

1978

# State of Utah v. Rex Glen Foust : Reply Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Robert B. Hansen; Earl F. Dortius; Attorneys for Respondent;

Hansen and Hansen; Attorneys for Appellant;

---

## Recommended Citation

Reply Brief, *State v. Foust*, No. 15786 (Utah Supreme Court, 1978).

[https://digitalcommons.law.byu.edu/uofu\\_sc2/1254](https://digitalcommons.law.byu.edu/uofu_sc2/1254)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT OF THE STATE OF UTAH

---

STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
	)	
-v-	)	No. 15786
	)	
REX GLEN FOUST,	)	
	)	
Defendant-Appellant.	)	

---

REPLY BRIEF OF APPELLANT

---

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

---

PHIL L. HANSEN  
HANSEN AND HANSEN  
250 East Broadway, Suite 100  
Salt Lake City, Utah 84111

ROBERT B. HANSEN  
Attorney General

Attorneys for Appellant

EARL F. DORIUS  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114  
Attorneys for Respondent

# TABLE OF CONTENTS

	Page
ARGUMENT	
UTAH CODE ANNOTATED, SECTION 76-5-406 (1953), AS AMENDED, WHEN READ IN CONNECTION WITH UTAH CODE ANNOTATED, SECTION 76-7-102 (1953), AS AMENDED, CLEARLY ESTABLISHES THAT THE AGE AT WHICH A PERSON IS DEEMED LEGALLY CAPABLE OF CONSENTING TO AN ACT OF SEXUAL INTERCOURSE, AND THEREFORE INCEST, IS FOURTEEN YEARS OF AGE, FOR BOTH MALES AND FEMALES	1
A. THE RESPONDENT SIDESTEPS THE CURRENT LAW IN THE STATE OF UTAH BY SUGGESTING TO THIS COURT THAT A REPEALED STATUTE RESOLVES THE ISSUE PRESENTED IN THE INSTANT CASE AS TO THE AGE OF CONSENT	1
B. THE TRIAL COURT'S INTERPRETATION OF THE LAW AS TO THE AGE OF CONSENT, WHICH ERRONEOUSLY LIMITS THE APPLICATION OF UTAH CODE ANNOTATED, SECTION 76-5-406(7) (1953), AS AMENDED, TO MALES OVER THE AGE OF FOURTEEN AND FEMALES OVER THE AGE OF EIGHTEEN, IS A DENIAL OF EQUAL PROTECTION AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 2 AND 24 OF THE UTAH CONSTITUTION	4
CONCLUSION	10

## CASES CITED

	Page
<u>Ex Parte Mathews</u> , 488 S.W.2d 438 (1973) .....	8,9
<u>Lamb v. Brown</u> , 456 F.2d 18 (10th Cir. 1972) .....	7,8,10
<u>People v. Ellis</u> , 293 N.E.2d 189 (1973) .....	9
<u>Radcliff v. Anderson</u> , 509 F.2d 1093 (10th Cir. 1973) .....	8
<u>Reed v. Reed</u> , 404 U.S. 81, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971) .....	6,7,10
<u>Stanton v. Stanton</u> , 517 P.2d 1010 (Utah 1974) .....	4,5
<u>Stanton v. Stanton</u> , 421 U.S. 7, 43 L. Ed. 2d 688, 955 S. Ct. 1373 (1975) .....	5,6,7

## OTHER AUTHORITIES

Utah Code Ann. § 15-2-1 (1953) .....	4
Utah Code Ann. § 76-2-301 (1953), as amended .....	2,10
Utah Code Ann. § 76-5-406 (1953), as amended ...	2,3,7,10
Utah Code Ann. § 76-7-102 (1953), as amended .....	2,3,10
Utah Code Ann. § 76-53-19 (1953), repealed .....	1

IN THE SUPREME COURT OF THE STATE OF UTAH

---

STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
	)	
-v-	)	No. 15786
	)	
REX GLEN FOUST,	)	
	)	
Defendant-Appellant.	)	

---

REPLY BRIEF OF APPELLANT

---

ARGUMENT

UTAH CODE ANNOTATED, SECTION 76-5-406 (1953), AS AMENDED, WHEN READ IN CONNECTION WITH UTAH CODE ANNOTATED, SECTION 76-7-102 (1953), AS AMENDED, CLEARLY ESTABLISHES THAT THE AGE AT WHICH A PERSON IS DEEMED LEGALLY CAPABLE OF CONSENTING TO AN ACT OF SEXUAL INTERCOURSE, AND THEREFORE INCEST, IS FOURTEEN YEARS OF AGE, FOR BOTH MALES AND FEMALES.

- A. THE RESPONDENT SIDESTEPS THE CURRENT LAW IN THE STATE OF UTAH BY SUGGESTING TO THIS COURT THAT A REPEALED STATUTE RESOLVES THE ISSUE PRESENTED IN THE INSTANT CASE AS TO THE AGE OF CONSENT.

The respondent submits in its brief that a repealed statute is controlling in the instant case. Utah Code Annotated, Section 76-53-19 (1953), repealed, and a few cases decided thereunder are cited by the respondent as

authority for the proposition that a female must be eighteen years of age before she is deemed legally capable of consenting to an act of illicit sexual intercourse. In citing this repealed statute, the respondent sidesteps the current law and, specifically, Utah Code Annotated § 76-5-406 (1953), as amended, which states in relevant part as follows:

An act of sexual intercourse  
... is without consent of the  
victim under any of the follow-  
ing circumstances:

(7) The victim is under  
fourteen years of age.  
(Emphasis added.)

There can be no doubt as to the meaning of § 76-5-406 and its overruling effect on § 76-53-19: a person, whether male or female, over the age of fourteen years, is deemed legally capable of consenting to an act of sexual intercourse.

The age of fourteen years, set forth as the age of consent in the above statute, reflects the considered opinion of the Legislature and is consistent with the statutory determination that the age of fourteen years is the age of criminal responsibility, as set out in Utah Code Annotated § 76-2-301 (1953), as amended.

In the instant case, the criminal offense of incest has been charged against the appellant. Utah Code Annotated § 76-7-102 (1953), as amended, sets forth the crime of incest as follows:

A person is guilty of incest when he has sexual intercourse with a person whom he knows to be an ancestor, descendant, brother, sister, uncle, aunt, nephew, niece or first cousin. (Emphasis added.)

Since consent is not a defense to the crime of incest, no language as to the age of consent appears in the incest statute. Nevertheless, the issue of consent can be, as it is in the instant case, important as an evidentiary matter.

The actus reus of incest, as set forth in the above statute, is the act of sexual intercourse. As stated earlier, Utah Code Annotated § 76-5-406(7) expressly provides that a person is deemed legally capable of consenting to an act of sexual intercourse when he or she reaches the age of fourteen years.

In the instant case, the complaining witness was sixteen years of age at the time of the alleged offense of incest and, therefore, legally capable of consenting to the actus reus of the crime, sexual intercourse. The complaining witness' testimony indicates that she did in fact consent to the act of sexual intercourse and, in so doing, aided in the commission of the crime of incest.

As stated in appellant's original brief, the complaining witness' act of consenting makes her an accomplice to the commission of the crime. As a result of being an

accomplice to the crime of incest, whether or not formal charges are brought against her, the complaining witness' testimony must be corroborated in order to sustain a conviction of the appellant.

- B. THE TRIAL COURT'S INTERPRETATION OF THE LAW AS TO THE AGE OF CONSENT, WHICH ERRONEOUSLY LIMITS THE APPLICATION OF UTAH CODE ANNOTATED, SECTION 76-5-406(7) (1953), AS AMENDED, TO MALES OVER THE AGE OF FOURTEEN AND FEMALES OVER THE AGE OF EIGHTEEN, IS A DENIAL OF EQUAL PROTECTION AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 2 AND 24 OF THE UTAH CONSTITUTION.

The issue as to whether discrimination between sexes based on age is an unconstitutional denial of equal protection under the Fourteenth Amendment has most recently been decided in the state of Utah in the case of Stanton v. Stanton, 517 P.2d 1010 (Utah 1974). In that case, supplementary proceedings were brought by the divorced wife to recover child support payments accruing after the daughter reached eighteen years of age. The defendant argued that under the divorce decree he was only required to make support payments to his daughter until she reached the age of majority and that under Utah Code Annotated § 15-2-1 (1953), a female reaches the age of majority at the age of eighteen. The plaintiff contended that the



statute, extending the period of minority in males to the age of twenty-one years and in females to only eighteen years, denied equal protection of the laws.

The Utah Supreme Court held that said statute was constitutional and stated:

There is no doubt that the questioned statute treats men and women differently, but people may be treated differently so long as there is a reasonable basis for the classification, which is related to the purposes of the act, and it applies equally and uniformly to all persons within the class. 517 P.2d at 1012 (emphasis added).

On appeal, the United States Supreme Court, in Stanton v. Stanton, 421 U.S. 7, 43 L. Ed. 2d 688, 95 S. Ct. 1373, rejected the Utah Supreme Court's reasoning and held that there was no reasonable basis for the discriminatory classification. The United States Supreme Court reversed the decision and held that the Utah statute was a denial of equal protection under the law. The United States Supreme Court stated:

. . . . there is nothing rational in the statutory distinction between males and females, which when related to the divorce decree, results in appellee's liability for support for the daughter only to age 18, but for

the son to age 21, thus imposing  
'criteria wholly unrelated to  
the objective of that statute.'  
421 U.S. 7, 43 L. Ed. at 691,  
95 S. Ct. 1373 (emphasis added).

The United States Supreme Court relied heavily on its earlier decision in Reed v. Reed, 404 U.S. 71, 30 L. Ed.2d 225, 92 S. Ct. 251 (1971). That case presented an equal protection challenge to a provision of the Idaho Probate Code which gave preference to males over females when persons, otherwise of the same entitlement, applied for appointment as administrator of a decedent's estate. The Court held that this provision of the probate code violated the equal protection clause.

A classification must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. (Emphasis added.)

In the case at bar, counsel for the appellant made a motion to dismiss the complaint based on insufficient evidence. Counsel argued that the complaining witness consented to the alleged sexual offense and was therefore an accomplice to the act so that her testimony would have to be corroborated in order to sustain a conviction. The trial court denied said motion and stated, "Eighteen and over is an accomplice.

by the statute." (Tr. 19, 20.)

It is unclear to which statute the trial judge was referring. Appellant has been unable to uncover a statute, under the modern laws of the State of Utah, which supports this conclusion. Since Utah Code Annotated § 76-5-406 (1953), as amended, is the only statute speaking to the age of consent for offenses involving the act of illicit sexual intercourse, it must be concluded that the trial court was interpreting said statute. The trial court's interpretation of § 76-5-406 must meet the test established by the United States Supreme Court in Reed, supra, and reiterated in Stanton, supra: Discrimination between sexes based on age "must not be arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation." 404 U.S. at 75-76.

It is the appellant's contention that to hold that a female must be eighteen years of age before she is legally capable of consenting to an act of sexual intercourse, where a male of only fourteen years is legally capable of consenting to the same act and could be charged as an accomplice, is an arbitrary classification in violation of Reed, supra, and the Fourteenth Amendment.

Distinguishing criminal culpability as between sexes based on age has been declared unconstitutional in numerous jurisdictions. In Lamb v. Brown, 456 F.2d 18 (10th

Cir. 1972), Danny Lamb, then 17 years of age, was tried as an adult under 10 Okla. Stat. Ann. § 1101 for the crime of burglary of an automobile, a felony under Oklahoma law. Lamb argued that he should have been proceeded against as a juvenile in juvenile court. In a habeas corpus proceeding, the United States Court of Appeals, Tenth Circuit held:

Oklahoma statute allowing females under the age of 18 the benefits of juvenile court proceedings while limiting the same benefits to males under the age of 16 violated the equal protection clause. 456 F.2d at 18.

The court further stated:

The general doctrine is that the Fourteenth Amendment, in respect to the administration of criminal justice, requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses. . . . 456 F.2d at 20 (emphasis added).

This decision was upheld in Radcliff v. Anderson, 509 F.2d 1093 (10th Cir. 1974) and was applied retroactively.

This same issue was brought before the court in Ex Parte Mathews, 488 S.W.2d 438 (1973). The court declared that a statute providing for inclusion of females at age 17 within a definition of the word "child," while not including males of the same age, and providing for original jurisdiction

of juvenile court over offenses committed by males under 17 years of age and females under 18 years of age was unconstitutional. The court stated:

. . . we are unable to find any rational objective or logical constitutional justification for the disparity in the age classification between seventeen-eighteen year old males and seventeen-eighteen year old females. 488 S.W.2d at 438 (emphasis added).

The court in People v. Ellis, 293 N.E. 2d 189 (1973) reached the same conclusion holding that:

The statutory provision here under review is clearly a denial of equal protection based upon a classification by the state on account of sex and the same is invalid and unconstitutional. 293 N.E.2d at 193.

The court reasoned that to deny a male minor the protection of juvenile court proceedings and grant such protection to a female defendant similarly situated amounted to a denial of equal protection.

It has been clearly established that there is no rational basis for distinguishing criminal culpability between sexes based on age. Therefore, there is no reasonable justification to support the trial court's conclusion that a 16 year old female, as a matter of law, cannot be held as an

accomplice to a sex crime, when under Utah law a male of the same age could be held criminally culpable. Such a classification, based on gender, is therefore "arbitrary" and invalid. Reed, supra.

This arbitrary classification would allow the male to be criminally convicted and punished while keeping a female similarly situated immune from any criminal proceedings. As established in Lamb, supra, "no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses . . . ." Since in the present case, the trial court held that the complaining witness could not be criminally prosecuted, but under Utah law a male similarly circumstanced could have been criminally punished, this would clearly be a denial of equal protection under the laws, as guaranteed by the Fourteenth Amendment.

#### CONCLUSION

The law as to the age of consent is clear. Under Section 76-2-301, Utah Code Annotated (1953), a person is criminally culpable for his conduct at the age of 14 years. Section 76-5-406, Utah Code Annotated (1953) provides that a person over 14 years of age is deemed capable of consenting to the act of sexual intercourse. Under Section 76-7-102, Utah Code Annotated (1953), sexual intercourse is the actus reus for the act of incest.

In the instant case, the complaining witness was

well over the age of criminal culpability. She admittedly consented to the act. She was therefore an accomplice to the alleged crime so that her testimony would have to be corroborated to sustain a conviction. In the absence of corroborating evidence, it was error for the trial court to deny counsel's motion to dismiss the complaint based on the grounds of insufficient evidence.

The trial court's interpretation of the Utah law as to consent denies equal protection under the law. The trial judge's conclusion would protect a female 16 years of age who knowingly and voluntarily consented to the act of sexual intercourse from being prosecuted as an accomplice. However, a male of the same age, similarly situated, could be criminally prosecuted and punished as an accomplice. There is no doubt that such an application of the law is a violation of equal protection as guaranteed by the Fourteenth Amendment.

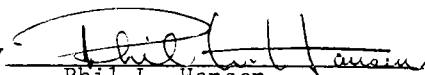
Wherefore, the appellant respectfully prays that his conviction be reversed or, in the alternative, that this court reverse and remand this case for a new trial with an instruction to the trial court that the jury must be instructed on the applicable law with regard to the age of

consent and accomplices and the need for corroboration in order to sustain the conviction of the appellant.

Respectfully submitted,

HANSEN AND HANSEN  
250 East Broadway, Suite 100  
Salt Lake City, Utah 84111

Attorneys for Appellant

By   
Phil L. Hansen

#### CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Reply Brief of Appellant were delivered to counsel for respondent, Robert B. Hansen, Attorney General, and Earl F. Dorius, Assistant Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, this 12th day of September, 1978.

