

1951

## State of Utah v. William Davie and Rosetta Davie : Brief of Defendants and Appellants

Utah Supreme Court

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Richard L. Stime; Attorney for Appellants;

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NO. 7694

IN THE SUPREME COURT  
OF THE STATE OF UTAH

\* \* \* \* \*

STATE OF UTAH,

Plaintiff and Respondent,

vs.

WILLIAM DAVIE and ROSETTA DAVIE,

Defendants and Appellants.

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BRIEF OF DEFENDANTS AND APPELLANTS

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**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, )

Plaintiff and Respondent, )

vs. )

WILLIAM DAVIE and ROSETTA DAVIE, )

Defendants and Appellants. )

Case

No. 7694

\* \* \* \* \*

NATURE OF THE CASE

Defendants prosecute this appeal from a judgment of the District Court of Davis County, Utah, Honorable John A. Hendricks presiding, upon a jury verdict of guilty to a charge of keeping a house of ill fame contrary to Section 103-51-21, Utah Code Annotated, 1943.

Counsel for appellants appears here in this action for the first time pursuant to an order of this court requiring him to

represent the accused on appeal. Subsequently this appeal was dismissed as to the defendant Rosetta Davis; consequently, it now lies in behalf of the defendant William Davis alone.

Trial in the lower court was upon a plea of not guilty to the information which charged the defendants with wilfully and unlawfully keeping a house of ill fame resorted to for the purpose of prostitution and lewdness, to-wit: the Benevolent Hand Club premises west of Farmington, Utah. It commenced on November 2, 1950 and was concluded by the verdict of the jury on November 3, 1950. Sentence was passed on November 14, 1950 committing each defendant to 360 days in the county jail. The appeal bond was fixed at \$5,000. A certificate of probable cause was obtained and the bond posted; however, subsequently the bond was withdrawn

and the defendant Rose committed. The defendant William was held to answer another charge, upon which he is now incarcerated. His sentence on this charge remains unserved.

The defendants offered no evidence.

### STATEMENT OF FACTS

A very general statement of facts will suffice for the purpose of the errors to be assigned.

On or about May 17, 1950, the defendant William Davis leased from one Ezra Peterson a barn located in Davis County north and west of Lagoon, for the purpose of making it into a private club (Tr. 7-10). The defendant had the place painted on the outside (Tr. 13-19) and made improvements on the inside.

On or about June 9, 1950, Sheriff Le-Grande Hess of Davis County, in company with

several of his deputies and deputized persons, conducted a raid on these premises where they suspected prostitution was being carried on. (Tr. 27-57). Three of the deputies, Brown, Peterson and Poulsen, went in first and proceeded to hire three girls to engage in what they suspected to be their calling and then the remainder, in company with the Davis County Attorney, came in and all persons in the place were taken to one of the rooms and questioned. The three deputies testified as to what they did. (Tr. 57-75) (Tr. 90-101) (Tr. 106-114). Mr. and Mrs. Davis were there and Mr. Davis was questioned by the County Attorney after being informed of his rights. Davis said that he was operating a membership social club. (Tr. 114-117). The place was examined, observed and the contents noted. (Tr. 118) (Tr. 126-132) (Tr. 63-64).



The people there were all questioned, and Mr. and Mrs. Davie and the girls were taken to the Weber County Sheriff's office, booked and committed to bail.

On the trial of the cause a witness, Kent, called by the State, testified to an act of intercourse with one of the girls at the Club on or about May 31, 1950. (Tr. 20-22). A witness, Henderson, also called by the State, testified to an act with one of the girls that was led up to but not consummated about a week before the place was raided. The court, however, failed to give a requested instruction on this testimony as coming from accomplices. Another witness for the State, Mrs. Ferris Workman, testified as to the general reputation of the premises in the community, that it was a house of prostitution. This proffered testimony was received over objection, and

a motion by defense counsel to strike same was denied. (Tr. 122-126).

### ASSIGNMENT OF ERROR

1. The lower court erred in refusing to instruct the jury that the witnesses for the State, Kent and Henderson, were accomplices, that the jury cannot convict on their testimony alone, and as to what corroborative evidence is.

2. The lower court erred in admitting evidence as to reputation of the premises involved.

3. The lower court erred in refusing to grant defendant William Davis's motion for a directed verdict.

### ARGUMENT

#### POINT I

THE LOWER COURT ERRED IN REFUSING  
TO INSTRUCT THE JURY THAT THE WIT-

NESSERS FOR THE STATE, KENT AND  
HENDERSON, WERE ACCOMPLICES, THAT  
THE JURY CANNOT CONVICT ON THEIR  
TESTIMONY ALONE, AND AS TO WHAT  
CORROBORATIVE EVIDENCE IS.

Section 103-32-18, Utah Code Annotated,  
1943 provides as follows: \*

"A conviction shall not be had on  
the testimony of an accomplice,  
unless he is corroborated by other  
evidence, which in itself and with-  
out the aid of the testimony of the  
accomplice tends to connect the de-  
fendant 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."

At the conclusion of the evidence and after  
denial of defendant's motion for a directed  
verdict, counsel for defendants requested  
the court to instruct the jury that the  
witnesses, Kent and Henderson, were accom-  
pllices, that the jury is unauthorized to  
convict based upon their evidence alone,  
that it must be corroborated by other and  
competent testimony, and the corroboration  
must go to more than the commission of the

offense, that it must connect the defendants with the crime charged. The court refused so to instruct (Tr. 160-161), and the case was then submitted to the jury. Both witnesses could have been prosecuted under the same statute that defendants were prosecuted, to-wit: 103-51-21, section (1) of which also provides "or to resort thereto for lewdness".

While we have no statutory definition of accomplice, the statute, does however, define who are principals, as follows:

"103-1-43

All persons concerned in the commission of a crime, either felony or misdemeanor, whether they directly commit the act constituting the offense or aid and abet in its commission \* \* \*."

The word accomplice is defined in 1 Wharton's Crim. Ev. (10th) Sec. 440, p. 291, thus:

"An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission

of a crime. The cooperation in the crime must be real, not merely apparent."

The test as approved by this court in *State v. Wade*, 66 U. 267 was laid down in *People v. Coffey*, 119 P. 901, as follows:

ow "This then is the true test and rule: If in any crime the participation of an individual has been criminally corrupt, he is an accomplice. If it has not been criminally corrupt he is not an accomplice."

The New York Court of Appeals in holding a thief to be an accomplice of one charged with receiving stolen goods, under a statute similar to Utah's said this in the case of *People v. Kopperschmidt*, 143 N.Y. 256: ~~256~~

" \* \* \* But under the Penal Law Sec. 2 one who aids or abets another in the commission of a crime is a principal, whether he has been previously guilty of an independent crime or not."

And further:

" \* \* \* We are dealing with the legislative definition of guilty participation, not with the common meaning of words."

**Again:**

**"The receiver cannot take with guilty knowledge unless aided therein by the act of the thief in delivering."**

**In holding a thief to be an accomplice of one charged with receiving stolen goods, our Supreme Court followed the above in the case of State v. Coroles, 74 U. 94.**

**Thus we submit here that the defendants could not keep a house of ill fame unless aided therein by the act of those who resort thereto, and conversely, without a house of ill fame there could be no resorting thereto for the purpose of lewdness. They are inextricably dependant upon each other.**

**We submit that where, as in the instant case the fact that the witnesses were accomplices and did what they did, was not in dispute, the question is one of law for the trial court and it is its duty so to instruct**



People v. Coffey, 119 P. 901. People v. Swope, 242 P. 1067. The question is further discussed in People v. Southwell, 152 P. 939, where it was said:

"Under this state of the case, and assuming that the corroborative evidence, admittedly slight, was sufficient to support the conviction, it was very material to the defendant to have the law as to the testimony of accomplices explicitly stated to the jury. It was not for the jury to decide whether each or any of the witnesses were accomplices, but under the testimony, it was the duty of the court to give the requested instructions advising the jury that Mrs. Willie Martin and Rena McMenagle were both accomplices as to the crime charged against appellant. Under the state of the record as we have described it, there should have been left to the jury not discretion of judgment to determine as to whether these witnesses were accomplices; the testimony showed as a fact that they were. For aught that appears, the jury may not have applied the rule of Section 1111 of the Penal Code to the testimony of these witnesses, but may have given full credit and weight to their testimony and left out of account altogether the requirement that such testimony, before it was sufficient to warrant a con-

viction, should be corroborated by other and independent evidence. For this error alone, we think that the appellant is entitled to a new trial."

In *People v. Swape, Supra*, it is said:

(pp 1071-1072):

" \* \* \* and all the defendants were entitled to have Johnson's testimony judged by the jury in accordance with the provisions of the statute affecting the testimony given by accomplices. That right was denied them; and it is impossible to determine the severity of the injury which each of them suffered by reason of such refusal."

The court's duty also extends to informing the jury as to what corroborative evidence is. We cite from *People v. Sternberg*, 43 P. 201 where the court deals with this question:

"Members of a jury might be in excusable ignorance of the legal definition of corroborative evidence and yet possess (or at least they should) intelligence enough to comprehend what was meant when they were told that it was additional evidence of a different character to the same point. The second and third proposed instructions are correct in law. They were not



covered by any that were given, and should have been declared, if applicable to the case. That they were applicable no doubt can be entertained. The evidence of accomplices was before the jury. It was defendant's right that his triers should know that it was a duty imposed upon them by law to receive this evidence with distrust. The question of the support of such testimony by corroborative evidence was a vital one for their determination. They were instructed in the language of the code (Pen. Code, Sec. 1111) that they could not convict unless there was corroborative evidence. Defendant was plainly within his right in asking that they be told what corroborative evidence is. That the jury was instructed in the language of section 1111 of the Penal Code, that the evidence of an accomplice is not sufficient to convict unless he is corroborated by other evidence which, in itself, and without the aid of the testimony of the accomplice, tends to convict (connect) defendant with the commission of the crime, informed them of the amount and kind of corroborative evidence required, but they were still left without enlightenment as to what in law constitutes this character of evidence."

In *People v. LaRue*, 216 P. 627, the court in commenting upon the importance to a de-

pendant of an instruction informing as to what corroborative evidence is, said as follows:

"Where the prosecution relies for a conviction upon the testimony of an accomplice, even though corroborated, the proposed instruction should be given, because the jury may reject the corroborating evidence as unworthy of belief, and in such case the instruction would be vital."

It should be pointed out that the above cases (California) were decided under a statute requiring corroboration of accomplice testimony similar to Utah's.

## POINT II

THE LOWER COURT ERRED IN ADMITTING EVIDENCE AS TO REPUTATION OF THE PREMISES INVOLVED.

The information, in the words of the statute, charged the defendants with keeping a house of ill fame, thus we submit that the gist of the offense consists in the use of the house, not in its reputa-

"reputation" mentioned so that the reputation of the house is not an element of the offense; therefore, any evidence admitted must be a matter of direct proof coming from the mouths of witnesses testifying from their own knowledge. In the face of the statute, evidence of reputation is strictly hearsay and should be excluded. We invite the court's attention to the case of *State v. Boardman*, 64 Maine 523, so holding, and further to the case of *Henson v. State*, 62 Md. 231 and the cases therein cited as standing for this proposition. The statute in *State v. Boardman*, supra, is similar to Utah's in being reenactive of the common law. The judgment there was reversed because of the error in admitting such evidence, all judges concurring in the remark of Peters, J.:

"The house must be proved to be a house of ill fame by facts and not by fame."

### POINT III

THE COURT ERRED IN REFUSING TO GRANT  
DEPENDANT WILLIAM DAVIE'S MOTION FOR  
A DIRECTED VERDICT.

Two things are necessary for a conviction under the statute involved; first, that the character of the place be established as a house of ill fame; and second, that the defendant charged be shown to be the keeper of said house. The record herein is entirely devoid of any evidence tending to connect the defendant William Davie with keeping the premises as a house of ill fame. The state proved a lease from Mr. Ezra Peterson to the defendant and then proved the defendant had the premises painted on the outside. Beyond that there is nothing to show any supervisory control, financial interest in, or actual operation of the premises. "Keeping", as defined by Bishop, contemplates such control over the house and its inmates

as pretains to the head or heads of a household. 2 Bish. Crim. Proc. (3d ed.) secs. 112-113. Beyond showing the presence of the defendant William on the premises the state failed in its burden of proof as to constituting him the keeper of the house.

We quote from 17 Am.Jur. 108:

"To sustain a charge of keeping a house of ill fame, the fact that the defendant is such keeper or proprietor as to be in control thereof is an element of the crime." Citing cases.

### CONCLUSION

We submit that the lower court erred as a matter of law in refusing to instruct on accomplice testimony, in admitting evidence as to the general reputation of the premises and in denying defendant William Davis's motion for a directed verdict. Accordingly, we feel the defendant was deprived of a fair trial in the two instances

and convicted on insufficient evidence in  
the other.

Respectfully submitted,

RICHARD L. STINE  
Attorney for Defendant.