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State of Utah v. Charles Alvin Kennedy : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)

Plaintiff-Respondent,)

vs.)

Case No. 16,854

CHARLES ALVIN KENNEDY,)

Defendant-Appellant.)

BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF THE
FOURTH JUDICIAL DISTRICT COURT,
IN AND FOR JUAB COUNTY, STATE
OF UTAH

HONORABLE ALLEN B. SORENSEN, JUDGE

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STATEMENT OF THE NATURE OF THE CASE

The defendant-appellant was charged in the Fourth Judicial District Court in and for Juab County, State of Utah, by way of an amended information with two counts of Forcible Sexual Abuse in violation of Section 76-5-404, U.C.A. (1953), as amended.

The first count of the amended information charged that the defendant did on or about the 4th day of August, 1979, at Nephi, Juab County, Utah, cause another to take indecent liberties with Toni Kennedy without her consent, with the intent to arouse or gratify the defendant's sexual desires.

The second count of the amended information charged that the defendant did on or about the 22nd day of August, 1979, at Nephi, Juab County, Utah, to take indecent liberties with Toni Kennedy without her consent, with the intent to arouse or gratify the defendant's sexual desires.

DISPOSITION IN THE LOWER COURT

The defendant-appellant was found guilty of two counts of Forcible Sexual Abuse before the lower Court setting without a jury, in violation of Section 76-5-404, U.C.A. (1953), as amended, on the 27th day of November, 1979.

After the matter was referred to the Adult Probation and Parole Department for a presentence investigation, the defendant was sentenced on Count I and Count II to be confined in the Utah State Prison for an indeterminate term not to exceed five

(5) years on both counts with each sentence to run concurrently with one another.

The lower Court denied the defendant's oral motion for a certificate of probable cause pursuant to Section 77-39-9, U.C.A. (1953), as amended.

The lower Court previously denied the defendant's motion to Quash or in the alternative to dismiss the amended information on the 16th day of October, 1979, on the basis that Section 76-5-404, U.C.A. (1953), as amended, was not so indefinite and vague as to violate the requirements of the Due Process of Law Requirements of the Constitution of Utah, Article I, Section 7 and of the United States Constitution's Amendments V and XIV.

RELIEF SOUGHT ON APPEAL

The appellant seeks reversal of the Fourth Judicial District Court Judgment, in and for Juab County, State of Utah, in that Section 76-5-404, U.C.A. (1953), as amended, is unconstitutional insofar as it deals with indecent liberties in that such section is so indefinite and vague in defining the prohibited acts that it denies the appellant due process of law as defined by the Utah State Constitution and the Constitution of the United States.

The appellant additionally seeks reversal of the lower Court's judgment in that the weight and sufficiency of the evidence produced at trial by the State of Utah against the appellant is so lacking and unsubstantial that reasonable men could not possibly reach guilty verdicts beyond a reasonable doubt in that the State of Utah failed to prove beyond a reasonable doubt that (1) the

appellant caused another to take indecent liberties with Toni Kennedy, his wife, (2) without her consent as defined in Section 76-5-406, U.C.A. (1953), as amended, and (3) such acts, if any, were for the purpose and with the requisite intent to arouse or gratify the appellant's sexual desires.

STATEMENT OF FACTS

At the preliminary hearing the State of Utah introduced over the appellant's objection an affidavit signed by one B.E. Marshall and indicated to the Court at such preliminary hearing that the State would produce Mr. Marshall at the trial of the appellant.

Mr. Marshall was never called at the appellant's trial but his affidavit did indicate that Mr. Marshall did not know Mrs. Kennedy did not consent to his or Mr. Kennedy's actions, but merely going on to note that he observed numerous arguments between Mr. and Mrs. Kennedy during the four day period he was there without further explanation as to what the arguments were over.

It should also be pointed out that no charges of rape were, to the very best of counsel's knowledge, ever filed against Mr. Marshall or the other individual she was alleged to be forced into having sex with, another man referred to as Rick. Additionally, to the best of counsel's knowledge, no criminal action is pending or anticipated against either individual.

The complainant, Mrs. Toni Kennedy, was married to the appellant at the time of the trial.

of trial and it is primarily her word which the Court chose to believe over the appellant's in which the Court found the appellant guilty.

As will be discussed more thoroughly later, any sexual act she engaged in appeared to be for monetary remuneration rather than the sexual gratification of the defendant and it is difficult to see from reading the entire transcript of the trial how any sexual act she engaged in can be said to be against her consent as defined by the statute.

As noted earlier, the appellant was charged and convicted of Forcible Sexual Abuse by allegedly forcing his wife, Toni Kennedy, to have sex with other men without her consent for the purpose and with the intent of arousing or gratifying the appellant's sexual desires.

ARGUMENT

POINT I. THE CHARGES AGAINST THE DEFENDANT SHOULD BE DISMISSED ON THE GROUNDS THAT THE LANGUAGE OF THE STATUTE UNDER WHICH HE IS CHARGED ARE SO INDEFINITE AND VAGUE AS TO VIOLATE THE REQUIREMENTS OF DUE PROCESS OF LAW UNDER THE PROVISIONS OF THE CONSTITUTION OF UTAH, ARTICLE I, SECTION 7, AND OF THE CONSTITUTION OF THE UNITED STATES, AMENDMENT V AND AMENDMENT XIV.

Section 76-5-404, U.C.A. 1953 (Supp. 1979), provides:

(1) A person commits forcible sexual abuse if, under circumstances not amounting to rape or sodomy, or attempted rape or sodomy, the actor touches the anus or any part of the genitals of another, or otherwise takes indecent liberties with another, or causes another to take indecent liberties with the actor or another, with the intent to cause substantial emotional or bodily pain to any person or with intent to arouse or gratify the sexual desire of any person, without the consent of the other, regardless of the sex of any participant.

(2) Forcible sexual abuse is a felony of the third degree.

which proscribes the taking of indecent liberties with another with the intent to arouse or gratify the sexual desires of any person. By his appeal, the defendant raises first the question whether his supposed conduct is included in the definition of "taking of indecent liberties with another." Could the legislature have intended that such an act would fall under the same penalty as the other enumerated acts in the statute, e.g. the touching of the anus or genitals of another? Even more crucial, however, is the question whether the language of the statute is sufficiently explicit in its prohibition that the defendant could have known, before the commission of such an act, that it would subject him to prosecution for this third degree felony?

The test for whether a statute is so indefinite as to violate due process requirements has been adequately stated by a number of United States Supreme Court decisions. In United States v. Harriss, 347 U.S. 612, 72 S.Ct. 808, 98 L. Ed. 989 (1954), the Court considered whether the Federal Regulation of Lobbying Act 2 and S.C. Sections 305, 307, and 308, was too vague and indefinite. As a test for vagueness, the Court stated:

The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. 347 U.S. at 617, 74 S.Ct. at 812.

In Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L. Ed. 2d 222 (1972), the Court elaborated upon the rationale behind the definiteness requirement, and stated:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws

opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries, for resolution on an ad hoc and subjective basis, with the attendant danger of arbitrary and discriminatory application. 408 U.S. at 108-109.

The same rationale is repeated in Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974), which considered whether a Massachusetts flag-abuse statute was unconstitutionally vague.

The Utah Supreme Court has adopted the same test for vagueness. In State v. Packard, 250 P.2d 561 (1952), the Court stated a three-pronged test, of which one of the factors may be viewed as a mere rewording of one another. The Court wrote:

Concerning the question of uncertainty or vagueness of statutes, the authorities seem to be in accord that the test a statute must meet to be valid is: It must be sufficiently definite (a) to inform persons of ordinary intelligence, who would be law abiding, what their conduct must be to conform to its requirements, (b) to advise a defendant accused of violating it just what constitutes the offense with which he is charged, and (c) to be susceptible of uniform interpretation and application by those charged with responsibility of applying and enforcing it. 250 P.2d at 564.

For the purposes of this appeal, the second factor of the Court's test is clearly includable in the first. Otherwise, the law clearly requires that a statute be sufficiently explicit that both the general public and the law enforcement establishment would be able to know, without doubt or disagreement, precisely what conduct is prohibited.

A further aspect of the vagueness test results from the following consideration: to say that due process requires that

a statute be sufficiently precise to give fair notice to a

person that his contemplated conduct is prohibited, or that it requires that a statute inform a person who would be law abiding what his conduct must be to conform to the law, implies the further rule that a statute will not be judged purely on its face nor on the basis of hypotheticals, but will be analyzed according to whether, under the facts and circumstances of the particular case, the defendant himself was given sufficient warning that his specific conduct was prohibited by the law. This rule, announced by the United States Supreme Court in United States v. National Dairy Producers' Corporation, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963), as well as in other cases, means, for the purposes of this case, that the issue is whether U.C.A. 76-5-404 is sufficiently explicit that the defendant should have known that his alleged conduct would be includable in this third degree felony. The appellant submits that the statute is not sufficiently explicit, but rather that it is so ambiguous and indefinite that he could not have known prior to his alleged conduct that he could be charged under this section and that must be the fact notwithstanding the fact that he may have been charged under some other section of the criminal code nor the fact that the Court is offended by the occurrence.

In order for the statute in question to meet the requirements of due process in this case, the language "indecent liberties" as used in the statute must not only be susceptible of some precise definition, but that definition must be so apparent or well established that persons of ordinary intelligence in this jurisdiction could reasonably ascertain what the definition is.

one of three sources: common usage among those subject to the law; explanations by the judiciary, the legislature, or other authorities; and prior applications of the law to specific factual situations. (See Balthazar v. Superior Court, 573 F.2d. 698 (1st Cir. 1978)). Given any of these three factors, the language of a statute may be validly construed either to include or to exclude a particular act, and all interested parties will be held to a knowledge of that construction. But absent a common understanding of the meaning of terms, absent a relevant explanation by the legislature or the judiciary, and absent prior judicial decisions applying the language to similar conduct, a defendant cannot reasonably be expected to foresee the unlawfulness of his act. He would therefore have grounds to raise the objection of vagueness.

Such is precisely the situation in this case. The term "indecent liberties" as used in the statute clearly cannot be said to include the acts which the Appellant is alleged to have done.

Even if such an act were generally considered to be an "indecent liberty" in generic terms, it would not necessarily follow that the legislature meant by use of the same generic language to include it in the statute's prohibitions. An infinite variety of acts could be agreed generally to be "indecent liberties" but obviously not all such acts were intended by the legislature to invoke third degree felony penalties. Given that some "indecent liberties" must be excluded from coverage by the statute, the crucial question becomes whether it is commonly understood that the alleged actions of the Appellant is one of the acts meant to be included. It certainly seems that the State

of Utah should have charged the appellant with rape as a principal under the aiding and abetting section of the criminal code if in fact it believed the appellant to have in fact done such acts. Because the statute refers specifically to only two other acts, the touching of the anus or genitals of another, it certainly cannot be reasonably concluded that everyone would understand that the alleged acts of the appellant is prohibited by the "other indecent liberties" language of this statute.

Further, there have been neither judicial explanations, legislative reports, nor cases of record which have construed the Utah statute in question to include the acts which the appellant is charged with. Prior police practices are not sufficient, if they exist in this case, because the due process requirement would demand that authoritative construction of the language appear as of record before a defendant would be held liable for the knowledge that his act was prohibited under the statute. See Driscoll v. Schmidt, 354 F. Supp. 1225 (W.D.Wisc. 1973).

Absent a general consensus as to what U.C.A. 76-5-404 means by "indecent liberties," and absent any other authoritative definition of the terms, the appellant could not reasonably have known that such an act would be included in the statute, and his prosecution under the statute is void because of the violation of his rights to due process. Several cases of recent vintage present similar conclusions in the context of similar facts.

In Balthazar v. Superior Court, supra, the First Circuit Court of Appeals reviewed the habeas corpus petition of a defendant convicted under the Massachusetts law prohibiting "unnatural and lascivious acts." Mass. Gen. Laws _____, § _____. strict

Court affirmed. The Court discussed the three sources of statutory definitions, outlined above, and noted that in the present case none of the three sources supplied a sufficiently precise explanation of the terms as used in the statute. Although both "unnatural acts" and "lascivious acts" were separately well defined terms in ordinary usage, when combined in the statute as if jointly to describe single acts, they created an ambiguity as to whether the defendant's conduct, fellatio and oral-anal contact, were included. The Court concluded:

The general rule is that constitutional challenges of vagueness must be based on a statute's application to the particular case. . . . We so limit our decisions today to the question of whether [the statute] as applied to petitioner, gave him fair notice as required by due process standards that his conduct, i.e. fellatio and oral-anal contact, constituted an "unnatural and lascivious act" proscribed by criminal statute. * * * In light of the diversity of conduct that could conceivably be covered by the terms "unnatural" and "lascivious" and the fact that there are certainly acts that are less natural and more universally condemned than Balthazar's conduct, . . . Balthazar could reasonably believe that the statute was aimed at other acts than his. 573 F. 2d at 700, 701.

Thus, Balthazar illustrates that though the terms used by the statute, on their face and out of context, may have a generally accepted meaning in the community, when they are incorporated by the legislature into the statute together with other terms, their meanings may be changed, limited, and obscured in such a way that it becomes unreasonable to expect the ordinary person to understand precisely what is meant. As will be pointed out later, the defendant would certainly have had a chance at a trial guaranting that he would be afforded due process considerations if he had been charged under another section for the acts he allegedly committed.

Similarly, in the present case, although "indecent liberties" may have a generally accepted meaning in the community when used alone, when incorporated into the statute and made to relate to the other terms of that statute, the same term loses its generally accepted meaning, and the defendant cannot be held liable unless some other source of authority was sufficient to inform him that his alleged actions were included in the meaning of the statute.

In Driscoll v. Schmidt, 354 F Supp. 1225 (W.D. Wisc. 1973), a defendant was charged with taking indecent liberties with the privates of a person under the age of 18. In a vagueness attack, the Court considered the question whether the defendant, when he engaged in fellatio and cunnilingus with his stepdaughter, could have reasonably understood that his conduct was prohibited by the statute. The Court held the language of the statute vague, on its face, but found that in Wisconsin Jury Instructions #1527 and #1528 there were sufficient explanations of the terms to constitute fair warning to the defendant that his conduct was unlawful.

In Miami Health Studios v. City of Miami Beach, 353 F. Supp. 593 (S.D.Fla. 1973), another Federal District Court dealt with the language of F.S.A. S 796.07 (1)(b) (1971), which prohibited lewd acts in certain places and stated:

The term lewdness shall be construed to include any indecent or obscene act.

In finding the statute unconstitutionally vague, the Court stated:

In the Court's opinion, [the statute] is so vague, indefinite, and uncertain as to render it violative of the petitioner's Fifth and Fourteenth Amendment rights to due process of law.

particularly subsection (1)(b) thereof, is not so clearly and definitely expressed that a man or woman of common intelligence could determine in advance whether his or her contemplated act was within or without the law. . . . The Courts of Florida have provided no enlightenment with respect to construction of the statute in question, nor has there been authoritative interpretation of the particularly offending phrase, "'lewdness' shall be construed to include any indecent or obscene act," found in subsection (1)(b) of the statute. 353 F. Supp. at 597-598.

The case thus further illustrates that due process requires some authoritative pronouncement or interpretation of otherwise ambiguous terms.

In District of Columbia v. Walters, 319 A.2d 332 (Ct.App. D.C. 1974), a District statute declared it unlawful to commit a "lewd, obscene, or indecent act." The defendant and eight others were arrested in a commercial establishment for engaging in acts of mutual masturbation. In discussing the interpretation of the statute, the Court referred to the testimony of the Director of Morals Division of the Metropolitan Police to the effect that he had neither received nor promulgated any guidelines as to the types of conduct included in the above statute. Other officers testified that the statute was generally applied against homosexuals and that new officers were trained by reference to arrest and prosecution records, but that there was no other interpretation of the conduct included in the terms. The trial court held that the statute was unconstitutionally vague, and the Appellate Court affirmed, stating:

The statute betrays the classic defects of vagueness in that it fails to give clear notice of what conduct is forbidden and invests the police with excessive discretion to decide, after the fact, who has violated the law. . . . [T]here is a broad, gray area in which the words of the statute will convey substantially different standards to different people, and by proscribing "any other lewd, obscene or indecent act" the statute is so encyclo-

pedic in its reach that the areas of reasonable disagreement are limitless. 319 A.2d at 335.

Thus, Walters illustrates that although the conduct of the defendant would be considered lewd, obscene, or indecent under almost anyone's standards, where the constitutionality of a statute is in question, the real issue is whether the legislature's use of those terms was meant to include the defendant's conduct, and whether, if so, the defendant reasonably could have known that the legislature so intended. In the present case, it may be clear that the community generally would agree that the allegations against the appellant if proved and if without the consent of the alleged victim would amount to an "indecent liberty." But the real question is whether the legislature's use of that generic term was meant to include such an act, and more importantly, whether the appellant could reasonably have known that the legislature intended to prohibit the conduct for which he is charged. It would seem that, for reasons stated above, the appellant could not reasonably have foreseen that the statute under which he is charged and convicted would include his alleged conduct.

A similar analysis was discussed in State v. Sharpe, 205 N.E.2d 113 (Ct.App. Ohio 1965). There, a defendant was charged with soliciting an "unnatural sexual act" under Ohio Rev. Code S 2905.30. The Court discussed the infinite biological and sociological range of sexual acts, enumerating many which are unnatural but clearly not immoral (e.g. birth control techniques, artificial insemination, etc.), but finding no cases or authorities to limit the term used in the statute. The Court concluded:

In spite of the possibility that a trial jury may apply reason and discretion, the statute is and is not an unnatural

evidence of a specific case, the objection still exists that persons, innocent or otherwise, are obviously subject to arrest and prosecution under this statute without having any positive guide whereby the solicited or the solicitor may know whether the act proposed is unnatural. Even the policeman does not have a sufficient standard to determine whether what he may have seen or heard requires an arrest. 205 N.E. 2d at 114-115.

The statute was therefore held unconstitutional.

In the present case, perhaps the greatest injustice is that the defendant could not have known, prior to his arrest, that his alleged actions would subject him to the penalties of this third degree felony charge under this section. The language of the statute leaves to the police the discretion to choose, by their own standards or preferences, what acts will be prosecuted and which will not.

The Utah Supreme Court when faced with a criminal section proscribing two or more persons to conspire "to commit any act injurious. . . to public morals. . ." stated that the offense needs:

"to give adequate guidance to those who would be law-abiding, to advise defendants to the nature of the offense with which they are charged, or to guide courts in trying those who are accused." State v. Musser (Utah 1950), 223 P. 2d 193.

The Court concluded the statute was unconstitutionally vague.

The issue presented is what does the phrase "indecent liberties" mean? By the statute itself, it means some act other than touching the anus or genitals of another, since the phrase "indecent liberties" is separated from the portion of the statute specifying that conduct by the disjunctive "otherwise."

decent liberties" in State v. MacMillan, 46 U. 19, 145 P. 833 (1915), at 834.

Its efforts failed in a cloud of propriety, calling "indecent" "self defining," and labelling as "indecent" specifically disclosing the defendant's particularity.

It should be noted as well, that the issue raised in MacMillan, supra was the sufficiency of the information and not the adequacy of the statute under constitutional provisions.

What other act then is an "indecent liberty" under the Statute? A non-consented kiss, embrace or a touching of the abdomen or some other non-genital area of the body? Is a touching even required?

The Merriam-Webster Dictionary, Copyright 1974, defines "indecent" as "Not decent; unbecoming, unseemly; also morally offensive."

Indecent is an adjective which varies and differs with each individual's judgment. The definition attached by individuals varies with each individuals morals. No strict definition may be attached since morals of each individual or community varies. It may be offensive to one person to embrace another and to another it would not.

The statutory interpretations given by the Utah Courts and others are of no help. State v. MacMillan supra finds the term "self-defining."

An analagous case to the present determination is State of Kansas v. Conley, 216 Kan. 66, 531 P.2d 36 (1975).

There the information charged the defendant in the general language of K.S.A. 21-3503 (1) (b) with committing the offense of indecent liberties with a child. The Court looked to the question

of whether the language used is so vague that it fails to warn as to conduct sought to be proscribed. The State argued that the term "indecent liberties" conveys such warning to persons of common intelligence.

The statute in Conley, supra stated:

"Indecent liberties with a child. (1) . . . (b) Any lewd fondling or touching of the person of . . . the child . . . done . . . with the intent to arouse or satisfy the sexual desires of . . . the offender."

The Court noted that "the particular name or label of an offense cannot be used to bootstrap a statutory definition otherwise lacking in specificity. It seems doubtful the legislature meant to proscribe every form of touching of the person even though some degree of sexuality be present as in youthful kissing or embracing, yet that can be argued from the language used. Where ascertainable standards of guilt declaring just what conduct is forbidden." 531 P.2d at 39.

The Kansas Court next met this question in State v. Wells, 573 P.2d 580 (1977), after the statute had been amended to state, in pertinent part, "Any lewd fondling or touching . . .". The Court accepted that as curing the defect noted in the Conley opinion supra.

The defendant herein argues that the Utah Statute does not reach beyond the language found inadequate in Conley. There the Court found that the title "indecent liberties" combined with the defining phrase "fondling or touching" was not sufficient to declare what conduct was forbidden and therefore did not satisfy constitutional requirements of due process. How then could the Utah Statute in question satisfy the Conley test?

liberties" is even less descriptive than the statute found deficient in Conley and therefore could no more satisfy the constitutional requirements of due process.

An individual is not given fair warning of the statute's proscription as required by the due process clause when the term may vary from one individual to another, or one community to another community, and where such a statute does not serve to warn of proscribed conduct.

POINT II. THE EVIDENCE IS NOT SUFFICIENT TO SUPPORT THE VERDICT.

The appellant asserts that the evidence is entirely so lacking and unsubstantial that reasonable men could not possibly reach a guilty verdict beyond a reasonable doubt in that the State of Utah failed to prove beyond a reasonable doubt that (1) the appellant caused others to take indecent liberties with Toni Kennedy, his wife, (2) without her consent as defined in Section 76-5-406, U.C.A. (1953), as amended, and (3) such acts, if any, were for the purpose and with the specific intent to arouse or gratify the sexual desires of the appellant.

From a reading of the trial transcript, the appellant cannot find any evidence in the least which shows that the appellant caused another to take indecent liberties with Toni Kennedy.

According to the appellant's testimony on cross examination and as supported by the rest of the transcript, the appellant merely allowed Toni Kennedy's sexual appetite to occur in order to keep peace. See page 65 of the trial transcript.

The most that appears is that the appellant allowed the sexual activity to occur but there is no evidence that he caused

others to engage in acts with Toni Kennedy. The most that can be said is that the appellant did not stop others from engaging in sexual acts with Toni Kennedy.

In particular, it should be noted at page 14 of the transcript that the appellant did not even like the individual known as Rick according to the complainant and it is hard to understand how or why the appellant would cause Rick to have sexual relations with Toni Kennedy, the appellant's wife, unless Toni Kennedy in fact wished to engage in such conduct, particularly since Rick had tried to get Toni Kennedy to divorce the appellant in March of 1979. See page 28 of the trial transcript line 6 through 10.

This brings us to the more essential element which is missing from the States case.

Section 76-5-406(1) and (2), U.C.A. (1953), as amended, defines when an act is without the consent of the alleged victim.

Section 76-5-406(1) indicates there is no consent:

When the actor compels the victim to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances.

Section 76-5-406(2) indicates there is no consent when:

The actor compels the victim to submit or participate by any threat that would prevent resistance by a person of ordinary resolution.

The remaining portions of Sections 76-5-406 are clearly not applicable to this case.

The most recent pronouncement of the Utah Supreme Court is the case of State v. Myers, No. 16223, filed January 24, 1980.

In that case the defendant pinned the complainants hands to the seat and after the occurrence she was crying, her skirt

was ripped, her blouse was torn, a strip of her hair was missing, and she had red marks on her arm. Additionally, she was taken to the hospital to confirm recent intercourse and patches of bruises and scratching were observed on her body.

In the case of State v. Reddish, 550 P.2d 728 (1976) the Utah Supreme Court noted that the victim screamed, resisted, tried to get away, but the defendant seized and held her, choked her and threatened her life which overcame her resistance. The Court noted she immediately called the police and a physical examination was done on the victim which noted that she had fresh scratches on her face and bruises on her neck. Additionally, the officers had found that the ground was torn up where the struggle was alleged to have taken place.

The Court noted at page 729 after referring to the statute:

From that statute it is seen that the overcoming of the victim's will can be accomplished either by force or threats; and it may also be accomplished by a combination of them, which the States evidence tends to show here. . . . to meet the requirements of making clear to the jury that the force and threats had to be of such character and such an effect on the prosecutrix as to overcome an earnest desire on her part to resist.

In the case of State v. Nuney, 520 p.2d 881 (1974), the Utah Supreme Court noted that the prosecutrix had pleaded with the defendant to take her home and that the defendant ordered her into the back seat and threatened her with violence if she did not comply. The prosecutrix testified she greatly feared physical abuse in that an inquiry was made by one of the men as to the location of a knife which was in the car.

pick the lock on the car of the automobile, but the Court noted the prosecutrix was unaware that the knife would be used for that purpose.

Additionally in Nuney, the Court stated that a police car approached the automobile and a companion of the defendant fled and hid in the bushes and the prosecutrix cried out she had been raped.

The Court referred to Section 76-5-406(2) of the present criminal code and affirmed the conviction in the case of Nuney.

Compare the three foregoing cases with that of the appellants.

At page 8 of the transcript the prosecutrix stated that she had sexual intercourse with a man she called B.J., and she stated at line 30 with reference to what she did with B.J. that:

I just wanted to hurry and get it over with,
but he wanted to try all kinds of different
positions, and I said I didn't want to. . . .

At page 9 of the transcript after the appellant had helped B.J. make his bed on the couch, the prosecutrix indicated at line 25, the prosecutrix said B.J. had said she had let him finish, "so I had intercourse with B.J., and then Charles had intercourse, well, just fast to get it over with, and then they went out of the bedroom and out in the front room, and I went to sleep."

The prosecutrix indicated at page 12 of the transcript she had intercourse with B.J. two or three more nights. But she never called the police nor were any threats mentioned against her. At page 12, line 17 the prosecutrix merely indicated that the appellant said she had to keep doing it until the truck was fixed. At line 19 she goes on to note, "It

about it.

The prosecutrix states at page 19 that various threats were made but there was no testimony that the appellant ever even attempted any such threats.

At page 20, the prosecutrix testified the appellant tried to run over her with a truck when she left him but there is no link that these threats were connected with the alleged violations that the appellant is convicted of.

The only actual physical violence that took place in fact is related at page 21, line 30 wherein the prosecutrix took a butcher knife after the appellant. At page 56 the appellant explains he held her down on the above-referred to occasions to keep her from getting the butcher knives and from committing suicide.

It is clear from reading the transcript that the prosecutrix drank a great deal and smoked marijuana often while the appellant did not.

It is equally clear that the sexual activity was her idea and not the appellants. Additionally, with regard to the letter that was introduced into evidence, it is clear from the record that the Court did not take it into his verdict. See page 54, line 12, wherein the Court stated it had nothing to do with the transaction the appellant was on trial for.

The facts in this case simply do not arise to the level of overcoming such earnest resistance as might reasonably be expected under the circumstances or that the actor compelled the prosecutrix to submit or participate by any threat that would prevent resistance by a person of ordinary resistance.

transcript for itself to determine whether or not the prosecutrix consented or not.

In the case of People v. Keeney, 293 N.E.2d 492 (1973) the Illinois Court reversed the trial Court setting without a jury.

The Keeney case is similar to ours, in that the defendant there was charged with aiding in a rape.

There the Court noted:

It is a fundamental rule in such cases that in order to prove the charge of forcible rape there must be evidence to show that the act was committed by force and against the will of the female, and if she has the use of her faculties and physical powers the evidence must show such resistance as will demonstrate that the act was against her will. . . . It is also fundamental that voluntary submission by the female, while she has power to resist, no matter how reluctantly yielded, amounts to consent and removes from the act an essential element of rape.

The Court in Keeney noted that the picture of a girl, "perhaps at times unstable who engaged frequently and willingly in sexual intercourse with males and almost as frequently expressed pangs of regret for her prior acts."

Such are the cases with Zamora v. State, 449 S.W.2d 43 (1969) and People v. Taylor, 268 N.E.2d 865 (1971) where rape charges were dismissed by reasons of giving consent particularly since no outrage was immediately noted by the prosecutrix and since the State attempted to rely on fear of the prosecutrix.

The Court in Taylor noted after it stated that resistance is not necessary if the prosecutrix was:

paralyzed by fear or overcome by superior strength of her attacker; that it is, however, fundamental that in order to prove the charge of forcible rape there must be evidence to show the act was committed by force and against the will of the female, and if she has the use of her faculties and physical powers, the evidence must show such resistance as will demonstrate that the act was against her will.

In our case it is hard to believe that the prosecutrix, if not before, could have complained between the 4th day of August and the 22nd day of August, 1980.

What seems more likely is that since she filed after the 22nd of August of 1979, that her sister had told her mother who told her father what was going on notwithstanding the prosecutrix's statements to the contrary. See page 31, line 27 through 30 of the transcript; and further after Rick persisted in his demands for the prosecutrix to divorce the Appellant even though the prosecutrix denied the same events referred to.

According to Sheri Blackburn, the prosecutrix's sister, after she discovered Rick under the covers -- see page 42, line 16 through 17, when the defendant was not around and after she was introduced to Rick on the 22nd of August, 1979 -- line 25-27 -- Sheri Blackburn overheard the prosecutrix state at page 43, line 12, "you are not going to put me out on the street again." Nevertheless, Sheri Blackburn stated she was in another room and she did not know what the argument was over. See page 44, lines 2 through 8.

The Appellant was called to the stand and gave an entirely different version of the events. However, the point is that the State did not prove its own case, even disregarding the statements of the Appellant which directly contradict the prosecutrix's testimony.

In Zamora the Court stated:

But something more than the mere want of consent must also be shown; there must have been resistance on the part of the female dependent in amount on circumstances surrounding her at the time and on the relative strength of herself

and the accused. Moreover, the resistance must have been real and not feigned. Threats apart, her failure to make every exertion in her power under the circumstances to prevent the crime will result in a presumption of consent.

It must be remembered that in our case, the prosecutrix was not injured in any way, nor -- what seems even more odd -- neither of the people she had sex with were ever charged with rape. How could the prosecutrix consent to have sex with the men not charged, but nevertheless claim such sex was without her consent? The State certainly could have charged B.J. Marshall since the State of Utah had him sign an Affidavit. It seems clear that the State merely wished to remove the Appellant from Nephi since it deemed him an undesirable, regardless of how it did it even if an innocent man had to be found guilty to do it.

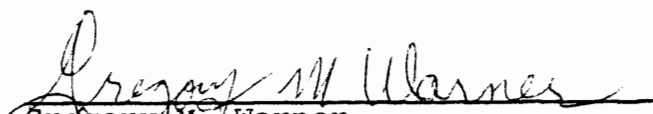
Finally, the prosecutrix admitted that she had been a prostitute in Virginia, see page 25, and it is clear that aside from the fact that consent was given by the prosecutrix pursuant to Section 76-5-406, even according to her testimony, the sexual acts were done in order that the truck of the Appellant's could be fixed and not for the appellant's sexual gratification, and no satisfactory explanation can be found as to her sexual activity with Rick other than the prosecutrix wished to engage in it.

CONCLUSION

The guilty verdicts of the trial Court should be reversed and the information ordered dismissed in accordance with the foregoing.

DATED this 11 day of March, 1980.

Respectfully submitted,


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CERTIFICATE OF DELIVERY

I hereby certify that I delivered the original and ten copies of the foregoing Brief of the Appellant to the Utah Supreme Court this _____ day of March, 1980.

CERTIFICATE OF RECEIPT

I received the foregoing this _____ day of March, 1980.

Clerk of the Utah Supreme Court

CERTIFICATE OF DELIVERY

I hereby certify that I delivered three copies of the foregoing Brief of the Appellant to the Utah Attorney General, Robert B. Hansen, at 236 State Capitol, Salt Lake City, Utah 84114 this _____ day of March, 1980.