1954

State of Utah v. Jay D. Ferry : Brief of Appellant

Utah Supreme Court

Aldrich & Bullock; Attorneys for Defendant and Appellant;

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In the Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

JAY D. FERRY,
Defendant and Appellant.

NO. 390
CRIMINAL

APPELLANT'S BRIEF

ALDRICH & BULLOCK,
Attorneys for Defendant
and Appellant

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STATEMENT OF FACTS

The defendant was tried by a jury in the Fifth Judicial District Court in and for Millard County, with the Honorable Will L. Hoyt presiding, for the offense of carnal knowledge, alleged to have been committed on or about July 15, 1953, on the person of June Peer, who was then 15 years of age. The complainant was the mother of June Peer (T. 2).

The only evidence introduced by the State and received by the court to prove the charge was:

(a) A birth certificate showing June Peer to have been 15 years of age at the time of the alleged offense (Plaintiff's Exhibit 3).

(b) A confession of the offense in the handwrit-in of Eldon A. Eliason, County Attorney for Millard

County, allegedly dictated to him by the defendant on or about July 22nd, 1953, in the office of Sheriff Culbert Robison in Fillmore while the defendant was under arrest (Plaintiff's Exhibit 1).

(c) The testimony of Sheriff Robison as to statements made by June Peer and the defendant in the presence of each other, himself, and County Attorney Eliason in Eliason's office in Delta on July 30, 1953, which statements, as related by the Sheriff, were declarations of participation in intercourse by June Peer and confessions of guilt by defendant (T. 106 to 113).

The record contains considerable conflicting testimony taken outside the presence of the jury on the question as to whether or not the alleged confessions of the defendant were voluntary (T. 6-103), and the court ruled that they were (T. 101-102).

Although the trial had been set approximately three months prior to the time it was held, the State did not have present either the complainant or June Peer, and introduced no evidence other than above set forth, circumstantial or direct, showing or tending to show that June Peer had ever had sexual intercourse with anyone. The state assigned to the court as the reason for not having the complainant and June Peer present that they were in the state of California, had been there some six weeks, and though subpoenaed and requested more than once to be present they would not appear (T. 2).

Upon a verdict of guilty, the court pronounced judgment that the defendant was guilty of the crime charged, and sentenced him to imprisonment in the state prison for a term not to exceed five years. (See Minute Entry Dec. 5, 1953).

STATEMENT OF POINTS

POINT I

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT AND JUDGMENT IN THAT THE STATE FAILED TO PROVE OR TO INTRODUCE ANY COMPETENT EVIDENCE TENDING TO PROVE THE CORPUS DELICTI, INDEPENDENT OF THE CONFESSIONS OF THE DEFENDANT.

ARGUMENT

POINT I

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT AND JUDGMENT IN THAT THE STATE FAILED TO PROVE OR TO INTRODUCE ANY COMPETENT EVIDENCE TENDING TO PROVE THE CORPUS DELICTI, INDEPENDENT OF THE CONFESSIONS OF THE DEFENDANT.

This Court held in **State vs. Johnson,** 95 Utah 572, 83 P. (2d) 1010 that there must be independent proof of the corpus delicti before a confession can be received for the consideration of the jury. See also **State vs. Jessup**, 98 Utah 482, 100 P. (2d) 969, and **State vs. Erwin,** 101 Utah 365, 120 P. (2d) 285. Since the decision in the **Johnson** case, the point of law decided therein has been annotated in 127 **A. L. R.,** commencing at page 1130, and it appears therefrom that some 41 jurisdictions have adopted the same or a substantially similar rule. The rule is particularly applicable to sexual offenses. See annotation in 40 **A. L. R.** 460.

At page 1069, Volume 2 of **Wharton's Criminal Evidence,** we find the following statement:

> "It is practically universally held that the corpus delicit of a crime cannot be proved by an extrajudicial confession standing alone, but must be proven independly of it. Moreover, a verdict of guilty and a subsequent conviction cannot be sustained upon an extrajudicial confession only. Stated conversely, the rule is that an extrajudicial confession of the accused must be corroborated by independent proof of the corpus delicit of the crime."

The corpus delicit of the crime of carnal knowledge obviously includes the fact of intercourse. That June Peer actually had sexual intercourse at or about the time alleged would have to be proved, or at least there would have to be some evidence tending to prove the same, **independent** of the confession of the defendant, before the defendant could be convicted. The trial judge seemed to concede the rule, but would not apply it in this case, because he apparently concluded that the declarations of participation by June Peer in intercourse with the defendant and the acquiescense of the defendant in such declarations, as testified to by Sheriff Robison, was sufficient independent proof of the corpus delicit to justify receiving in evidence the defendant's written confession (T. 102 and 151). This, we submit, cannot be the law for it either permits the proof of the corpus delicit by strictly hearsay evidence or renders meaningless the almost universal rule above stated.

If the declarations of June Peer to the effect that she had intercourse with the defendant had not been made in the presence of the defendant, but only in the presence of the Sheriff and the County Attorney, such statements would be pure hearsay and inadmissible. What, then, may make such statements admissible, under certain conditions, when

made in the presence of the defendant? Wharton in his work on **Criminal Evidence,** Volume 2, Page 1, says:

> "It may be stated as a general rule that, when a statement is made in the presence and hearing of an accused, incriminating in character, and such statement is not denied, contradicted, or objected to by him, both the statement and the fact of his failure to deny are admissable on a criminal trial as evidence of his acquiescence in its truth. A statement so made would, of itself, be objectionable as hearsay testimony, being a statement made at some time other than at a present trial, offered to prove the truth of the matter therein asserted, and based entirely on the credibility of a declarer not then before the court. However, as in the case of admissions generally, the statements herein considered are not offered as evidence of their truth merely because they were uttered; they are secondary in nature and are accepted in evidence as untainted by the hearsay stigma merely because they are a necessary predicate to the showing of the substantive evidence, **the reaction of the accused thereto."** (Boldface supplied)

This principle is well illustrated by the rule that a statement made by a person who would be incompetent to testify is, nevertheless, admissible in evidence when made in the presence of the defendant and not denied by him. **Wharton Criminal Evidence,** Vol. 2, pp. 1094. And this Court said in **State vs. Snowden,** 23 Utah 318, 65 P. 479, at pp. 482-483:

> "The complaint was not admitted as original evidence of the truth of the facts therein sworn to, but simply as a necessary incident, explaining and characterizing the nature of defendant's acquiescence or confession. Admissions and confessions may be implied

> from the acquiescence of the party in the statements of others made in his presence, when the circumstances are such as afford an opportunity to act or speak, and would naturally call for some action or reply from men similarly situated . . . And it makes no difference that the statements which call for a reply are made by a party who is incompetent to testify . . . "

We believe the conclusion is inescapable that the declarations of June Peer could not have been received in evidence by the trial court for any purpose, save and except they may be considered as admissions or confessions of the defendant; and if they were received in evidence on that basis, they are no better than direct admisions or confessions of the defendant, and, therefore, could not be used as proof of the corpus delicti.

It is patent that in the case at bar there was absolutely no proof, even circumstantial ,showing or tending to show that a crime had been committed, independent of the confessions of the defendant. Certainly two confessions of the same alleged crime at different times would not each be independent proof of the corpus delicti, furnishing a basis for the admission in evidence of the other. If that were true, all that would be necessary to satisfy the rule above set forth would be for the sheriff or the prosecuting attorney to make sure that the defendant repeated his confession in the presence of a witness one minute, five minutes, an hour, a day, or a week after it was first obtained, and then the corpus delicti would be considered proved by independent evidence. "Independent evidence" must mean evidence independent of the defendant's confessions, whether there be one or a dozen instances of confessing the same

crime. See **Forte vs. United States,** 68 App. D. C. 111, 94F (2d) 236, 127 A. L. R. 1120.

CONCLUSION

We are strongly of the opinion that there is absolutely no competent evidence of the corpus delicti in this case, and that therefore, the judgment of conviction should be reversed. The Court's attention is respectfully called to the motion of the District Attorney for a continuance at the beginning of the trial and the resistance of the defendant to the motion (T. 1-2). The defendant had been in jail from the time of his arrest in July until the trial in December ,and the judge, in denying the motion, stated that the State had had ample time to produce the complainant and the alleged victim. In this we concur, and for this Honorable Court to merely grant the defendant a new trial now would be in effect granting the State's motion. We respectfully ask, therefore, that the case be reversed with instruction to the trial court to dismiss the action in accordance with the defendant's motion to dismiss, made at the conclusion of the State's case.

Respectfully submited,
ALDRICH & BULLOCK,
Attorneys for Defendant
and Appellant