

1980

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

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

CHARLES ALVIN KENNEDY,

Defendant-Appellant.

Case No. 16854

BRIEF OF RESPONDENT

APPEAL FROM JUDGMENT OF THE FOURTH
JUDICIAL DISTRICT COURT, IN AND FOR
JUAB COUNTY, STATE OF UTAH, THE
HONORABLE ALLEN B. SORESENSEN , JUDGE
PRESIDING

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

CHARLES ALVAN KENNEDY,

Defendant-Appellant.

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant appeals from his conviction by the Court, sitting without a jury, of two counts of Forcible Sexual Abuse in violation of Utah Code Ann. § 76-5-404 (1953), as amended. The charge was based on appellant's causing others to take indecent liberties with appellant's wife.

DISPOSITION IN THE LOWER COURT

The appellant was tried on November 27, 1979 in the Fourth Judicial District Court for Juab County. The trial was conducted before the Honorable Allen B. Sorenson, Judge, sitting without a jury. Judge Sorenson found appellant guilty as charged of two counts of Forcible Sexual Abuse, in violation

of § 76-5-404, Utah Code Annotated (1953) as amended, a third degree felony.

On January 4, 1980, Judge Sorenson sentenced appellant to two indeterminate terms not to exceed five (5) years in the Utah State Prison. The sentences were to run concurrently. (R. at 42-43).

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment and sentence pronounced by the lower court.

STATEMENT OF THE FACTS

On August 4, 1979 the appellant brought a hitchhiker named "B.J." to his home in the town of Nephi, Juab County, Utah (T.6). The appellant asked B.J. to help appellant install an engine in the latter's truck in exchange for which B.J. could have intercourse with Toni Kennedy, appellant's wife (T.7). When confronted with this proposition, Mrs. Kennedy told appellant she did not want to have intercourse with B.J. to which appellant replied that that was the only way he could get his truck fixed (T.7).

After B.J. and appellant finished work, B.J. took a shower, and Mrs. Kennedy again told appellant she didn't want to have intercourse with B.J. Appellant then set up a tape recorder and went into a bedroom closet while B.J. and Mrs. Kennedy had intercourse (T. 8-9). Appellant had earlier

instructed B.J. to teach Mrs. Kennedy "different positions" in which to have sex (T. 9). Mrs. Kennedy tried to leave the house but appellant caught her and brought her back. B.J. had intercourse with her again, while appellant watched, then appellant had intercourse with her (T. 9).

B.J. stayed with the Kennedy's for three or four nights and was allowed to have sexual intercourse with Mrs. Kennedy on all but the last night (T. 12). Each day, Mrs. Kennedy told her husband she did not want to have intercourse with B.J., but appellant forced her to continue until his truck was fixed (T. 12, 13).

On August 22, 1979, a man named "Rick" appeared at the Kennedys home. "Rick" had been there before in March of 1979 (T. 14). Appellant took Rick to a fast-food restaurant a few blocks away, was gone about forty-five minutes, and when he returned told Mrs. Kennedy that he wanted her to "go to bed" with Rick to avoid trouble (T. 15-16).

Later that evening, Rick had sexual intercourse with Mrs. Kennedy. Appellant had again turned the tape recorder on to record the event and was hiding in the closet (T. 17). He listened to the tapes in his shop "over and over again" (T. 28). Appellant had Mrs. Kennedy return to bed and both Rick and appellant had sexual intercourse with her (T. 17). Rick stayed the next night also and had intercourse with Mrs. Kennedy again (T. 17).

Mrs. Kennedy testified that this type of event had occurred five or six times (T. 19). Appellant told Mrs. Kennedy that he wanted her to go to bed with the men he brought home and threatened that if she tried to leave, he would not let her take their baby. He further threatened to kill her father if he intervened (T. 19). Appellant was in possession of several pictures depicting Mrs. Kennedy in the act of sexual intercourse with another man which he threatened to disclose to her father if she did not cooperate (T. 19). Further, appellant used physical violence or threatened to use violence against Mrs. Kennedy (T. 20). She testified that but for appellant's coercion she would not have had intercourse with these men (T. 24).

The State introduced the testimony of Sheri Lynn Blackburn, Mrs. Kennedy's eighteen-year-old sister who recounted that on August 22, 1979 she was taken into the Kennedy's bedroom by their daughter, Dawn, and was introduced to "Rick" who was under the "covers" with Mrs. Kennedy (T. 42). Ms. Blackburn overheard appellant and Mrs. Kennedy arguing and heard appellant tell Mrs. Kennedy that she would do anything he told her to (T. 43).

Upon taking the stand, appellant testified that these acts were done with his wife's consent (T. 48). He admitted using the tape recorder to "find out what was going on in the room at the time" (T. 47). He also admitted sitting in the

closet while B.J. and Mrs. Kennedy had sexual intercourse and later having intercourse with her while B.J. watched (T. 60). Finally, appellant admitted using physical violence against Mrs. Kennedy during their arguments (T. 56).

ARGUMENT

POINT I

UTAH CODE ANN. § 76-5-404 (1953), AS AMENDED, IS NOT UNCONSTITUTIONALLY VAGUE PER SE OR AS APPLIED TO THIS CASE.

Appellant was charged and convicted under Utah Code Ann. § 76-5-404 (1953), as amended, which provides:

(1) A person commits forcible sexual abuse if, under circumstances not amounting to 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 either participant.

Appellant was convicted of having caused another to take indecent liberties with his wife, without her consent, and with the intent to gratify or arouse his own sexual desire. Appellant contends on appeal that the phrase "indecent liberties" is so unclear as to render the statute unconstitutionally vague. The fact that this statute does not specifically delineate the types of conduct which constitute "indecent liberties" does not render it

unconstitutionally vague. Under current standards, a law is not unconstitutionally vague unless it fails to give a person of ordinary intelligence reasonable opportunity to know what the statute proscribes. Smith v. Goguen, 415 U.S. 566 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

The courts have recognized that where commonsense understanding reveals the general nature of the conduct prohibited, the due process clause of the Fourteenth Amendment does not mandate complete certainty about the meaning of statutory terms. Thus, in a recent case, the Colorado Supreme Court held that:

Where fairness can be achieved by a commonsense reading of the statute, we will not adopt a hypertechnical construction to invalidate the provision.

People v. Garcia, Colo., 595 P.2d 228, 231 (1979). See also State v. Randol, Kan., 597 P.2d 672 (1979). In Boyce Motor Lines v. United States, 342 U.S. 337 (1952), the Supreme Court of the United States wrote:

But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of government

inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.

342 U.S. 337, 340.

This Court has also recognized the principle in State v. Packard, 122 Utah 369, 250 P.2d 561 (1952), cited by appellant. The Court there stated:

The limitations of language are such that neither absolute exactitude nor complete precision of meaning are to be expected, and such standard cannot be required.

250 P.2d 561, 564. Respondent submits that the phrase "indecent liberties" is sufficiently precise to give a person of ordinary intelligence notice that the type of conduct in which appellant engaged is prohibited.

In the case of State v. MacMillan, 46 Utah 19, 145 Pac. 833 (1915), this Court recognized that the term "indecent liberties" is self-defining and capable of being understood by anyone familiar with the English language. Recently, this Court reconsidered MacMillan in the context of a charge of Forcible Sexual Abuse in State of Utah in the Interest of J.L.S., No. 16253, decided April 11, 1980. In that case a minor was charged with taking "indecent

liberties" in that he touched the clothed breasts of the victim. In reversing the conviction, this Court reconfirmed the MacMillan decision but added an interpretation of the term "indecent liberties" to avoid vagueness:

In the present statute 76-5-404(1), the term "indecent liberties" cannot derive the requisite specificity of meaning required constitutionally, by being read in conjunction with the age of the victim, but if it be considered as referring to conduct of the same magnitude of gravity as that specifically described in the statute, the potential infirmity for vagueness is rectified.

State in the Interest of J.L.S., supra, at pp. 3-4 (emphasis added).

When the statute is read in terms of this "magnitude of gravity" test and in the light of commonsense and understanding, as applied to the facts of this case it is not unconstitutionally vague. Causing another person to have sexual intercourse with one's wife without her consent is of equal or greater gravity as touching the anus or genitals of another or of causing another to do so. Indeed, the acts of intercourse engaged in in this case involved unconsented to "touching" of Mrs. Kennedy's genitals. Although the conduct here does not amount to rape, it falls somewhere between rape and mere touching of another's anus or genitals.

Further, common usage of the term "indecent liberties" includes taking indecent liberties with the wife of another person. This includes the act of sexual intercourse. Thus, when the appellant caused others to have sexual intercourse with the appellant's wife without her consent, he was causing them to take "indecent liberties" with her and commonsense would indicate that such conduct is proscribed by the statute. As in Boyce Motor Lines, quoted supra, appellant by engaging in conduct which is "perilously close" to proscribed conduct assumed the risk of crossing the line.

POINT II

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION.

Appellant contends the evidence adduced at trial is insufficient to support the conviction. Specifically, he alleges that the state failed to prove beyond a reasonable doubt:

- 1) that appellant caused others to take indecent liberties with his wife;
- 2) that such was without his wife's consent, and;
- 3) that such acts were for the purpose of arousing or gratifying the appellant's sexual desires.

Respondent submits that substantial evidence of each of these

elements was presented at trial.

It is well established in Utah that in order for a convicted defendant to succeed in challenging on appeal the sufficiency of evidence adduced at trial, he must establish that the evidence was so inconclusive or insubstantial that reasonable minds must have entertained reasonable doubt that the defendant committed the crime. State v. Daniels, 584 P.2d 880 (Utah 1978); State v. Wilson, 565 P.2d 66 (Utah 1977); State v. Jones, 554 P.2d 1321 (Utah 1976). Such cases also establish that in considering a claim of insufficiency of the evidence on appeal, this Court must assume that the trier of fact believed those aspects of the evidence and drew such reasonable inferences therefrom as support the verdict. Where, as in the case at bar, the evidence is conflicting:

. . . we are obliged to assume on appeal that the jury believed those aspects of the evidence which support the verdict; and that, in doing so, there is a reasonable basis therein upon which the jury could believe that the defendant committed that offense as charged.

State v. Gandee, 587 P.2d 1064, 1065-1066 (Utah 1978); see also State in the Interest of M.S., 584 P.2d 914 (Utah 1978), establishing that the same principle applies to bench trials.

The appellant has failed to meet this showing, having only pointed to the conflict in testimony at the trial, and assuming that the only evidence presented was appellant's

testimony. The testimony presented by the State shows appellant's guilt beyond a reasonable doubt.

First, Mrs. Kennedy established that appellant made deals with both B.J. and Rick culminating in his giving them access to his wife (T. 7, 16). This establishes that the appellant caused these men to take indecent liberties with Mrs. Kennedy and this testimony was believed by the trial judge. Second, Mrs. Kennedy testified that each time she had intercourse with the other men, appellant set up a tape-recorder next to the bed and was watching from the bedroom closet (T. 8, 17). Further, appellant sat on the bed and watched while both B.J. and Rick have intercourse with Mrs. Kennedy (T. 10, 17). Appellant told B.J. to teach Mrs. Kennedy different "positions" (T. 9). Finally, Mrs. Kennedy established that appellant listened to the tape recordings in his shop "over and over again" (T. 28). This evidence establishes beyond a reasonable doubt that appellant caused these men to have intercourse with his wife to arouse or gratify his sexual desire.

Third, appellant relies on the contention that these acts were engaged in with Mrs. Kennedy's consent.

Section 76-5-406, Utah Code Ann., 1953 as amended, provides:

An act of sexual intercourse, sodomy, or sexual abuse is without the consent of the victim under any of the following circumstances:

(1) 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; or

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

(emphasis added). Appellant contends that the degree of resistance necessary to vitiate consent in the case at bar is the same as that required in rape cases. Respondent rejects this contention.

On the facts of the instant case, the "actor" is not the person committing the act of sexual intercourse, but rather the person who caused such other persons to take indecent liberties with Mrs. Kennedy: the appellant. Thus, in testing the degree of consent by Mrs. Kennedy, the relevant inquiry focuses on the degree of coercion or threats which appellant employed to force her to have intercourse with these men.

Because of the husband-wife relationship between the appellant and Mrs. Kennedy, the degree of coercion necessary to overcome her reasonable resistance in this case is lower than in other circumstances. Appellant exercised inherent authority over his wife. Her alternatives of leaving appellant completely or of going to the police

were unreasonable in the circumstances, due to appellant's threats, detailed below. Mrs. Kennedy could not legally force appellant to leave his own home. Mrs. Kennedy reiterated several times at trial that the acts of intercourse with B.J. and Rick were without her consent (T. 7, 12, 13, 16, 18, 24, 33). She pleaded with appellant not to force her to have intercourse with these men, but appellant refused to listen. In the five or six times that this conduct occurred, appellant threatened that if Mrs. Kennedy did not have intercourse with the men, he would kill her father, would blackmail her with pictures of she and another man together, would use these activities to obtain custody of their children if she tried to leave him, and would "come after her" if she tried to leave (T. 19). Appellant used physical force against her, and when she tried to get away to avoid having intercourse with B.J., appellant caught her and forced her to return to their home (T. 9, 20). When asked on cross-examination why she had not reported these acts to the police, Mrs. Kennedy stated that she was afraid of what might happen (T. 31).

The psychological effect of these threats on Mrs. Kennedy is established by the fact that she unsuccessfully attempted suicide by taking an overdose of pills (T. 22,23). She felt as though the whole world was against her (T. 23).

In light of this evidence, Mrs. Kennedy, as a person of ordinary resolution, could not be expected to have done more to resist having intercourse with the other men. If she tried to leave she would either be caught or risk losing her children. If she tried to physically resist the advances of the other men, she faced possible forcible compulsion by either the appellant or the other men, or both. There is sufficient evidence here to establish beyond a reasonable doubt that these acts were committed without the consent of Mrs. Kennedy.

CONCLUSION

Respondent submits that appellant's conviction and sentence should be affirmed, since the State produced sufficient evidence to sustain the trial court's finding of guilt, and the statute under which appellant was charged is not unconstitutionally vague.

Respectfully submitted,

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