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The State of Utah v. Louis G. Tryfonas : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

vs.

LOUIS G. TRYFONAS,
Defendant-Appellant.

Case No. 12427

BRIEF OF APPELLANT

Appeal from Judgment of the District Court of Utah County, Utah Honorable Allen B. Sorensen

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NATURE OF THE CASE

Appellant, Louis G. Tryfonas, appeals the grand larceny conviction rendered against him.

DISPOSITION IN LOWER COURT

On February 11, 1970, appellant, Louis G. Tryfonas, was convicted and adjudged guilty of the crime of grand larceny in the District Court of Utah County, State of Utah, Honorable Allen B. Sorensen presiding.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of his conviction for the crime of grand larceny. Alternatively, appellant seeks to have the case remanded for a new trial.

STATEMENT OF FACTS

Two United States Forest Service agents confronted the appellant, Louis G. Tryfonas, on Forest Service land in Hobble Creek Canyon. Two beef halves were in the immediate vicinity of the appellant. The appellant was apprehended by these agents and subsequently charged with the crime of grand larceny. The appellant was never alternatively charged with the crime of petty larceny, and during the trial no instructions regarding the lesser offense were given.

ARGUMENT I

THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION TO DISMISS ON THE GROUND THAT THE STATE FAILED TO PROVE THE CRIME CHARGED BECAUSE NO PROOF WAS OFFERED AS TO THE VALUE OF THE BEEF ALLEGEDLY STOLEN, NOR WAS ANY PROOF OFFERED THAT THE BEEF FIT WITHIN THE DEFINITION OF "COW" IN SECTION 76-38-4 UTAH CODE ANN. (1953).

Section 76-38-4 Utah Code Ann. (1953) provides:

> Grand larceny is committed in either of the following cases:
>
> (1) When the property taken is of value exceeding $50.
>
> . . .
>
> (3) When the property taken is a . . . cow.

In this case the state could have attempted to prove grand larceny in either of two ways: that the value of the property was in excess of $50, or that the property taken was a "cow." While the original complaint contained no reference to "cow" and charged the appellant with taking property "of a value in excess of $50," the state apparently abandoned this theory and attempted to establish grand larceny because of the nature of the property. The information had no reference to value, charging appellant with the theft of "one cow," and the state presented absolutely no evidence of the value of the property allegedly taken, even though it called a witness who could have competently evaluated the worth of the beef. (T. 35.)

Since no evidence of value was ever presented, this grand larceny conviction may only stand if the conduct of the appellant, as proved by the state, fell within the proscription of subsection (3) of section 76-38-4. In other words, to properly deny the appellant's motion to dismiss because the evidence was insufficient to establish the elements of the offense, the state had to prove that the appellant took a cow and not merely that he took two pieces of a cow's carcass.

The threshold problem here presented is: "When does a cow cease being a cow?" It is initially apparent that section 76-38-4 contains no reference to the theft of beef. Therefore, it would seem that the cow must be taken alive to fall within the statute. The Utah Supreme Court, however, ruled in *State v. Laub*, 102 Utah 402, 131 P.2d 805 (1942) that one means of "taking" a cow is to kill it and, accordingly, grand larceny may be perpetrated by taking a dead cow *if the one taking it also killed it.* In *Laub* the court stated:

> Defendants in their brief contend that in order to constitute the crime of grand larceny, where the value of the meat does not exceed $50, the calf must be shown to have been alive during the entire course of the commission of the crime. This contention would appear correct if the person who took the carcass had had nothing to do with the killing of the animal. But where the animal is killed as a means of making the theft possible, the crime of grand larceny is complete just as much as if it had been loaded on a truck alive and taken away. This was a six month old calf. It was on the open range. If the person seeking to steal it shot it in order to catch it, the crime of grand larceny would be made out at the time it was shot and taken into possession. The killing or shooting was but the manner chosen to obtain possession. *State v. Laub*, 102 Utah 402, 131 P.2d 805, 807 (1942).

The significance of the *Laub* decision is that it does not change the obvious meaning of the statute. The taking of a cow still is restricted to the taking of a live animal. *Laub* simply made it clear that a two-step taking is

possible within the act—killing (caption) and transporting (asportation). This decision is compatible with the general construction rule that criminal statutes must be strictly construed. *Laub* clearly requires the one charged with the larcenous possession to be the one who killed the animal in order to sustain a grand larceny conviction. Any other standard would broaden the definition of "cow" in the act and force the court into drawing an artificial line somewhere between the taking of a cow on the open range which recently died a natural death and the taking of a steak in a grocery store.

The *Laub* decision puts an additional burden on the state when it attempts to prove grand larceny solely because the property allegedly taken was two pieces of beef carcass. Assuming that the state can prove that the defendant took the beef, it must in addition prove that the defendant killed the cow from which the beef in his possession came. This is an element of the offense of grand larceny, just as proof of value in excess of $50 would be, and must be proved beyond a reasonable doubt.

At first blush, it would appear that the state misread the *Laub* case and concluded from it that proof that the carcass was once a cow is enough to bring the conduct within the "taking of a cow" provision. The state made no systematic attempt to establish that the appellant killed the cow in question. At the close of the state's case, the appellant moved for dismissal because reasonable minds could not differ with the conclusion that the

state failed to prove the appellant killed the animal. (T. 37-38.) This motion was erroneously denied.

Examining the state's evidence in the light most favorable to it, only one piece of testimony had even a remote relationship to the issue of who killed the animal. That testimony was to the effect that the Forest Service agents, during the course of the arrest, shined a light into a nearby car and noticed a 45 to 50 caliber smooth bore percussion cap rifle in the back seat. (T. 22, 27.) That, however, is the sum total of the state's evidence on the issue of who killed the animal. No evidence was presented as to how the cow was killed, let alone whether it had been killed by such a distinctive weapon as a smooth bore 50 caliber rifle; no evidence was offered to prove the observed weapon had been, or even could be, fired; no evidence was offered that someone had head a shot; in fact, no evidence was even offered to prove the ownership of the car in which the rifle was spotted.

If the state is to rest on the existence of a rifle in the back seat of somebody's car as evidence that the appellant killed the cow, then surely it must make some kind of an effort to link the rifle to both the appellant and the means of killing the animal. In this case there is not any evidence to support even a tenuous connection with either. We are, therefore, presented merely with the existence of a rifle in the back of someone's car in the middle of an area where many people carry firearms. Without so much as even testimony of a bullet hole in the carcass, or evidence connecting the appellant to the owner-

ship or possession of the weapon, no light can make this evidence probative on the issue of who killed the cow. To infer that since there was a rifle and a dead cow, the cow was killed by a rifle, and then to infer that the appellant killed the cow is at best an inference on an inference, and more likely not even logically related.

Since no evidence of value was ever placed before the finder of fact and since a reasonable man could not conclude the evidence sufficient to prove the appellant killed the cow, the crime of grand larceny was never established as to the appellant, and his conviction must be reversed.

ARGUMENT II

THE TRIAL COURT ERRED IN NOT INSTRUCTING THE JURY AS TO THE DEFINITION OF THE WORD "COW" IN SECTION 76-38-4 UTAH CODE ANN. (1953).

The trial court's only instruction as to what constituted grand larceny was as follows:

> 'Grand Larceny' is the felonious stealing taking and carrying away of a heifer or cow, being the personal property of another.

The appellant excepted to the instructions because they made no effort to clarify for the jury when a cow ceased to be a cow and when it became beef. As pointed out in Argument I, *supra*, the standard in Utah is clear. *State v. Laub*, 102 Utah 402, 131 P.2d 805 (1942) states

that one must kill the cow in order to be liable for grand larceny under the above definition when a live cow is not the subject of the theft.

In this instance it was crucial to any consideration of the offense to know exactly what conduct was within meaning of "taking a cow." Here the evidence showed only two pieces of beef and not a live cow as the subject matter of a possible theft. Since the instructions did not state the *Laub* rule, the jury was permitted to infer that any taking of beef could fall within the definition of grand larceny.

The jury should have been instructed to the effect that they could only find the appellant guilty of grand larceny if they were convinced that he had taken part in the killing of the animal. Without this instruction there is nothing to prevent a jury from logically concluding the theft of a side of beef from a butcher shop to be grand larceny.

No instruction was given regarding the value of the property taken as a means of finding grand larceny, and no instruction was given to the jury regarding the different degrees of larceny. (T. 40.) The jury was left completely ignorant of the fact that the crime of petty larceny exists and that it was entirely possible that the appellant could be guilty of the lesser offense and not the greater. Because of the improper instructions a juror could have voted for a grand larceny conviction where he was convinced the appellant did in fact steal something, and yet not convinced that he killed the animal. The

state's decision to not charge the lesser offense, combined with the improper instructions to the jury, makes it dangerously likely that a man was convicted of a crime of greater degree than the jury really believed him guilty of.

For the reasons stated in Argument I, *supra*, it is apparent that only the crime of petty larceny is at all supported by the evidence. If the grand larceny conviction is not reversed outright because of the insufficiency of the evidence (see Argument I, *supra*), it must at least be remanded in order that the jury may properly consider the lesser offense.

CONCLUSION

For the foregoing reasons it is respectfully contended that the conviction against appellant should be reversed. Alternatively, it is contended that the case be remanded for a new trial.

Respectfully submitted,

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