

1957

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

Utah Supreme Court

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In the
Supreme Court of the State of Utah

FILED

FEB 13 1957

STATE OF UTAH,

vs.

FRANK DAVID CLAUSON,

Respondent,

Appellant.

Clerk, Supreme Court, Utah

Case No.
8517

BRIEF OF RESPONDENT

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In the
Supreme Court of the State of Utah

STATE OF UTAH,

vs.

FRANK DAVID CLAUSON,

Respondent,

Appellant.

} Case No.
8517

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Frank David Clauson, appellant here, was by jury trial found guilty of the crime of sodomy; after psychiatric examination as required by Title 77, Chapter 49, Section 1, Utah Code Annotated 1953, he was sentenced to be incarcerated in the Utah State Prison for an indeterminate term of not less than three nor more than twenty years.

STATEMENT OF FACTS

Appellant's brief states the facts in a light most favorable to appellant; respondent does not adopt the facts as stated by appellant. Albeit the complaining witness had

previously been charged with adultery (R. 35) and offered to submit to intercourse in a proper manner with the defendant at the time of the commission of the crime charged (R. 35 and 41) the defendant and appellant so conducted himself as to place the complaining witness in fear for her very life. He placed a wire around her neck; (R. 16) he threatened her with a yellow-handled pocket knife, he placed the point of the blade against her ribs; (R. 18) he cut her with the knife; (R. 19) he threatened her life with the knife declaring:

“I can take and use this on you [the knife] and take you over and get some dry twigs and limbs and put you on top of them, and put gas on them and nobody will ever find you.

* * * *

“I have done it before and they have never got me” (R. 21).

This was the testimony of the complaining witness; the jury apparently believed sufficient of it to establish the commission of the crime charged.

The defendant and appellant tells another story (R. 99, 132). He admits being with the complaining witness on the day of the offense; (R. 103) they drank beer and wine together and visited with her sister; he accounts for the time taken on the trip from Park City to Heber as having been spent sleeping in his car at Keetley; (R. 108) he had the complaining witness throw the wine bottle out of the car on the highway after leaving Keetley and on the way to Heber (R. 110 and 121). [The sheriff found the bottle at the scene of the crime (R. 88).] He admitted

ownership of the knife which had been identified and placed in evidence (R. 129). The jury may have relied more upon what the sheriff said on rebuttal (R. 133, 134) than upon the words of your appellant; appellant had at no time prior to the trial claimed to be sleeping away the time during which the commission of the crime occurred.

STATEMENT OF POINTS

POINT I

THE FORMS OF VERDICT FURNISHED BY THE COURT WERE ADEQUATE AND SUFFICIENT.

POINT II

THE COURT DID NOT ERR IN DENYING APPELLANT'S REQUESTED INSTRUCTIONS.

POINT III

THE COURT BELOW DID NOT ERR IN ALLOWING THE SHERIFF TO TESTIFY AS TO A CONVERSATION HAD BETWEEN THE SHERIFF AND THE DEFENDANT.

ARGUMENT

POINT I

THE FORMS OF VERDICT FURNISHED BY THE COURT WERE ADEQUATE AND SUFFICIENT.

The jury was instructed in part, as follows:

“You are instructed that contained within the principal crime of Sodomy as charged in the Infor-

mation in this case, is the lesser crime of attempt to commit the crime of Sodomy. In this connection you are instructed that a person is guilty of an attempt to commit the principal crime charged in the Information when he has the present intent to commit such crime, and performs an overt act or overt acts tending to the commission of the principal crime as charged in the Information but fails in, or is prevented from, accomplishing such principal crime charged in the Information because of being prevented from full accomplishment of his purpose to commit such principal crime by resistance on the part of the one upon who he would commit such an offense or by the interference of circumstances which are against the will and purpose of the defendant himself."

"You are instructed that the material allegations of the Information as the same apply to the lesser offense of an attempt to commit the crime of Sodomy are as follows:

"1. That on or about the 14th day of September, 1955 the defendant, Frank David Clauson, attempted to insert his penis into the anus or into the mouth of Mavis North.

"2. That the consummation of such attempt was prevented by the resistance of the said Mavis North or by some circumstance outside of the defendant himself.

"3. That such attempt occurred at Wasatch County, State of Utah.

"You are further instructed that if you find that the State has proved to your satisfaction beyond reasonable doubt each and both of the foregoing material allegations numbered 1 and 2, and should you further find from the evidence that the material allegation numbered 3, has been proved by the State

by a preponderance of the evidence, then the defendant is guilty of the crime of attempt to commit Sodomy as charged in the Information and it is your duty to so find. But if from a full, fair and impartial consideration of all of such evidence you have a reasonable doubt as to the truth of any of such material allegations numbered 1 and 2, or should you further find that the State has failed to prove by a preponderance of the evidence allegation numbered 3, then you cannot find the defendant guilty of the crime of attempt to commit Sodomy as charged in said Information and it is your duty to acquit him."

The Court also instructed the jury:

"You are instructed that it is your duty to consider all of the evidence given in this case as the same applies to the principal crime of Sodomy as charged in the Information. And if you are convinced beyond reasonable doubt that the defendant is guilty thereof, it is your duty to so find, and to then disregard the instructions given herewith which pertain to the included offense of attempt to commit Sodomy as charged in the said Information. But if after a full, fair and impartial consideration of all of such evidence you have a reasonable doubt as to whether or not the defendant is guilty of the crime of Sodomy as charged in the Information, then it is your duty to determine from the evidence given in this case, as the same applies to the charge of attempt to commit Sodomy as charged in the Information, whether or not the defendant is guilty of the lesser offense of attempt to commit Sodomy. And if from such a consideration of the evidence you are satisfied beyond reasonable doubt that the defendant is guilty of the crime of attempt to commit Sodomy, it is your duty to convict him of such crime.

But if you then have a reasonable doubt as to whether or not the defendant is guilty of the crime of attempt to commit Sodomy, then you must acquit him.

“In other words, it is your duty to first consider all of the evidence given as the same applies to the principal crime charged, and to consider such evidence as the same applies to the lesser offense charged, only if you are not satisfied beyond reasonable doubt as to his guilt of the principal crime charged. If then you are not satisfied beyond reasonable doubt that the defendant is guilty of one or the other of such charged offenses, then you must acquit him.”

After which the court furnished the jury the following forms of verdict:

I

We, the Jury impanelled in the above entitled cause, find the defendant guilty of the crime of Sodomy as charged in the information.

II

We, the Jury impanelled in the above entitled cause, find the defendant guilty of the crime of intent to commit Sodomy charged in the Information.

III

We, the Jury impanelled in the above entitled cause, find the defendant not guilty.

Appellant was informed against for the crime of sodomy; 76-53-22, Utah Code Annotated 1953. Assault with

intent to commit sodomy, 76-7-7, U. C. A. 1953, is, respondent thinks, an included offense. *State v. Blythe*, 20 Ut. 378, 58 P. 1108; *State v. Smith*, 90 Ut. 482, 62 P. 2d 1110. The instructions above set forth clearly informed the jury of the included offense. Had the jury found from the evidence that the offense was not consummated but that appellant committed an overt act or acts with the intent to commit the offense a finding of guilty of the lesser included offense could have been returned.

Appellant contends that intent is an essential element to the offense of sodomy. This court has held that "no particular intent is a necessary element of the offense." *State v. Turner*, 3 Ut. 2nd, 285 P. 2d 1045. Based upon the false premise that intent is a necessary element to the offense appellant further contends that "* * * the *intent* to commit sodomy is not a crime under the statute or at common law;" therefor, says appellant, a form of verdict should have been furnished the jury upon which the jury "* * * might have found the defendant guilty of an *attempt* to commit sodomy." They deal with niceties and play with words. The evidence of the state tended to prove the commission of the completed crime of sodomy as charged in the information and it was not the duty of the court to instruct on lesser included offenses whether requested to do so or not. *State v. Mitchell*, 3 Ut. 2d 70, 278 P. 2 618. Logically, it would follow that where an instruction on an *attempt* to commit the crime charged was not requested and not the duty of the court to give, then furnishing the jury with such a verdict form should not be required. We are familiar with the case of *State v. Smith*,

supra, wherein this court makes out a distinction between attempt to rape and assault with intent to rape and goes on to say, at page 1117:

“* * * that *where the evidence permits*, the trial court should instruct the jury with respect to offenses included in the charged offense and also that they may find the defendant guilty of an attempt to commit the offense charged.” (Emphasis added.)

The Idaho Supreme Court in following the holding of this court in *State v. Smith*, supra, said:

“It is * * * *only where the evidence permits*, that the trial court should instruct a jury with respect to offenses included in the charged offense and with respect to attempts.” *State v. Elsen*, 187 P. 2d 976, 979. (Emphasis added.)

Be what has been said as it may, the court did in fact instruct the jury of the attempted offense of assault with intent to commit sodomy, and did provide the jury with a form of verdict upon which such a finding might have been returned. However, from the record itself, it appears more than clearly reasonable that the jury, having found defendant guilty of the principal offense, did not see fit under the instructions to give consideration to the included and lesser charge.

POINT II

THE COURT DID NOT ERR IN DENYING APPELLANT'S REQUESTED INSTRUCTIONS.

Appellant's contention is that under the facts and the testimony the question of whether or not the complaining

witness was or was not an accomplice was a question of fact to be submitted to the jury under proper instruction.

Respondent thinks appellant misunderstands what constitutes an accomplice. By its accepted terms it can only be

“one who knowingly, voluntarily, and with common intent with the principal offender unites with him in the commission of the crime.” Wharton’s Criminal Evidence, Vol. 2, 12th Ed. p. 229.

Such was not your appellant’s defense to the charge in the court below; appellant’s defense was a complete denial of the commission of the offense. The case for the prosecution was inconsistent with any theory of law involving an accomplice. In fact, there was no such issue raised on either side and corroboration of the prosecutrix’s testimony was not required. The rule enunciated in *State v. Smith*, 274 P. 2 246, 2 Ut. 2, 358, requiring corroboration under 77-31-18, U. C. A. 1953, is not here applicable.

In this state there is no statutory definition of an accomplice. *State v. Caroles*, 74 Ut. 94, 277 P. 203; *State v. Cragun*, 85 Ut. 149, 38 P. 2 1071; *State v. Bowman*, 92 Ut. 540, 70 P. 2 458, 461, 111 A. L. R. 1493; *State v. Fertig*, ... Ut. ..., 233 P. 2 347. The rule is in this state, however, that:

“An accomplice is one who is liable to prosecution for the identical offense charged against the defendant on trial.” *State v. Fertig*, supra.

The evidence for appellant in the case at bar goes to a denial of the offense charged; the evidence of the prosecution supports the commission of the crime upon the victim by force

and through fear. It is true that in many sex crimes such as adultery, fornication, incest or sodomy, one who participates in the crime is an accomplice in the prosecution of the other involved. But the general rule has well recognized exceptions, such as where the crime is committed through force, threats, duress, fraud or undue influence. The reason for this is obvious—the intent necessary to constitute one an accomplice cannot exist with the overcoming of the will which is an essential ingredient of the commission of an offense by threat and force. See *Hutson v. U. S.*, U. S. C. A. 9th Cir., Oct. 1956, 238 F. 2 167. One who consents to perpetration of sodomy or fellatio on herself solely because of physical violence or threats of great bodily harm is not an “accomplice” whose testimony to such offenses must be corroborated. *People v. Bathilana*, 126 P. 2 923, 52 Cal. App. 2 685. There are a host of such cases digested, see American Digest System, Criminal Law 507(7) ; 77-31-14 U. C. A. 1953 is not for application here and the legislature has not as yet seen fit to require corroboration of the prosecutrix’s testimony in all sex offenses in the absence of the involvement of an accomplice. As a matter of law the victim was not an accomplice.

POINT III

THE COURT BELOW DID NOT ERR IN ALLOWING THE SHERIFF TO TESTIFY AS TO A CONVERSATION HAD BETWEEN THE SHERIFF AND THE DEFENDANT.

The sole objection made to the complained of testimony of the sheriff was that the conversation constituted hearsay.

Over such objection the sheriff was permitted to testify as to what he, the sheriff, told the defendant what the complaining witness had said. The sheriff had asked the defendant if he had driven the complaining witness directly to Heber and the defendant had replied that he had, and that he did not stop with the complaining witness anywhere between Park City and Heber. Thereafter, the sheriff testified that he said to the defendant "I believe I better tell you what she said". He said "What did she say?" I said "She claims on the way over to Heber that you drove on the Kamas road and took her up some place where you 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 that 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 did not take her off the road against her will at any time. While defendant did deny his guilt, it is entirely clear that the conversation embraced an admission of the defendant that he had been in the company of the complaining witness on the date of the offense charged at or near the scene of the crime. Such evidence is admissible. *Douglas v. State*, Cal., 120 P. 2d 921, 926, *State v. Irwin*, 101 Ut. 365, 120 P. 2d 285.

We recognize the rule that *courts will not receive the testimony of a witness as to what some other person told him, as evidence of the existence of the fact asserted*. *State Bank of Beaver County v. Hollingshead*, 82 Ut. 416, 25 P. 2d 612. The reason for this rule is that the unsworn statement of a person not called as a witness or subjected to the

test of cross-examination is not recognized as having sufficient probative effect to raise an inference that the fact is as stated. *Steel v. Jensen*, Wash. 115 P. 2d 145. However, the objection that evidence is Hearsay is frequently raised under circumstances not calling for an application of the Hearsay rule, and the reports are full of cases in which the courts have refused to sustain such an objection. *Golden v. Keene Cement and Plastic Company*, 98 Ut. 23, 95 P. 2d 755. We think that the complete answer upon which the rule of the court admitting the testimony of the sheriff should be sustained is to be found in a statement from *Commonwealth v. Godfrey* (Pa.), Vol. I, Section 441, pages 434-435:

“The hearsay rule has no application where the question is whether certain things were said or written by a third person, and not whether they are true.”

Wigmore on Evidence, Third Ed. Section 1361, says this:

“The theory of the Hearsay rule is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand subject to the test of cross-examination. If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence in the matter asserted, but *without reference to the truth of the matter asserted*, the Hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. It may or may not be received, according as it has any relevancy in the case; but if it is not received, this is in no way due to the Hearsay rule.

* * * *

“The prohibition of the Hearsay rule, then, does not apply to all words or utterances merely as such. If this fundamental principal is clearly realized its application is a comparatively simple matter. The Hearsay rule excludes extra judicial utterances only when offered for a special purpose, namely as assertions to evidence the truth of the matter asserted.

Mr. Justice Wade, in a concurring opinion, *John C. Cutler Association v. De Jay Stohrs*, 3 Ut. 2 107, 279 P. 2d 700, discusses the above rule as treated by the work of Wigmore. In the case at bar, the statement by the sheriff was in no wise an assertion of the truth of the fact, but was merely in response to a question as to what was said during a conversation between the defendant and himself; further, the testimony was in no wise prejudicial since the commission of the offense was clearly and conclusively established by evidence independent of the testimony of the sheriff.

CONCLUSION

The verdict and sentence should be sustained.

Respectfully submitted,

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