1972

State of Utah v. Donald Albert Abram aka Donald A. Rasmussen : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, -vs- ONALD ALBERT ABRAM, aka onald A. Rasmussen, Defendants-Appellant.	Case No. 12609

BRIEF OF APPELLANT

An Appeal to Dismiss the Conviction of ppellant under the Bastardy Act 77-60-1 t. seq., U.C.A. (1953) as Amended, Entered n the District Court of the Third Judicial istrict, Honorable Marcellus K. Snow, Pre- iding.

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STATEMENT OF THE NATURE OF THE CASE

This is a Bastardy Action brought pursuant to the Bastardy Act 77-60-1 et. seq. Utah Code Annotated (1953) as Amended.

DISPOSITION IN LOWER COURT

Criminal suit was filed against Defendant-Appellant for the crime of Bastardy. Trial by jury was held before the Honorable

Marcellus K. Snow, a Judge of the Third Judicial District of the State of Utah, at St. George, Washington County, State of Utah. Defendant-Appellant was found quilty of the crime of Bastardy.

RELIEF SOUGHT ON APPEAL

Appellant respectfully requests the Court to set aside his conviction for the crime of Bastardy on the grounds that in light of the Uniform Act on Paternity Appellant was denied equal protection of the law by being subjected to criminal procedures before trial and a civil standard of proof during trial; that sections 1, 2, and 3 of the Bastardy Act 77-60 U.C.A. (1953) as amended have been repealed by implication by the Uniform Act on Paternity 78-45a et. seq. U.C.A. (1953); that evidence of prosecutrix's opportunity to get pregnant by other men was erroneously limited to a one month period; and that a document purporting to prove

Appellant's guilt was erroneously admitted into evidence.

STATEMENT OF THE FACTS

Ronald Albert Abram, Appellant, was charged with the crime of Bastardy. A complaint was made by the prosecutrix, a summons was issued and served, Appellant was placed under arrest and arrangement proceedings held.

On February 12, 1971 the Respondent submitted a bill of particulars persuant to 77-21-9, U.C.A. (1953). On March 2, 1971 Appellants Attorney filed a motion to suppress the introduction of a typewritten, unsigned letter alleged by respondent to have been written by the Appellant. By order of the court dated March 17, 1971, Appellant's motion to suppress was overruled.

Trial by jury was held before the Honorable Marcellus K. Snow, a Judge of the Third Judicial District of the State of Utah, at St. George, Washington County, State of Utah,

on April 14, 1971. During trial, Appellant's attorney objected to the Court's ruling that the period of gestation be confined to a one month period. Also, Appellant's attorney objected to jury instructions numbered 2, 3 and 4 upon the grounds that Appellant was being subjected to both criminal and civil procedures in the same cause of action which violated the 14th amendment right of equal protection, because others in his class are subject to wholly civil procedures of the Uniform Act on Paternity, and in light of the Uniform Act on Paternity, the provisions of the Bastardy Act providing for criminal procedures are repealed by implication.

On April 15, 1971 Appellant was found guilty of the crime of Bastardy.

ARGUMENT

POINT I

IN LIGHT OF THE MORE RECENTLY PASSED UNIFORM ACT ON PATERNITY 78-45a-1 et. seq., UTAH CODE ANNOTATED (1953) PROSECUTION OF THE BASTARDY ACT 77-60-1 et. seq., U. C.A. (1953) AS AMENDED CONSTITUTES A DENIAL OF EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE FOUR-

TEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. The right of equal protection of Appellant was violated by subjecting him to both criminal and civil procedures in the same cause of action while others in his class are subject to the wholly civil procedures of the Uniform Act on Paternity. Therefore Appellant specifically objects to sections 1, 2 and 3 of the Bastardy Act which provide for criminal procedure before trial in the complaint, warrant, arrest and bail procedures.

77-60-1 provides:

> "Arrest of father on Complaint of mother when an unmarried female pregnant or delivered of a child, which by law will be deemed a bastard shall make complaint to the Justice of the Peace in the County where she may be so pregnant or delivered, or where the person accused may be found, and shall accuse, under oath or affirmation, the person with being the father of such child, it shall be the duty of such Justice to issue a warrant against the person so accused and cause him to be brought forthwith before him, or, in his absence, before any other Justice of the Peace of such County."

77-60-2 provides:

> "Binding over to District Court. Upon appearance of the Defendant, it shall be the duty of the County Attorney to examine the woman under oath or affirmation before the Justice and in the presence of the Defendant touching the charge against him. The Defendant shall have the right to controvert such charge, and evidence shall be heard as in other cases. If the Justice shall be of the opinion that there is probably cause to believe that the Defendant is the father of such bastard, it shall be his duty to bind the Defendant, with sufficient surety, to appear before the District Court and answer such charge as in other cases. If the Defendant shall neglect or refuse to give bond as security as aforesaid, the Justice shall cause him to be committed to the jail of the County."

77-60-3 provides:

> "For an information to be filed with the District Court, of criminal proceedings."

All three of these sections were applied to Appellant and are criminal in nature. 77-60-1 provides for a complaint by the mother to the Justice of the Peace with issuance of warrant and the making of the arrest following. 77-60-2 provides that probable cause must be shown. 77-60-3 provides that an information is to be filed in the District Court. On the other hand, Section 78-45a-5 of the Unifor

Act on Paternity, supra, gives the District Court jurisdiction to determine rights and obligations of the parties. 78-45a-2 says that all that is necessary to start the action is for the mother, child, or agency, who having expended money on the child, have an action against the father, to file a Petition with the Court alleging such paternity, and requesting the appropriate remedy. In other words, the process is wholly civil in nature.

In order to have equal protection of the law, "they have to affect allike all persons similarly situated." State vs. Shondel, 23 Utah 2d 343, 453 P. 2d 146 (1969). Citing McDonald D. vs. Commonwealth of Massachusetts, 180 U.S. 311 21 S.C. 389, 45 l. ed. 542.

The Supreme Court of Utah in the case of State vs. Twitchell, 8 Utah 2d 314, 333 P. 2d 1075 (1959) at 317, stated:

> "We agree that (referring to the proposition that the prosecutor shall not be given a choice of whether to proceed under a felony statute or under a misdemeanor statute under the same set of facts) this may tend to deny to Defendant and others of his class equal

protection of the laws, if the same identical facts may be used in prosecutions under two completely integrated statutes . . ."

The facts in the Twitchell case did not support that thesis. The Court determined tha the felony of automobile homicide was taken ou of the old act, therefore there was no overlapping of the two statutes. In this case there is no such distinction. Both acts are designe to compel a natural father to contribute towards the support of his offspring. They both provide basically the same test, remedies, etc., except for the process of getting into Court. Both acts provide for support and maintenance of the child, expenses of pregnancy, and educa tion of the child. 77-60-7, 78-45a-5.

There is a four year statute of limitatio on back support, 77-60-15, 78-45a-3. Sections 18 to 23 of the Bastardy Act provide for blood tests and the procedure involved is essentiall the same as those provided for in the Uniform Act on Paternity, 78-45a-7 to 10.

There are differences in the two acts, to wit:

1. 78-25-19 limits the number of qualified examiners to three (3) whereas 78-45a-8 has no limitation on the number of examiners.

2. 78-45a-8 provides that a party may demand that other experts perform other tests; 78-25-19 is silent as to the point.

3. 78-25-22 provides that the Court may resolve the question of paternity against the party who will not submit to the test; the Uniform Act on Paternity has no similar provision.

Admittably these differences are technical however, both acts may be invoked against the same person upon the same set of facts, thus the Appellant was subject to prosecution for the same identical facts under two completely integrated statutes.

B. In Griffin vs. Illinois 351 U.S. 12, 100 l. ed. 891 (1956) at 18 the Court said:

> "Consequently at all stages of the proceedings the due process and equal protection clauses protect persons like petitioner from invidious discrimination."

At the point of proceedings which Appellant is objecting, that is the incongruous use of criminal procedure before trial and a civil standard of proof during trial, there is a denial of equal protection.

Presecution of the Bastardy Act allows th prosecutrix to go to the County attorney instead of a private attorney, as a result, Appellant was sought out by warrant, arrested and forced to post bail in order to stay out of jail. This would not have occured if Appellant were prosecuted under the Uniform Act on Praternity. Thus, Appellant was not treated alike with other members of his class nor was he protected at all stages of the proceedings from invidious discrimination.

C. Further, since an action to determine paternity is civil in nature, Appellant should not have been prosecuted under the Bastardy Act which provided for criminal procedures to be followed in the making of the complaint, issuing the warrant, making the arrest and posting bail.

> "The question is no longer an open one in this Jurisdiction. That these proceedings though criminal in form, are, in their nature and in the object sought, civil, has been the settled law in this State since the case of State vs. Reeves, 43 Utah 447, 135 P. 270, which was followed and approved in the case of State vs. Hammond, 46 Utah 249,148 P.420 and State vs. Anderson, 63 Utah 171, 224 P. 442, 40a A.L.R. 94. In our opinion the foregoing cases are conclusive upon the questions presented by such assignments of error." State vs. Knight, 76 Utah 514, 290 P. 774 (1930).

The decisions of the Court have consistently declared that civil, not criminal, rules would be followed in Bastardy proceedings. In the case of State vs. Reeves, supra, the question as to the quantum of proof required to establish the paternity of the child was held by the Court to be a preponderance of the evidence and not beyond a reasonable doubt. Again in State vs. Anderson, supra, the Court held that the purpose of the proceedings in the Bastardy Act was not to inflict punishment by imprisonment, but to compel the father to support the bastard child during the tender

years; therefore, the action was determined to be civil in nature and not criminal. Further, in State vs. Kranendonk, supra, the Court held that the Defendant in that case was not entitled to a motion in arrest of judgment because the proceedings being civil and not criminal did not entitle him to that motion.

In the cases cited, an issue of whether civil or criminal procedure rules would be utilized was involved. In all instances, the Civil Rules of Procedure were deemed to be proper by the Utah Court. Based upon the holdings of the Court cited, it is clear that the Rules of Civil Procedure apply to the bastardy action brought against Appellant. Therefore, Appellant was denied the right of equal protection of the law in that he was prosecuted in a civil action under criminal rules of procedures.

The Appellant asks that he be given the right of equal protection of the law. The

Court has consistently held that all persons in a class must be treated alike. Appellant is not treated alike with others who are prosecuted under the Uniform Act on Paternity. Thus Appellant was not afforded his right of equal protection when prosecuted under the Bastardy Act; therefore, the Appellant request that Sections 1, 2 and 3 of the Bastardy Act, supra, be declared violative of the Fourteenth Amendment of the Constitution of the United States.

POINT II

THE BASTARDY ACT 77-60 SECTION 1, 2 and 3, UTAH CODE ANNOTATED (1953) AS AMENDED, HAS BEEN REPEALED BY IMPLICATION BY THE UNFORM ACT ON PATERNITY 78-45a-1 et. seq., U.C.A. (1953)

A. The criminal procedure utilized in the Bastardy Act is so repugnant to the new act that those provisions become repealed by implication. The two acts, the Bastardy Act and the Uniform Act on Paternity, are substantially the same. The most significant difference is the arrest and arraignment pro-

visions in the Bastardy Act.

1. In Utah, the rule of construction is that where there are two acts covering the same subject matter, they will both stand, absent a serious conflict. In State vs. Shondel, supra, the Court states:

> ". . .the generally recognized rule that where there is a conflict between two legislative acts, the latest act will ordinarily prevail."

To be impliedly repealed, the offensive act must have been passed by the legislature prior to the other act. The Bastardy Act was originally passed in 1911 and has passed down through the years in about the same form. The Uniform Act on Paternity was passed in 1965. The Uniform Paternity Act, based upon the Court's holding in Shondel, supra, prevails over the Bastardy Act, where the provisions of the two acts are in conflict.

2. In addition to the time sequence, there must be irreconcible conflict. The Court stated in Glenn B. Farrell, 5 Utah 2d 439, 30 P. 2d 380 (1965):

"In order for a latter inactment to take presidence over a prior one without expressly repealing it, there must be irreconcible conflict. . ."

In the Glenn case the Court found that irreconcible conflict did not exist. The Court relied on proper statutory construction that requires that the Statutes be harmonized whenever possible. It is impossible to harmonize the criminal process in the Bastardy Act with the civil process of the Uniform Paternity Act. The irreconcible conflict arises from those provisions of the Bastardy Act which provides for a complaint, warrant, arrest, binding over and for an information to be filed. All of these are criminal procedures.

The Uniform Act on Paternity eliminates criminal procedure completely. The Court has consistently held that Paternity proceedings are civil. It is impossible to interchange these procedures between acts as they are entirely inconsistent. Using the criminal procedure of the Bastardy Act would violate

78-45a-2 of the Uniform Act on Paternity. Also using the procedures of the Uniform Act on Paternity would violate 77-60-1 of the Bastardy Act. In each instance, suit could not be commenced since the action was not properly instituted. Under these circumstances the Court would not have jursidiction to hear the matter. Thus an irreconcible conflict has arisen between the two statutes, and pursuant to the holding in Shondel, supra, the latter Uniform Act on Paternity prevails.

In addition, the criminal processes utilized in the Bastardy Act are clearly not to be used in this type of action because had the legislature wanted criminal procedures, they could have included it in the new law. Rather, they have adopted the Uniform Act on Paternity supra, with its wholly civil procedures. Thus they impliedly repealed the irreconcible procedures of the Bastardy Act.

B. An additional fact in support of the repeal of the Bastardy Statute is specific statutory language. 78-45a-15 Of the Uniform Act on Paternity, U.C.A. (1953) states:

> "This act shall be so interpreted and construed to effectuate its general purpose to make uniform the law of these states which inact it."

Of the three other states which adopted this act, two, Mississippi and Kentucky, have repealed the Bastardy Act. The Mississippi Bastardy Act was similar to ours. 4 Miss. Code 383 (1943) et. seq., provided for crimina procedures prior to District Court proceedings That act was specifically repealed by the adoption of the Uniform Act on Paternity. 4 Miss. Code 383-01 (Supp.) (1942). The repeal in the new act in Kentucky can be found at 60. K.R.S. 406 et. seq.. Therefore, to effectuate the purposes of the act the legislature must have intended the Bastardy Act to be repealed so as to be uniform throughout the states adopting said Uniform Act.

C. In addition, 78-45a-17 of the Uniform Act on Paternity, U.C.A. (1953) states that "this act applies to all cases of birth out of wedlock as defined in this act where birth occurrs after this act takes effect." This is a clear statement by the legislature that the Uniform Act on Paternity should be used in all cases arising after its enactment. It shows that the legislature intended the outdated and needless bulk of the Bastardy Act proceedings were to give way to the more rational approach of the Uniform Act on Paternity.

In order to effectuate the better administration of justice, Appellant respecfully requests this Court to declare the irreconcibl terms of the Bastardy Act repealed by implication.

POINT III

A TYPEWRITTEN UNSIGNED LETTER WAS ADMITTED INTO EVIDENCE WITHOUT ITS AUTHENTICITY BEING ESTABLISHED, WHICH RESULTED IN PREJUDICIAL ERROR AND APPELLANT'S CONVICTION.

Without respect to their admissibility, letters and telegrams are subject to the general rules of evidence, and to various rules relating to documentary evidence. Baker vs. Glennwood Mining Co., 82 Utah 100, 21P. 2d 889 Corpus Juris 2d., Evidence Sec. 357. Proof must be made preliminarily that the proferred writing is authentic and that the party agains whom it is offered is in some way connected with it by having written it, received it or acted pursuant to its contents. Murdock vs. Farrell, 49 Utah 314, 163 P. 1102 (1907); Anderson vs. Thomas, 108 Utah 52 (1945), 159 P 2d 142.

A. 78-25-9 U.C.A. (1953) states the manner in which writings may be proved:

"Any writing may be proved either:

(1) By anyone who saw the writing executed; or,

(2) By evidence of the genuineness of the handwriting of the maker; or,

(3) By a subscribing witness."

The letter purported to have been written by Appellant was not authenticated in any of th above ways. There was no testimony of anyone who saw Appellant execute the writing, the letter was typewritten and unsigned and the respondent did not produce a subscribing witness. Therefore, the letter should have been excluded Continental Baking Co. vs. Katz, 68 C. 2d 512, 67 Cal. Rpt. 761, 439 P. 2d 889.

2. A proper foundation must be laid for the admission of documentary evidence, that is the identity and authenticity of the document must be reasonably established as a pre-requisite to its admission into evidence. Jones on Evidence, Vol. 3 pg. 1044.

The only evidence offered to prove that Appellant wrote the subject letter is a smudge post-mark and an accusation that the letter contained information that only the Appellant could have known.

In 9 A.L.R. 984, it is stated that the authorities generally concede that under proper facts and circumstances the authenticity or genuineness of a letter may be established by indirect or circumstantial evidence, without resort to proof of handwriting or typewriting. Among other things upon which reliance may be placed is that a letter states facts which coul only be known to or relate to the purported writer.

This rule requires a showing of informatic contained in the letter which would only have been known to the author. Respondent made no such showing. The letter contains information known to both the prosecutrix and the Appellan thus, authentication was not accomplished.

Further, the post-mark on the letter was smudged, not legible. Alone, the post-mark ev if legible would not be suffifient to authenticate the document. Reynolds vs. Hinricks, 16 S.D. 602, 94N.W. 644- Jones on Evidence, pg. 1205.

Therefore, the letter was improperly admitted into evidence.

3. Admitting the letter into evidence and allowing the jury to take it into the jury room for reference and analipis was prejudicial error. In Joseph vs. Groves Latter-day Saints Hospital, 10 Utah 2d 94, 348 P. 2d 935, the court held:

> "The burden is upon the appellant not only to show that there was error, but that it was prejudicial to the extent that there is reasonable likelihood that in its absence there would have been a different result."

In the Joseph case, supra, the court four error but reuled it was harmless error. Admitting the letter into evidence was not harmless error. The letter states that its author is the child's father. When allowed into evidence it was an admission by the author of his guilt and by admitting it as evidence Appellant was deemed the author. The letter was enough standing alone to convict the Appellant.

If the letter had not been admitted, Appe lant would not have been convicted. The only

testimony which accused Appellant of being the father was that of the prosecutrix. In addition, the evidence is contradictory as to whether Appellant was with prosecutrix during the period of gestation, as it was proved by Appellant that he was attending school some 316 miles from the home of prosecutrix. Also Appellant established that during the period of gestation, prosecutrix had opportunity to be with men who might have fathered her child.

Therefore, Appellant would not have been convicted if the letter had not been admitted into evidence.

Therefore, Appellant respectfully request the court to dismiss his conviction since the admission into evidence of the letter was improper and resulted in prejudicial error and in his conviction.

POINT IV

EXCLUSION OF EVIDENCE WHICH SHOWED THAT PROSECUTRIX HAD AN OPPORTUNITY TO HAVE SEXUAL RELATIONS WITH MEN OTHER THAN APPELLANT EXCEPT FOR A

ONE MONTH PERIOD WAS ERRONIOUS AND PREJUDICIAL ERROR RESULTED.

A. Evidence of prosecutrix's sexual relations with men other than Appellant during the period of conception is permissible.

> "In paternity proceedings, refusal to permit plaintiff to be asked, when testifying as an adverse witness under the code of civil procedure, whether she had sexual relations with other men during period of which she conceived, was error. Croset vs. Page, 147 C.A. 2d 385, 305 P. 2d 121.

In the Croset case the court found that conception took place on the night of June 14, 1952. Nevertheless, the court found that evidence of sexual relations of prosecutrix with men other than Appellant should have been admitted for the period in which prosecutrix could have become pregnant. The court in the present case limited the period of time for which such evidence may be introduced to one month, October 15, to November 15. Based upon the holding in the Croset case, the court should have allowed such evidence for a period in which conception may have taken place. The

court in the Croset case found that period to be two months.

Appellant has the right but not the burde of showing that prosecutrix had such relations with other men during or about the time when i the ordinary course of nature the child must have been received. Berry vs. Chaplin, 169 P. 2d 442 (1942)

In the Berry case, supra, the court found the period of gestation to be two months.

The period of gestation is that period in which presecutrix can conceive. The only test imony establishing the period of gestation is that of the doctor and the prosecutrix. The doctor's opinion is based upon the prosecutrix statement to him of the date of her last perio Therefore, the doctor was relying upon prosecu trix's opinion of when she was able to get pre nant. Obviously, prosecutrix's will pick the date that collaborates her complaint.

In light of the Croset and Chaplin cases, a period of two months would be reasonable.

Further, testimony other than prosecutrix's as to the period of gestation is lacking. In view of the above, the trial court was not correct in limiting the period of gestation to one month.

B. The exclusion of evidence showing that prosecutrix had sexual intercourse within the period of gestation with other men was prejudicial error.

The Joseph case, supra, requires that an error to be prejudicial must be such that if it had not been committed defendant would not have been convicted. If Appellant had been allowed to inquire beyond the one month period, he would have introduced evidence tending to establish that prosecutrix had sexual intercourse with other men in November and in October and late September. The introduction of this evidence would have required that prosecutrix bear a greater burden in proving that Appellant was in fact the father, which burden

plaintiff did not bear. Therefore, the exclusion of such evidence was prejudicial error.

Appellant requests the court to dismiss his conviction because the trial court erroniously excluded evidence which would have prevented his conviction.

CONCLUSION

Appellant respectfully requests the Court to reverse the lower court on the following grounds:

1. That appellant was denied his right of equal protection of the laws in that he was subject to both criminal and civil procedure rules while others in his class are subject to the wholly civil procedures of the Uniform Act on Paternity, 78-45a-1 et. seq., U.C.A. (1953).

2. That sections 1, 2 and 3 of the Bastardy Act 77-60, U.C.A. (1953) as amended have been repealed by implication by the Uniform Act on Paternity 78-45a-1 et. seq., U.C.A. (1953).

3. That evidence tending to prove that prosecutrix had sexual relations with other men during the period of gestation was

errorneously excluded by the lower court.

4. That a letter alleged by respondent to have been written by the Appellant and admitting the authori's guilt was erroneously admitted into evidence.

RESPECTFULLY SUBMITTED

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