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State of Utah v. Milda Hopkins Ashdown : Brief of Defendant and Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent

vs.

MILDA HOPKINS ASHDOWN,
Defendant and Appellant

Criminal No. 8456

BRIEF OF DEFENDANT AND APPELLANT

Appeal from the Fifth Judicial District Court of the State
of Utah, in and for the County of Iron,

Honorable Will L. Hoyt, Judge.

J. VERNON ERICKSON,
Attorney for Defendant and Appellant.

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The defendant by the Information in this action was charged with the murder of Ray Ashdown, on the 5th day of July, 1955, at Cedar City, Iron County, Utah.

The action was tried in Iron County, Utah, on August 22 to 26th, 1955, when the Jury returned a verdict of guilty of murder in the first degree with a recommendation of life imprisonment, from which the defendant appeals.

STATEMENT OF FACTS

Defendant-Appellant was the wife of Ray Ashdown. They lived at Cedar City, Utah; On the morning of July 5, 1955, Dr. R. G. Williams was called to the Ashdown residence by Mrs. Ashdown to attend her husband Ray. When the Doctor arrived Mr. Ashdown was having a generalized convulsive seizure and death seemed to be imminent. He told the Doctor he had drank some lemon juice about a half hour before, then he took another convulsion and died. (T. 21-5). Analysis of the contents of the stomach of Mr. Ashdown by the State Chemist revealed that the same contained strychnine and the cause of his death was attributed to strychnine poisoning. There was a bottle of lemon juice found in the refrigerator of the Ashdown home but it did not contain any strychnine (T. 45-7) and no where in the home was any strychnine found. (T.57).

On the 9th of July, 1955, a funeral was held for Ray Ashdown, and at the cemetery after the burial the Sheriff of Iron County, Arthur Nelson, asked Mrs. Ashdown's son-in-law to bring Mrs. Ashdown to the City and County Building for a talk. The defendant and her sister came to the Sheriff's Office. There were present Sheriff Nelson and Deputies Arch Benson and Chuck Wells. The ladies complained about the heat and were served a glass of lemonade. The Sheriff then asked if they could talk to defendant alone

in the Courtroom. They went into the Court Room where in addition to the Sheriff and his Deputies, the District Attorney, Patrick H. Fenton was present. (T. 91-2). Then the defendant was subjected to a series of questioning which began at about 4 in the afternoon and did not end until about 9 or 9:30 in the evening, during all of which time defendant never left the room, was not given any food or rest, and at about 8:30 in the evening defendant made certain statements to the effect that she put the poison in the cup of lemon juice and gave it to her husband to drink, after which she was held on a charge of murder in the first degree. (T.71-9).

The record discloses that the defendant was a person of limited education, having gone to school only to the seventh or eighth grade—that she was married between the age of 16 and 17 years (T-113)—that she had just attended the funeral and burial of her husband when she was taken to the Court House for questioning—that the weather was extremely hot (T.71-2)—that she was in a hysterical frame of mind and sobbed and cried during the questioning (T. 107, 116, 135) — that she was taken in for questioning alone and was not represented by family, friends or legal counsel—that her father was in the Court House during the questioning and requested that she be given an attorney, but her father as well as her uncle were denied admission to the Court Room where she was being questioned, and were told that there was an attorney in there to represent her. (T. 78, 86-7, 97, 105-6). The defendant, after the alleged admission, requested legal counsel which request was entirely ignored. (T. 136). Next day a written confession was prepared by the Sheriff and handed to her for signing which she did. (T.83-4). At the trial of the action counsel for defendant objected to the admission of the written testimony and of the testimony and evidence relating to the oral confessions for the

reasons they were obtained in violation of the Constitutional rights of the defendant, (T. 118-19) and the Court ruled the written confession should not be admitted but made findings to the effect that there was no coercion, duress or promises of immunity or violation of constitutional rights of defendant (T. 150-53). The case went to the Jury and the Jury after deliberating some 19 hours returned a verdict of guilty with recommendation of life imprisonment (T. 190). It is from the findings of the Court and the verdict of the Jury that this appeal is taken, on the grounds and points hereinafter stated:

STATEMENT OF POINTS

POINT I. THE VERDICT IS CONTRARY TO LAW AND THE EVIDENCE.

POINT II. THE COURT ERRED IN FINDING THAT THERE WAS NO COERCION, DURESS OR PROMISES OF IMMUNITY OR VIOLATION OF CONSTITUTIONAL RIGHTS OF DEFENDANT.

POINT III. THE COURT ERRED IN ADMITTING TESTIMONY AND EVIDENCE INTRODUCED BY THE STATE TO THE EFFECT THAT DEFENDANT UNDER ORAL QUESTIONING PRIOR TO HER ARREST, ORALLY CONFESSED TO CRIME CHARGED, FOR THE REASON THAT SUCH TESTIMONY AND EVIDENCE WERE OBTAINED THROUGH COERCION, DURESS AND PROMISES OF IMMUNITY AND IN VIOLATION OF LAW AND OF THE GUARANTEES OF THE CONSTITUTION OF THE UNITED STATES AND THE STATE OF UTAH.

POINT IV. THE COURT ERRED IN CHARGING THE JURY AS PER HIS INSTRUCTION NO. 6, BY

WHICH THE JURY WAS CONFUSED AND MISDIRECTED SO AS TO RENDER AN IMPROPER VERDICT AGAINST DEFENDANT.

POINT V. THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR ACQUITTAL.

POINT VI. THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL.

ARGUMENT

POINT I. THE VERDICT IS CONTRARY TO LAW AND THE EVIDENCE.

Aside from the oral admissions made by the defendant during the questioning by the officers there was no other evidence in the record connecting defendant with the crime. There was no strychnine found in the home or no record of defendant's purchasing any from any drug store, nor did the officers find any at the farm of Kumen Jones, where the defendant said she obtained it. There was no evidence of any outside source whatsoever to connect defendant with the crime.

As will be hereinafter strongly contended by the defense, that all of the testimony and evidence that defendant confessed to the crime charged, is and was inadmissible, and if such contention is upheld by this Court, then there is no other evidence to support the charge and the verdict of the Jury must be set aside.

POINT II. THE COURT ERRED IN FINDING THAT THERE WAS NO COERCION, DURESS OR PROMISES OF IMMUNITY OR VIOLATION OF CONSTITUTIONAL RIGHTS OF DEFENDANT.

Article I, Section 7, of the Constitution of Utah, provides:

No person shall be deprived of life, liberty or property, without due process of law.

Article I, Section 12, Constitution of Utah, provides:

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel.

The accused shall not be compelled to give evidence against himself.

The Court made findings with regard to the admissibility of the testimony given by Sheriff Arthur Nelson, his Deputies and Patrick H. Fenton, the District Attorney to the effect that there was no promise made or assurance given of any immunity for prosecution (2) That defendant was advised of her constitutional rights before she made the statements sought to be introduced (3) That she did not ask for an attorney until after such statements were made (4) That she was questioned by the officers from approximately 4:00 P.M. until approximately 8:30 P.M. before she made the statements in question, and that her sister, her father and her uncle were not permitted to go into the Courtroom during the course of that questioning. (5) That there were no threats of violence or other threats made by either of the officers or by the District Attorney (6) That there was no promise made nor any assurance given of any benefit or reward, except the District Attorney informed the defendant that if poison had been given by mistake it might make a difference between a prosecution for murder and manslaughter, and informed the defendant of the penalties for those respective offenses (7) That the method of examination and circumstances were not severe enough to amount to compulsion as that is contemplated by the constitutional provisions or statutes which provide that a person shall not be compell-

ed to give evidence against himself. (8) That the circumstances were not such as to induce the defendant to make the statements in question and (9) that the inducing cause of the statement was not fear nor duress, nor compulsion, nor any promise or assurance of any reward or immunity. (Transcript page 150).

The defense contends that the Court erred in such findings, and that the alleged confession was not free and voluntary and was obtained in violation of the guarantees of the State Constitution and of the United States Constitution which stands as a bar against the conviction of any individual in an American Court by means of a coerced confession, or the denial of the right to counsel, or the denial of due process.

The record is replete with instances to show that defendant's alleged confession was not voluntary.

Appellant sets forth the circumstances surrounding such examination of the defendant as follows:

1. Defendant was a person of limited education.

2. She was in a hysterical frame of mind having attended the funeral and burial of her husband just immediately prior to the questioning.

3. The weather was extremely hot.

4. No member of her family was permitted to be in the room with her during such examination, although her father and uncle requested it.

5. She was continuously questioned and kept in the Court Room from 4 P.M. until 9:30 P.M. and at 8:30 P.M. such alleged confession was made by her.

6. She did not have benefit of counsel during such examination, and was not properly advised of her constitutional rights.

7. Officers repeated questions and statements over and over.

Appellant sets forth excerpts from the record to substantiate the above circumstances and to show that the alleged statements were not made freely and voluntarily by her but were the product of sustained questioning and pressure, and that her constitutional rights against self incrimination, the right to counsel and due process were flagrantly violated:

That defendant was a person of limited education:

William Hopkins, Direct, Transcript page 113:

“Q How much of an education did she have?

A Very little education.**She probably passed the seventh or eighth grade. ***She was between sixteen and seventeen years of age when she was married. Just a child like.”

Defendant was requested to come to Court Room for questioning directly after the funeral of her husband:

Sheriff Arthur Nelson, Direct, Transcript page 71:

“I asked to have her come up. I went out to the cemetery and the funeral was just over and they were ready to leave and I contacted her brother-in-law** Stewart had Mrs. Ashdown in his car, he was a son-in-law of Mrs. Ashdown, and I asked him if he would ask Stewart to bring Mrs. Ashdown by the County and City Building, we would like to talk to her. So Alf brought word back to me that he would go that way and take Mrs. Ashdown to the County and City Building.”

The weather was hot:

Sheriff Arthur Nelson, Direct, Transcript page 72:

“Well they were complaining about it being hot and it was hot so we served them a glass of lemonade, and then I asked Mrs. Ashdown if we could talk to her alone in the courtroom. And so we went into the courtroom and talked with her.”

No member of her family was permitted to be in the Court Room with her during such examination, although her father and uncle requested it:

Sheriff Arthur Nelson, Direct, Transcript page 73:

“Q Was Mr. Arch Benson, another deputy sheriff, present during this conversation?

A No, he was out in the hallway sort of taking care of the door; there was people trying to come in and out and we tried to keep everyone out of the courtroom.

Charles Wells, by Court, Transcript page 138:

“Q Did he say he would like to talk to her alone?

A Yes, sir.

Q Her sister was with her at that time?

A Her sister was in the Sheriff’s Office at the time, yes, sir.”

Walter Segler, Direct, Transcript page 104:

“A Well, when they entered the door at the foot of the stairs this Mr. Benson was at the foot of the steps and didn’t figure on anybody entering there.

Mr. Segler continuing from Transcript page 105:

“Q Who was with you?

A Well, Mr. Hopkins, her father.

And I says I am her uncle and this is her father. And I says I don’t think she has got a right to be questioned without her father’s presence or some attorney.

Q What happened.

A And I said I would like to go to the sheriff’s office. He never resisted, but we walked up the stairs and when we got to the top of the stairs there was another, either marshal or, I wouldn’t be sure, but I believe it was Hoyt, I am not sure,

a city marshal, I think. Of course I am not familiar with these names, I just since this came up got acquainted with them.”

Segler from Transcript page 106:

“I told them I thought that Mr. Hopkins, her father, or some attorney should be in her presence. And they refused to let either one of us go in.”

William Hopkins, Direct, T. page 114:

“A I remember, if my memory serves me rightly, I appeared there between four and five o’clock and went immediately into the sheriff’s office; and there we contacted Mr. Benson, Sheriff Miller and Sheriff Bybee, and as I remember it right, I made the remark that it didn’t look to me like a fair, square deal, to railroad that girl into that sheriff’s office without counsel or friends of any description.

Q What was the answer to that?

A Well, if I remember right, I believe Mr. Benson related that she was under suspicion. And if I remember right I believe I told him that we was very sorry, that we had no—that was the first information I had to that effect that she was even under suspicion, and he informed me that she was under suspicion.”

Defendant was questioned and kept in the Court Room from 4 P.M. until 9:30 P.M. without food or rest:

Nelson, Direct, T. page 71:

“Q Will you tell us the time of day that conversation took place?

A As near as I can remember it was about four o’clock.”

Wells, Direct, T. page 129:

“The Court: Did she leave the room at any time during the period from when she first went into the courtroom until she left in the evening?

A. No sir.

The Court: Was she offered the opportunity to leave the room at any time?

A I don’t think that I remember of a request be-

ing made or the offer being made at any time, Judge.

The Court: What time was it that she actually did leave the courtroom?

A That was possibly, I would say, between 9:30 and a quarter to ten.

The Court: Did you notice the time? When you say 'possibly' that doesn't help us.

A I came out of the courtroom at 9:30, yes, sir. I noticed the time."

Wells, Cross, T. page 135:

Q Did you offer anything, any food, didn't you say "Will you have lunch? Will you eat? Did you say that?

A You mean after four o'clock?

Q Yes.

A No."

Nelson, Direct, T. page 74:

"Q Was anything said to Mrs. Ashdown that she was free to leave the courtroom if she cared to?

A By George, I don't remember about that."

Walter Segler, Direct, T. page 108:

"***But before that, when Mr. Wells come out he says, 'Well' he says, 'it has been six and a half hours in this.'"

Defendant was in an hysterical condition during the questioning:

After defendant made the alleged oral confession in the evening of the 9th day of July, she was placed under arrest but she wasn't asked to sign any written statement until the next day on the 10th. To show that defendant was hysterical and not in a calm or unexcited state and didn't know what she was doing on July 9th when the alleged confession was made, the following is quoted from the record:

Nelson, Direct, T. page 86:

"The Court: Sheriff, why did you wait until the afternoon of the 10th before offering this to Mrs. Ashdown to sign?

A Well, we didn't take any written statement on the 9th. We thought we would talk to her on the 10th, she would be calm and wouldn't be excited and she would know what she was doing. We didn't want to feel like taking advantage of her."

Walter Segler, Direct, T. page 107:

"A And at that time I heard her crying and carrying on in there.

Q How long did you hear her crying?

A A couple of times when I was in the hall, and I don't know how long.

Q And you were there in the hall how long would you say, how many hours?

A Well, in the Sheriff's office and thereabout and back and forth to Mrs. Ashdown's place, I would say we was there approximately two and a half hours, or such a matter."

William Hopkins, Redirect, T. page 116:

"Q Could you hear Mildred crying?

A I could. Crying and moaning.

Q All the time you were there?

A Well, at intervals, most of the time, yes."

Wells, Cross Examination, T. page 135:

"Q Was she crying?

A She would sob and cry at times, yes sir."

Defendant did not have benefit of counsel during such examination although she requested it and her father and uncle requested it:

Nelson, Direct, T. page 78:

"***At that point she said 'I had ought to have an attorney.' 'Well' I said 'you have told us about everything now except the strychnine.' I says, 'Tell us where you got the strychnine and we can clear it up and get this over with.'

Nelson, Direct, T. p. 86:

"A She said 'I had ought to have an attorney,' that is the way she put it.

The Court: And then what was said?

A Well, I told her, I said 'Well, you told us about everything now except where you got the strychnine.' I says 'It is a little late to get an attorney.'"

The Court: What did she say then?

A She didn't ask any more for an attorney. She never mentioned one any more."

Nelson, Cross, T. page 87:

"Q Now, you stated to the court that after she asked for counsel she had confessed everything but where she got the strychnine, is that correct?

A Yes, that is right.

Q And you felt, like you told the court, there was no need for doing that, just as well get it over with.

A Yes, that is the way I felt about it.

Q You didn't heed to her request, then did you?

A No, we didn't."

Nelson, Cross, T. page 97:

"Q Now, how many times, sheriff, did that girl ask for counsel, one, two or three times?

A I heard her ask the one time.

Q Why didn't you give it to her, sheriff.

A Well, she had told us about everything then."

Segler, Direct, T. page 105:

"A Well, I says, it isn't fair to take that girl up there and question her without her father's presence or an attorney.***

A And I says, I am her uncle and this is her father. And I says, 'I don't think she has got a right to be questioned without her father's presence or some attorney.'"

Segler, T. page 106:

"A And when I told them up there again that I was her uncle, and I didn't think they had a right to take her in and question her, and one of the officers, I don't know which one it was spoke up and says, 'Why she's got an attorney in there to defend her.' He says, 'to give her constitu-

tional rights.' I says: 'Is he her attorney, or who?' I says, 'I didn't know anything about it until this time.' "

Segler, T. page 109:

"A Well, I am not sure, but it seems to me like it was Mr. Benson, it was one of them, like I said I wasn't acquainted with the men, didn't know them at the time, but they said she has got an attorney in there to advise her, and so they didn't want to let us in, because I said that I figured she needed her father's presence or an attorney. And they said 'Why she's got an attorney in there to advise her.' And that is the only answer we got, in regards to that."

William Hopkins, Direct, T. p. 114:

"A ***and there we contacted Mr. Benson, Sheriff Miller and Sheriff Bybee, and as I remember it right, I made the remark that it didn't look to me like a fair, square deal, to railroad that girl into that sheriff's office without counsel or friends of any description.

Q Did you ask for counsel then?

A Yes. I said 'I believe that she should have an attorney in there.' And I made the remark that I intended to employ you as an attorney."

Hopkins, ReDirect, T. p. 116:

"A Yes, I told them when I first went in there I thought that that was wrong for them to take her in there and quiz her and railroad her."

Wells, Cross, T. p. 136:

"Q Now, you said she did ask for counsel. Was there anyone that spoke up and said you can get him, we will go get him for you now?

A I think in answering that—

Q Just answer that

A She did ask for counsel

Q And she didn't get counsel

A Not at that time, no, sir.

Q Did she ever tell you, 'I don't want counsel?'

A No, that statement was never made to me."

Defendant's oral confession was not voluntary and the following excerpts from the record show that it wasn't and that inducements were made:

Nelson, Direct, T. p. 73:

"Well, I said to Mrs. Ashdown again, that the doctor still claimed that Ray had been poisoned and we would like to find out what had happened and asked her if there was any chance she had made a mistake of any kind and put poison in that lemon juice and thought it was salt."**

Nelson, Direct T. p. 76:

"A Well, then I asked Mrs. Ashdown again, I says, 'Now,' I says, 'Think and see if there has been a chance that there has been a mistake made, any kind of a mistake made' I says 'we should know about it and we could iron it out.'"

Nelson, Direct, T. p. 77:

*****And I think I asked her about the same thing over again, that somebody must have put some poison in the cup because Ray was pronounced being poisoned."**

Nelson, Direct T. p. 78:

*****Why don't you tell us the truth about that poison and how it got in the cup. I says 'Tell us the truth about it so as we can clear this thing up.' She started crying and said 'I will never see my children any more.' And I says, 'Yes, you would see your children again, Mrs. Ashdown.' I says, 'Your children will be taken care of.' I says, 'Just tell us who put the poison in the cup.'"**

Nelson, Cross, T. p. 93:

"Q Then I asked you at the hearing, to impress it very much, at that time I will ask you did not Patrick Fenton, the distirct attorney, in your presence and in the presence of Mr. Welsh, say 'I killed five men while I was in the Army and it is better to confess, I got off. If I hadn't done that' and you studied and you studied, and you said you didn't hear that statement.*You**

know now it was said.

Yes, I know there was something to that effect, now, yes.

Milda Hopkins Ashdown, Direct T. p. 112:

“Q Milda, will you tell the court when you were being examined by the officers what Pat Fenton told you in reference to killing those men?

A Well, he said ‘if you will tell us what happened, why it will go a lot easier on you. He says, I confessed and it was a lot easier on me, If I hadn’t confessed I might not have gotten off, I might have been facing the firing squad now.’”

Wells, Direct, T. p. 123:

“Sheriff Nelson asked her if there couldn’t have been some mistake of when this liquid was taken by her husband. He asked her if she couldn’t have made a mistake by putting something in the liquid besides salt.

Q Was that subject dwelled on at any great length, Mr. Wells?

A Yes, sir. That question was asked her, to the best of my recollection fifteen or twenty times.”

Wells, Direct, T. p. 126:

“Mr. Nelson at that time asked Mrs. Ashdown, and I think the statement was made this way: He says, “Mrs. Ashdown, you know that Ray did not mix the poisoning and take it his self.”

Wells, Direct, T. p. 127:

“Mr. Fenton made the statement as I recall being in quite a predicament at one time his self; that he was accused of killing four men and through the cooperation of the investigating officers and by telling the truth the investigating officers was of much value to him and possibly saved him from the firing squad.”

Wells, examination by the Court, T. p. 137:

“Can you tell me how it came about that Mr. Fenton read those statutes relating to murder or manslaughter and what was said before he came to reading those statutes:

A At that time, your Honor, I think that she was asked if a mistake could have been made, at the time that this lemon juice was mixed, and if there had been a mistake made, I think Mr. Fenton, as I understood it, described the different penalties, in case that there would have been a prosecution."

Q And what did she say:

A As I remember it he read the statutes to her and told her the difference, that if a prosecution, a complaint was issued against her, of what the difference of the complaint would be.

Q Was there anything said about it would be better for her to tell what happened at that time?

A I think she was told at that time that if there had been a mistake made, that in case of prosecution it would be a lesser degree, the crime."

Fenton, examination by the Court, page 144:

"A Yes, your Honor. Mrs. Ashdown had been asked by the sheriff several times if there was any possibility of an accident in connection with this matter, if she might possibly have got hold of some poison and put it in the lemon juice thinking it was salt. And at one point during the phase of the conversation I told Mrs. Ashdown that at one time in Europe I had been accused of killing five men and that I had told the investigating officers of what had happened, and that they had helped and in effect cleared me of the charges, and that if it was an accident she might wish to tell the investigating officers what had happened."

Nelson, Direct, T. p. 159:

"I told Mrs. Ashdown, I says, 'Is there any chance, possible chance, that there has been a mistake made, accidentally, or any other way?' and I says, 'If there has, I wish we knew about it.' 'Well,' I says, 'Someone must know something about it.'"

Nelson, Direct, T. p. 160:

***And I says, 'Someone had to—someone had to put the poison in that lemon juice, it is pronounced poison.'"

Nelson, Direct, T. p. 161:

***Finally I said to Mrs. Ashdown, I said, 'Mrs. Ashdown, I don't believe that Ray put that poison in that juice.' I said, 'Why don't you tell us the truth about that poison and who put it in?' She says 'I'll never see my children any more.' 'Yes,' I says 'You'll see your children again, **that will be taken care of.**'

Wells, Cross, T. p. 173:

"Mr. Nelson at that time asked Mrs. Ashdown, he told Mrs. Ashdown that he didn't believe that that was the truth, that he didn't think that Ray had mixed the strychnine in the lemon juice; therefore, he asked Mrs. Ashdown to tell him the truth about who put the strychnine in the lemon juice.***"

Wells, Cross, T. p. 181:

"Mr. Fenton at that time told Mrs. Ashdown that he had an experience and was charged at that time with killing four men, I think, in Europe, and he had co-operated with the investigators who was investigating the case and they were the ones that had helped to clear him."

Defendant was not properly advised of her Constitutional rights:

There is a little conflict in the record as to just when or how defendant was advised of her Constitutional rights. At any rate it was not at the beginning of the questioning as the record bears out:

Nelson, Direct, T. p. 74:

"Q Sheriff, prior to asking Mrs. Ashdown if she had made a mistake, was Mrs. Ashdown informed as to whether or not she needed to answer your questions?

A I don't believe at that time. I believe it was a little later on when we advised her of her—when you advised her of her constitutional rights. I don't believe it was right on the start.

A We had talked to her a few minutes before that, before you had explained the constitutional rights.

Q Will you tell us as nearly as you can remember the words that were used in explaining Mrs. Ashdown's rights to her?

A Yes, you told her you wanted to advise her of her constitutional rights, that she was entitled to an attorney, that she didn't have to answer any questions unless she wanted to, the questions that she did answer could be used against her in court if it came to court. I think that is about what you told her.***

Q Was anything said to Mrs. Ashdown about she was free to leave the Courtroom if she cared to?

A By George, I don't remember about that."

Nelson, Cross, T. p. 89:

"Q All right, then you told the court that you started to question her, you don't know just how long after Mr. Fenton, after you had been questioning her,—you said it was after you had been questioning her, he advised her of her constitutional rights. Is that right?

A It wasn't long after we started questioning her.

Q Would you say half an hour or an hour?

A I would say around a half hour."

Officers repeated their questions over and over:

Nelson, Direct, T. p. 76:

"***I says 'No, we don't want you to confess to anything you didn't do; we don't want anyone to confess to something they didn't do.' And I think that was told to her at least twenty-five or thirty times during the conversation in the evening."

Nelson, Direct, T. p. 77:

"***And I think I asked her about the same thing over again, that somebody must have put some poison in the cup because Ray was pronounced being poisoned."

Wells, Direct, T. p. 123:

"Yes, sir, That question was asked her, to the best of my recollection **fifteen or twenty times.**"

It is a fundamental rule of criminal law that a confession may not be used against a defendant, unless the prosecution can show its free and voluntary character, that it was made without previous inducement, and that neither duress nor intimidation caused defendant to furnish such evidence against himself, and so long as the constitutional privilege of a defendant not to give evidence against himself exists, that right must be protected by adherence to the well established rule intended to guard against undue advantage being taken of his fears, hopes or mental or physical weakness. See *People v. Loper* 112 Pac, 720 (Cal.)

The Utah Supreme Court in the case of *State v. Crank*, 105 Utah, 332, 142 Pac. 2nd, 178, held that the state has burden of proving that alleged confession was voluntary by a preponderance of all the evidence on that question. Our court in this case reviews American authorities on the question of when a confession is voluntary from which the following is quoted:

From page 189 of the Pacific Report:

In the following cases the language in each mentioned was held to be an inducement sufficient to exclude a confession or statement made in consequence thereof: In *Kelly v. State* (1882) 72 Ala. 244, saying to the prisoner 'You have got your foot in it, and somebody else was with you. Now, if you did break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth and nothing but the truth.' In *People v. Barrie*, 49 Cal, 342, saying to the accused: 'It will be better for you to make a full disclosure.' In *People v. Thompson* (1890) 84 Cal, 598, 605, 24 Pac. 384-6, saying to the accused: 'I don't think the truth will hurt anybody. It will be better for you to come out and tell all you know about it, if you feel that way.' ***In *Biscoe v. State* (1887) 67 Md. 6, 8 A 571, saying to the accused: 'It will be better for you to tell the truth, and have no more trouble about it.' ***In *Com. v. Myers* (1894) 160 Mass. 530, 36 N.E. 481, saying to the accused: 'You had better tell the truth.' ***In

Vaughan v. Com. (1867) 17 Gratt, Va. 566, saying to the accused: 'You had as well tell all about it.' "

And further quoting from Justice's Larsen's opinion in State v. Crank, from page 190 of the Pacific Report:

"The New Mexico court distinguishes the two cases by the statement 'appellant is an intelligent, educated man' which makes in the Wickman case. **In other words, the court holds that in the case of an uneducated person it will more easily infer some promise of leniency which would influence the mind of the accused to confess, than in the case of an educated man.***** (bold face type added)

The Wyoming court in Maki v. State, 18 Wyo, 481, 112 P. 334, 335, 33 L.R.A.N.S. 465, was considering whether testimony given by the accused at an inquest was admissible as being a voluntary confession, and gave the following definition: '**A statement, to have been voluntarily made, must proceed from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous, disturbing cause.**' (Bold face type added).

Going on, the court quotes 1 Greenleaf on Evidence, 225: 'The manner of the examination is therefore particularly regarded; and if it appears that the prisoner had not been left wholly free, and did not consider himself to be so in what he was called upon to say, or did not feel himself at liberty to wholly decline any explanation or declaration whatever, the examination is not held to have been voluntary.'

And from page 191 of the Pacific Report, same case:

"In a case of long protracted questioning of a Chinese, in the absence of an interpreter, friends or counsel, People v. Quan Gim Gow, 23 Cal App. 507, 138 P. 918, 919. the court said: 'While no physical force was used, and neither threats nor promises made, there can be do doubt at all but **that the repeated questioning of the officers, like the constant dropping of water upon a rock** (bold face type added) finally wore through his mental resolution of silence. Admittedly, his refusal at first to answer incriminating questions gave evidence of a desire to make no statement. When, then, did this unwillingness vanish and a desire to talk succeed it? Not after he had been given any period of time for reflection; for his inquisitors allowed him none. The examination was persisted until a response was forthcoming, and, under the circumstances, it must be said that the responses appear to

have been unwillingly made and as a direct result of continued importuning.***The fact that the questioning was done by police officers presents an important item for consideration in determining whether the admissions extracted were of a voluntary character.'***

In State v. Johnson, 95 Utah, 572, 83 P. 2d 1010, 1013, the court considered the matter of voluntariness, and said: 'In determining whether a confession was voluntary there must be taken into consideration the age and intelligence of the witness, the place and conditions under which the statement was made, the circumstances that invoked the conversation, as well as the nature, content and import of the statement itself.' "

Therefore, in view of the record and evidence which show so clearly that the statements made by the defendant herein were not free and voluntary but were the result of duress, intimidation, sustained pressure and inducement by the officers of Iron County, and that all of such proceedings were definitely in violation of the constitutional rights of the defendant, defendant-appellant strongly contends that the Court erred in finding there was no coercion of defendant, or that she had not been denied any constitutional rights, and the record and evidence will not support the Court's findings in these respects.

POINT III. THE COURT ERRED IN ADMITTING TESTIMONY AND EVIDENCE INTRODUCED BY THE STATE TO THE EFFECT THAT DEFENDANT UNDER ORAL QUESTIONING PRIOR TO HER ARREST, ORALLY CONFESSED TO THE CRIME CHARGED, FOR THE REASON THAT SUCH TESTIMONY AND EVIDENCE WERE OBTAINED THROUGH COERCION, DURESS AND PROMISES OF IMMUNITY AND IN VIOLATION OF LAW AND OF THE GUARANTEES OF THE CONSTITUTION OF THE UNITED STATES AND THE STATE OF UTAH.

It is a well settled rule of law that a confession will not be admitted in evidence unless it was voluntarily made. The Appellant contends that all of the testimony relating to the oral confession of the defendant was inadmissible owing to the method in which it was obtained, which, as has been clearly shown in the preceding argument covered by Point II, that the statements were not free and voluntary, and that the method of examination was against the guarantees of the 5th Amendment of the Constitution of the United States which guarantees that the accused shall not be compelled to give evidence against himself, and the sanction thereto by Article I, Section 12 of the Constitution of the State of Utah, and in violation of defendant's right to due process as guaranteed by our National and State Constitutions, and that the admitting of such testimony in evidence was error by the court. There are numerous authorities on this subject of which the following are some of the late decisions:

Commonwealth v. Burke, 1951, (Pa) 79A 2d 654 (Murder in the first degree): Due process was denied to the defendant because after his arrest he was held by the police incommunicado under a fictitious name and subjected to coercion and extensive police questioning until he confessed to the crime. "A conviction in a capital case based upon a confession or self-incriminating testimony which has been coerced from the defendant to police officers constitutes a denial of due process."

State v. Archer, 1953, (Iowa), 58 N.W. 2d 44, (Murder) Defendant was denied due process when the trial court allowed into evidence at his trial confessions obtained from him after he was badgered without rest to give the statements in the confessions as demanded by the officers while they had detained him illegally. Although the confessions stated that they were voluntarily made by the defendant, the facts established that they were the result of improper pressure.

In *Watts v. State of Indiana*, 338 U. S. 49, 69 S. Ct., 1347, 1350, the United States Supreme Court said: "A statement to be voluntary of course need not be volunteered, but if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary."

In a recent decision in the case of *People v. Cahan*, 282 P. 2d 905 (Cal.) the following is quoted: (Reading from page 911 of Justice Traynor's Opinion)

"Despite the persuasive force of the foregoing arguments, we have concluded as Justice Carter and Justice Schauer have consistently maintained, **that evidence obtained in violation of the constitutional guarantees is inadmissible.** (Bold face type added).

People v. Le Doux, 155 Cal. 535, 102 P. 517; *People v. Mayen*, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383, and the cases based thereon are therefore overruled. We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers. When, as in the present case, the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the gatherer of evidence and the government acting as judge. ***It is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law. The end that the state seeks may be a laudable one, but it no more justifies unlawful acts than a laudable end justified unlawful action by any member of the public. Moreover, any

process of law that sanctions the imposition of penalties upon an individual through the use of the fruits of official lawlessness tends to the destruction of the whole system of restraints on the exercise of the public force that are inherent in the 'concept of ordered liberty.' See Allen, *The Wolf Case*, 45 Ill. L. Rev. 1, 20. 'Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.'

Brandeis, J. dissenting in *Olmstead v. United States*, 277 U. S. 438, 485, 48 S. Ct. 564, 575 and cases cited. If the unconstitutional conduct of the law enforcement officers were more flagrant or more closely connected with the conduct of the trial, it is clear that the foregoing principles would compel the reversal of any conviction based thereon. Thus, no matter how guilty a defendant might be or how outrageous his crime, he must not be deprived of a fair trial, and any action, official or otherwise, that would have that effect would not be tolerated. Similarly, he may not be convicted on the basis of evidence obtained by the use of the rack or screw or other brutal means no matter how reliable the evidence obtained may be.

Rochin v. People of Cal, supra, 342 U. S. 165, 72 S. Ct. 205. Today one of the foremost public concerns is the police state, and recent history has demonstrated all too clearly how short the step is from lawless although efficient enforcement of the law to **the stamping out of human rights** (bold face type added). This peril has been recognized and dealt with

when its challenge has been obvious; Police officers and prosecuting officials are primarily interested in convicting criminals. Given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law themselves since not to do so will jeopardize their objectives. Moreover, the same considerations that justify the privilege against self incrimination are not irrelevant here. As Wigmore points out, that privilege, just as the prohibition against unreasonable searches and seizures, is primarily for the protection of the innocent. 'The real objection is that any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself morally suffer thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,— that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.' (8 Wigmore on Evidence 3rd Ed. 2251 p. 309). Similarly, a system that permits the prosecution to trust habitually to the use of illegally obtained evidence cannot help but encourage violations of the constitution at the expense of lawful means of enforcing the law. See, Frankfurter, J. dissenting in *Harris v. United States*, supra, 331, U. S. 145, 172, 67 S. Ct. 1098. On the other hand, if courts respect the constitutional provisions by refusing to sanction their violation, they will not only command respect of law abiding citizens for themselves adhering to the law, they will also arouse public opinion as a deterrent to lawless enforcement of the law by bringing just criticism to bear on law enforcement officers who allow criminals to escape by pursuing them in lawless ways. ***Cases undoubtedly arise where a violation of the privilege against

self-incrimination, a coerced confession, the testimony of defendant's spouse, a violation of the attorney-client privilege or other privilege is essential to the conviction of the criminal, but the choice has been made that he go unpunished. Arguments against the wisdom of these rights and privileges, just as arguments against the wisdom of the prohibitions against unreasonable searches and seizures, should be addressed to the question whether they should exist at all, but arguments against the wisdom of the constitutional provisions may not be invoked to justify a failure to enforce them while they remain the law of the land."

And from foot note 4, page 909, of the above case:

"The Wolf and Irvine cases would then be brought into line with the cases holding coerced confessions inadmissible. (Cases cited). It is now settled that such confessions are excluded, not because they may lack evidential trustworthiness ('a coerced confession is inadmissible under the Due Process Clause even though statements in it may be independently established as true.' *Watts v. State of Indiana*, supra, 338, U. S. 49, 50, 69 S. Ct. 1347, 1348 and cases cited" but because of the manner in which they are obtained. (See *McCormick*, *Developments in Admissibility of Confessions*, 24 *Tex. L. Rev.* 239, 245)""***

In view of the fundamental rules of law governing the admissibility of confessions, and of all the circumstances respecting the method in which the admissions of the defendant-appellant herein were obtained, it is contended by the appellant herein that the Court erred grossly in admitting such evidence over the objection of her counsel.

POINT IV. THE COURT ERRED IN CHARGING THE JURY AS PER HIS INSTRUCTION NO. 6, BY WHICH THE JURY WAS CONFUSED AND MISDIRECTED SO AS TO RENDER AN IMPROPER VERDICT AGAINST DEFENDANT.

Defendant contends that it was not alone a question for the Jury to find whether they believed the statements had or had not been made by defendant during the oral questioning prior to her arrest, but rather whether they believed such statements had been made by the defendant and that such statements were the free and voluntary statements of defendant and not made under coercion, duress and promises of immunity, and the Court in failing to so instruct committed error in submitting the same to the Jury.

Under Instruction No. 6, the Jury was instructed that they could consider the statements made by the defendant on the two occasions she was interviewed by the officers, in answer to their questions, and that they could consider the surrounding circumstances including the events of the day and the experiences of the defendant during the day and on days immediately preceding, the attitude and conduct of the officers mentioned, their statements to the defendant, and whether any threats were made or any promises, either express or implied, of immunity for prosecution, or whether any assurance was given of any benefit or reward to the defendant if she made a statement. They were also charged to consider the length of time covered by the questioning and whether the circumstances show any coercion or compulsion or any physical or mental strain or suffering or fear or hysteria on the part of the defendant during the time. Then the Court says, quoting from said Instruction No. 6:

“After giving due consideration to all the surrounding circumstances, you should determine whether the alleged statements were made by the defendant, and if so, whether such statements or any of them are entitled to be believed and if so to what extent. You are the exclusive judges of the credibility of such statements and the weight to be given to them if you believe that any such statements were made.”

This Instruction fails to advise the Jury that if they should find that the alleged statements were not freely and voluntarily made, that they (the Jury) should disregard them.

Our Utah Supreme Court has passed upon this question in the case of *State v. Crank*, 105 Utah, 332, 142 Pac. 2nd, 178. From page 185 of the *Pacific Report*, I quote Justice Larson:

“The law relative to just what part the jury may play in determining whether a confession was voluntary is in an unhappy state of flux. There is no uniformity in the decision. Roughly speaking they may be placed in three classes. Some hold that the question is solely one of law for the Court. ***The second group of jurisdictions have decisions which seem to hold that the question of voluntariness of a confession should be submitted to the jury for a determination of whether it was sufficiently voluntary for them to consider it as evidence in making their conclusion as to his guilt. In many of these states the question has not been squarely passed upon, and what is said in the opinions is largely dicta based upon the practice in vogue. We shall examine these cases later. The States which may be placed in this group are: (various states) and Utah.***

From page 186:

We now turn to the cases in the second group. The practice there is best expressed by the court of California and of Massachusetts. In *People v. Black*, 73 Cal, App. 13, 238 P. 374, 376, the court said: ‘Before we exhibit the state of the record upon this situation, it may be well to state the rule which regulates the respective functions of judge and jury when the question of the admissibility of a confession arises in a criminal case. The judge must determine, first, and as a matter of course, whether the confession was free and voluntary, and whether, therefore, it is to be heard by the jury. Notwithstanding, however, the settlement of this question, which is merely preliminary, and which bears solely upon the matter of the admissibility of the confession, as already indi-

cated, there is yet a function to be exercised by the jury concerning it. In allowing the confession to go to the jury, the judge has ruled, it is true, that it was freely and voluntarily made, **but the ruling in no way binds the jury.** (bold face type added). That body, now considering the matter substantively, may disregard the view of the judge made evident by his permitting the confession to be heard, and may, as the trier of all final questions of fact in the case, conclude that the confession was not free and voluntary, and may therefore refuse to consider it.'

And from page 188:

In deliberating on a verdict the jury considers all the evidence submitted to it as it bears upon the question to be decided. Conflicts must be reconciled by the jury, or it (the jury) must decide which it believes. It must also determine what weight it ascribes or gives to the various items of evidence. Since a defendant cannot be compelled to give evidence against himself either in or out of court—that is, since the jury can only consider statements of defendant which are his voluntary and free will act, the jury must of necessity, as to any statements attributed to him, determine if they were free and voluntary, for testimony otherwise obtained from accused is entitled to no credence in law. When there is a conflict in the evidence as to how a confession was given, **the court advises the jury that evidence of the accused, involuntarily given, is as a matter of law entitled to no credence.** (bold face type added) Or as generally put in the decisions, the court instructs the jury that if any confessing statements attributed to accused were not his free and voluntary utterances they should disregard them, which is simply the same as saying as a matter of law it is entitled to no weight or credence. This is the real substance of nearly all the decisions which say that the jury ultimately determines the question of the voluntariness of the confession. It is closely akin to the standard stock instruction that if the jury believe that a witness has knowingly testified falsely on any material matter they may disbelieve all his testimony. Thus the voluntariness of the confession as a matter of law is solely for the determination of the court; that is to say, the court is the sole judge of the question

as to whether the confession was obtained in a way the law does not sanction; whether things were done to obtain a confession which render it incompetent as not the result of a free and untrammelled will, as a matter of law. Was it obtained in such a way that the law suppresses it as the result of taking unfair, an unconstitutional advantage of the accused? That is the problem of the court. It may well be that although it was not obtained under such conditions that the law will suppress it, yet it may have been obtained under such conditions that as a substantive matter the accused may have been led, caused or induced to make statements or admit facts against himself, not the result of his own will or choice, but by the suggestions, veiled implications, or conduct of others in a position of apparent advantage. Did it emanate from the desire of the accused to tell the truth or from other motives induced by the actions, words, or circumstances created by others who are in an apparent position of advantage to help or hinder? If the jury thinks it so obtained they may give it no credence or weight whatever. See Greenleaf, 16th Ed. Vol. 1 pp 355, 356; Wigmore, 3rd Ed., Vol. III, pp 349, 350 and cases cited. This becomes a question of fact for the jury, and they may be told to disregard it as unworthy of belief if they find it was so obtained. There is then no conflict between the function of the court and jury."

Appellant contends that in the instant case none of the testimony as to her admissions should have been admitted and that the Court erred in finding that such statements were voluntary, and agrees with what Justice Wade said in his concurring opinion in *State v. Crank* that the important thing is that the judge be convinced that the confession is voluntary before he gives it to the jury; that he holds the trump card and once given to the jury if it was in reality not voluntarily given, much harm may be done.

But after the Court did admit such testimony in evidence it was his duty to have instructed the jury that if the Jury found these statements were not free and voluntary

utterances of defendant, that they should disregard them. But instruction No. 6 failed in this regard and could only have confused and misdirected the Jury. The Jury didn't know what to do even if they believed the statements made by defendant weren't voluntarily made, for the Court had only instructed them that all they had to find was whether they believed such statements had been made by defendant and if they were true. It may have been that the Jury in this case believed the statements had been involuntarily made, yet, because of the insufficiency and the confusing nature of the Instruction, they may have been constrained to reach a verdict of conviction because they didn't know if they were not satisfied that such statements were voluntarily made that they should give no credence to them.

POINT V. THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR ACQUITTAL.

POINT VI. THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL.

Defendant asserts that for all the reasons set forth above, the lower Court committed error in denying the motion of the defense for a directed verdict made at the conclusion of the trial, and in denying defendant's Motion for New Trial, and that for the reasons submitted herein the verdict of the Jury and decision of the trial court should be reversed.

Respectfully submitted,

J. VERNON ERICKSON,

Attorney for Appellant.