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State of Utah v. Leo Mills : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

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 STATE OF UTAH,
 Plaintiff and
 Respondent,

vs

Case No. 7862

LEO MILLS,
 Defendant and
 Appellant.
 -----ooOoo-----

APPELLANT'S BRIEF

FILED

JUN 26 1952

 D. H. OLIVER
 Clerk, Supreme Court, Utah

ATTORNEY FOR APPELLANT

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH,
Plaintiff and
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vs

LEO MILLS,
Defendant and
Appellant.

Case No. 7862

APPELLANT'S BRIEF

STATEMENT

The Appellant, hereafter called Defendant, was convicted of the offense of "Carnal Knowledge" in the District Court of Salt Lake County, Utah, and from said conviction appeals to this court. (T 8 & 29).

To reverse the conviction, the defendant relies upon the following

POINTS

1. THE VERDICT IS CONTRARY TO THE PREPONDERANCE OF THE EVIDENCE. (T 41 to 94).
2. THE JURY OBVIOUSLY DISREGARDED THE COURT'S INSTRUCTIONS NUMBERS 5, 6 & 9.

**3. A VERDICT BASED ON PREJUDICE OR
PASSION SHOULD BE SET ASIDE.**

**ARGUMENT
Point 1.**

**THE VERDICT IS CONTRARY TO THE PREPONDERANCE
OF THE EVIDENCE.**

**Williams vs State, 68 P2nd 530
Bufford vs State, 141 So 359
People vs Keller, 198 NW 939**

Barbara Broadwater, the complaining witness,
testified on behalf of the State, T 41 to 56,
in substance, that she was a girl 17 years of
age and living with her parents at 258 East
Whitlock street, Salt Lake City, and that on
the 29th day of October, 1961, at about 7:30
P. M. while she was preparing to go to mutual,
the defendant called her on the telephone and
told her he wanted to talk to her, without
telling her what he wanted to talk about, and
that thereupon she met him at the corner of
2nd East and Whitlock at about a quarter to
Eight where she got into his car and they went

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for a ride, going first to Draper arriving there about 8:30 where they stopped and sat and talked and from whence they came back to Salt Lake City and went up 21st South to the reservoir, apparently in Parleys Canyon, arriving there about eleven o'clock, at which place they had sexual intercourse, after which he carried her home arriving there early in the morning, about 4:30 or 5 o'clock in the morning.

This is the only evidence in the entire record that tends to connect the defendant with the offense.

The evidence did disclose that the defendant and prosecutrix were acquainted with each other in that they were employed at the same place, the sturdevant's home on East South Temple, for a period of about 2½ months prior to the time in question, yet there is nothing in that acquaintance that indicated

anything out of the ordinary between them.

On direct examination, the prosecutrix made the following statement:

Q. Barbara, have you had some sexual education in school, and in your home? A. Yes, I have. (Lines, 18, 19 & 20, T. 51).

and on cross examination she testified:

Q. Do you ever go out with boy friends?

A. Yes. (T. 55, lines 7 and 8).

The defendant testified in his own behalf, (T. 63 to 74), wherein he gave a full and complete account of his activities on October 29th and 30th, the substance of which is as follows.

The defendant had been on his vacation for a week and was planning to spend a week in Los Angeles before returning to work. On the morning of the 29th he started to repair his car for the trip and packing his things.

He lived at 279 West 3rd South with his wife and three children. About 4 P. M. on the 29th he and his wife went to the State Finance Company and borrowed \$140.00 with which to make the trip. (See Exhibit 1). Upon return from the Finance Co., he finished repairing the heater on his car while his wife prepared dinner, they had dinner around 6:30 or 7 o'clock after which Mr. and Mrs. Mills went to Grand Central Market on 9th South and Main Street where they did some shopping, leaving there about 8 o'clock and went to the Liquor Store and then back home. Shortly after arriving home this time some friends dropped in and they had a party which lasted until after mid-night. Mr. and Mrs. Mills carried the last of these friends, Henry Colding, home between 12:30 and 1 o'clock A. M. October

30th, after which they returned home and she did some ironing while he took a Nap before leaving for California at Four that morning.

This story is corroborated by the testimony of Mrs. Mills, (T. 56 to 63; Henry Colding 82 to 85; Bernard Gordon 78 to 82; Marion Mills, 75 to 78).

The District Attorney attempted to discredit the testimony of Mrs. Mills and Marion, on the theory that they were the wife and son of the defendant. I can conceive of a woman perjuring herself for her husband in some cases, but this is the type of case where you don't find wives coming to the rescue to protect a husband whom she suspects of being unfaithful; while on the other hand, any woman would be less than a wife if she did not come to the rescue when she knows her husband was, in fact, by her

side at the time he is accused of being unfaithful. Marion, the son, was an honor student in High School and at one time an Honor Member of this Court, to which this court can take judicial notice, He testified that when he came home from work about 11:30 that night, his father and some more people were in the front room playing cards, or something.

Bernard Gordon and Henry Colding are both totally disinterested witnesses. They are the ones that called at the Mills home that evening and played cards and had some drinks, they couldn't be mistaken as to who was there. The District Attorney tried to make it appear that the occassion could have been some other time, but the evidence is very clear and convincing as to the date or time in question. Both Gordon and Colding were very positive that it was the night before Mills

left on his vacation. The reason for Gordon's being there was to collect a bill before Mills got away, and Colding went there purposely to celebrate his leaving.

Williams vs State is a case directly in point. There the prosecutrix positively identified the defendant as being the man that attacked her. Three other witnesses positively identified the defendant as being the man they saw under circumstances pointing to his guilt. The defendant and several of his witnesses testified as to his whereabouts at the time of the offense was being committed. The defendant was convicted and in reversing the conviction, the court said: at page 538,

"It is true that this has held many times that there is no rule of law which forbids a jury to convict for the crime of rape on the uncorroborated testimony of the prosecutrix, provided they are satisfied beyond a reasonable doubt of the truth of her testimony. It does not follow

however, that a conviction upon such testimony is to be arbitrarily sustained under all circumstances..... This court does not hold with some that, as a matter of law, rape cannot be established by the uncorroborated testimony of the prosecutrix, but in common with all courts recognize that, without such corroboration, her testimony must be clear and convincing. And, where the testimony of the prosecutrix bears upon its face inherent evidence of improbability, there should be corroboration by other evidence, connecting the defendant with the commission of the crime. The law is that the life or liberty of a citizen shall be taken only in case the right to do so is established beyond all reasonable doubt; and while there is no law which forbids a jury to convict of rape on the uncorroborated testimony of the prosecutrix, provided they are satisfied beyond a reasonable doubt of the truth of her testimony, yet the courts have always recognized the danger of conviction on her uncorroborated testimony, and the testimony of the prosecutrix, if inherently

improbable and uncorroborated, will not justify or support a conviction; as the only reasonable conclusion in such cases is that such verdicts are the result of passion or prejudice, and therefore contrary to law."

In describing the testimony of the prosecutrix the court used the phrase "Inherently improbable." In the case at bar the prosecutrix is a teen-age girl with sex education and goes out with boys. On matters of this kind girls are prone to be untruthful and will go to almost any length to conceal and protect their boy friends. In this case Barbara started out with a falsehood on her lips; she told her parents she was going to mutual when she knew she was going on a date. She went on a date and when she was called in question about it she named a man she only knew a few weeks before, whom she had met at work. There was no petting or other

signs of affection at work, other than knowing each other at work, there was no association between them; they had not been out on dates before and knew practically nothing of each other except seeing each other at work. In this we claim that it is inherently improbable that this girl would play hooky from Church and go on a date with a stranger without knowing where she was going or what for. It is more likely she had a date with some of her boy friends whom she knew and with whom she had been out with before and when she got caught in her sins she had to find a scape goat on whom to place the blame.

This brings us to Point 2.

THE JURY OBVIOUSLY DISREGARDED THE COURT'S
INSTRUCTIONS

In Instruction No. 5, T. 14, the court instructed the jury as follows,

- * I instruct you that the accusation made against the defendant is one easy to make and hard to defend against. Consequently it is your duty to examine the evidence given by Barbara Broadwater with care and caution and give it such weight and credence as you believe the testimony of the witness is entitled to under all the facts and circumstances of the case.*

And in instruction No. 6, T. 15, the court said:

- * I instruct you that the defendant is a competent witness in his own behalf, and his testimony should be received and given the same consideration as you give that of any other witness. The fact that he stands accused of crime is no evidence of his guilt and is no reason for rejecting his testimony. However you should weigh his testimony the same as you weigh the testimony of any other witness.*

Instruction No. 9, T. 16, after defining reasonable doubt and other matters, concluded

with this paragraph;

" To warrant you in convicting the defendant, the evidence must, to your minds, exclude every reasonable hypothesis other than that of the guilt of the defendant. That is to say, if after an entire consideration and comparison of all the testimony in the case, you can reasonably explain the facts given in evidence on any reasonable ground other than the guilt of the defendant, you should acquit him."

Now if the court will review the testimony again it will reveal the following comparisons.

1. At the time Barbara says the defendant called her at her home, the testimony shows he of defendant and his wife, was having dinner.

2. At the time she says he picked her up at 2nd East and Whitlock Avenue, the defendant and his wife were at Grand Central Market, 9th South and Main Street, according

To their testimony.

3. At the time she says she was being ravished by the reservoir, some time around 11 o'clock to 1 o'clock A. M., the testimony of Mrs. Mills, Marion Mills, Bernard Gordon, the Barber, Henry Colding and the defendant shows that he was at home having a party.

and 4. At the time she says she got home around 4:30 or 5 o'clock that morning the defendant had been gone at least an hour on his way to Los Angeles.

There were Four(4) credible witnesses who corroborated the testimony of the defendant against none for the prosecutrix. With this state of the evidence, upon what theory can it be said that the jury paid any attention to the court's instructions or the evidence of the defendant?

The answer is plain, the jury arbitrarily took the testimony of the prosecutrix, and totally disregarded all other evidence and instructions of the court, and convicted defendant, and as stated by the Oklahoma court in Williams vs State, " the only reasonable conclusion to be reached is that the verdict was the result of passion or prejudice, and therefore contrary to law".

In Bufford vs State, 141 So. 359, the Supreme Court of Alabama said,

" Notwithstanding inconclusive and speculative circumstantial evidence supporting manslaughter conviction, appellate court should vacate verdict outweighed by facts, probabilities and exculpatory circumstances."

POINT 3.

A VERDICT BASED ON PREJUDICE OR PASSION SHOULD BE SET ASIDE.

This proposition is a truism that need no authorities in support.

As pointed out above in the Williams case, the jury obviously disregarded the evidence and the court's instructions and the only reasonable explanation for such is prejudice and passion. As pointed out by the court in its instructions No. 5, this kind of charge is easy to make and hard to defend. It is the kind of case that naturally raises the animosity and prejudice in people anywhere and at any time, and especially so where a Negro man and White woman are involved. This being the case, we respectfully submit that the court erred in denying defendant's motion for a new trial and that the same should be reversed and remanded.

Respectfully submitted,

D. H. Oliver

Attorney for Appellant.