

1951

State of Utah v. Rose Ducinnie Davie : Brief of Defendant and Appellant

Utah Supreme Court

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100-68

NO. 7762

IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

ROSE DUCINNIE DAVIE,

Defendant and Appellant.

BRIEF OF DEFENDANT AND APPELLANT

FILED RICHARD L. STINE
Attorney for Appellant
NOV 23 1951

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH

* * * * *

STATE OF UTAH,)	
Plaintiff and Respondent,)	
vs.)	Case
ROSE DUCINNIE DAVIE,)	No. 7762
Defendant and Appellant.)	

* * * * *

NATURE OF THE CASE

Defendant prosecutes this appeal from a judgment of the District Court of Weber County, Utah, Honorable Charles G. Cowley 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 appellant appears here in this action for the first time pursuant to an order of this court requiring him to

represent the accused on appeal.

Trial in the lower court was upon a plea of not guilty to the information and amended information supplemented by Bills of Particulars, which charged the defendant with wilfully and unlawfully keeping a house of ill fame located at 205 - 25th Street, Ogden, Weber County, Utah, and which was resorted to for the purpose of prostitution and lewdness. It commenced on November 9, 1950 and was concluded by the verdict of the jury on November 13, 1950. Sentence was imposed on November 20, 1950, committing the defendant to twelve months in the county jail. A certificate of probable cause was obtained and this appeal taken. The sentence remains unserved.

The defendant offered no evidence.

STATEMENT OF FACTS

On or about July 23, 1950, Detective Arlyn M. Garside, in company with Detective Leroy Bennett and police officers Terman and Green of the Ogden City Police, conducted a raid on the premises known as the Rose Rooms in Ogden, where they suspected prostitution was being carried on. (Tr. 33). Inside they found the defendant, a colored maid, and a man with a girl. They informed the defendant they had a warrant for her arrest and all the persons there were taken to the police station. (Tr. 39-40). The arrangements of the rooms and their contents were noted and some pictures were taken. (Tr. 34-37).

On the trial of the cause Garside testified that he had known Mrs. Davie for a period of three years, that he, in company with other officers, had observed

the place for some nine months seeing fellows going in and out at all hours and that he had talked to certain of these fellows (Tr. 55-56), and that he knew some of the girls living at the rooms, had arrested at least one before, and had talked to some of them on occasions. (Tr. 42, 43, 44, 45, 48, 49). He testified as to a conversation with the defendant in January of 1951 where he told her that the heat was and advised her to go into some other business, but that she told him prostitution was her business and she was going to stick with it. (Tr. 65-67). Carside also testified as to another conversation with Rose in company with a detective Clawson (Tr. 66) in February of 1951 along the same lines. Other officers testified to conversations with Rose at the premises. (Tr. 104-106) (Tr. 106-113) (Tr. 127).

The following named witnesses testified for the State as to separate acts of intercourse with girls at the premises, Sequira (Tr. 7-15); Hicks (Tr. 16-20); Mandonado (Tr. 21-26); Muir (Tr. 84-88). The court failed to give a requested instruction constituting these witnesses accomplices. A witness, Lyman, who was at the premises when the officers broke in, also testified; however, he had committed no act. (Tr. 93-99).

A witness, Yates, employed by the Mountain Fuel Supply Co., testified as to a service application concerning the premises, which was in his handwriting. (Tr. 26-31). A witness, Tribe, an Ogden realtor, testified as to insurance policies on the premises taken from the files of one Holmes, an insurance man, with whom he shared office space. (Tr. 99-102).

A witness, Shorten, employed by the Utah Power and Light Company, testified as to a service application card for electricity to be furnished the premises, which came from the company files but had been prepared by someone else. (Tr. 103-104). A witness, Burke, employed by the telephone company, testified as to their records, not prepared by him or in his handwriting, showing telephone service to the premises. All this above testimony was received over the objection that these items had not been properly identified.

ASSIGNMENT OF ERROR

1. The lower court erred in failing to instruct the jury that the state's witnesses, Sequira, Hicks, Mandanado, Muir, and Lyman, were accomplices.
2. The lower court erred in admitting in evidence the records of the telephone

company, the insurance agent and the power company.

ARGUMENT

POINT I

THE LOWER COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT THE STATE'S WITNESSES, SEQUIRA, HICKS, MANDON-ADO, MUIR AND LYMAN, WERE ACCOMPLICES.

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 * * *."

Section 103-32-18 provides for accomplice testimony 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 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."

It is true that in the instant case, the witnesses referred to could not be prosecuted for the identical crime of keeping a house of prostitution, but all could most certainly have been charged under identically the same statute and section thereof, to-wit: 103-51-21, section (1) of which provides:

" * * * or to resort thereto for lewdness."

This we submit should make them accomplices within the meaning of our statute because of their guilty participation. To hold otherwise would defeat the purpose of the statute prohibiting conviction on the testimony of accomplices unless corroborated. This court in *State v. Wade*, 66 U. 267 cited with approval this comment from *People v. Coffey*, 119 P. 901:

"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. Kupperesmidt*, 143 N.E. 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."

1 Wharton's *Crim. Ev.* (10th) p. 921 defines an accomplice as follows:

"An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of the crime. The cooperation in the crime must be real, not merely apparent."

This court in *State v. Coroles*, 74 U. 94, in holding a thief to be an accomplice of one charged with receiving stolen goods, cited

with approval the New York case of *People v. Kopperschmidt*, *supra*. Mr. Justice Folland on p. 100 said:

"We see no escape from the conclusion that, where one steals property, takes it, and delivers it to another who receives the property, knowing it to have been stolen, the thief is within the definition of principal and hence an accomplice. He is concerned in the commission of the crime charged against the defendant. He aided and abetted in its commission. The evidence of such a witness comes from a tainted source. He is *particeps criminis*. Under the provision of our statute his testimony must be corroborated to sustain a conviction."

As the court said in the *Kopperschmidt* case, *supra*:

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

We submit that it is so here. The keeper cannot keep without guilty knowledge unless aided therein by the act of the resorter in resorting. They are *particeps*

criminis because the character of the premises can only be established by the unlawful act of these resorting to the place for the purpose of lewdness, as contemplated by the statute.

If these witnesses were in fact accomplices, then the trial court had a duty of so instructing the jury in accordance with the statute. *State v. Powell*, 45 U. 193; *People v. Howell*, 230 P. 991; *People v. Coffey*, 119 P. 901; *People v. Sweeps*, 242 P. 1067.

POINT II

THE LOWER COURT ERRED IN ADMITTING THE RECORDS OF THE TELEPHONE COMPANY, THE INSURANCE AGENT, AND THE POWER COMPANY.

With respect to the records of the telephone company it should be pointed out that Mr. Burke, who testified as to them, was the Unit Manager of the company, and

merely had access to the records. It was not shown that he made the records themselves nor that he had supervision of their making or keeping. (Tr. 83).

This is the least that should be required of him before his testimony relating thereto is competent. The general rule is that the person making the notations or entries or the person supervising same, if he can be produced, should testify. *Missouri K. & T. R. Co. v. Davis*, 104 P. 34.

The error as to the records of the insurance agent, Holmes, is more flagrant. These were identified by the realtor, Tribe, who neither prepared them, supervised their preparation or keeping or even knew where they were until the Wednesday before the trial. (Tr. 99-102). Their admission was grave error. Tribe

did nothing more than share office space with Holmes. We refer to the case of State v. Maddox, 73 So. 783, where it was held error to admit books and delivery sheets purporting to be records of an express office, taken charge of by the witness after the dates covered by the sheets, the witness knowing nothing of the correctness of such papers or the signature thereon.

With respect to the Power Company's records, it was not made clear exactly what his duties with respect to the records were. (Tr. 103-104). He testified that the record came from their files, that he kept the records of the users of their service but that he had no personal knowledge other than the record of the account.

CONCLUSION

We submit that the lower court erred

as a matter of law in failing to instruct
on accomplice testimony as to those wit-
nesses indicated and in admitting in evi-
dence the records referred to.

Respectfully submitted,

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Attorney for Defendant.