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State of Utah v. Eugene Johnson : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

OCT 17 1956

STATE OF UTAH,

Respondent,

Clerk, Supreme Court, Utah

— vs. —

EUGENE JOHNSON,

Appellant.

Case
No. 8548

UNIVERSITY UTAH

JAN 28 1957

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Respondent's Brief

Respectfully submitted

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

— vs. —

EUGENE JOHNSON,

Respondent,

Appellant.

} Case
No. 8548

Respondent's Brief

STATEMENT OF FACTS

In support of the information filed on the 14th day of July, 1955, charging Eugene Johnson and Charles Brooks with second-degree burglary (R. 5), the State presented the following testimony at the trial held the 23rd and 24th days of September, 1955, the Honorable Charles G. Cowley presiding.

The first witness called on behalf of the State was Lew S. Birch. He testified that during the early morning hours of July 3, 1955, while acting in the capacity of a

police officer of Ogden City, he noticed a man walking away from the front door of a closed shop (R. 9). As the police officers approached, they called to him to stop, which he did. Officer Birch alighted from the car, made a quick search of the man, who is appellant herein, and then started to examine the building by which the appellant was first sighted. As the officer approached the front of the building he saw another man inside the shop (R. 10). Officer Birch found the front door locked and then checked the building to see how the man inside had gained entry. He discovered that a window in the rear of the store had been broken (R. 11).

Upon the arrival of the officers that had been summoned to help, it was discovered that the appellant who had been handcuffed and placed in the patrol car driven by Officers Birch and Muller, had tried to escape (R. 12). A quick search of the area was made and appellant was found lying face down by a service station a short distance from the patrol car with his forehead badly cut (R 12). The officers phoned the owner of the store and when the owner's son arrived, they entered the store and arrested Charles Brooks (R. 12).

Officer Birch testified that while appellant and Brooks were being transported to the police station, the appellant, in a conversation with him, did not deny being implicated in the burglary and in fact, admitted that he was when he stated that, "there was too many other people involved" for him to give the policemen any information (R. 42-43). Officer Birch further testi-

fied that after the appellant and his companion had been taken to the police station he returned to the store and examined the area around it. At the rear of the building he located some tools and also a ladder which was partially covered with cardboard (R. 45). The window through which Brooks entered the shop was 18 feet above the ground (R. 47). He also testified that appellant and his companion, though they had alcohol on their breath, did not appear to be drunk and both men were able to talk and walk in a reasonably sober manner (R. 29-40).

The next witness called by the State was David Muller. Mr. Muller testified to the following: That he was, during the early morning hours of July 3, 1955, employed by Ogden City as a police officer; that he was with Officer Birch on their regular rounds at that time (R. 48). Mr. Muller's testimony corroborates the testimony of Officer Birch. It was Officer Muller who discovered that the appellant had apparently tried to escape from the police car (R 50) and it was he who found the appellant lying face down by a service station not far from the shop with a cut on his forehead.

The State's next witness was L. A. Jacobson, also an officer of the Ogden City Police Department. Mr. Jacobson testified that upon hearing the radioed call for help from Officers Muller and Birch he and his partner proceeded to the location given in the call (R. 58). When they reached the store, they pulled their patrol car into an alley at the rear of the store and it was then

that Officer Jacobson first noticed the broken window (R. 58). After starting to search for the appellant after his attempt to escape, Jacobson returned to the store after the appellant had been found and examined the rear of the building with a spotlight (R. 59). Shortly thereafter he heard a noise from inside the building and heard the man who was in the building apparently running towards the front. Officer Jacobson ran around the building and arrived in front of the shop just as he dropped to the floor behind a showcase. Officer Jacobson then talked with the appellant and asked him what he had been doing in the vicinity of the store. The appellant said he was just on his way home (R. 60).

After the store owner's son had arrived and had opened the front door, Officer Jacobson entered the store and there confronted Charles Brooks, placing him under arrest. At that time Brooks said, "Well, I guess you got me cold turkey" (R. 60). Officer Jacobson further testified that before appellant was taken to the police station he, in a conversation with Officer Jacobson, stated that, "I didn't go inside of the place Jake, I will swear to that" (R. 64). After Officers Birch and Muller had left for the police station with the appellant and Brooks, Officer Jacobson returned to the rear of the building and discovered some tools and a ladder which had been hidden by covering it with cardboard (R. 61). In his examination of the building and the area immediately surrounding it he found a plank which was about 8 to 10 feet in length. It was lying at the rear of the building (R. 68). It caught his attention and

he checked it to see if with its use a person could have reached the window which was about 18 feet above the ground (R. 69). He testified that it was short and reached only a little more than half-way up the building (R. 69). Officer Jacobson also testified to the fact that he had seen both the appellant and Brooks earlier in the evening in each other's company (R. 77).

The State's next witness was Mr. Glen Robbins. He testified that during the early morning hours of July 3, 1955, he was aroused by the ringing of the telephone and when he answered he was informed that his father's store had been burglarized and was asked to come and open up the store (R. 79). He was present when Officer Jacobson confronted Brooks and when Brooks said "something about you got me cold turkey" (R. 80). Mr. Robbins made a quick tour through the store to see if anything had been stolen. He also examined the cash register. Mr. Robbins testified that the ladder did not belong to the store and to his knowledge had not been on the premises before (R. 81). With this the State closed its case.

The defense called as its first witness the appellant, Eugene Johnson, who was sworn and testified as follows: That during the afternoon of July 2, 1955, he met Charles Brooks in downtown Ogden. They soon started drinking and continued to do so through the afternoon and evening (R. 22). It was his testimony that during this time they both consumed quite a bit of wine (R. 89). Late in the evening Brooks decided that he wanted to go to the Dee Hospital to visit his mother.

Appellant accompanied Brooks to the hospital and waited outside (R. 89). After Brooks came out of the hospital he talked to appellant and told him that his sister lived not far from there and that he wished to go see her (R. 89). Appellant claims by this time to have developed a bad cough and became ill, due to the amount of wine consumed. After they arrived at Brooks' sister's home they decided not to disturb the family, the house being dark. At that time appellant mentioned to Brooks that he wished to lie down because he was sick (R. 90). They then walked behind some buildings looking for a place where appellant could rest; they found a small fire burning in a field and sat down beside it. Appellant claims that as soon as he had stretched out on the ground he fell asleep (R. 90). It is his story that he does not know how long he was asleep and that when he awoke Brooks was gone. Upon awakening he got up and walked to the front of the building to see if there was a clock inside. He did not see one and as he turned to leave he was stopped by the policemen. The appellant claims that after he had been handcuffed and placed in the police car he felt very ill and nauseated. He maintains that he did not try to escape but only left the car so that he would not dirty it if he came sick to his stomach again (R. 92). However, he does not explain why he ran away from the car in such a hurry that he stumbled and fell.

Appellant claims that he did not cooperate with Brooks in planning the burglary of the store; that he did not know that Brooks intended to burglarize the store

and that he was in no way implicated in the burglary. Under cross-examination appellant admitted that he had a previous criminal record and that he had been convicted of a felony (R. 96).

The final witness called by the defense was Charles Brooks, who testified substantially as did the appellant. It is his story that he obtained entrance into the building by climbing up the plank that was found by Officer Jacobson (R. 105). Yet he claims to have done this while drunk. Brooks claims to have found the plank leaning up against the building and noticed that it almost reached the window (R. 105). He makes the claim that it was only curiosity that prompted him to climb up this plank and enter the building. Once inside the building, Brooks claims to have become so ill that he felt it necessary to lie down and did so after he discovered that the plank had apparently been knocked over. The flashlight that was found in his possession he claims to have discovered at the foot of the plank just before he started to climb up it (R. 106). Brooks claims to have had no criminal intent in entering the building; that his reason for entering was unknown to him because of his drunken condition. He claims never to have seen the ladder which was presented as the State's Exhibit D during the trial (R. 112). He also testified to the fact that he and the appellant never discussed burglarizing the store; (R. 108) never planned to burglarize the store, nor did in fact cooperate in the burglary (R. 109). Brooks, claiming that at the time he gained entrance to the store, appellant was still asleep by the fire (R. 105-106). Brooks also admits that he has a

criminal record having been convicted of a felony previously (R. 112). With this the defense rested.

The matter was then submitted to the jury which found appellant and Brooks guilty of burglary in the second degree.

STATEMENT OF POINTS

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO GRANT APPELLANT'S MOTION TO DISMISS THE INFORMATION BECAUSE WHEN SUCH A MOTION IS MADE THE JUDGE MUST ASSUME THE TRUTH OF THE STATE'S EVIDENCE AND GIVE TO THE STATE THE BENEFIT OF ALL THE LEGITIMATE INFERENCES TO BE DRAWN THEREFROM.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO GRANT APPELLANT'S MOTION TO DISMISS THE INFORMATION BECAUSE WHEN SUCH A MOTION IS MADE THE JUDGE MUST ASSUME THE TRUTH OF THE STATE'S EVIDENCE AND GIVE TO THE STATE THE BENEFIT OF ALL THE LEGITIMATE INFERENCES TO BE DRAWN THEREFROM.

Section 77-31-31, Utah Code Annotated 1953, provides in part as follows, concerning the responsibility of a jury at a criminal trial. "On a trial * * * questions

of law are to be decided by the court and questions the fact by the jury * * *.' The early case of *People v. Biddlecome*, 3 Utah 208; 2 P. 194, established the law in Utah wherein it was held that the jurors are the sole judges of the facts. Also in the case of *State v. Bayes*, 47 Utah 474 155 P. 335, the court stated that it was the exclusive province of the jury to judge the credibility of witnesses. In making the motion to dismiss the information, counsel for appellant claims that the State had not " * * * established a prima facie case * * *" nor had the State produced any evidence showing criminal intent on the part of Brooks or appellant. The evidence presented by the State has been summarized in the Statement of Facts. What did it show? It placed before the jury the following facts to be considered:

1. How did Brooks get into the store?

(A) Is it plausible to believe a drunk man could climb up a 2x10 plank leaning against a building, and though it was only 10 feet long, be able to climb up to and through a window which was approximately 18 feet above the ground.

(B) Or is it more believable that the ladder, discovered at the rear of the building, had been used by Brooks to climb through the window and that after he had entered the store, that it had been removed and hidden so as not to attract attention.

2. Was appellant so intoxicated that he had no knowledge of Brooks whereabouts at the time he was arrested?

(A) Is it plausible to believe that appellant was so intoxicated that he did not see Brooks inside the building when he was in front of the store and he did not know that Brooks had entered the building?

(B) Or is it more believable to assume that appellant was participating in the burglary to the extent that he was acting as a look-out and had removed the ladder after Brooks had entered the store?

3. Had appellant after he had been handcuffed and placed in the police car under arrest, gotten out of the car only to keep from getting it dirty?

(A) Is it possible to believe that appellant was only interested in not dirtying the police car?

(B) Or is it more plausible to believe that appellant was trying to escape when he discovered the police had left him unguarded?

In the light of the foregoing, it would appear that counsel's objection was directed at the weight of the evidence and not at its sufficiency. Though most of the evidence introduced by the State was circumstantial, it was consistent with the hypothesis of guilt when compared with facts that are proven. *State v. Crawford*, 59 Utah 39; 201 P. 1030. The evidence was such that it effectively excluded the other theory presented by the defense, i. e. that appellant and Brooks were so intoxicated they did not know what they were doing. *State v. Wells*, 35 Utah 400, *State v. Crawford* supra. In the case

of *State v. Penderville*, 2 Utah 2d 281 ; 272 P. 2d 195, this honorable court commented as follows upon the duty of the trial court when considering a motion to dismiss or a motion for a directed verdict because of the lack of evidence :

“It has been repeatedly held by this court that upon a motion to dismiss or to direct a verdict of not guilty for lack of evidence that the trial court does not consider the weight of the evidence or credibility of the witnesses, but determines the naked legal proposition of law, whether there is any substantial evidence of the guilt of the accused, *and all reasonable inferences are to be taken in favor of the state.* *State v. Lewellyn*, 71 Utah 331, 266 P. 261; *State v. Thatcher*, 108 Utah 63, 167 P. 2d 258; *State v. Aures*, 102 Utah 113, 127 P. 2d 872; *State v. Peterson*, 121 Utah 229, 240 P. 2d 504. As is pointed out in one or more of these cases, the trial court has a discretion in the case of a motion for a new trial that it does not have in case of a motion to dismiss or to direct a verdict of not guilty. *Nevertheless, in either case if there is before the court evidence upon which reasonable men might differ as to whether the defendant is or is not guilty, he may deny the motion.*” (Emphasis added.)

From the evidence presented at the trial one may reasonably infer that the appellant was cooperating with Brooks in the burglary ; that appellant assisted Brooks by helping him to enter the store and that appellant was attempting to escape when he found he was left unguarded in the police car. The fact that the appellant and Brooks had been together throughout the evening hours of July 2, 1955, and were still within close proximity of each other during the burglary, would

also allow the jury to draw an inference that there had been cooperation and planning by the two prior to the entry of the store by Brooks. The California Supreme Court in the case of *People v. Adams*, 119 Cal. App. 2d 445, 259 P. 2d 56 commented as follows:

“If the evidence against the appellant, considered by itself without regard to conflicting evidence, tends to support the verdict, the question ceases to be one of law, of which this court alone has jurisdiction, and becomes one of fact upon which the decision of the trial court or jury is final and conclusive. * * * Questions as to the weight of the evidence and the credibility of the witnesses are for the trier of fact, and it may believe and accept a portion of the testimony of a witness and disbelieve the remainder. * * * *People v. Henderson*, 34 Cal. 2d 340, 346; 209 P. 2d 785. *People v. Thomas*, 103 Cal. App. 2d 669, * * *”

Another California case, *People v. Huizenga*, 34 Calif. 2d 669 213 P. 2d 710 quotes very extensively from the federal case, *Curley v. United States*, 81 U. S. App. D. C. 389 160 F. 2d 229. In the Curley case the court thoroughly examined the history of the rule of law that requires the judge to submit to the jury the question of the credibility of the witness and the weight of the evidence.

“ * * * This contention confuses the function of court and jury by implying that if the court itself can formulate a reasonable theory of innocence from the evidence it must reverse a judgment of conviction. It is not for the court, however, to determine whether it can formulate such a theory. It must assume in favor of the verdict the existence of every fact that the jury could reasonably deduce from the evidence and then deter-

mine whether or not a reasonable jury could find the defendant guilty beyond a reasonable doubt. * * * Thus, the rule that the circumstances relied upon by the prosecution must be consistent with guilt and inconsistent with an hypothesis of innocence is a rule of instruction for the jury, and is not the rule for the guidance of the court on review. *People v. Newland*, supra, 15 Cal. 2d [678], at page 682, 104 P. 2d [778], at page 780.

“ ‘The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. *But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make. The law recognizes that the scope of a reasonable mind is broad. Its conclusion is not always a point certain, but, upon given evidence, may be one of a number of conclusions. Both innocence and guilt beyond reasonable doubt may lie fairly within the limits of reasonable conclusion from given facts. The judge’s function is exhausted when he determines that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind.*’ *Curley v. United States*, 81 U. S. App. D. C. 389, 160 F. 2d 229, 232.” (Emphasis added.)

Section 76-1-44 Utah Code Annotated 1953 provides in part as follows:

“All persons concerned in the commission of a crime, either felony or misdemeanor, whether they directly commit the act constituting the offense or aid and abet in its commission * * * or, * * * have advised and encouraged its commission, * * * are principals in the crime so committed.”

One is an “aider” and “abetter” in the commission of any crime if he is an active partner in the intent which was the crime’s basic element and the least degree of concert or collusion between parties to an illegal transaction makes acts of one the acts of all. *Commonwealth v. Lowry*, 89 Atl. 2d 733, 374 Penn. 594; *Dye v. State*, 40 S. 2d 641, 34 Ala. App. 371; *State v. Lord*, 84 P. 2d 80, 42 New Mexico 638. Under this definition a person to be found an aider or abetter must have participated in some way in the commission of a crime. The participation need only be encouragement.

Therefore, the respondent feels that the judge in refusing appellant’s motion to dismiss the information did not violate the discretion vested in him, and, in fact, was obligated to allow the matter to go to the jury.

CONCLUSION

The verdict of the lower court should be sustained.

Respectfully submitted

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