

1957

State of Utah v. Barton Kay Kirkham : Brief of Respondent

Utah Supreme Court

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1957

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In the
Supreme Court of the State of Utah

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STATE OF UTAH,

Plaintiff and Respondent, Clerk, Supreme Court, Utah

vs.

Case No.
8684

BARTON KAY KIRKHAM,

*Defendant and Appellant.***BRIEF OF RESPONDENT****E. R. CALLISTER,**

Attorney General,

WALTER L. BUDGE,

Deputy Attorney General,

Attorneys for Respondent.

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In the Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

BARTON KAY KIRKHAM,
Defendant and Appellant.

Case No.
8684

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

No one says that Barton Kay Kirkham did not kill David Avon Frame.

We are here concerned with but two propositions which have been advanced by counsel for defendant on this appeal:

First: Did the Court below by the giving of Instruction No. 9 exclude the element of moral wrong from the jury's consideration; and, if so, was the giving of the instruction erroneous?

Second: Was error permitted by the Court below in refusing to give to the jury defendant's requested Instruction No. 3; and, as a result thereof, was the defendant prejudiced by the remarks of counsel for the State during argument?

The facts presented in respondent's brief will be limited to these issues; we, of course, understand that on appeal involving murder it is the policy of this Court to review and to consider the entire record for error whether cited or not. We are confident that if there were possible further contentions for error eminent counsel for appellant would have claimed for it. We point to none.

STATEMENT OF FACTS

The facts are not in dispute.

The Court instructed the jury, in part, as follows:

"INSTRUCTION 9

"The defendant, in his defense, has pleaded and contends that he is not guilty of any crime charged in the Information, because, at the time the act was committed, he, the defendant, was insane.

"Insanity may be a complete defense to a criminal act, or it may reduce the degree of offenses, or it may have no bearing upon the question of guilt.

"Insanity is an element in determining questions of guilt of or punishment for crime only when it renders the person so affected irresponsible or

partly irresponsible. That is, the defendant cannot be convicted of a crime, if, at the time of the act, he was insane to such an extent that he did not know the nature of the act; that is, did not know he had a revolver, that it may be loaded, or that, if discharged, it might injure or kill; OR that, when he fired the shot, he did not know it was wrong in the sense that such act was condemned by morals *or* law; OR that he was unable, by reason of mental disease, to control his actions or impulses to injure or kill David Avon Frame.

“If defendant was afflicted with a disease of the mind, at the time of the alleged offense in any one or more of these three manners, then, in such case, he was not legally responsible and is entitled to an acquittal” (Tr. 252).

It is contended that your appellant was incapable of understanding the moral implications of his conduct and that the instruction, *supra*, precluded the jury from considering the evidence presented in support thereof. But that under the instruction given the jurors were required to find only that appellant was of sufficient mentality to know that his act was against the law; that the “morality requirement” in application of the right and wrong test was denied recognition.

The Court refused to give appellant’s requested Instruction No. 3, as follows:

“INSTRUCTION NO. 3

“The State of Utah has a mental hospital where patients who are suffering from mental illness may be incarcerated and treated for such time as is con-

sidered by a court of competent jurisdiction to be necessary" (Tr. 266).

STATEMENT OF POINTS

POINT I.

THE COURT'S INSTRUCTION NO. 9 WAS NOT PREJUDICIAL TO DEFENDANT'S CAUSE.

POINT II.

THE COURT DID NOT ERR IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 3.

ARGUMENT

POINT I.

THE COURT'S INSTRUCTION NO. 9 WAS NOT PREJUDICIAL TO DEFENDANT'S CAUSE.

"INSTRUCTION 9

"The defendant, in his defense, has pleaded and contends that he is not guilty of any crime charged in the Information, because, at the time the act was committed, he, the defendant, was insane.

"Insanity may be a complete defense to a criminal act, or it may reduce the degree of offenses, or it may have no bearing upon the question of guilt.

"Insanity is an element in determining questions of guilt of or punishment for crime only when

it renders the person so affected irresponsible or partly irresponsible. That is, the defendant cannot be convicted of a crime, if, at the time of the act, he was insane to such an extent that he did not know the nature of the act; that is, did not know he had a revolver, that it may be loaded, or that, if discharged, it might injure or kill; OR that, when he fired the shot, he did not know it was wrong in the sense that such act was condemned by morals *or* law; OR that he was unable, by reason of mental disease, to control his actions or impulses to injure or kill David Avon Frame.

“If defendant was afflicted with a disease of the mind, at the time of the alleged offense in any one or more of these three manners, then, in such case, he was not legally responsible and is entitled to an acquittal” (Tr. 252).

The adverse criticism made of the instruction is that the use of the disjunctive “or” instead of “and” between the words “morals” and “law” instructs the jury that if Kirkham knew that his acts were against the law he was legally sane. There has long been a question as to whether, under the M’Naghten test, “right and wrong” means legally or morally, right or wrong; it has been written on this subject:

“* * * The judges in M’Naghten’s Case apparently took the view that the knowledge of right and wrong involved in that test was a knowledge as to whether the act committed was wrong by the law of the land, stating, in answer to the first question as to the effect of an insane delusion, that the act would be punishable according to the nature of the crime committed, although committed in consequence of such a delusion, if the accused knew at the time

of committing the crime that he was acting contrary to the law of the land.

“And the argument that under the rule the term “right and wrong” should be taken in the moral rather than in the legal sense was rejected in *Reg. v. Windle* [1952] 2 QB 826, [1952] 2 All Eng. 1, the court saying that the law could only distinguish between that which was in accordance with law and that which was contrary thereto.

“In *United States v. Smith* (1954) 5 USCMA 314, 17 CMR 314, it was said that an accused’s notion that an act was morally right, although he realized its legal wrongfulness, would not constitute a defense under the ‘right-and-wrong’ test as applied in the military establishment.

“Knowledge that the act committed was a violation of the criminal law was held in *McElroy v. State* (1922) 146 Tenn. 442, 242 SW 883, to be sufficient to justify holding the accused responsible. The court held that the accused’s delusion that the killing in question had been directed by God was not sufficient to excuse him in view of the showing that he knew it was against the law, saying that it was no new thing for criminals to attempt to justify their conduct upon the excuse that they had acted on a divine command, but that men cannot put themselves beyond the reach of the law by the indulgence of such vain imaginations.

“And in *Harrison v. State* (1902) 44 Tex. Crim. 164, 69 SW 500, one who committed bigamy under the delusion that the act had been directed by a vision from God was held to be responsible, where he admittedly knew, at the time, that his act was punishable by the law of the state.

“However, the case of *Bergin v. Stack* [1952] Austr. LT 810, as stated in the Eng. & Emp. Dig.,

3d Cum. Supp. 1955, holds that in certain criminal cases the test of insanity is whether the accused knew that his act was wrong according to the standards of reasonable men, not whether he knew it was wrong as being contrary to law.

“And in *People v. Schmidt* (1915) 216 NY 324, 110 NE 945, LRA 1916D 519, Ann. Cas. 1916A 978, the court took the view that the wrong contemplated by the M’Naghten test is moral and not legal wrong.” [Anno. 45 ALR 2d 1447, 1454.]

Instruction No. 9 was given as a mimeographed “stock” instruction. The wording thereof is as suggested by this Court in *State v. Green*, 78 U. 580, 6 P. 2d 177, 184; (see also the recent (1956) case of *State v. Riggle*, 298 P. 2d 349, 367) and, of the identical instruction this Court has said:

“* * * The * * * instruction is a concise and correct statement of law applicable to the case in hand. *State v. Green* * * *.”
[*State v. Green*, 86 U. 192, 40 P. 2d 961.]

The rule as laid down by the Court in the M’Naghten case has been widely adopted and is, we think, the established law of this jurisdiction. *State v. Green* (both cases), supra; 45 ALR 2d at 1452-3. This Court has recognized both of the tests laid down by M’Naghten’s case, and has held that a person is not criminally responsible where he does not know the nature and quality of his act as well as not knowing right from wrong. *State v. Brown*, 36 U. 46, 102 P. 641; *State v. Green*, supra. This Court has also recognized the “irresistible impulse” modification of the M’Naghten rule. *State v. Green*, supra. Your appellant now asks this Honorable Court to further revise the rule by

adopting the minority views expressed in *People v. Schmidt*, 216 N. Y. 324, 110 N. E. 945, L. R. A. 1916D 519, Ann. Cas. 1916A 978; i. e., the view that the wrong contemplated by the M'Naghten test is moral but not legal wrong. Or, in the alternative, we opine, seek to have the Court declare that a defendant must [to be criminally responsible] know that the act complained of was legally *and* morally wrong. We think the rule best left as it is; that the jury's inquiry of the defendant should be, first, was the act committed wrong by the law of the land; second, did the defendant know the nature and quality of his act so as to be criminally responsible therefor, recognizing and applying the "irresistible impulse" test to the latter inquiry. Instruction No. 9 is clear and concise as to these tests; if a defendant be so insane that he does not know his act to be against law, then he cannot be criminally responsible and his moral outlook becomes as nothing. Legal insanity is a disorder of intellect. Moral insanity is a disorder of the feelings and propensities. The first is a defense, the second an excuse, a reason for wrongdoing, nothing more. To rationalize otherwise would be to sanction such crimes as polygamy as well as murder and make enforcement of law dependent upon individual moral concept.

May we say, not facetiously, that in giving full weight to all of the Court's instructions the jurors took little notice of the "or", used in place of the "and" between the words "moral" and "law" in Instruction No. 9. The word "or" is frequently misused. (Blacks Law Dictionary, Fourth Edition.) The jury found your appellant capable of distinguishing between right and wrong with reference to the particu-

lar act complained of and the rules governing the insanity defense in this jurisdiction.

POINT II.

THE COURT DID NOT ERR IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 3.

Your appellant requested of the Court the following instruction :

"INSTRUCTION NO. 3

"The State of Utah has a mental hospital where patients who are suffering from mental illness may be incarcerated and treated for such time as is considered by a court of competent jurisdiction to be necessary."

The requested instruction was not predicated on or applicable to the issues presented by the pleadings and the evidence and therefore it was erroneous and properly refused. *State v. Dubois*, (Utah) 98 P. 2d 354; *State v. Marasco*, 17 P. 2d 919, 81 Utah 325; *State v. Anderson*, 100 Utah 468, 116 P. 2d 968; *State v. Thompson*, 110 Utah 113, 170 P. 2d 153; *State v. BeBee*, 110 Utah 484, 175 P. 2d 478; see also 23 *C. J. S. Criminal Law*, Sec. 1310, page 902, and supplement. In *State v. Thompson*, supra, this Court said :

"We have repeatedly criticized the giving of abstract statements of the law to the jury, and held that it is the duty of the court to apply the law to the facts supported by the evidence and to not in-

struct on any question which is not involved in the case under the evidence.”

[Utah authorities there cited.]

In *State v. Riggle*, Wyo. 1956, *supra*, it was held that the power of the Board of Pardons was not pertinent to the issues and that it was proper not to instruct the jury thereon. We see an analogy.

Appellant claims for his requested instruction under authority of 64-7-36 (Subsection G), U. C. A. 1953, this statute is not for application in a criminal cause; where a verdict is returned of not guilty by reason of insanity the Court proceeds and makes its determination under 77-24-14, Code of Criminal Procedure, U. C. A. 1953. Be that as it may, your appellant appears to concede that there was no admitted evidence pertaining to incarceration for insanity or discharge of the defendant upon return of a verdict of not guilty by reason of insanity. Of the District Attorney's statement they say:

“* * * It was not founded on any evidence introduced by either party. * * *”

(Appellant's brief, p. 25.)

If so the above authorities, cited for the rule that the instruction was properly refused for want of applicability to the issues presented by the evidence, are controlling.

Appellant's argument under Point II of his brief concerns itself more pointedly to the conduct and remarks of the District Attorney than to the contended error of the Court in refusing the requested instruction. We are not

prepared to say that the contention raised for appellant is not without merit; we find ourselves concerned over the propriety of the remarks complained of, however, we here claim, upon the record, for *no prejudicial error*. If, as appellant contends, it was in fact anticipated by counsel that the District Attorney might claim that a verdict of not guilty by reason of insanity would result in the defendant being “turned loose” it might have been best had they consulted the Court prior to arguments as to their concern. An objection to the initial remark concerning the subject matter would also have been proper. Factually, however, it would seem that counsel for the defendant “wielded the shield into a sword” and therewith struck many telling blows for the defense. Appellant complains of the District Attorney as follows:

“The District Attorney did in fact state in his opening argument to the jury: ‘Should you acquit him, he would be turned loose’ (R. 204). Again in his rebuttle argument Mr. Anderson belabored at great length the proposition that defendant would be turned loose if found not guilty by reason of insanity” (R. 231, 232).

(Appellant’s brief, p. 25.)

For what the District Attorney uttered we turn to the record, opening argument:

“* * * It seems to me that the essence of this case is found in what we see in the testimony of the doctor, when he said every man who commits a killing or a murder—every man is—either does it because of neurosis, psychosis—which is a mental disease of one sort or another—or psychopathic personality, which is not insanity—which is a character disorder.

“And the defendant in this case is not one of the first two groups and would not be hospitalized, according to the report which the doctor returned. Should you acquit him, he would be turned loose.
* * *” (Tr. 204).

Closing argument:

“* * * Counsel has accused me of misleading you, and I refer now to the instructions, so that I may make no mistake and may correct any misimpression which they may have left with you.

“Defense said they don’t want to turn this boy loose on society, and they have said I have misled you; and nothing is farther from the truth, if, by a verdict of not guilty, you are led to believe that he may go free.

“The doctor here who has examined him has said that, in his examination which took place after this incident—counsel queried him and asked him if his examination did not include a consideration of the events of this night, and he said it did. The doctor went on to say that hospitalization at this time is not indicated, and I think that was his response in the report to the court.

“You interpret that—and you have the right; you have heard him. What is your conclusion? If it isn’t hospitalization on a plea—or on a verdict of not guilty—what is it? Where would you stand?

“Then, consider next with regard to this question of insanity; counsel says, ‘We are not asking you to turn him loose on society.’ That was Mr. Duncan, but, then, Mr. Black gets up and he argues Instruction No. 10 to you, which says that the defendant—legal insanity is—‘the test in determining legal insanity is not whether the defendant, at the time of committing the offense, knew what he was doing, but whether the defendant was in such mental

condition as to be able to distinguish between right and wrong in reference to the particular act complained of.

“ ‘In this connection, you are instructed that the State of Utah has the burden of proving to your minds beyond all reasonable doubt that defendant was sane at the time of killing David Avon Frame, and, if the State has failed to sustain this burden, you must find defendant not guilty by reason of insanity.’

“If he was legally insane, as they seem to be arguing with you, in support of the plea of ‘not guilty by reason of insanity,’ if Mr. Black wants you to believe that this is insanity, as he so positively declares the doctor said, aren’t they, then, asking you for a verdict of not guilty? If they ask you not to turn him loose on society, they are asking you for a verdict other than not guilty, and, if they are asking you for a verdict other than not guilty, then they don’t believe themselves—their argument on legal insanity—and, furthermore, the doctor did not say that this man was legally insane. He said that there are three categories into which a murderer falls, and he repeated them—psychosis, neurosis, or psychopathic personality; and the defendant is neither or the first two; the defendant is the third; and, with respect to the third, he said every murder in cold blood, and murder, except police and military in war, is abnormal.

“The cold-blooded murder is an abnormal act, and that every criminal, generally speaking, may be classified as either ‘moderate’ or ‘severe’ character disorder. Are we to excuse them all, then, because they have character disorder? Is that the purport of the defense? He said, even they would not turn the defendant free. * * *

(Tr. 231, 232, 233.)

Counsel for the defense countered the above arguments as follows:

LaMar Duncan, Esq.:

“* * * Might I say, right in the beginning, that we are not interested in—in any way, in your releasing this boy on society. Mr. Black and I, right from the beginning, have been very frank; we have been very open with His Honor and with you. We have not withheld anything, and we haven’t tried to tell you anything that wasn’t so. We have been just as fair as we know how in the defense of this young boy.

“Now, where are these sources that come to make up this boy’s thinking?

“And, while counsel is talking about ‘justice,’ I want to tell you that he misled you; that that man told you something that wasn’t true. He told you that the doctor here—and the doctor was fair, he was called by both sides. He did say—and I submit to you the record—ladies and gentlemen of the jury, he did say that a character disorder was a mental disorder. He wants to categorize in some sort of way so he can get over this thing.

“He is just blood-thirsty; that is all he has got in mind. I have practiced law for over twenty-three years, and I have never seen a prosecutor that would deliberately go out of his way to try to mislead. That was a deliberate attempt to mislead you, and I think you all got it. I think you heard what that doctor said; that doctor went into great detail, and this is what he said:

“He said a person with this kind of mind, he would feel in his own way that he was justified in what he did. He said he would have a build-up inside of him—a tension—that was built up, and, as

a result of that tension, he just reacted in a certain fashion, and that was all there was to it.

“Now, this is a terrible thing. I am not trying to minimize the thing that happened, nor am I trying to tell you that it is a small matter. It is a matter of deep concern, and I have said—and I repeat right at the outset—that we are not asking you, in any manner, to release this boy on society. That has never been our intention. * * *

(Tr. 209, 210, 211.)

“* * * Now, we have raised this question of insanity, not for any purpose of releasing this boy on society—a 19-year-old boy.

“Counsel comes in and he yells for blood. He wants you, ladies and gentlemen, to forget all Christian principles that you have. He wants you to revert to the old savage Mosiac law in this case, of an eye for an eye, and a tooth for a tooth. He wants to have the life of this boy. * * *

(Tr. 213.)

“* * *

“I am reading Instruction No. 17:

“‘If you find the defendant guilty of murder in the first degree, it will then be your duty to determine whether you will recommend that he be imprisoned for life at hard labor. If you do not make this recommendation, the court, under the law, has no alternative but to impose a sentence of death. If you do make this recommendation, the court is given the discretion of sentencing defendant either to life imprisonment at hard labor or death.’

“In other words, his Honor himself would take upon himself that responsibility.

“‘The making or withholding of the foregoing recommendation is a matter entirely within your

discretion to be exercised in any manner and for any reason you see fit, and you must not take anything that may or may not have been said or done by this court as any intimation of the court as to what should or should not control or influence you in reaching a conclusion on this matter.'

"Now, we are confronted with, what are we going to do? I have said, and repeat, that we, in no way, want you, or desire that you, should turn this boy loose on society; * * *

"He has said—his Honor has told you in this instruction that you can make than recommendation.
* * *

(Tr. 214, 215.)

"* * *

"It isn't much I am asking for. We are not asking—I repeat again—asking you to turn this boy loose, but I am asking you to give her just a ray of hope—that which the Master gave all of us—that she might, on Christmas morning, have a hope of life. It may be life behind four walls and for the rest of his life; and that in itself—that is your prerogative; but, again, I plead with you to give this boy—to spare his life—if not for his sake, for the sake of this boy's mother, who has already been through a thousand hells as she sat here. * * *"

(Tr. 217.)

Wayne L. Black, Esq.:

"* * *

"Counsel makes another remark that I want to refer to: 'If you acquit him, he will be turned loose.' That is as far from the fact as anything that could possibly be said in this court here today. Counsel knows, and you know, that determination of insanity—determinations of whether a person should be

incarcerated in mental institutions—are matters for the court, to be determined according to the court's dictates and the court's decisions.

"I say to you, there isn't anything this jury can do today that would turn this boy loose on society. There is no verdict you could render that would turn him loose on society. Your decision is going to determine one of three things: Either he is going to go into a mental institution—and Dr. Nelson said that this would require in-patient treatment over a long period of years; didn't you hear him say that?

"Either he is going into a mental institution, or he is going out to the State Prison for the rest of his life, or he is going to stand before a firing squad for the commission of this offense.

"Those are the three, and only three, alternatives that stand in the way of this boy's life at this cross-roads of his life. Now, I want that to be indelibly and crystally-clear before the court and jury. He is not going to be turned free on society, regardless of what anyone does.

"* * *

"Now, it is the law that, if you should return a verdict of first degree murder—and I say God forbid that you do—if you should return a verdict of first degree murder in this case, you have the further responsibility of determining whether or not to recommend leniency. If you do not recommend leniency, the court has no choice, no discretion but to sentence this boy to go out some cold, early morning, and to face a firing squad, or to face a hangman's noose. If you do recommend leniency, then, of course, the responsibility is with the court to further deliberate and determine whether his punishment shall be life imprisonment or shall be death at the hands of an executioner. * * *

(Tr. 225, 226, 227.)

So far as the pleadings and the evidence in this matter are concerned, both counsel for prosecution and defense were probably "out of bounds." From the entire proceedings and remarks made it is evident that the jury could not have possibly been misled and the defendant's cause was not prejudiced.

We contend that the evidence of defendant's guilt and sanity was so clear and convincing that no reasonable jury could be expected to return a different verdict, even in the absence of the irregularities, and the error complained of, if any, was harmless. *State v. St. Clair*, 3 Utah 2d 230, 244, 282 P. 2d 323, 332. If this is not a case where capital punishment should be imposed, then such punishment might well be eliminated from our statute books.

CONCLUSION

The verdict should be permitted to stand.

Respectfully submitted,

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Attorneys for Respondent.