1968

State of Utah v. Tony Renzo : Brief of Defendant-Appellant

IN THE SUPREME COURT

of the

STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

v.

TONY RENZO,
Defendant and Appellant.

Case No.
11038

BRIEF OF DEFENDANT-APPELLANT

Appeal from the Third District Court of
Salt Lake County, Judge Bryant H. Croft,
to the Supreme Court of Utah

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STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from the conviction of voluntary manslaughter and the provision of statutory sentence therefor, on the basis that he was denied due process of the law.

DISPOSITION IN THE LOWER COURT

Mr. Renzo was tried to a jury before the Honorable Bryant H. Croft, Third Judicial District Court in and

for Salt Lake County, State of Utah, on an information alleging that on the 27th day of February, 1965, he murdered Bertha Magera with malice aforethought. The jury returned a verdict of voluntary manslaughter.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the verdict and judgment of the lower court reversed and the appellant discharged.

STATEMENT OF FACTS

The appellant was arrested in the early morning of February 28, 1965, in Salt Lake County, State of Utah, and charged with first degree murder in that on February 27, 1965, Tony Renzo murdered Bertha Magera.

Preliminary hearing was had on the 1st day of April, 1965. The matter was continued to April 5, 1965 at 2:00 p.m. at the request of the State, to bring in more evidence. A further stay was granted to May 5, 1965 to await certain FBI reports. Defendant was placed on bond by the District Court. On the continued date, the State rested, and after argument the court dismissed the case. The file was transferred to the District Court on May 13, 1965 for filing.

On December 28, 1966, a new complaint (R. 11) was signed and filed by the same complaining witness, re-charging the defendant in identical language with the murder of Bertha Magera. Defendant was placed on bond of $2,500.00 on application to the District Court on the

29th day of December, 1966.

On December 30, 1966, defendant moved to dismiss, and the motion was denied. Preliminary hearing was set for February 13 and 14, 1967, and on February 2, 1967, the District Attorney's office (the District Attorney's office tried the second preliminary hearing) moved to continue preliminary hearing to March 9 and 10. The motion was denied. On February 14, the State moved for a continuance to March 23 and 24, 1967, and the motion was granted over the defendant's objection. On March 23 and 24, preliminary hearing was had and the court took the defendant's motion to dismiss under advisement until March 31, 1967, and on that date for a further period until April 7, 1967, on which date the court bound the matter over to the District Court on the charge of first degree murder (see Magistrate's transcript R. 2 and 3).

There was no substantial new evidence or different evidence in the two preliminary hearings (transcript of preliminary hearing April 1, 1965 and transcript of preliminary hearing March 23 and 24, 1967.)

On April 24, 1967, the defendant was arraigned and after filing a motion to dismiss, plead not guilty. The motion to dismiss was set for hearing on May 4, 1967. Prior to hearing on the motion to dismiss, the defendant's bond was discontinued by District Judge Bryant H. Croft.

At the hearing on the motion to dismiss, District Attorney Banks was called by the defendant (R. 125, et seq.) and testified that he looked into the matter of State v. Renzo in the early summer of 1965 (R. 126); there was a grand jury in session during the fall of 1965; he never placed the Renzo matter before the grand jury (R. 126); that after reading the transcript of the preliminary hearing in the summer of 1965, he was convinced that the case should have gone to trial (R. 127); that he did not have the case refiled in the spring or summer of 1965 because he had other matters on his mind (R. 129); that he had three Assistant District Attorneys during this period (R. 129).

The motion to dismiss was argued and denied by Judge Croft.

The case was set for trial on June 12, 1967. The jury was selected, and the case tried on June 12 through June 15, 1967.

Twenty-three witnesses were sworn and testified. Testimony showed that Bertha Magera was found with numerous bruises and lacerations diversified over the entire body, together with lacerations of the vaginal area, and a crushed chest. Witness Dr. Probert found her to be dead on his examination at her home on the morning of February 28, 1965.

Pathologist Dr. Swift testified that the cause of death was "respiratory failure due to the fracture of the chest wall and inability of the chest wall to move

together with collapse of the right lung" (R. 228).

He testified that no other combination of the in-injuries other than the chest injury was sufficient to cause death (R. 233); that the bruises and lacerations other than the chest injury did not contribute to the death (R. 233).

He could give no opinion as to what trauma caused the chest injury other than it was from the front and couldn't have been caused by a blow from the fist (R. 239).

Mrs. Magera was lying face up on her bed partially covered by a blanket, reddish smears and patches of what appeared to be human hair were found throughout the house and on various objects, including a stove kickplate and a bamboo stick.

Testimony showed that the defendant had been at the Magera house in the late afternoon, again at night when he had a fight with his brother-in-law Williams resulting in much bleeding from Williams in the kitchen, and again early in the morning when he opened the door for his sister and sister-in-law and discovered Bertha Magera in the unlighted bedroom.

The deceased had been drinking and had a .265 blood alcohol by weight. Dr. Swift testified that she would be considered drunk (R. 241).

Numerous articles including a stove part, a bamboo pole, various shoes, hair samples, bottles, rags, and a mop were sent to the FBI for testing. There was no evidence as to whether the various stains thereon were blood or, if so, what type. There was no matching of hair samples to the deceased, the defendant, or the brother-in-law who fought and bled in the house that night.

There is no evidence in the record as to the source of the trauma which caused the chest injuries from which Bertha Magera died.

Various pictures were admitted with reddish stains which appeared to be blood and substances which appeared to be hair to the photographer, Sgt. Wade Robinson. There is no evidence in the record as to whether any were either blood or hair, or as to whether if they were blood or hair, whose blood or hair they were as to type or similarity.

Exhibits 29 and 34, colored slides of the vaginal area with the orifice distended by the fingers of Dr. Probert were admitted in evidence over vigorous protests (R. 210-215) even though the pathologist's testimony was that the injuries in that area did not contribute to the death (R. 215-233).

Defendant made a motion to dismiss at the end of the State's case and for a directed verdict at the close

of the evidence based both on the failure of due process with respect to a speedy trial and on the sufficiency of the evidence as to each degree of murder and of manslaughter. These motions were denied.

Defendant made a proffer of proof regarding the death of a defense witness who would have placed other automobiles and people at the Magera residence during the period in which the trauma resulting in the death of Mrs. Magera must have taken place (R. 493-495).

The defendant denied under oath any physical contact with the decedent during the night or evening in question.

The jury was instructed, the case argued and the jury returned a verdict of voluntary manslaughter.

POINT I

THE DEFENDANT WAS DENIED DUE PROCESS OF LAW IN THAT HE WAS DENIED A SPEEDY TRIAL EITHER BY WILLFUL DELAY ON THE PART OF THE PROSECUTION OR BY INEXCUSABLE LACK OF DILIGENCE ON THE PART OF THE PROSECUTION. THE DELAY WAS PREJUDICIAL TO THE DEFENDANT.

The Constitution of the United States, amendment VI, grants an accused a speedy and public trial. Amendment XIV of the same document extends that due process right to prosecution under State law.

Klopfer v. North Carolina, 386 U.S. 213, 87 S. Ct. ....., 18 L.Ed 2d 1 (1967):

> "In the light of Gideon, Malloy and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment, the statements made in West and similar cases generally declaring that the Sixth Amendment does not apply to the State can no longer be regarded as the law. We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that guarantee, like the right against compelled self-incrimination is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.' Malloy v. Hogan, 378 US, at 10 (12 L Ed 2d at 661)."

Quoting from page 8 of 18 L.Ed 2d: (Klopfer v. North Carolina)

> "We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, 'We will sell to no man, we will not deny or defer to any man either justice or right.'"

The Constitution of Utah, Article I, Section 12, restates the right to a speedy and public trial.

By enactment at 77-1-8, sub. 6, UCA 1953, the Utah legislature has indicated its awareness of due process

provisions of the two constitutions and has set limitations on trial dates. The cases thereunder require the defendant to insist on early trial. *State v. Bohn,* 67 Utah 362, 248 P. 19, which this defendant did at all times. Said cases also require the court to devise a remedy. *State v. Morgan,* 23 Utah 212, 64 P. 365.

In this case there were two filing of complaints by the State. The complaints differed only in date of the filing, the first being February 27, 1965, and the second December 28, 1966.

The defendant at all times urged and insisted on trial and that the matters move forward while the State procrastinated.

At the first preliminary hearing, the State was granted continuances from April 2 to April 5, and further continuances to May 5, for FBI evidence which was not produced or used in either preliminary nor at the trial with the exception of identification of one small lump of dirt.

The first preliminary hearing resulted in a dismissal on May 13, 1965. The District Attorney "looked into the matter in the early summer of 1965" (R. 126) and "was convinced that the matter should have gone to trial" (R. 127), but did nothing about it until the latter part of December, 1966.

Though a Grand Jury was in session in Salt Lake County for the last six months of 1965, the District

Attorney never considered placing this case before the Grand Jury (R. 126), "he had other matters on his mind" (R. 129). At that time and during the entire period, he had three assistant district attorneys (R. 129).

Some twenty months after the first preliminary hearing and nineteen months after the District Attorney was "convinced the matter should have gone to trial" and one year after the Grand Jury had expired by operation of law, a new and identical complaint was filed without new evidence. (Compare transcript of the two preliminary hearings).

Defendant moved to dismiss and on denial of that motion demanded an immediate hearing. The District Attorney succeeded in getting continuances on preliminary hearings covering almost three months to March 23 and 24, 1967, over the Defendant's objections (The District Attorney's office handled the second preliminary hearing and the continuances rather than the County Attorney's office, contrary to our normal criminal procedure). The Magistrate held the matter under advisement for two weeks before binding defendant over at first degree murder.

Following arraignment in the District Court, defendant made motions to dismiss and a motion for reinstatement of bond which were denied.

On June 12, 1967, twenty-seven months and 12 days after the defendant was initially charged, the matter

came to trial.

The defendant caused no delay and asked for no continuances but insisted that the matter go forward at all times.

The law assumes prejudice from denial of a speedy trial —

> "where an accused has been denied a public trial it is assumed that he has been prejudiced and it is not necessary for the defendant to raise that point or prove it." State v. Jordan, 57 Utah 612, 196 P. 565. Also United States v. Lustman 258 Fed 2d, 475, cert. den. 79 Sup Ct. 118, 358 US 880, 38 Led. 109.

Renzo was actually prejudiced. A proposed witness Mr. Sessions having died in the spring of '67, (See defendant's proffer at R. 493-495) who would have placed other persons at the scene of Mrs. Magera's death during the appropriate period; keeping in mind that in this case there was no direct evidence of physical contact between the deceased and the defendant and no evidence as to what caused the trauma resulting in the broken ribs and collapsed lungs from which she died.

The defendant is aware of the multitude of cases allowing recharging by complaint or indictment by a Grand Jury after a dismissal not amounting to jeopardy and has no quarrel with the recharging based on new evidence or a mistake of law in the first instance. However, recharging or reindictment must be timely and a

delay based on inexcusable neglect or willful delay of the prosecution cannot be condoned. See *United States v. Ewell*, 242 Fed. Supp. 451. Probable jurisdiction indicated 85 Sup Ct 1530, 381 US 909, 14 LEd 2d 432, where a reindictment after two years denied the accused the right to speedy trial. Also see *United States v. Dennis*, 342 Fed. Supp. 166. In the Supreme Court case of *Klopfer v. North Carolina*, 386 U.S. 123 (1967) where the District Attorney tried to reinstitute a case some 18 months after filing a nolle prosequi under their peculiar statute.

The instant case does not involve difficulty in finding the defendant or of waiting for other pending trials in other jurisdictions nor the completion of sentences in other jurisdictions. Also it does not involve any newly discovered evidence. It is an apparent situation of "we don't like the Magistrate's ruling; we will refile at our own convenience when a Magistrate of our choice is sitting—" There was no presentation to a Grand Jury though a Grand Jury was sitting for six months after the District Attorney had determined in his own mind that the case "should go to trial."

Is justice a question of when the prosecution feels inclined to move at its convenience, a question of when and before which Magistrate they should refile? Even in civil cases involved with money, not lives or years, the court requires reasonable diligence.

The constitutional right to a speedy trial arises

from the difficulty in defending a charge after a lengthy passage of time. The average citizen does not have the facilities of the State for costly investigation, for tracing witnesses or preserving evidence.

In the case of *Young v. United States, D. C. Court of Appeals,* January 19, 1968, the Court quoted from *Bond v. United States* D.C. App., 233 A.2d 506 (1967) by stating:

> "... the trial court considered each of the elements necessary to maintain a speedy trial which we outlined. . . . The record reflects that the trial court was convinced — and we agree — that the delays, wholly attributable to the Government were not absolutely necessary and could have been limited with the exercise of appropriate diligence; and although the delays were not in bad faith, they resulted from a deliberate choice for a prosecutorial advantage and were as oppressive to appellee as if they had been in bad faith. The court concluded that the total time consumed between the date of the accident and the date on which the Government was finally prepared to prosecute was unreasonable and resulted in a denial to appellee of his constitutional right to a speedy trial."

In the Young case, supra, the case had been filed once. The State was granted a continuance from July 20, 1966, and on trial date August 24, 1966, the Government was not prepared to proceed and the case was dismissed. On October 18, 1966, the defendant was recharged and the case came to trial on November 29, 1966. When the

Court granted appellee's motion to dismiss with prejudice in these terms:

> "By its own admission, the Government was lax in reinstating the charge — almost two months after the first dismissal. By the time the case came on for trial in November, seven and one-half months had elapsed from the date of the accident, and five and one-half months had passed since appellee had first presented himself ready to stand trial. No part of the five and one-half months' delay can be attributed to appellee; nor can it be said that appellee, who opposed the granting of one continuance and moved for dismissal when another continuance was requested, failed to assert his right to a speedy trial."

Also see *United States v. Ewell*, 383 US 116 (1960) and *Klopfer v. North Carolina*, supra, which cases affirmatively state that the Sixth amendment guaranteeing to an accused the right to a speedy trial applies to the States through due process of the Fourteenth amendment. In that case also a delay in prosecution was wholly attributable to the State without the defendant's waiving his rights to a speedy trial nor employing delaying tactics of any kind.

In cases where the State is not satisfied with the result of a preliminary hearing or other proceeding and where re-filing is possible, the State is under a duty to move with at least reasonable diligence and should not be allowed to bide their time until they see fit to file.

As in the Young case, supra, two months was deemed an excessive time for refiling and seven and one-half months between the initial charge and trial was also held to be excessive.

In the instant case there was a period of twenty seven months between the initial charge and trial and a period in excess of eighteen months between dismissal of the initial charge and filing of the second charge, during which time the District Attorney by his own statement considered that the "case should go to trial."

In this regard it is necessary to repeat that this is not a case, nor does the State contend that this is a case, where discovery of any evidence or availability of missing witnesses caused the delay.

The defendant's rights to due process under the State and Federal constitutions has been denied and the jury's verdict should be set aside and the defendant discharged.

POINT II

ADMISSION OF EXHIBITS 29 and 34 WAS ERROR BY THE COURT AND COULD ONLY SERVE TO INFLAME THE JURY.

Admission of Exhibits 29 and 34 both being colored slides of the vaginal area of the decedent (distended by the examining doctor's fingers) over defendant's objections was error. The record contains no foundation as to when or how the injuries in that area had been inflicted

nor was there any connection between those injuries and the defendant. The pathologist Dr. Swift, called by the State, testified that those injuries did not contribute to the decedent's death.

To impress upon the court that the admission of said pictures was inflammatory and prejudicial requires only that the court view the exhibits themselves. Admission of Exhibits 29 and 34 was error, contributed nothing to the proof, and could only serve to inflame the jury.

SUMMARY

It is submitted that the defendant was not granted a speedy trial; that he was prejudiced thereby; the delays have denied him the ability to produce evidence to the effect that other people were in the area during the time when the decedent received the injuries causing her death. This evidence would have been available at trial had the State not procrastinated in refiling. It seems uncontrovertable that under the cases heretofore set forth the defendant was denied a speedy trial and was prejudiced. Also the court erred in admission of Exhibits 29 and 34 which by their very nature had to be prejudicial. It is respectfully requested that this court, after considering the record and the law, reverse the verdict of the jury and the judgment of the court and discharge the defendant.

Respectfully submitted,

HATCH & McRAE