

1954

State of Utah v. Hal J. Lane : Brief of Appellant

Utah Supreme Court

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I N T H E S U P R E M E C O U R T

O F T H E

S T A T E O F U T A H

STATE OF UTAH,

Respondent,

vs.

HAL J. LANE,

Appellant.

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Case No.

8210

B R I E F O F A P P E L L A N T

LEE W. HOBBS

Attorney For Appellant

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STATEMENT OF FACTS

The facts are as follows:

On December 5, 1953, one Kevin Hanley delivered a check in the sum of \$78.20 drawn on Continental Bank & Trust Company of Salt Lake City, Utah, and signed by Walter Stevenson to Safeway Stores in Salt Lake City, Utah, in exchange for a small amount of groceries and the balance in cash.

(Tr. Page 14, 32, 33, 46) The said Kevin Hanley was later arrested, (Tr. Page 18, 51), and implicated the defendant herein as follows:

Mr. Hanley testified that he had met the defendant, Mr. Lane, in Ogden, Utah, (Tr. Page 4). The defendant Lane had subsequently proposed a scheme of making money. (Tr. Page 5) That one Frank Clouse was included in the scheme. (Tr. Page 6, 7) That the witness Hanley rented an apartment in Salt Lake City in the name of Walter Stevenson, painting contractor. (Tr. Page 8) That a telephone was installed in the apartment under the name of Walter Stevenson (Tr. Page 8; Exhibit 2A). That two checking

accounts were opened in the Continental Bank and Trust Company, Salt Lake City, one in the name of Walter Stevenson, painting contractor, the second account in the names of Walter Stevenson and included the name of his wife as a joint account. (Tr. Page 6, 7) (Exhibits 1, 2, 2A, 2B) That \$50.00 was deposited in each account. That the check subject of the instant prosecution was one of the checks drawn on the account of Walter Stevenson, painting contractor.

The State's witness, Frank Clouse, testified in substance to the same plan or scheme and testified that himself, Frank Clouse, Kevin Hanley and the defendant, Hal Lane, had each taken part.

Robert Sheeran, a witness produced on behalf of the State, testified he was employed at Continental Bank & Trust Company as a representative of the Business Development Department. That he recognised Mr. Kevin Hanley as the same person who had opened a checking account in the Continental Bank & Trust Company under the name of Walter

Stevenson, painting contractor. That he, Robert Sheeran, had accepted the application of the witness, Kevin Hanley, for the setting up of the account. (Tr. Page 28, 29) That the check subject of the prosecution, (Exhibit 2), had been presented to the bank for payment and that at the time the check came in there were insufficient funds to cover the check and that it was returned to the maker for that reason. (Tr. Page 31)

The witness further testified that a number of checks were drawn against this account and honored by the bank (Tr. Page 30), and that the checks dishonored by the bank were dishonored for the reason that there were insufficient funds. (Tr. Page 30)

The witness Hanley further testified that he had a phone installed in the apartment, and had paid for the telephone with a check drawn on the same account as the check subject of this prosecution, (Exhibit 2). (Exhibit 2A), The State also introduced evidence that Hanley had made a

deposit to the account of Walter Stevenson, (Exhibit 2B). The witnesses, Hanley and Clouse, each testified that they had taken a check similar to Exhibit 2 to the Paris Company Department Store in Salt Lake City and purchased a wallet identified as State's Exhibit 6, and received the balance of the check in cash. (Tr. Page 16, 17, 45, 46)

As corroboration the State called Paul E. Parsons, a jailer in the Salt Lake County Jail, who testified that he observed Mr. Lane standing on the opposite side of the counter from the desk at which the witness was seated; that he observed the defendant Lane reach in his back pocket and pull out something; that the witness went around the counter and noticed the defendant Lane tucking a billfold in the corner of the counter; the witness Parsons then identified Exhibit 6, the wallet, as the wallet which had been dropped on the floor of the jail by the defendant Lane. (Tr. Page 34, 35)

Officer Ferris D. Andrus testified (Page 51)

that pursuant to information received by him from Mr. Kevin Hanley on December 5th, that he was looking for a gray 1949 Lincoln Sedan with two men in it. He stated that he found a gray 1949 Lincoln Sedan parked just north of 5th South on Main Street, Salt Lake City. That the defendant, Mr. Lane, was seated alone in this car at the driver's wheel. That he got in the automobile opposite the driver and reached up on the sun visor and took a wallet and check from behind the sun visor, State's Exhibit 8. (Tr. Page 54) Officer Andrus also testified that he found another check in the glove compartment which check is State's Exhibit 9, (Tr. Page 54), said check being taken out of the glove compartment of the gray Lincoln Sedan, each of which exhibits were admitted in evidence over the objection of the defendant's counsel.

Officer Andrus further testified that he had seen a tan wallet similar to State's Exhibit 6 on the floor in the jail. That Mr.

Paul Parsons had drawn his attention to the wallet (Tr. Page 56). At the conclusion of the State's evidence the defendant moved to dismiss, (Tr. Page 60). First, on the grounds that the State's own evidence had affirmatively shown that the facts did not constitute a fictitious check within the meaning of the law; Second, that the evidence offered in corroboration of the testimony of the witnesses and accomplices, Hanley and Clouse, was inadequate as a matter of law. These motions were each denied by the Court. The jury was thereupon instructed as to the law governing the facts as proven. Among the instructions given was the Court's Instruction No. 6, the portion thereof relevant to this appeal being set out in defendant's argument. The defendant submitted Requested Instructions Numbered 1 and 2, each of which the court refused to give the jury as requested, the court expressing the opinion the statement of law

therein had been given in substance. The jury thereupon found the defendant guilty of issuing a fictitious check as charged. From the court's refusal to grant the motions of the defendant and from the court's refusal to instruct the jury as requested in the defendant's Requested Instructions No. 1 and 2, and from the Court's giving of Instruction No. 6, the defendant appeals.

STATEMENT OF POINTS

POINT I.

THE COURT ERRED IN REFUSING TO GRANT THE DEFENDANT'S MOTION TO DISMISS MADE ON THE GROUNDS THAT THE EVIDENCE ADDUCED BY THE STATE AS CORROBORATION OF THE TESTIMONY OF THE ACCOMPLICES WAS INSUFFICIENT AS A MATTER OF LAW.

POINT II.

THE COURT ERRED IN REFUSING TO GRANT THE DEFENDANT'S MOTION TO DISMISS MADE ON THE GROUNDS THAT THE FACTS ADDUCED BY THE STATE DO NOT CONSTITUTE AN OFFENSE UNDER 76-26-7, UCA 1953, AND DO NOT CONSTITUTE A FICTITIOUS CHECK WITHIN THE MEANING OF THE LAW.

POINT III.

THE COURT ERRONEOUSLY INSTRUCTED THE JURY IN ITS INSTRUCTION NO° 6 AS TO THEIR FUNCTION IN DETERMINING THE NECESSITY AND EXTENT OF TESTIMONY IN CORROBORATION OF ACCOMPLICES.

ARGUMENT

POINT I.

THE COURT ERRED IN REFUSING TO GRANT THE DEFENDANT'S MOTION TO DISMISS MADE ON THE GROUNDS THAT THE EVIDENCE ADDUCED BY THE STATE AS CORROBORATION OF THE TESTIMONY OF THE ACCOMPLICES WAS INSUFFICIENT AS A MATTER OF LAW.

The evidence adduced by the State as corroboration of the testimony of the accomplices, Hanley and Clouse, was insufficient as a matter of law.

The witnesses, Hanley and Clouse, were charged with the same offense as the defendant herein and entered a plea of guilty prior to trial.

The controlling law governing the sufficiency of corroborating evidence for the purpose of corroborating the testimony of an accomplice is based upon 77-31-18 UCA 1953:

"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."

The corroboration of one accomplice cannot be maintained by the testimony of a second accomplice.

20 Am. Jur., Evidence Sec. 1239

In the instant case, the record is entirely without evidence tending to connect the defendant with the commission of the offense charged, that is, the making and uttering of the check identified as State's Exhibit No. 2, other than the testimony of the accomplices, Hanley and Clouse. The evidence offered by the State as corroboration of the testimony of the witnesses, Hanley and Clouse, consisted entirely of (1) the testimony of Paul E. Parsons, (Tr. Page 34), and (2) the testimony of Ferris D. Andrus (Tr. Page 50). These will be discussed in order.

Mr. Parsons testified (Tr. Page 34, 35) that he was seated at a desk in the Salt Lake County Jail; that he observed the defendant Lane remove something from his pocket; that he, Parsons, went around the counter and found a wallet or billfold on the floor; this wallet

was identified by Hanley (Tr. Page 16) and Clouse (Tr. Page 45) as a wallet purchased by them with a check in the Paris Company department store in Salt Lake City. There is no evidence that the check given in exchange for the wallet was not a valid check nor any evidence that it was not honored by the drawee bank.

While evidence of similar checks is admissible to show a course of action, scheme, or plan, and the offering of the check given the Paris Company would be valid for this purpose upon the further showing that it was a false or fraudulent instrument, it is admissible only for the limited purpose of showing a plan or scheme. To use this type of evidence as corroboration of the testimony of accomplices is to extend unreasonably the probative force of this type of evidence.

People vs. Nitsberg, 287 NY 163
38 NE 2nd 490
40 NE 2nd 40

It is well established that evidence of other crimes even when confessed by a defendant are

not corroborating evidence of the offense charged:

State vs. Hansen, 40 Utah 418; 122 Pac. 375;
State vs. Kimball, 45 Utah 433; 146 Pac. 313;
State vs. Gregorious, 81 Utah 33; 16 Pac. 2nd
893;
20 Am. Jur., Evidence Sec. 1237

In the instant case there was no evidence that the check given the Paris Company constituted a criminal act. The witness Sheeran testified that some checks drawn on this account had been paid, (Tr. Page 30). Assuming for the purposes of argument that this check had been proven to be false and fraudulent, it is the defendant's contention that this would not constitute any valid evidence corroborating the testimony of Hanley and Clouse as to having passed the check, Exhibit 2, subject of this prosecution.

Officer Andrus testified that he was looking for a gray 1949 Lincoln Sedan; that he found such a car and the defendant Lane seated therein. That he got into the car and found a check (Exhibit 8), and a wallet behind the sun visor of the automobile,

and a check (Exhibit 9) in the glove compartment of the automobile. Hanley testified that he rode down to Salt Lake from Ogden with the defendant in such a car (Tr. Page 18). Nowhere in the testimony of Officer Andrus did he disclose any evidence tending to connect the defendant with the commission of the crime charged, that is, the passing of State's Exhibit 2. Again Exhibits 8 and 9 as in the case with the wallet, Exhibit 6, are no evidence of the commission of the offense charged. Evidence which merely corroborates a portion of the story told by an accomplice is not sufficient under the statute. It must also connect the defendant with the commission of the offense charged.

Slayton vs. State, 173 So. 645
State vs. Scott, 279 NW 832

POINT II.

THE COURT ERRED IN REFUSING TO GRANT THE DEFENDANT'S MOTION TO DISMISS MADE ON THE GROUNDS THAT THE FACTS ADDUCED BY THE STATE DO NOT CONSTITUTE AN OFFENSE UNDER 76-26-7, UCA 1953, AND DO NOT CONSTITUTE A FICTITIOUS CHECK WITHIN THE MEANING OF THE LAW:

The defendant Lane was charged by the information of the crime of issuing a fictitious check in violation of 76-26-7 UCA 1953 as follows:

"That the defendant * * * did make and pass a fictitious check purporting to be an instrument in writing of Walter Stevenson for the payment of \$78.20 and there was no such person as Walter Stevenson at the specified address in existence, the said Hal J. Lane * * * then and there knowing the said instrument to be fictitious."

The evidence adduced on behalf of the State affirmatively shows that the Kevin Hanley went to the Continental Bank & Trust Company and opened a checking account in the name of Walter Stevenson, painting contractor, (Tr. Page 6, 7, 28);

that a number of checks were written on the account and were honored by the drawee bank (Tr. Page 8, 30); that the check which defendant is charged with uttering was presented to the drawee bank for payment and was returned to the endorsee, Safeway Stores, for the reason that there were insufficient funds in the account to honor the same. (Tr. Page 31) The statute under which the prosecution of the defendant was had provides:

"Every person who makes, passes, utters, or publishes, with intention to defraud any other person * * * any fictitious bill, note or check, purporting to be the bill, note, check or other instrument in writing for the payment of money or property of some individual when in fact there is no such * * * individual in existence, knowing the bill, note, check, or instrument in writing to be fictitious, is punishable by imprisonment in the state prison * * *."

In the instant case the check subject of the prosecution, State's Exhibit 2, was proven by the State to be drawn on a valid and existing checking account, (Tr. Page 6, 7, 8, 28, 29, 30), upon which other checks had been honored. The witness Sheeran identified the witness Hanley as the Walter

Stevenson who opened the account. Thus the record is uncontradicted that there was such a person as Walter Stevenson, he having been identified in open court by the State's witness. That for the purposes of trial the name of Kevin Hanley is used of no probative effect to the proposition that one of these names is "real" and one is "fictitious". The fact is clear that the check (Exhibit 2) was drawn upon the account of a person not only existing, but present in the court room at the time of trial. The statute under which the defendant was prosecuted, being a special one carving out of the forgery statutes certain specific instruments, is limited in its application to the one specified therein, i.e., a check drawn on a person not in existence.

93 Utah 274

State vs. Gorham, 72 Pac. 2nd 656

State vs. Jensen, 136 Pac. 2nd 949-953

103 Utah 478

A person in the absence of fraud may freely assume any name or such names as suit his desires or fancy. This being the case, such a person is

existent upon the assumption of the name, and subsequent fraudulent use of the name does not render the person assuming it non-existent.

That such a course of conduct might constitute a confidence game or a crime under the false personation statutes is self-evident. That it constitutes a fictitious check under 76-26-7 UCA 1953 is against the clear intent and wording of the statute.

38 Am. Jur., Name, Sec. 11, 28

POINT III.

THE COURT ERRONEOUSLY INSTRUCTED THE JURY IN ITS INSTRUCTION NO. 6 AS TO THEIR FUNCTION IN DETERMINING THE NECESSITY AND EXTENT OF TESTIMONY IN CORROBORATION OF ACCOMPLICES:

At the conclusion of the evidence and upon the Court's denial of the defendant's motions, the jury was instructed as to the law governing the facts of the case. Among the instructions given was the following, a portion of Instruction No. 6:

"Therefore, if you find in this case from the evidence that the witnesses Hanley and Clouse were accomplices in the commission of the crime charged in the information, if you find from the evidence and beyond a reasonable doubt that such crime was committed, then you are instructed that you cannot convict the defendant on the testimony of Hanley or Clouse, unless you further find that their testimony is corroborated by other evidence which in itself and without the aid of the testimony of said Hanley and Clouse tends to connect the defendant with the commission of the offense."

The defendant submitted to the Court, its Requested Instructions No. 1 and 2 as follows:

Instruction 1

"You are instructed that, under the law of this State, a person accused of a crime

cannot be convicted upon the testimony of an accomplice, unless the testimony of the accomplice 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 charged.

"You are further instructed that the corroborating evidence required by law must show more than the fact that the offense was committed, or the circumstances of the offense. If corroborating evidence does no more than cast a grave suspicion upon the defendant, or if such evidence is consistent with the innocence of the defendant, then it is not sufficient, and you must find the defendant not guilty."

Instruction 2

"You are instructed that the testimony of an accomplice may not be corroborated by the testimony of a second accomplice.

"In considering the sufficiency of the corroborating evidence, you should exclude completely from your consideration the evidence given by the witnesses Hanley and Clouse.

"The remaining evidence must be sufficient in itself to connect the defendant with the commission of the offense charged. If this remaining evidence is not sufficient to connect the defendant with the offense charged, or if this remaining evidence does no more than to cast a grave suspicion upon the defendant, or if such evidence is consistent with the innocence of the defendant, then you must find the defendant not guilty."

The Court refused to give the instructions as requested. It is the contention of the defendant that the Court erred in giving its Instruction No. 6 as set out above and in refusing to give defendant's requested instructions No. 1 and 2, for the reason that the instructions as given allowed the jury to find by necessary implication that the witnesses Hanley and Clouse need not be corroborated in their testimony. The language of the instruction of the Court was ambiguous in that it stated,

" * * * if you find in this case from the evidence that the witnesses Hanley and Clouse were accomplices in the commission of the crime, * * *."

From this language the jury might well assume that it was their function to determine whether or not corroboration of this evidence was necessary.

The general rule of law applicable to the testimony of accomplices is that if there is a dispute or a question of fact as to whether or not the witness was in fact an accomplice, then this is one of the matters to be determined by the jury.

In the instant case, however, both Hanley and Clouse admitted the making and uttering of the checks (State's Exhibit 2), and testified that they had entered a plea of guilty to the crime as charged under these circumstances. It was the duty of the Court to instruct the jury that as a matter of law Hanley and Clouse were accomplices and that therefore the jury must find sufficient corroborating evidence in and of itself sufficient to connect the defendant with the commission of the offense charged as is set out in defendant's Requested Instructions No. 1 and 2.

State vs. Coroles, 74 Utah 94, 100
277 Pac. 203

State vs. Somers, 97 Utah 132
90 Pac. 2nd 273

The defendant contends that refusal to instruct the jury that witnesses Hanley and Clouse were accomplices as a matter of law tended at least to confuse and mislead the jury as to their function in determining the probative weight and effect of the corroborating witnesses. Under the instructions as given the jury might well have determined that

while the evidence was not sufficiently corroborative by the testimony of officers Parsons and Andrus, that nevertheless by the terms of Instruction 6 as given they need not find that Hanley and Clouse were accomplices. Defendant contends that the instructions as given was therefore prejudicial to his cause.

CONCLUSION

It is respectfully submitted that the evidence does not support the verdict, that the verdict is contrary to law, and that the Court erred in denying the defendant's motions to dismiss the defendant. The verdict should be reversed.

Respectfully submitted,

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