

1951

State of Utah v. McKinley Simpson : Brief of Appellant

Utah Supreme Court

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7715

IN THE SUPREME COURT OF UTAH

*****O*****

STATE OF UTAH)

Plaintiff and Respondent.)

vs.)

) Case No. 7715

MCKINLEY SIMPSON)

Defendant and Appellant.)

*****O*****

APPELLANT'S BRIEF

*****O*****

FILED
AUG 8 - 1951

Clerk, Supreme Court, Utah

D. H. OLIVER

Attorney for Appellant

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH,)
Plaintiff
& Respondent,)

CASE No. 7715

BECKLEY BROWN,)
Defendant
& Appellant.)

BRIEF OF APPELLANT

STATEMENT

The defendant was convicted of second degree burglary in the District Court of Salt Lake County, Utah, and to reverse said conviction, he prosecutes this appeal.

To reverse the judgment, defendant relies on the following

POINTS

I

IT IS REVERSIBLE ERROR TO ADMIT IN EVIDENCE STATEMENTS MADE BY A CO-DEFENDANT OR ACCOUPICE, OUT OF THE PRESENCE OF THE

DEFENDANT, THEN ON TRIAL.

II

A PERSON MAY NOT BE CONVICED UPON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

III

IT IS THE DUTY OF THE TRIAL COURT TO INSTRUCT THE JURY UPON THE LAW APPLICABLE TO THIS CASE.

ARGUMENT: Point 1

IT IS REVENABLE ERROR TO BELIEVE IN EVIDENCE STATEMENTS MADE BY A CO-DEFENDANT OR ACCOMPLICE, OUT OF THE PRESENCE OF THE DEFENDANT, THEN ON TRIAL. (Tr. 68 & 98).

Boats vs State, 139 F 840
Ford vs State, 114 F 873
McC. vs Olsen, 65 F 612
Haines vs Leroy 13 F 8

The defendant objected to the testimony of Henry Oliver in regard to a transaction he had with James Dixon, an accomplice in this crime, the next day after the crime was committed. Tr. 68 and 98.

This testimony reveals that after the burglary had been committed, the witness purchased 4 tires from James Nixon and the disposition of them after the purchase, all of which was accomplished out of the presence of the defendant, Simpson.

In *Scotts vs. State*, it is said

"Under the rules of evidence, declarations of joint defendants, made after the commission of the crime and in reference to it, in the absence of the defendant on trial, are not competent. Such declarations are regarded as any other hearsay testimony, and we can not say that, without this incompetent testimony, the jury would have found the verdict for the State; this testimony may have made the requirement of proof which satisfied their minds. In that case plaintiff in error would have been convicted upon illegal evidence.*"

To the same effect are the other cases cited herein.

Point II

A PERSON MAY NOT BE CONVICTED UPON THE
UNCORROBORATED TESTIMONY OF AN ACCOMPLICE

CCA 1943, 151-9-17
State vs Alser, 151 P 157
State vs Stiball 145 P 313
State vs Lay, 110 P 936
People vs Robbins, 134 P 317
Richardson vs Court, 170 SR 452

State vs Alser is a Utah case wherein
the defendant was charged with larceny and
the only evidence of defendant's guilt was
the testimony of an accomplice and the
presence of the cows on defendant's ranch.
Our court reversed the conviction for the
reason that the court refused to instruct
the jury that if they found that Curtis
was an accomplice, they should acquit defendant.

In the instant case Paul Perkins was
a confessed and admitted accomplice and we
contend that defendant's request for a
directed verdict should have been granted.
(Tr 99 and 102).

At the trial the State contended that

possession of the tires constituted sufficient corroboration and the trial court so held, but we content that there is no evidence in the entire record that shows, or tends to show, that Simpson ever had possession of a single tire at any time, except the testimony of Paul Perkins. It is true that Simpson went to Pete's place in the car of Clewis, together with Paul and one other person, and brought Pete out to see the tires for the purpose of a proposed sale. Simpson explained his connection with this transaction and no one disputed his explanation except Paul. Paul being a confessed thief, the possession of the tires should not be transferred from him to some one else by construction, while he continues to hold actual possession.

In State vs Ray, our court said

"Under this statute, the jury has no legal right to convict a defendant upon the uncorroborated testi-

mony of an accomplice, even though they believe the testimony of the accomplice to be true as to every material fact, and are convinced of the guilt of the defendant beyond a reasonable doubt."

This rule was adhered to in People vs. Brown, 83 P2 718, and the cases herein cited.

In this case Simpson testified in his own behalf, ir 99 to 107. This testimony is corroborated by the testimony of Tommy Johnson, ir 63 to 65, and Cornelius Johnson, ir 74 to 75, who testified that Paul Perkins, Vernon Skinner and one other man brought the tires to their home. Tommy identified this third man as a big man with a mustache. Even Paul admits that Robert Glavis was the driver of the car and that Glavis was a big man with a mustache. The tires were in Glavis' car at Pete's place; Glavis was driving and they proceeded from there to the Johnson home.

In the absence of proof of charge of drivers, the presumption is very conclusive that Claude was the old man at the Jensen home. This evidence is very positive that Paul was not telling the truth about a material fact and therefore his entire testimony becomes unworthy of belief.

Point III

IT IS THE DUTY OF THE COURT TO INSTRUCT THE JURY UPON THE LAW APPLICABLE TO THE FACTS IN THE CASE.

UCA 1943, 101-24-1, 2
UCA 1943, 104-24-14, 4
State vs Almar, 101 P 157
State vs Pearson, 70 P 550
Bivens vs State, 26 P 238

The defendant requested the court to instruct the jury in regard to the testimony of Paul Perkins, Jr. 1st.

As above pointed out, this court, in the same case, reversed a conviction on this ground. The statute requires such instructions and the courts so hold.

SUMMARY

In point I we have pointed out the error of the court in relieving the testimony of Henry Oliver; point II deals with the testimony of an accomplice, and point III shows error on the part of the court in failing to properly instruct the jury.

Here we call the court's attention to the charge alleged in the Information: the defendant is charged with "BRIKING; the CONVEYANCE of this charge is

"THE BREAKING AND ENTERING"

nowhere in the entire record is there any evidence of Simpson's "BRIKING AND ENTERING" except the testimony of Paul Perkins. This being true, we contend that the trial court should have the jury to acquit Simpson.

In *Richardson vs Commonwealth*, supra, the defendant was charged with larceny. the stolen property was found in the possession of the defendant shortly

after the theft, an accomplice testified that he and the defendant had stolen the property. After reviewing the authorities and the evidence, the Missouri Court held that the evidence might be sufficient to convict on a charge of "receiving stolen property" but not for the larceny itself.

Let's assume, for the sake of argument, that Simpson did have possession of the tires. Does it necessarily follow that he "THREW INTO THE SHOWN TIRE COMPANY"? We contend that it does not, and that the burden rests with the State to prove that he did. We confess that the evidence might be sufficient to cast suspicion on Simpson but the question still remains, suspicious of what? Did he receive the tires from Jack, knowing them to have been stolen? Did he steal the tires after the burglary? Flight could evidence of these offenses, either of which is punishable under our statutes.

See UCA 1943, Sections 103-36-12 and 103-36-4, neither of which requires a MARRIAGE AND ENTERTAINING, and in this we respectfully submit, in

CONCLUSION

If Paul Perkins's testimony be eliminated from the record, all we have left is the fact that the Brewer Tire Company was broken into at the time alleged. Perkins offering Simpson \$2.50 commission on each tire he could sell; Simpson contacting Pete and contacting Perkins through Skinner, Perkins, Skinner, Clewis and Simpson delivered the tires for inspection by Pete. At this point Simpson went home and went to bed, and Perkins, Skinner and Clewis stacked the tires in the Johnson house. Simpson arose early next morning, thinking it was time to go to work, and observed Perkins on the street and went to where he was and was there approached by police officers; where he was arrested.

We respectfully submit that this is the type
of transaction the Legislature had in mind
when it said:

"And the corroboration shall not be
sufficient if it merely shows the
commission of the offense and the
circumstances thereof." (105-27-1)

Respectfully submitted,

. . . Oliver

Attorney for Appellant.