1957

Clayton E. Butt v. Marcell Graham : Brief of Respondent

Utah Supreme Court

E. R. Callister; Walter L. Budge; Attorneys for Respondent;

In the
Supreme Court of the State of Utah

CLAYTON E. BUTT,
Plaintiff and Appellant,

vs.

MARCELL GRAHAM, Warden, Utah State Prison,
Defendant and Respondent.

Case No.
8592

BRIEF OF RESPONDENT

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CASES CITED

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Appellant, Clayton E. Butt, was charged with and [after trial by jury in the Third Judicial District Court in and for Salt Lake County] convicted of, the crime of carnal knowledge. Appeal from said conviction was perfected to this Court.

Appellant comes now before this Court appealing from a decision adverse to him in a habeas corpus proceeding in the Court below.

It is your appellant's contention that the prosecution suppressed evidence known to the prosecution to exist such as would amount to a denial of due process of law; appellant further contends in this cause that the Court below also erred in denying an oral motion for a writ of coram nobis based upon alleged newly discovered evidence, i. e., the same evidence alleged to have been suppressed.

STATEMENT OF FACTS

The "Statment of Facts" set forth in appellant's brief strays far from the record made in this cause in the Court below. Since no appeal was taken from the original conviction of your appellant and since there was no record made in this cause of the proceedings before the "Board of Pardons" we would contend that references made to the trial of the cause and/or to the proceedings had before the "Board of Pardons" have no proper place in appellant's brief. The writ of habeas corpus is not to be substituted for an appeal; the proceedings had before the "Board of Pardons" are not properly before this Court for review. We shall not here concern ourselves with those matters.

It is your appellant's primary contention that there was a suppression of evidence by the prosecution such as would deny him due process of law; the evidence alleged to have been suppressed by the prosecution was that of a physical examination performed by an Ogden, Utah physician upon the prosecutrix in the trial of your appellant upon a charge of carnal knowledge. We admit such examination was made and, that the prosecution was aware of the examination and the results thereof. It is apparent

from the record that the accused, appellant here, and his counsel at time of trial were equally aware of said examination having been made and the results thereof were available to the defense before and at the time of trial.

The record in this cause completely sustains the contentions of respondent. First witness in the proceedings below was your appellant, Clayton E. Butt; his testimony was, in part, as follows:

> "Q. (By Mr. Woolley) What was the name of the girl with whom you had sexual relations at the time of that trial?
>
> "A. June Durrant.
>
> "Q. Where did she live?
>
> "A. In Ogden, Utah.
>
> "Q. Where were you arrested?
>
> "A. In Ogden, in her home.
>
> "Q. Shortly after your arrest did you have a conversation with the father of this girl concerning having the girl examined by a doctor?
>
> "A. I did.
>
> "Q. And will you tell us about what the substance of that conversation was?
>
> "A. Mr. Durrant accused me of having had sexual relationship with June and I told him I had not, if he would take the girl and have her examined it would prove it, and I told him I was even willing to pay the doctor's fee if he would have her examined.
>
> "Q. After that time did you learn anything concerning this examination?
>
> "A. No, I did not" (R. 15-16).

If your appellant failed to learn anything more concerning the examination of the prosecutrix by the physician such was the result of his own neglect and not because of any suppression on the part of the state.

Called to the witness stand next for appellant was Tel Charlier, Esq., attorney at law, and your appellant's counsel at time of trial; he testified:

> "Q. Do you know the plaintiff in this action, Mr. Butt?
>
> "A. I do.
>
> "Q. Did you represent him on a charge of carnal knowledge last year?
>
> "A. I did.
>
> "Q. Now did you prior to the trial on that case and during the trial and prior to preliminary hearing, did you know that the complaining witness in that trial had a physical examination?
>
> "A. I had been told that by Mr. Butt prior to the trial. I don't know whether it was prior to the preliminary hearing or not.
>
> "Q. What did he say?
>
> "A. He said he understood that she had been given a physical examination the night he was arrested in Ogden.
>
> "Q. Did he say that he understood that she did, or she should have?
>
> "A. He told me, as I recall, that he understood that she had done or that he had requested it, and *I believe he told me that the officers had told him that she had been given an examination.*
>
> "Q. Do you remember where that conversation took place?
>
> "A. It took place in my office, and at that time I told him that I did not have time to go to Ogden

and I suggested he go to Ogden and check with the officers and see what he could find out, if anything, about this examination and if there was anything that might be favorable to use in his defense we would see if we could get enough money together to get the doctors down to testify.

"Q. Did you have a conversation with Jay Banks concerning a physical examination given to the girl?

"A. I did.

"Q. When and where was that?

"A. It was here in the County Building in Mr. Bank's office in the County Attorney's office just before the preliminary hearing.

"Q. And what did Mr. Banks tell you about that physical examination?

"A. He told me that he understood that there had been a physical examination made on her, as I recall. Said it was inconclusive as far as they were concerned" (R. 20-21).

As for what the prosecution told him, Mr. Charlier had this to say, finally:

"A. As I recall that is all that he did tell me, that there was this physical examination, that was inconclusive, and that some slides or some tests had been destroyed or ruined or something of that nature.

"Q. And that is about the extent of the conversation about what the physical examination showed, is that right?

"A. That is as much as I can recall about it" (R. 22).

Had your appellant's trial counsel considered this evidence essential to the defense it is at least crystal clear that the

prosecution did not deny to him its existence or attempt to suppress it.

Ivan Taylor, M. D., was the next witness for your appellant. The doctor had examined the prosecutrix, and her sister; (R. 26) the result of the examinations were negative, i. e., they disclosed no spermatoza (R. 29). However, the doctor had no knowledge of the elapsed time between the sexual act [or whether or not there was one] and the time of the examination (R. 30-31). Nor did the doctor know where the girls might have gone or might have done between the time of the act and the time of the examination (R. 30-33). The doctor did not disclose to the prosecution prior to the preliminary hearing what the slides disclosed:

> "Q. Were you subpoenaed down here for preliminary hearing on Mr. Butt's trial, Dr. Taylor?
> "A. I was subpoenaed once. I don't know what that was for. I was subpoenaed.
>
> "Q. Where did you have to come to?
> "A. I was to report here to the District Attorney's office for Mr. Banks.
>
> "Q. Did you discuss the matter of these slides with Mr. Banks at this time?
> "A. No, sir. I was asked regarding them. I said this was privileged information, that any information I gave would of necessity be ordered by the court.
>
> "THE COURT: Is that what you told Mr. Banks?
>
> "THE WITNESS: As near as I can tell. Any information a doctor has regarding a patient is privileged information" (R. 28).

* * * * *

"Q. (By Mr. Woolley) Did you have occasion to talk to Mr. Aldon Anderson about the slides, the District Attorney here?

"A. I don't recall talking to Mr. Anderson about the slides" (R. 28).

Jay E. Banks, Esq., of the prosecution was called by the appellant. Mr. Banks withheld nothing from your appellant's trial counsel, in fact he "* * * offered Mr. Charlier to come up and I would show him what we had in the State's case, * * *" (R. 36).

Aldon Anderson, Esq., also of the prosecution, was called for appellant. Mr. Anderson withheld no information nor evidence from the defense and he presented the State's case on information available to him which proved sufficient to obtain a conviction [without the use of the results of the medical examination which he knew to be negative] and he suppressed no evidence (R. 38-40).

The evidence adduced in the Court below fails completely to reveal a suppression of any evidence whatsoever and certainly discloses nothing that could be labeled "newly discovered evidence."

STATEMENT OF POINTS

POINT I.

THE COURT BELOW DID NOT ERR; THERE WAS NO SUPPRESSION OF EVIDENCE AND NO SHOWING MADE OF ANY NEWLY DISCOVERED EVIDENCE SUCH AS WOULD JUSTIFY THE ISSUANCE OF A WRIT OF CORAM NOBIS.

ARGUMENT

POINT I.

THE COURT BELOW DID NOT ERR; THERE WAS NO SUPPRESSION OF EVIDENCE AND NO SHOWING MADE OF ANY NEWLY DISCOVERED EVIDENCE SUCH AS WOULD JUSTIFY THE ISSUANCE OF A WRIT OF CORAM NOBIS.

Respondent would concur with appellant in that prosecuting attorneys have an obligation to protect the innocent equal to their obligation to convict the guilty; that knowingly suppressing evidence material to the defendant's cause could amount to a denial of due process; and, that, in a proper case the writ of coram nobis may issue in this jurisdiction upon the ground of newly discovered evidence. *Neal* v. *Beckstead,* 285, P. 2d 129, 3 Utah 2d 403.

But, in the absence of any suppression of material evidence and for the lack of any newly discovered evidence neither of the great writs should be imposed upon for the purposes of an appeal nor the granting of a new trial.

The issues raised in this appeal are issues of fact only; appellant's cause falls for want of proof, not from lack of support of law. Appellant might have prevailed in the Court below had his contentions been well founded within the soul of the law—reason, and proof thereof adduced.

Respondent readily concedes that:

> "The deliberate suppression by the prosecution of evidence favorable to a defendant may constitute a denial of due process." *Pyle* v. *Kansas,* 317 U. S. 213.

But, we do not concede that that for what petitioner contends here rises to the tests promulgated by the authorities cited in his brief such as *United States* v. *Baldi,* 195 Fed. 2d 815, wherein it was shown that the prosecution deliberately suppressed the fact that the bullet which killed the officer was not of a caliber which could have been fired from the petitioner's weapon, and that the prosecutor had in his constructive possession the death bullet, and that even though asked if there were other bullets than those in evidence, did not inform defense counsel of the existence of this bullet. In that case, apparently the bullet which killed the officer was actually fired from the gun of a fellow-officer. Nor, is there here a factual situation, as in *United States* v. *Ragen,* 86 Fed. Supp. 382, wherein it was conclusively shown in the habeas corpus proceedings that the victim of the alleged rapist had not been raped, but was in fact a virgin within the knowledge of the prosecution. Those are cases in which there is *proof* of the deliberate suppression of evidence which was vital to the defense; a failure on the part of the prosecution to observe that fundamental fairness essential to the very concept of justice—truly a denial of due process. The suppression of evidence herein contended for seems a far cry from the factual situations presented to the courts in the above cases. In fact there was none.

We think the United States District Court, W. D. Penn., in May of 1954, correctly stated the rule, saying:

> "Evidence is not suppressed or withheld if the accused has knowledge of the facts and circumstances, or if they otherwise become available to him

during the trial." *United States* v. *Dye,* 123 Fed. Supp. 762.

The record in this case conclusively shows that the appellant Butt had requested that the examination be made by the physician, and that he knew, as his counsel testified, that the examination had been made because the police officers told him so; further, there is absolutely no question but what counsel representing the appellant at the original trial, by his own admission, knew of the existence of the allegedly suppressed evidence. We can say further that from the record, the prosecuting attorneys at all times made available to the defense the results of the medical examination which appellant now accuses them of having suppressed.

CONCLUSION

It can only be concluded that this appeal is without merit; that from the testimony of appellant's own witnesses, a lack of merit is clearly established. The decision of the Court below should be sustained.

Respectfully submitted,

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