

1957

State of Utah v. Frank David Clauson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

FILED

JAN 16 1957

Clerk, Supreme Court, Utah

STATE OF UTAH

)
Plaintiff and Respondent)

Vs.

) Case No.

FRANK DAVID CLAUSON

)
Defendant and Appellant)

8517

BRIEF OF APPELLANT

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The defendant was bound over for trial upon a waiver of preliminary hearing (R-1) and defendant appeared for arraignment on September 23, 1955 (R-1) and was returned to the Justice's Court in and for Heber Precinct, Wasatch County, State of Utah, for preliminary hearing by request of Glen S. Hatch, attorney for defendant (R-1). Preliminary hearing was had September 27, 1955, and the defendant was bound over to the District Court for trial by Archie D. Buys, Justice of the Peace (R-1-2) (R-4). The defendant appeared for arraignment October 11, 1955, and on October 11, 1955 the defendant demanded a Bill of Particulars (R-7), which was furnished December 10, 1955, (R-9). Upon the defendant's plea of not guilty entered October 11, 1955, before the Honorable Joseph E. Nelson, one of the judges of the Fourth Judicial District of the State of Utah, in and for Wasatch County, the case came on for hearing before a jury on the 30th day of November, 1955. Then proceeded to trial after both the defendant and the State had exhausted their preemptory challenges, and

the defense rested. The jury retired at 2:35 o'clock P.M. on December 1, 1955 (Tr-155). Defendant excepted to court's refusal to give all the requested instructions Numbers 1 to 6 inclusive (Tr-154). The Court gave its instructions covering the offense, together with stock instructions (Tr-135-Tr-153). Arguments were presented. The jury retired and returned a verdict of guilty. Defendant was sentenced by the Court for an indeterminate period, not to exceed twenty years in the Utah State Prison. Within the time provided by law the defendant appealed to the Supreme Court of the State of Utah.

STATEMENT OF FACTS.

On the 14th day of September, 1955, the defendant, Frank David Clauson, at the request of Mavis North, took her from Park City, Utah, to Heber City, Utah, in his automobile. The defendant, Frank David Clauson, and the complaining witness, Mavis North, met on the 14th day of September, 1955, in a beer tavern in Park City, Summit County, Utah, known as The Drift. and after having a few drinks of beer,

at the request of the complaining witness, the defendant agreed to drive her to Heber City in his automobile. After leaving the Drift, the complaining witness went to the Utah State Liquor Store and purchased a fifth of wine for them to drink on the way to Heber City (Tr-11). The State contends that on the way to Heber City, near the town of Keetley, the defendant pulled off of the main highway and drove some distance up a side road and that the defendant through force and fear induced the complaining witness to commit the act of sodomy (Tr-14, line 12-Tr-22A, line 5), and that during the time of the alleged act of the defendant an automobile drove up in the close vicinity (Tr-22A, line 12). It was still light (Tr-58, line 9) (Tr-39, line 27 to 29). The complaining witness testified that she told Mr. Clauson that she would give it to him if he would take it in a decent way (Tr-34, lines 7 and 8), but the prosecutrix had been charged with adultery in Wasatch County, State of Utah, prior to September 14, 1955 (Tr-13-14-15 and Tr-5). The prosecutrix and the plaintiff were

friendly immediately after the alleged criminal acts in that prosecutrix purchased some beer for defendant at Keetley on the way back to Heber and that she told defendant that if he wanted intercourse he could have it, but he would have to take it the right way (Tr-41, line 17-18-19); that she was not frightened of him when the automobile was parked near them (Tr-51, lines 20 to 30). After reaching Heber both of them drove to the hospital and visited the prosecutrix's husband (Tr-59, line 29). Immediately following, defendant and prosecutrix drove back to a beer joint and prosecutrix bought defendant some more beer (Tr-61, lines 12-24). After the prosecutrix purchased a bottle of whiskey at the State Liquor Store at Heber, two days after the alleged act took place, at approximately 1:30 in the afternoon of that day, the prosecutrix complained to the Sheriff of Wasatch County about the alleged act of the defendant on the two days previous (Tr-27). All of the testimony of the prosecutrix relative to turning off from the main Heber Highway,

and the act which took place thereat, was denied by the defendant (Tr-108, line 7, Tr-110, line 11). The court allowed, over defendant's objection, hearsay testimony of a conversation between the Sheriff of Wasatch County, and the complaining witness as to the alleged actions of the defendant and out of the presence of the defendant. Before the jury retired the court submitted to them three forms of verdict, substantially as follows: (1) We, the jury impaneled in the above entitled cause, find the defendant guilty of the crime of sodomy as charged in the information. (2) We, the jury impaneled in the above entitled cause, find the defendant guilty of the crime of intent to commit sodomy charged in the information. (3) We, the jury impaneled in the above entitled cause, find the defendant not guilty.

Before the jury retired for deliberation, during the instruction to the jury upon the law relative to the matter, the court refused to give the following instructions requested by the defendant: "You are instructed that the defendant cannot be convicted

on the sole and uncorroborated testimony of an accomplice. By this is meant that if the only proof of any one fact essential to the crime is furnished by an accomplice, then you must find the defendant not guilty."

STATEMENT OF POINTS.

1. THE COURT ERRED IN FURNISHING THE JURY WITH FORMS OF VERDICT IN THE MATTER, FAILING AND NEGLECTING TO FURNISH VERDICTS FOR ANY AND ALL INCLUDED OFFENCES, PARTICULARLY A VERDICT OF PROPER FORM TO ENABLE THE JURY TO FIND THE DEFENDANT GUILTY OF ATTEMPT TO COMMIT SODOMY.

2. THE COURT ERRED IN REFUSING TO GRANT DEFENDANT'S REQUESTED INSTRUCTIONS: "YOU ARE FURTHER INSTRUCTED THAT IF THE WITNESS, MAVIS NORTH, CONSENTED TO THE ALLEGED ACT OF SODOMY, SHE WOULD THEN BE AN ACCOMPLICE, AND UNLESS HER TESTIMONY AS TO ANY ESSENTIAL FACT WERE CORROBORATED, YOU SHOULD FIND THE DEFENDANT NOT GUILTY."

"YOU ARE INSTRUCTED THAT THE DEFENDANT CANNOT BE CONVICTED ON THE SOLE AND UNCORROBORATED TESTIMONY OF AN ACCOMPLICE. BY THIS IS MEANT THAT IF THE ONLY PROOF OF ANY ONE FACT ESSENTIAL TO THE CRIME IS FURNISHED BY AN ACCOMPLICE, THEN YOU MUST FIND THE DEFENDANT NOT GUILTY."

3. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY ON ITS OWN VOLITION WHETHER OR NOT THE PROSECUTING WITNESS COULD HAVE BEEN AN ACCOMPLICE UNDER THE FACTS AND CIRCUMSTANCES OF THE CASE.

4. THE COURT ERRED IN ALLOWING IN EVIDENCE HEARSAY STATEMENTS AND CONCLUSIONS ARISING FROM CONVERSATIONS NOT IN THE PRESENCE OF THE DEFENDANT.

ARGUMENT.

POINT NO. I.

THE COURT ERRED IN FURNISHING THE JURY WITH FORMS OF VERDICT IN THE MATTER, FAILING AND NEGLECTING TO FURNISH VERDICTS FOR ANY AND ALL INCLUDED OFFENCES, PARTICULARLY A VERDICT OF PROPER FORM TO ENABLE THE JURY TO FIND THE DEFENDANT GUILTY OF ATTEMPT TO COMMIT SODOMY.

The court erred in not furnishing the jury with sufficient and proper forms of verdicts to cover all and any included offences, comprehending all the facts and evidence testified to, and involved in the case, and particularly a verdict in proper form to enable the jury to find, if in their judgment the facts justified the same, that the defendant was guilty of an attempt to commit sodomy only. In the case *Cupp vs. State* (74 SW2nd 801), the Court said:

We believe the better practice would be, if the court is going to give to the jury a form of verdict, it should give a form of every kind of verdict that may possibly be returned by the jury. Otherwise, it may be construed by the jury to mean that the court is of the opinion that only a certain kind of verdict was justified under the law and the facts.

and then went on to comment:

However, in the instant case the jury assessed a

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in the penitentiary,

which is the maximum penalty for murder without malice, when the minimum penalty with malice is two years. Therefore, if the charge was error it was harmless error. Harmless error is no grounds for reversal.

In the case of Riley vs. State, a Texas case, 1934, (75 SW 2nd 880) on a rehearing the court found the following:

That said paragraph 22 of the case ignored the right of the appellant to have the jury told what form of verdict they should render if they found the appellant guilty of assault to murder without malice is beyond question, as is also the materiality of the same as likely to inflict injury upon the appellant from the standpoint of the possible infliction of the lighter penalty if proper forms of verdict had been submitted, and also the possible recommendation of a suspended sentence in such case. The attention of the court below was pointedly called to the error by a specific exception. We think we erred in not directing a reversal of the case for such error.

The case was reversed and remanded.

In the case of People vs. Pratt (228 Pac. 47), a California case, 1924, wherein the form of the verdict, which was given by the court to the jury, would have been sufficient prior to the amendment of the act which took place after the arrest of the defendant. but before trial, the court held that the form

of the verdict being sufficient prior to the amendment, that this offence would not come under the amendment, and therefore denied reversal of the trial court's decision. However, in its obiter dictum, the court states:

When forms of verdict are submitted to the jury they should be comprehensive enough to cover every phase of the law under the evidence, and should include any kind of verdict that the jury would be warranted in returning after its deliberation, and this is especially so where a statute requires that a verdict of guilty shall assess the degree of the crime, and the place of imprisonment. If, therefore, the defendant was entitled to the benefit of the amendment it is clearly apparent that his substantial rights have been affected.

In *West vs. State* (208 Pac. 412), an Arizona case, July 20, 1922, the court held that it is claimed that because section 1084 of the penal code provides that

When the defendant is acquitted upon the grounds that he was insane at the time of the commission of the act charged, the verdict must be not guilty by reason of insanity. A form of verdict incorporating that idea should also have been submitted to the jury, and a failure to do so was error; also, that it was error to tell the jury that if they found the defendant insane at the time the act was committed, they should return a verdict of not guilty.

court to submit forms of verdicts to the jury, it may be conceded that when he does so he should submit as many forms as the facts of the case would permit to be returned. But before a failure to do so could be made the basis of a reversible error, it must be made to appear that the omission prejudiced in some way the rights of the defendant.

The court held in that matter that the verdict given by the judge, and acted upon by the jury, was more favorable to the defendant, and therefore his rights were not prejudiced.

It is the contention of the defendant that when the court furnished the forms of verdict, as set forth above, enumerated and designated as Nos. 1, 2 and 3, the forms of verdict so furnished did not comprehend or embrace all of the offences which might have been deliberated upon by the jury, and that the form of verdict designated as Number 2 set forth no kind of offence which the jury might have found the defendant guilty of, to-wit

We, the jury impaneled in the above entitled cause, find the defendant guilty of the crime of intent to commit sodomy charged in the informa-

tion.

The intent to commit sodomy is, of course, an essential element to the crime of sodomy itself, and the intent to commit sodomy is not a crime under the statute or at common law. In all probability what the court below had in mind in presenting such forms to the jury was that the jury might have found the defendant guilty of attempt to commit sodomy, which form of verdict was never given to the jury, and therefore they had no opportunity to consider such included offense although the court had instructed them on such an offense (R-22, Instructions 4 and 5). It is further contended by the defendant that the failure to furnish a proper form on an attempt to commit sodomy, which the court had instructed upon, amounts to such error as warrants a reversal of the judgment and sentence of the court below, that from the forms of verdict furnished to the jury the opportunity to consider under those forms the question of guilt or innocence of the defendant of the lesser crime of an attempt to commit sodomy, was denied by the jury by the failure of

of the court to furnish such proper form. Moreover, the jury may have construed the forms furnished as giving them no other choice than to consider and deliberate on the guilt of the defendant of the crime of sodomy as charged in the information, or to consider an acquittal of that charge, since no instruction was given them consistent with the second form furnished.

Who can say that the jury would not have considered the included offense if a proper form of verdict had been furnished them? That under the forms furnished, the court had been persuaded by the evidence that no such form was necessary, and therefore the jury might find the defendant guilty of committing the crime of sodomy as charged in the information, or might not find him guilty of such offense? The defendant contends that he was entitled to have the included offense of attempt to commit sodomy considered, and that such consideration might have been suggested by a proper form of verdict, had it been given. The defendant contends that it was the duty of the court in furnishing one or more forms of verdict for the

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jury's consideration, to furnish proper forms for all offenses which might be comprehended and included in the charge against the defendant as set forth in the information; that under the law and facts of the case at bar, that the trial court in failing to furnish the jury with the proper form of verdict covering and embracing the lesser offense of an attempt to commit sodomy was a derogation of, and prejudicial to the substantive rights of the defendant, and particularly in view of Instructions 4 and 5 given the jury as cited above.

POINT NO. II

THE COURT ERRED IN REFUSING TO GRANT DEFENDANT'S REQUESTED INSTRUCTIONS: "YOU ARE FURTHER IN*STRUCTED THAT IF THE WITNESS, MAVIS NORTH, CONSENTED TO THE ALLEGED ACT OF SODOMY, SHE WOULD THEN BE AN ACCOMPLICE, AND UNLESS HER TESTIMONY AS TO ANY ESSENTIAL FACT WERE CORROBORATED, YOU SHOULD FIND THE DEFENDANT NOT GUILTY."

"YOU ARE INSTRUCTED THAT THE DEFENDANT CANNOT BE CONVICTED ON THE SOLE AND UNCORROBORATED TESTIMONY OF AN ACCOMPLICE. BY THIS IS MEANT THAT IF THE ONLY PROOF OF ANY ONE FACT ESSENTIAL TO THE CRIME IS FURNISHED BY AN ACCOMPLICE, THEN YOU MUST FIND THE DEFENDANT NOT GUILTY."

The defendant contends that under the facts and the testimony as rendered in the case at bar, the

question of whether or not,,under such facts and testimony, Mavis North, the complaining witness herein, was or was not an accomplice, was a question of fact which should have been submitted to the jury under proper instructions, and that the court's refusal to give the requested instructions of the defendant, or instructions on its own volition, amounted to a prejudicial error.

In the case of People vs. Featherstone (67 Cal. App. 2nd 793; 155 Pac. 2nd, 685) the court said:

When the question of an accomplice arises in the trial of a case, the general and accepted rule is for the court to instruct the jury touching the law of accomplices, and leave the question of whether or not the witness be an accomplice for the decision of the jury as a matter of fact.

Cited in that case with approval is the case of People vs. Coffey (161 California 443, 119 Pac. 901) in which case the court held:

Whether or not a witness is an accomplice of the accused is for the determination of the jury on conflicting evidence, but for the court where his acts and conduct are admitted.

In the case at bar the evidence and testimony as given by the prosecutrix of the place and the alleged

acts of the commission of the crime, and denied by the defendant, puts such testimony before the jury in a conflicting state, and under such circumstances it was the duty of the court to put to the jury the question as to whether or not the complaining witness was an accomplice.

In the case of Dickens vs. People (186 Pac. 277; 67 Colorado 409) the court held:

That the error of the court in refusing to give proper instructions will be presumed to be prejudicial in the absence of affirmative showing to the contrary.

In the case of State vs. Carey (122 Pac. 868) the court states:

That if the jury from a consideration of the character of the complaining witness was of the opinion that he might readily be a party to such crime, they might, under certain circumstances, be justified in reaching the conclusion that he was the guilty party alone, or an accomplice. If the jury was satisfied from the evidence that the complaining witness was an accomplice, if the offense was attempted, then and unless there was corroborating evidence, it would be the duty of the jury to acquit, for by the statute conviction cannot be had upon the uncorroborated evidence of an accomplice.

Whether he consented is a question for the jury

in all cases where the evidence is at all doubtful.

The jury should have considered the question of whether or not the prosecutrix was an accomplice, as gathered from her character, her conduct and demeanor, both before and after the alleged commission of the crime, as testified to by the complaining witness (Tr-9, lines 15 to 26), that she met the defendant at a beer tavern in Park City; that complaining witness and the defendant, after some conversation at The Drift, a beer tavern in Park City, Utah, left for Heber City, Utah (Tr-13); that before leaving, she, the complaining witness bought and paid for a bottle of wine for them to drink on the way to Heber City; (Tr-12, lines 6, 7, and 8); that the complaining witness had been charged with adultery and admitted the charge (Tr-35, lines 13 to 25); that the complaining witness did not cry for help during or immediately after the commission of the alleged offense while people in a car were present in the near vicinity; all of which testimony should have

court as to whether or not the demeanor on the part of the complaining witness was not only salient to a consideration of her creditability, but should have been considered in connection with whether or not she was an accomplice in the act.

The failure of the trial court at the request of the defendant to instruct the jury on the law of accomplices was held to be reversible error by the appellate court in *Hewett vs. State*, 1927, an Oklahoma case (38 Okla. Crm. 105; 259 Pac. 144), where the defendant was convicted of forgery in making a false entry in the records of the bank on the testimony of a fellow employee, who could have been found to have actually made the entry, under the direction of the defendant, and who acknowledged that it was false.

In *Wingo vs. State*, a Texas case, 1919 (210 SW

547)

The appellate court reversed the conviction on the ground that the charge of the trial court unduly restricted the jury's right to find that the witness was an accomplice. The trial court's charge predicated the jury's right to find that she was an accomplice upon their belief that she did voluntarily and with the same intent which actuated the defendant, unite with him in the alleged commission of the offense. The appellate court held that in determining whether or not she was an accomplice where she had stated that she submitted through force and fear, the jury should consider all of the facts in the case in determining whether or not her testimony was an accomplice's testimony, and that if proof showed that

she consented, or did not oppose the act, she was an accomplice witness.

Under Paragraph 20 in 920 ALR, page 86, under the necessity for instruction to the jury, it has been held that where there is conflicting evidence as to whether the witness is an accomplice, the trial court must instruct the jury upon the subject of accomplices regardless of whether or not such instruction has been requested by the defendant.

Underhill on Criminal Evidence, under the topic of Crimes against Person, Paragraph 360, page 623, Second Edition, states:

And as the crime is usually committed when no third party is present, corroboration is very difficult if not impossible to obtain, except so far as it may be found in circumstances which would naturally accompany the commission of such offense. When, however, the crime is attempted without or against the consent of the pathic party he is not an accomplice, and a conviction may be had upon his testimony alone. Whether he consented is a question for the jury in all cases where the evidence is at all doubtful. Evidence to show that he did or did not consent is always relevant, particularly in the case of a charge of assault with intent to commit sodomy.

In Cole vs. State (175 Pac. 2nd, 376), an Oklahoma case, 1946, the court said:

Although the presecuting witness denied that he consented to the act, there were strong circumstances to refute this statement, which would indicate that he consented to what was done. His

testimony after the first act was committed was that he immediately went off to sleep in the same bed with the defendant, and did not awaken until the defendant disturbed him about sunrise while attempting to commit a second act. That the witness did not yell for help, or attempt to leave the premises, but took a bath and listened to the radio while the defendant was shaving, preparatory to going to church, that he went to church with the defendant and remained in his company during the day are strong circumstances to indicate that if the act was committed it was with the consent of Roy Longhopper. If it was done with his consent then he was an accomplice, and his testimony would have to be corroborated by independent evidence tending to connect the defendant with the commission of the crime before the jury would have been justified in finding the defendant guilty.

In this case the complaining witness didn't tell what happened for two months. In the case a bar the prosecutrix let two days elapse before she complained to the Sheriff of the alleged acts of the defendant. Moreover, in the case at bar she did not cry for help and remained in the defendant's company and purchased beer for him, and visited a beer tavern with him, and also her husband at the hospital as above recited.

POINT NO. III

THE COURT ERRED IN FAILING TO INSTRUCT THE JURY ON ITS OWN VOLITION WHETHER OR NOT THE PROSECUTING WITNESS SHOULD HAVE BEEN AN ACCOMPLICE UNDER THE FACTS AND CIRCUMSTANCES OF THE CASE.

In *Medis vs. State* (27 Texas Appeals, 194; 11

SW 112), the court held:

That on trial for sodomy the testimony of a person on which the act was committed must be corroborated if he consented and the jury should be so instructed where the consent is in doubt. (See also *Cole vs. State*.)

Although the defendant asked for an instruction to the effect that if the complaining witness consented to the alleged act of sodomy, she would then be an accomplice, which instruction the court refused, but the instruction requested was sufficient to call the court's attention to the subject of accomplices and that there might be facts and circumstances in the case tending to show the prosecuting witness to be an accomplice, and that the court on its own motion should have submitted this question to the jury, and if the court was dissatisfied with the instruction requested by the defendant, it should have defined for the jury the essential acts, nature and character of an accomplice.

In People vs. Warren (104 Pac. 2nd, 1024):

The defendants were convicted of illegal possession of firearms. The only testimony implicating the named defendant was that of one Groom, who had been arrested on the same charge with others, and subsequently released. Groom denied on the stand that he owned or handled any guns, but he admitted that he had previously taken the cylinder out of one of them to a hardware store, and purchased bullets to fit it, and returned it to one of the defendants. The defendant, Warren, claimed that the trial court committed prejudicial error in failing to instruct the jury as to what constituted an accomplice, and the necessity for the corroboration of the testimony of the accomplice, even though he had requested no such instructions at the trial. This contention was upheld by the appellate court in reversing the conviction as to warrant, on its findings, that there was testimony from which the jury might have concluded that Groom was an accomplice.

People vs. Peturcci, 1947. 67 NY 2nd, 611; 271

App. Div. 1936.

Because of a ruling of the trial court, that as a matter of law, the complaining witness was not an accomplice of the defendant, the appellate court held that whether there was a voluntary submission to the act on his part was a question for the jury.

In People vs. Peck (185 Pac. 881) the court

stated:

It is the duty of the court in criminal cases to give of its own motion, where they are not proposed or presented in writing by the parties them-

selves, instructions on the general principles of law pertinent to the case; but it is not his duty to give instructions on specific points developed through the evidence introduced in the trial, such as the legal scope of impeaching testimony, unless such instructions are requested by the party desiring them.

The above case was also upheld by the California Appellate Court.

In Hendrickson vs. Commonwealth (235 Kentucky 5, 29 SW 2nd 646) the court said:

Because of the failure of the trial court to instruct the jury as to the weight to be given the testimony of the co-defendants in each case, that the jury could not properly pass on the questions of whether the witness was an accomplice or not without proper instructions from the court, and that it was the duty of the court to instruct the jury, and that where the facts authorized it, the failure to do so universally has been held by us to be such an error as to require reversal of the judgment.

In the case at bar no instructions were given the jury on the subject of accomplices, and therefore the court and the jury could have assumed the complaining witness not to be an accomplice, although there were many facts and circumstances testified to upon which, under proper instructions, the jury could have considered the question of whether or not the prosecuting

witness was in fact an accomplice. Under the instructions given by the court to the jury it is assumed that the complaining witness was as a matter of law not an accomplice, and the jury's right to consider the question of whether or not the facts justified a finding that she was an accomplice was denied consideration and deliberation. It is important and pertinent that the failure of the prosecuting witness to relate the alleged acts of the defendant to the officers for a period of two days after they were alleged to have happened casts some doubt upon the veracity of the testimony of the complaining witness, sufficient at least to have the question of whether or not she was an accomplice submitted to the jury as a question of fact, especially so where such acts and testimony as to the place and commission of the crime have been denied by the defendant himself.

In *People vs. Coffey* (161 Cal. 443; 19 Pac. 901) the court held:

Whether a witness is an accomplice of the accused is for the determination of the jury on conflict-

ing evidence, but for the court where his acts and conduct are admitted.

POINT NO. IV

THE COURT ERRED IN ALLOWING IN EVIDENCE HEARSAY STATEMENTS AND CONCLUSIONS ARISING FROM CONVERSATIONS NOT IN THE PRESENCE OF THE DEFENDANT.

The particular hearsay evidence which the court allowed was testified to by the Sheriff in a conversation with the defendant, Frank David Clauson, and over the objection of the defendant, the court allowed the following testimony to be given (Tr-82, line 15):

A. I think I asked him, or Mr. Gale asked him, whehter or not he was not on shift that night. He said, "Yes." He said he worked at the mine and he had brought her over before and worked too. I said, "Are you sure you worked at the mine?" He said, "Yes, I worked at the mine." I said, "Did you bring her directly to Heber?" And he said, "Yes, I did." I said, "You didn't stop anyplace?" He said, "No, I didn't." I said, "I believe I better tell you what she said." He said, "What did she say?" I said, "She claims on the way over from Park City, that you drove up the Kamas road and took her up someplace and"--

Mr. Hatch: I object to this testimony as being hearsay. I appreciate it is said for the purpose of clearing up what he said to Mr. Clauson, but ti is now giving what Mrs. North may have said to him, and, because of that, I object to that testimony.

The Court: He may state what Mr. Clauson said and also the conversation as to what he said, relative to this. .

Mr. Hatch: But not for the purpose of getting the hearsay between his conversations, between he and Mrs. North.

Mr. Howard: He is relating what he said, not outside the presence of the Defendant.

The Court: The objection is overruled. He may answer.

A (Continued) "and took her up someplace on the mountain where he had illicit sexual relations." He said, "that is not true. I drove her straight to Heber." I said, "She makes it even worse than that. She said you used a wire around her throat and also that you stuck her with a knife in an attempt to make her give in to you." He Said, "That is not the truth", that he didn't take her off the road against her will or at any time. I said, "You certainly don't have to tell me anything that you don't want to, I am just telling you what Mrs. North said." So we continued on to Heber City and that is about all the conversation that I recall until we got to the courthouse. Then, as we came in the office, Mr. Gale and I sat down. At that time, Mr. Clauson remembered that perhaps he had laid off a day that week. He said he didn't make it back on shift, that he had laid off a day and he thought it was the 13th.

The conversation between the complaining witness, Mavis North, and the Sheriff was made outside the presence of the defendant, and therefore constitutes

hearsay, and the defendant contends that the court, in

overruling the objection to its admission, prejudiced the rights of the defendant to a fair and impartial trial.

In the case of *People vs. Huston*, (134 Pac. 2nd 758; 21 Cal. 2nd 690) the court said:

The fact that the prosecutrix made a complaint in the prosecution for committing a lewd act is admissible as "original evidence," but testimony concerning the details as then given, or the name of the defendant accused is hearsay.

In *Coppage vs. State* (137 Pac. 2nd 797), an Oklahoma case, the court on appeal said:

In rape prosecution testimony of prosecutrix's employer as to conversation with prosecutrix after she had been brought back to City by alleged assailant, during which interval prosecutrix had opportunity to deliberate upon a statement was not part of "res gestae" and hence was inadmissible as hearsay.

Generally testimony cannot be corroborated by proof that the witness stated same facts testified to in court on some occasion when not under oath and not in the presence of the accused, but such statements are excluded as hearsay.

In *People vs. Brown* (163 Pac. 2nd 699) a California case, the court said:

In sex cases generally, evidence of recital of facts by victim to third party is inadmissible

McPhee vs. People; Supreme Court of Colorado,
January 29, 1940 (98 Pac. 2nd 997). On page 998 of
the report the court said:

Chief Boyer (police chief) and Schoepflin (a co-conspirator) were permitted to testify to a conversation occurring between them, when the defendant was not present, as to the manner in which McPhee (defendant) wanted to dispose of stolen cars. This evidence was clearly hearsay. . . . The statements made by Schoepflin to Boyer with reference to McPhee's participation in the conspiracy to dispose of stolen automobiles, while admissible against Schoepflin under the circumstances, if he had been on trial, were not admissible against McPhee.

The court further said in the past paragraph on page 998 of the report:

Under these circumstances the admission of the hearsay testimony, particularly that of Boyer (police chief) constituted prejudicial error.

(The designation of parties in parentheses are ours.)

People vs. Jaramillo (30 Pac. 2nd 427; Cal. App. 232), 1934, said:

Police woman's statement that an interpreter said to her that defendant, who spoke Spanish, admitted sexual relations with prosecutrix held inadmissible as hearsay.

People vs. Mangum (32 Cal. App. 2nd; 88 Pac. 2nd,

In prosecution for rape by force, objections to questions propounded to witness and calling for a conversation between witness and prosecutrix were properly sustained, since questions call for hearsay testimony.

In *Clark vs. People* (86 Pac. 2nd 257) (103 Colorado 371), the Colorado Supreme Court held:

In prosecution for murder by abortion, permitting man by whom the deceased was pregnant to testify that the deceased had told him she was going to have an abortion performed by the defendant was reversible error, where conversation took place out of the defendant's presence and prior to the time the deceased met the defendant.

State vs. Chealey (116 Pac. 2nd, 377), a Utah case:

In involuntary manslaughter prosecution based on death resulting when truck driven by accused overturned, testimony as to conversations between two persons at the time when the accused was not present should have been excluded as hearsay, but if admissible, such testimony was admissible only for impeachment purposes.

In *State vs. Cheameres* (147 Pac. 2nd, 815; modified in 150 Pac. 2nd, 1012), a Washington case, the court said:

In prosecution for living with a common prostitute, testimony of investigator for office of prosecuting attorney, that woman with whom the defendant was charged with living told him that she was a

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admissible as hearsay, in that the defendant was

present when the admission was made.

In the case of Miller vs. People, Supreme Court of Colorado, February 24, 1936 (55 Pac. 2nd 320), under Notes 3 - 5 on Page 321 of the report the court says:

The law seems to be that, while statements, confessions, and admissions of guilt made by one of several persons jointly indicted and tried for the same offense are admissible against the person making them, they are not admissible against his co-defendants unless made in their presence and assented to by them.

In the same case the court further states:

Sheriff's testimony as to private conversations with the principal in the commission of a crime implicating a co-defendant as accessory before the fact, held inadmissible as hearsay in a separate trial of such co-defendant.

In the case at bar, although Sheriff Payne testified to a conversation he had with the defendant, the objectionable part of that conversation being that he was allowed to repeat on the witness stand, and before the jury, statements and conclusions which the complaining witness had told him, while not under oath and out of the presence of the defendant, and after the occurrence of an interval of two days from the

the complaining witness, and after she had purchased a bottle of whiskey. Clearly such testimony is hearsay under the authorities, and a repetition of such statements made by the complaining witness to the Sheriff, and repeated by him on the witness stand tended to lend dignity and enhancement to them and could have easily influenced the jury as to their truth when spoken by such a creditable witness.

Viewing the record as a whole, the defendant contends that he has not had a fair and impartial trial, and that the errors of the trial court, as pointed out in this brief, are of such serious moment as to arrest the attention of the court, and warrant reversing the judgment of the court below.

Respectfully submitted,

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