1978

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

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF APPELLANT

NATURE OF THE CASE

The appellant was convicted of the crime of incest in violation of Section 76-7-102, Utah Code Annotated (1953) and appeals.

DISPOSITION IN THE LOWER COURT

The case was tried before an eight-person jury in the Second Judicial District Court in and for Davis County, State of Utah, before the Honorable J. Duffy Palmer. The jury returned a verdict of guilty as charged and the defendant appeals.

RELIEF SOUGHT ON APPEAL

The appellant seeks to have his conviction reversed or, in the alternative, to have this case remanded for a new

trial.

STATEMENT OF FACTS

Appellant Rex Glen Foust was charged and convicted of the crime of incest in violation of Section 76-7-102, Utah Code Annotated (1953). On November 15, 1977, the case came on for jury trial in the Second Judicial District Court in and for Davis County, State of Utah, before the Honorable J. Duffy Palmer, presiding.

Kathryn Foust, a witness for the State, testified that she met the appellant when she was eight years of age. (Tr. 5.) Kathryn Foust was legally adopted by the appellant when she was eight years old. (Tr. 5.)

The witness further testified that she was sixteen years of age when the alleged crime of incest took place. (Tr. 4.) Her testimony leading up to the alleged crime showed that she desired to go to a school Christmas dance (Tr. 7); and that Kathryn's mother said she would have to ask her step-father, the appellant, for his permission to attend the dance. (Tr. 7.)

On the date of the alleged incident, December 1976, she questioned the appellant about going to the dance. (Tr. 8.) There was no one else in the house at the time. (Tr. 8.) The witness testified that on two separate occasions, that same afternoon, the appellant fondled her breasts. (Tr. 9, 10.) When she asked if she could go to the dance, the appellant

responded by asking if she wanted "to play." (Tr. 11.)

The following testimony of Kathryn Foust is taken from the transcript:

> I figured I wanted to go to the girls' dance so I consented. (Tr. 11.)

On cross-examination she testified:

> I wanted to go to the dance so I decided to have relations. (Tr. 17.)

The witness and the appellant allegedly went to his bedroom and had sex. (Tr. 12.) Consequently, she was permitted to go to the school dance. (Tr. 14.)

Kathryn Foust's testimony was the only evidence offered by the State to establish that the appellant committed the alleged crime. No other evidence was offered to corroborate her testimony. At the conclusion of her testimony, the State rested its case. (Tr. 18.)

Defense counsel moved to dismiss the complaint on the grounds of insufficient evidence. (Tr. 19.) Counsel argued that Kathryn Foust was over the age of fourteen and consented to the act (Tr. 19); and that she was therefore an accomplice to the alleged offense. (Tr. 19.) As an accomplice, it was argued, her testimony must be corroborated to sustain the conviction. (Tr. 19.)

The Court denied counsel's motion to dismiss. (Tr. 19.) The judge concluded that a person must be eighteen years or older to be an accomplice by statute (Tr. 19, 20) and entered a judgment of guilty.

ARGUMENT

THE UNCORROBORATED TESTIMONY OF A MINOR, AGE SIXTEEN AT THE TIME OF THE ALLEGED OFFENSE, WAS LEGALLY INSUFFICIENT TO CONVICT THE APPELLANT OF INCEST, WHEN THE MINOR VOLUNTARILY AND KNOWINGLY PARTICIPATED IN THE UNLAWFUL ACT.

A. The testimony of an accomplice must be corroborated in order to sustain a conviction.

The testimony of an accomplice is, as a matter of law, insufficient to sustain a conviction unless it is corroborated by other competent evidence. Section 77-31-18, Utah Code Annotated (1953) provides:

> Conviction on testimony of accomplice.--A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof.

Section 77-31-18 supplements the policy that testimony of an accomplice shall be regarded with distrust by barring a

conviction of a defendant based solely upon the uncorroborated testimony of an accomplice, even though such testimony of an accomplice may convince the jury beyond a reasonable doubt. The requirement of Section 77-31-18 is in addition to the requirement of the doctrine of reasonable doubt; it in effect says that even though the jury is convinced to a moral certainty that the defendant is guilty, it still must acquit him if the testimony of the accomplice is uncorroborated.

B. A minor, age sixteen, who voluntarily and knowingly participates in an act of incest is an accomplice to the crime whose testimony must be corroborated to sustain a conviction.

This court has set up a two-prong test to determine if a party to a criminal act is an accomplice. The first requirement before one can be held to be an accomplice is that the party voluntarily and knowingly united with another in the commission of a criminal act. State v. Georgopoulos, 492 P.2d 1353 (Utah 1972); State v. Helm, 563 P.2d 794 (Utah 1977). The second requirement is that the party could have been prosecuted for the identical offense charged the defendant on trial. State v. Fertig, 233 P.2d 347 (Utah 1951); State v. Georgopoulos, supra. Generally, the question of whether or not the alleged accomplice possessed the requisite mental state is a question for the jury, while the second requirement

is a question of law for the judge. State v. Fertig, supra. The aforementioned allocation of duties between the jury and the judge is modified only when the alleged accomplice is, as a matter of law, deemed incapable of possessing the requisite mental state.

In Utah a person under the age of fourteen is, as a matter of law, incapable of being an accomplice to any criminal act because those persons less than fourteen years old are not criminally responsible for their conduct. Section 76-2-301, Utah Code Annotated (1953) provides:

> A person is not criminally responsible for conduct performed before he reaches the age of fourteen years.

Likewise, Section 76-5-406, Utah Code Annotated (1953) specifies that a person under fourteen years of age is incapable of consenting to an act of sexual intercourse, sodomy, or sexual abuse which thereby precludes those under fourteen from possessing the requisite mental state to be deemed to be an accomplice.

Conversely, those minors fourteen years old and older are deemed capable of having the mental capacity to consent to and commit crimes for which they are criminally accountable.

In addition to the above statutes, which deal

directly with criminal responsibility and consent, Section 76-5-401, Utah Code Annotated (1953), Unlawful Sexual Intercourse, indirectly deals with the age at which minors are deemed capable of assenting to sexual acts. It provides:

> (1) 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. (Emphasis added.)

The clear import of the Criminal Code, when considered in its entirety, is that a minor, at the age of sixteen, can voluntarily and knowingly participate in a criminal act and is capable of consenting to those acts. By virtue of Section 76-2-301 and Section 76-5-406, there appears to be no legal bar to a finding that a person fourteen years or older is an accomplice. Absent such a legal bar, the question of whether or not a minor voluntarily and knowingly participated in the criminal act is a question for the jury. State v. Fertig, supra. Logically, if one can be held criminally responsible for an act, he can also be an accomplice thereto, and there can be no doubt that if a minor is found to be an accomplice then Section 77-31-18 requiring corroboration would apply.

Assuming, arguendo, that a minor, age sixteen, is capable of possessing a requisite mental state to be held to

be an accomplice by the jury, the judge must then deal with the second prong of the test laid down by this court; i.e., that the accomplice could be charged with the identical offense which the defendant at trial is accused.

The statute governing the charging of juvenile provides that in the case of all felonies, a minor can be, if the State so desires, be charged as an adult under the Criminal Code. Section 55-10-86, Utah Code Annotated (1953) provides as follows:

> Felony committed by child--Hearing and certification to district court.--If the petition in the case of a person fourteen years of age or older alleges that he committed an act which would constitute a felony if committed by an adult, and if the court after full investigation and a hearing finds that it would be contrary to the best interests of the child or of the public to retain jurisdiction, the court may enter an order certifying to that effect and directing that the child be held for criminal proceedings in the district court, with a hearing before a committing magistrate to be held as in other felony cases. The provisions of section 55-10-96 and other provisions relating to proceedings in children's cases shall, to the extent they are pertinent, be applicable to the hearing held under this section.
>
> When a criminal complaint is filed in a court of competent

> jurisdiction charging the child with the offense certified under this section, the jurisdiction of the juvenile court is terminated as to the child or person concerned.

The fact that minors are not ordinarily prosecuted in the criminal courts in our society today does not detract from the fact that minors could be accused of the same offense for which a principal is charged under the aforecited statute.

In view of the fact that incest in violation of Section 76-6-102, Utah Code Annotated (1953) is a third degree felony, and therefore a crime which a minor could be charged with under Section 55-10-86, Utah Code Annotated (1953) as an adult, the second prong of the applicable test has been met.

Unlike the crimes such as "carnal knowledge," "statutory rape," or "contributing to the delinquency of a minor," both parties to an act of incest, assuming the requisite legal age and mental state, could be charged with the identical crime.

This court has not directly ruled on the application of Section 77-31-18, Utah Code Annotated (1953) (corroboration) to a charge of incest under Section 76-7-102, Utah Code Annotated (1953) where the complaining witness was a minor, age sixteen. However, this court dealt with the general issue of the need for corroboration in a similar case, State v. Clawson, 308 P.2d 264 (Utah 1957). In Clawson the defendant

was convicted of sodomy based on the sole uncorroborated testimony of the prosecutrix. This court reversed the conviction, holding that it was error on the part of the trial court to have refused the requested instruction concerning the need for corroboration. See also State v. Thompson, 87 P. 709 (Utah 1906); State v. Kimball, 146 P. 313 (Utah 1915) which required corroboration in adultery cases; and State v. Huntsman 204 P.2d 448 (Utah 1949) which held that under the prior criminal code corroboration was not necessary in a case involving "carnal knowledge."

Numerous other jurisdictions have considered the more specific issue of whether corroboration is required where a minor voluntarily participates in an unlawful sexual act with an adult and the minor is later the complaining witness. Those jurisdictions which have considered the issue have almost uniformly held that corroboration is necessary in order to sustain the conviction. 19 A.L.R.2d §§ 9 & 21, Wharton's Criminal Evidence 13th ed., Vol. 3 § 647.

The Oklahoma Supreme Court in Motherly v. State, 71 P.2d 1094 (Okla. 1937) dealt with an almost identical fact situation as is presented by this appeal. In that case the defendant was convicted of incest based on the testimony of his daughter that he had had sexual relations with her over a period of years from the time she was fourteen until she was twenty. The daughter was the only witness presented by the

State on direct examination. The Oklahoma Supreme Court reversed the defendant's conviction holding:

> We believe that under the facts in this case the court should have determined as a matter of law, the question as to whether or not the evidence show that prosecutrix had voluntarily committed the act and should have told the jury that under such testimony she was an accomplice and it was necessary for her testimony to be corroborated.

More recently the California Supreme Court dealt with this issue. In People v. Cox, 227 P.2d 290 (Calif. 1951) the defendant was charged and convicted with the crime of sodomy. The two complaining witnesses were both boys age fourteen. The evidence established that the boys voluntarily participated in the offense. The trial court ruled the boys were not accomplices and therefore their testimony did not need to be corroborated in order to convict. The Supreme Court of California reversed, holding that, "since the prosecuting witnesses were of the age of fourteen years, they were capable of committing a crime, and since they knowingly, freely and voluntarily participated in acts prohibited by section 288a of the Penal Code, they were subject to prosecution for violating such section, the identical offense for which defendant was on trial. Therefore they were accomplices and their testimony, in order to sustain a conviction of defendant, must

have been corroborated in accordance with section 1111 of the Penal Code."

A review of the more recent cases shows widespread acceptance of the proposition that the testimony of a minor who voluntarily and knowingly participates in an illicit sexual act is an accomplice to the act and therefore the minor's testimony must be corroborated to sustain a conviction. State v. Howard, 400 P.2d 332 (Ariz. 1965), fifteen-year-old girl held to be an accomplice to lewd and lscivious act; People v. McRae, 187 P.2d 741 (Calif. 1947), cert. denied, 68 S. Ct. 1511, 334 U.S. 843, 92 L. Ed. 1967, 15-year-old boy was an accomplice in sexual offense per J. Traynor; People v. Cox, 227 P. 290, 102 C.A.2d 285 (1951), two fourteen-year-old boys held to be accomplices to act of sodomy whose testimony in order to sustain the conviction had to be corroborated; Woody v. State, 238 P.2d 367 (Okla. 1951), fifteen-year-old boy held to be an accomplice to voluntary sex acts. See also Wharton's Criminal Evidence, 13th ed., Vol. 3, § 647.

C. The trial court erroneously ruled that the complaining witness could not legally be an accomplice to incest and thereby improperly refused to either instruct the jury on the need for corroboration or alternatively to dismiss the complaint.

The relevant testimony elicited from the prosecutrix at trial was that she was sixteen years old on the day

of the alleged offense (Tr. 4) and that she voluntarily had sexual relations with the defendant in order to gain permission to go to a school dance. (Tr. 11.) The voluntariness of the witness's actions is demonstrated by the following excerpts from the transcript:

DIRECT EXAMINATION

> WITNESS KATHRYN FOUST: I figured that I wanted to go to the girls' dance so I consented. (Tr. 11.)

CROSS-EXAMINATION

> WITNESS KATHRYN FOUST: Yes, but that isn't really the situation that you described. I wanted to go to the dance so I decided to have relations. (Tr. 17.)

No evidence was presented by the State to establish that the witness was coerced in any way to participate in the alleged act. There can be no doubt that the testimony of the prosecutrix was uncorroborated as she was the sole witness for the State in its case in chief. Subsequent to the State resting, defense counsel moved to dismiss the complaint on the grounds of insufficient evidence, submitting to the court that the witness was an accomplice to the act of incest whose testimony needed to be corroborated. (Tr. 19.) The Court denied the motion and responded as follows:

> COURT: Eighteen and over is an accomplice, by the statute. (Tr. 19.)

At the close of the trial, but prior to the jury being instructed, counsel requested the following two instructions:

> No. 5. You are instructed that any person over fourteen years of age is criminally responsible for his conduct. Therefore, any person over the age of fourteen who willingly participates in a criminal act is an accomplice to the crime committed.
>
> No. 6. You are instructed that a conviction shall not be had on the testimony of an accomplice, unless she is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof.
>
> The test of sufficiency of corroborative evidence is that it need not be sufficient in itself to support a conviction, but it must implicate the accused in the offense, and not be consistent with his innocence, unless it will do more than cast a grave suspicion on the accused.

Once again the trial court refused to give the instructions (Tr. 45) and ruled as follows:

> It is the opinion of the court that the age of consent, if at all, in incest would be at the

> age of eighteen wherein she becomes an adult and that the pressure of the father would indicate whether or not it was free will consent. (Tr. 45.)

The trial court clearly committed prejudicial error in refusing to either instruct the jury on the applicable law of accomplice and the need for corroboration so that the jury could determine whether the prosecutrix had the requisite mental state to be an accomplice or, in the alternative, to declare as a matter of law, based on the undisputed testimony of the consent of the prosecutrix, that she was an accomplice and that inasmuch as her testimony was uncorroborated, the complaint would be dismissed.

CONCLUSION

There can be little doubt that the prosecutrix, being age sixteen at the time of the alleged unlawful act, was criminally responsible for her actions, assuming the requisite mental state, by virtue of Section 76-2-301, Utah Code Annotated (1953). Likewise, inasmuch as the act committed was incest, a felony in violation of Section 76-6-102, Utah Code Annotated (1953), the prosecutrix could have been charged with the identical offense of incest as the appellant was brought to trial on. As such, the prosecutrix in the case at bar was legally capable of being an accomplice to the crime of incest. The question which remained at the time the State completed

its case, and again after defense counsel had rested, was whether or not the prosecutrix was factually an accomplice to the alleged criminal act. The judge thereupon committed prejudicial error by either failing to instruct the jury on the requirements necessary to find the prosecutrix an accomplice and the incumbent requirement of corroboration of her testimony in order to sustain the conviction or in failing as a matter of law to find the prosecutrix was an accomplice and thereby dismiss the complaint as her testimony was uncorroborated.

Wherefore, the appellant respectfully prays that his conviction be reversed as a matter of law based on the undisputed fact that the prosecutrix consented to the unlawful act and that her testimony was uncorroborated or, in the alternative, reverse and remand this case for a new trial with the instruction to the trial court that the jury must be instructed on the applicable law with regard to accomplices and the need for corroboration in order to sustain the conviction of the appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Apellant was served on counsel for the respondent by delivering two copies thereof to the Office of the Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, and by mailing two copies thereof to Steven C. Vanderlinden, Deputy County Attorney, Davis County Courthouse, Farmington, Utah 84025, in a postage prepaid envelope on the 19th day of July, 1978.

Kaye Dahle Pls