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State of Utah v. William Davie and Rosetta Davie : Brief of Plaintiff and Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Respondent,

v.

ROSE DUCINNIE DAVIE,

Defendant and Appellant.

Case No. 7762

BRIEF OF PLAINTIFF AND RESPONDENT

FILED

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In the Supreme Court of the State of Utah

STATE OF UTAH,

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Case No. 7762

BRIEF OF PLAINTIFF AND RESPONDENT

STATEMENT OF FACTS

The statement of facts as stated in the appellant's brief is acceptable to the State. The statute under which this conviction was had is 103-51-21, Utah Code Annotated 1943, insofar as it is pertinent to this appeal and provides:

It shall be unlawful for any person:

(1) To keep a house of ill fame resorted to for the purpose of prostitution or lewdness, or to willfully reside in such house, or to resort thereto for lewdness;
or,

(2) * * *

STATEMENT OF POINTS

I. STATE'S WITNESSES SEQUIRA, HICKS, MANDONADO, MUIR AND LYMAN WERE NOT ACCOMPLICES.

II. EVEN ASSUMING WITNESSES SEQUIRA, HICKS, MANDONADO, MUIR AND LYMAN WERE ACCOMPLICES, THE LOWER COURT DID NOT ERR IN FAILING TO SO INSTRUCT THE JURY.

III. THE LOWER COURT DID NOT ERR IN ADMITTING THE RECORDS OF THE TELEPHONE COMPANY, THE POWER COMPANY AND THE INSURANCE AGENT.

POINT I

STATE'S WITNESSES SEQUIRA, HICKS, MANDONADO, MUIR AND LYMAN WERE NOT ACCOMPLICES.

The defendant was charged with the crime of keeping a house of ill fame resorted to for the purpose of prostitution and lewdness. We do not have a statutory definition of accomplices. Section 103-1-43, Utah Code Annotated 1943, defines who are principals. In the case of State v. Bowman, 92 Utah 540, 70 P. 2d 458, this court stated that the word "accomplice" has been construed to refer to one who is or could be charged as a principal with the defendant on trial.

Defendant acknowledges that the witnesses could not be charged with the crime of keeping a house of prostitution, but asserts, apparently, that defendant and the witnesses could

have been charged under that part of the statute making it an offense to "resort thereto for lewdness." Defendant, however, was not charged with resorting, and even if the witnesses could have been charged under the separate offense of resorting "thereto for lewdness" that would not make them accomplices in this case.

California has a statute defining principals which is substantially similar to ours.

Section 11.11 of the Penal Code of California which requires that testimony of an accomplice be corroborated before a conviction can be had was amended in 1915 to define an accomplice as follows:

An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against defendant on trial in the cause in which the testimony of the accomplice is given.

This amendment came about as a result of the decision of *People v. Coffey*, 161 Cal. 433, 119 P. 901, 39 L.R.A. (N.S.) 704, which is cited by defendant. Since the time of the amendment the courts of California have given a much stricter and restrictive definition of an accomplice. The case of *People v. Clapp*, 151 P. 2d 237 (1944), 24 Cal. 2d 753, is an illustration. This was a case where the defendant had performed an abortion upon one of the witnesses, and two other witnesses had watched the operation. It was asserted on appeal that the two witnesses who were present during the operation were accomplices, and, therefore, their testimony needed to be corroborated as required by Section 11.11 of the Penal Code. The court stated:

* * * It is necessary to determine whether sections 31 and 971 of the Penal Code or other provisions of the criminal law subject the witness to prosecution under the provisions that the defendant is accused of violating, or whether the acts of the witness participating in the transaction constitute a separate and distinct offense. If a statutory provision so defines a crime that the participation of two or more persons is necessary for its commission, but prescribes punishment for the acts of certain participants only, and another statutory provision prescribes punishment for the acts of participants not subject to the first provision, it is clear that the latter are criminally liable only under the specific provision relating to their participation in the criminal transaction. The specific provision making the acts of participation in the transaction a separate offense supercedes the general provision in section 31 of the Penal Code that such acts subject the participant in the crime of the accused to prosecution for its commission.

The reasoning of this case was extended in the case of *People v. Grayson*, 189 P. 2d 285, 8 Cal. App. 2d 516 (1948). The appellant was convicted of receiving and holding a wager on a horse race. On appeal he complained that a witness, one Pease, who placed a bet with the defendant, was an accomplice. In this case there were not two separate statutes covering the offenses, but section 37a of the Penal Code of California had several subdivisions. Subdivision 3 made it illegal for a person to receive bets. Subdivision 6 of the section made it illegal for a person to offer or place a bet. The court reasoned:

* * * So, here, since the act of placing a bet, without which, of course, the bet could not be received by another, was punishable as a separate offense under subdivision 6, and was not specifically under sub-

division 3, it was not punishable under section 31, and Pease was not an accomplice of appellant who received the bet. The testimony of Pease was sufficient, without corroboration, to prove the offense charged in count one.

The defendant in the present case is charged with keeping a house of ill fame. Section 103-51-21, Utah Code Annotated 1943, has several subdivisions. Within subdivision 1 there are several clauses, to-wit:

It shall be unlawful for any person:

(1) To keep a house of ill fame resorted to for the purpose of prostitution or lewdness, or to willfully reside in such house, or to resort thereto for lewdness;

It is the contention of the State that each of these clauses is a separate and distinct offense just as though they were set out in separate subdivisions or separate sections. Consequently, if the above-mentioned witnesses were guilty of a crime it was a separate and distinct offense—that of resorting to a house of ill fame for lewdness.

It has been held in Iowa that a woman engaged in prostitution in a house of ill fame is not an accomplice of the person charged with the management of the house. This was based upon the theory that there was no affirmative participation in the actual management. The Iowa statute defining principal is similar to ours. In *State v. Anderson*, 38 NW 662, the defendant was convicted of keeping a house of ill fame. Four women who stayed in the house testified to numerous acts of prostitution in the place and under the supervision of the defendant who received part of the remuneration paid to the women by the men patronizing the house. Two of these

women did not assist in its management. The other two did such work as night clerking, serving drinks and hustling. The lower court failed to instruct that the two who did not have any control of the management of the house were accomplices. The court did instruct that the other two were accomplices and that the statute of Iowa required corroboration. The appellate court said:

" * * * Two of these witnesses were intimates of the place but did not assist in its management, therefore they were not to be deemed accomplices. However, there is evidence from which the jury could find two other witnesses were accomplices. (Page 665).

See also *People v. Webb*, 25 N.Y.S. 2d 554; reversed on other grounds, 26 N.Y.S. 2d 386; *People v. Swift*, 261 App. Div. 808, 23 N.Y.S. 1022; *Jackson v. United States*, D. C. App. (1919), 48 App. D. C. 269; *State v. Chauvet* 1900, 111 Iowa 687, 83 N.W. 717, 51 L.R.A. 630, 82 Am. St. Rep. 359; *Stone v. State* (1919), 47 Tex. C. Cr. 575, 85 S.W. 808; *People v. Richardson* (1917), 22 N.Y. 103, 118 N.E. 514; 16 C.J. 1388, page 681. It should be noted that New York, Iowa and California have statutes which are substantially similar to the State of Utah's defining principal and requiring corroboration of accomplices' testimony.

It is not contended that these four witnesses in the present case had any active management in the keeping of the house of ill fame which the defendant is accused of operating. It is, therefore, submitted that they were not accomplices any more than was the prostitute in the Iowa case.

POINT II

EVEN ASSUMING WITNESSES SEQUIRA, HICKS, MANDONADO, MUIR AND LYMAN WERE ACCOMPLICES, THE LOWER COURT DID NOT ERR IN FAILING TO SO INSTRUCT THE JURY.

This court in the case of *State v. Simpson*, 236 P. 2d 1077, decided October 26, 1951, squarely met the question of whether the refusal of a trial judge to instruct the jury regarding the testimony of accomplices and the need for corroboration thereof was in error.

As to the third point, while it is perhaps a better practice for the trial court to give a cautionary instruction regarding the testimony of an accomplice, it is generally held that this is a matter which lies within the discretion of the trial judge, and it is not reversible error to fail to give such an instruction. *People v. Ruiz*, 144 Cal. 251, 77 P. 907; *Commonwealth v. Beal*, 314 Mass. 210, 50 N.E. 2d 14; *State v. Gaddis*, 131 N.J.L. 44, 34 A.2d 735; *Gordon v. State*, 188 Miss. 708, 196 So. 507; *U. S. v. Block*, 2 Cir., 88 P.2d 618; and *People v. Nathanson*, 389 Ill. 311, 59 N.E. 2d 677. p. 1083.

The instructions usually given in criminal cases as to the weight of testimony and the credibility of witnesses was given in this case. Instruction No. 13 is particularly in point.

You are the sole judges of all questions of fact, of the weight of the evidence and the credibility of the witnesses. In weighing the testimony you may consider the bias, if any is shown, of any witness to testify for or against any party, his interest, if any, in the result of the trial, his appearance on the witness stand,

and any probable motive which he may have to tell that which is not true; you may consider the reasonableness of the witnesses' statements, their apparent frankness and candor, or the want of it, their opportunity to know and understand, and their capacity to remember, and from all the facts and circumstances given in evidence determine what weight ought to be given to the testimony of any witness.

There was ample corroborative evidence coming from police officers Garside (R. 32-61) (R. 133, 136), Bennett (R. 104-136), Wilson (R. 127), and Henderson (R. 106), and the other witnesses.

POINT III

THE LOWER COURT DID NOT ERR IN ADMITTING THE RECORDS OF THE TELEPHONE COMPANY, THE POWER COMPANY AND THE INSURANCE AGENT.

The record of the telephone company was identified by the unit manager of the Ogden office. He identified them as records of the company which showed telephone listings of the users of the service of the company. He stated that they were from his office, and that he had access to them (R. 82). As to the power company's records the person identifying those records stated he was an employee of the power company, that he took the records from the files of the power company of which he had charge, and that it was his duty to keep records of the users of the power company's service (R. 103-104).

This state has recognized the "shop book" rule in several cases, a list of which is given in *Clayton v. Metropolitan Life Ins. Co.*, 96 U. 331, 85 P. 2d 819, 822. In the case of *Bohlke v. Wright*, 93 P. 2d 321, 200 Wash. 374 (1939), it was urged that it was error to allow the admission of the record of a telephone conversation. The divisional manager of the telephone company was allowed to identify the record.

The slip of paper was part of the records of the telephone company, and as such was entitled to be admitted in evidence. Citations omitted.) p. 323.

See also *Pinkerton's National Detective Agency v. Rosedale Silk Co.*, 184 Atl. 282, 121 Pa. Supra 496.

The records of the insurance company were identified by Mr. Harold Tribe, who shared business office space with the insurance agent, William J. Holmes, who at the time of the trial, was out of the state. He testified that they shared offices, that they had had occasion to assist each other in various ways and were familiar with the records in each other's business. He identified an insurance diary which was kept in the files at "our office." On cross examination he testified that he had an occasion to take and replace the record in the insurance company's files, and that the record came from the file in their office (R. 99-102).

The necessity of verifying the correctness of entries by the bookkeeper, clerk or other person who made the entries in a book of accounts is obviated or necessarily relaxed when such person has died, has become and remains at the time of the trial, insane or physically unable to attend as a witness, is beyond the jurisdiction

of the court or otherwise unavailable as a witness.
* * * . 20 Am. Jur., Evidence, Section 1070.

It is submitted that Mr. Tribe had ample opportunity to be familiar with the records of the insurance company inasmuch as he had a joint office with this insurance company and had assisted the agent thereof in various ways.

CONCLUSION

It is respectfully submitted that the lower court did not err in refusing to instruct on accomplices' testimony or in admitting into the evidence the records heretofore referred to.

Respectfully,

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