroborated testimony of the victim." State v. Sisneros, No. 15046, ___ P.2d ___ (July 10, 1978); State v. Middelstadt, 579 P.2d 908 (Utah 1978). This holding comports with the common law rule that "in the trial of offenses against the chastity of women, the testimony of the prosecuting witness was sufficient evidence to support a conviction, and neither another witness nor corroborating circumstances were necessary." 7 Wigmore Evidence (3d ed. 1940) § 2061. Also, State v. Davis, 147 P.2d 940 (Wash. 1944).

The Kentucky court in Browning v. Commonwealth, 351 S.W.2d at 501 (1966), stated:

"This court has consistently held in a long line of decisions that under an indictment for incest committed by a father with his daughter, a conviction is authorized upon the testimony of the daughter alone, she not being an accomplice."

See also State v. Akers, 328 S.W.2d 31 (Mo. 1959).

The record in this case is brief; but revealing. The testimony of the prosecutrix was uncontradicted. The facts surrounding the incident that she testified to are highly believable, and the defendant does not challenge the fact that the act occurred. Although he did not testify at trial, he had ample opportunity to challenge the occurrence of the act through the cross-examination of the victim. Cross-examination of the victim revealed no inconsistencies in her story, nor did it elicit any indication of antagonism by the victim towards her stepfather. Although the character evidence presented by the defendant was directed at his reputation for moral character, two of the character witnesses admitted that they knew him only at work, and that their testimony went only to his reputation for truth and veracity.

The unique nature of incest has already been alluded to, and the fact that the victim chose to remain silent as

long as she did is not unusual, especially in view of the admonitions from her father. It is significant to note that less than a month after the event she chose to leave her family.

In State v. Guldin, 162 P.2d 907 (Ariz. 1945), the Court held that the defendant was properly convicted on the uncorroborated testimony of the prosecutrix and noted:

"Her story of the act did not disclose its physical impossibility, nor was it so incredible that no reasonable person could believe it. [Citations omitted.] This has to be the rule. Otherwise many offenders would go unpunished. Acts of the character involved here are performed secretly, without the presence of witnesses. The character of the act affords little opportunity, in most cases, for corroboration. Men do not advertise acts of this kind."

CONCLUSION

It is not clear under the Utah Criminal Code whether the victim was legally able to consent to the act of incest. Even if she were, the uncontroverted testimony at trial was sufficient to allow the judge to rule, as a matter of law, that the prosecutrix was a victim and not an accomplice. Therefore, his denial of

the defendant's motion to dismiss was appropriate, and by so ruling, the judge negated the need to instruct the jury on corroboration of an accomplice. It is the law in Utah that a conviction may properly be had on the uncontroverted testimony of the victim.

Respectfully submitted,

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