1968

State of Utah v. Val Taylor : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

VAL TAYLOR,
Defendant-Appellant.

Case No. 11052

BRIEF OF APPELLANT

Appeal from the Judgment of the Second District Juvenile Court, in and for Salt Lake County The Honorable John Farr Larson, Judge

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STATEMENT OF NATURE OF CASE

This is an action by plaintiff, STATE OF UTAH, against defendant, VAL TAYLOR, for a violation of Section 55-10-80, Utah Code Annotated, 1953, as amended by the Laws of Utah, 1965, and more particularly, Sub-section (1), to-wit:

> "Any person eighteen (18) years of age or over who induces, aids, or encourages a child to violate any federal, state, or local law or municipal ordinance, or who tends to cause children

to become or remain delinquent, or who aids, contributes to, or becomes responsible for the neglect or delinquency of any child."

On the 15th day of February, 1967, Don Poulsen, a Murray City police officer, filed a Complaint in the Second District Juvenile Court as follows:

> "The undersigned, being duly sworn, complains and alleges that the above defendant, over the age of 18 years, in the above stated County, State of Utah, did on or about the 9th day of February, 1967, commit the crime of contributing to the delinquency and neglect of Shana and Christine Sleater, children under the age of 18 years as follows: At the time and place aforesaid, said defendant, while said children were in his custody, did take indecent liberties on their persons, and did require and induce said Shana and Christine Sleater to perform oral sodomy on his person; the defendant, by reason of the above said acts did aid, contribute to, or become responsible for the neglect and delinquency of the said children."

DISPOSITION IN THE JUVENILE COURT

At the trial, the Honorable John Farr Larson, hearing the evidence without a jury, found the defendant "guilty", and sentenced defendant to six (6) months in the county jail.

RELIEF SOUGHT ON APPEAL

By this appeal, defendant seeks to reverse the judgment of the Juvenile Court in its entirety and to

obtain a dismissal, or, in the alternative, that the matter be remanded to the Juvenile Court for a new trail.

STATEMENT OF FACTS

The defendant, VAL TAYLOR, was married to Carolyn Taylor on August 31, 1962, at Salt Lake City, Utah. Prior to the marriage of Carolyn Taylor to defendant, she had four (4) children, two (2) older boys, and two (2) girls, Shana Sleater and Christine Sleater, the girls in question in the trial, Shana Sleater being of the age of seven (7) years and Christine Sleater being of the age of six (6) years. The parties also have a child of their marriage, Ryne Taylor, who is four (4) years of age.

The Complaint in question was signed after Mr. and Mrs. Taylor had had marital difficulties and a time when the two girls were living with their grandparents, Arthur G. and Oneda Hedberg.

Prior to the trial on the matter, defendant by and through his attorney had duly filed a Demand for Jury Trial (R. 134). This matter was initially set for trial on the 21st day of April, 1967, and continued until July 10, 1967. Pursuant to a telephone call from the Juvenile Court, defendant's attorney was informed if he insisted upon a jury trial in this matter that the matter would be transferred to a City court, and defendant's attorney, without consultation with defendant, waived the jury trial.

At the trial on the matter, the only testimony on behalf of the State of Utah was the testimony of the two children, Shana Sleater and Christine Sleater (R. 4 through R. 36).

ARGUMENT

Point 1.

THE JUVENILE COURT SHOULD HAVE GRANTED DEFENDANT'S MOTION TO DISMISS ON THE BASIS OF ITS FAILURE TO PROVE THE COMMISSION OF THE OFFENSE ALLEGED ON OR ABOUT THE 9TH DAY OF FEBRUARY, 1967.

On the trial of the matter, the only evidence as to the time that the alleged offense had occurred was on cross examination by Mr. Olsen, attorney for defendant, said testimony of Shana Sleater being as follows:

Q. Do you remember how long ago this was supposed to have happened, Shana? Was it a month ago?

A. I don't know.

Q. You don't remember when this was supposed to have happened? How long before you went to live with your grandmother was it supposed to have happened?

A. I don't know.

Q. Do you remember of telling this to a policeman?

A. No. (R. 12, R. 13)

Q. You don't know when this happened?

A. No.

Q. Was it a year ago?

A. I don't know.

Q. Two years ago?

A. I don' tknow. (R. 17, L. 15 thru 20)

On direct examination of Christine Sleater by Mr. Hansen, Deputy County Attorney, as to when the act was supposed to have occurred, the following evidence was given:

Q. What time of the day—do you remember when it happened?

A. I don't remember.

Q. You don't remember?

A. Yeah, I remember it was last year. (R. 25, L. 31, R. 26, L. 1 thru 3)

Further, on cross examination of Christine Sleater, the following testimony was given:

Q. Do you remember how long ago this was supposed to have happened, Christy, before you went to live with your grandma?

I. It happened the day—it happened when we were moving to a—it happened when—I don't know. (R. 29, L. 22 thru 26)

Q. Do you remember the day the house caught on fire?

A. No.

Q. Don't you remember the day the house caught on fire?

A. No, but I knew it got on fire.

Q. Was this before or after that?

A. No.

Q. Was it before?

A. I don't know when it was.

Q. You just don't know when it was? Could it have been last year?

A. I don't know. It was last year when I lived with him. That is when the fire was.

Q. Were you going to school part of the day? Was it during school time?

A. No.

Q. It wasn't during school time?

A. No.

Q. You were home all day?

A. No, we just got—we just—it wasn't school when we did it. (R. 31, L. 11 thru 31. R. 32, L. 1)

It is admitted that the State is not required to establish that the crime was committed on the precise date alleged in the Complaint. However, the State alleges in said Complaint that the crime was committed on or about the 9th day of February, 1967, and is required by taking such election as to date to show that the crime in fact was committed on or about the date as alleged by said Complaint. This principle was

applied in *State v. Pace,* 187 Ore. 498, 212 P. 2d 755, in which case the defendant was accused of sexual intercourse with a minor daughter. The Oregon court ruled as follows:

> "The state was not required to establish that the crime was committed on the precise date alleged in the indictment. It was, however, in keeping with its election, required to show that the crime was committed 'on or about August 20, 1948'. The state, in using the words 'on or about' in making its election, did not thereby put the time of the offense at large, but meant that the time, August 20, 1948, was stated with proximate accuracy."

See also *Stephen v. State,* 207 Ind. 388, 193 N.E. 375; *Crawford v. Arends,* 351 Mo. 1100, 176 S.W. 2d. 1.

Further, in the case of *State v. Rodman,* 44 N.M. 162, 99 P. 2d. 711, in which case the defendant had been charged with statutory rape, the New Mexico court stated:

> "To men of common sense, as members of a jury or presumed to be, the expression 'on or about' does not mean a variation of three or four months. The common understanding of the words 'on or about' when used in connection with a definite point of time, is that they do not put the time at large, but indicate that it is stated with approximate accuracy."

As stated in 23 C.J.S., Criminal Law, Section 1196, Page 746:

> "Where the prosecution elects to proceed for an offense as of a certain date, the instructions

should limit the jury to finding whether the offense was committed on that date."

Further, in *State v. MacMillan,* 46 Ut. 19, 145 P. 833, a case involving indecent liberties with a minor child, the defendant by way of appeal urged that the time that the alleged offense was committed was not proven. The Utah court stated:

> "It is true the little girl could not give the date, nor the month, nor the year; but the time was sufficiently proved by other facts and circumstances."

In the case now before this court, there was no other testimony whatsoever by any persons except the six and seven year old children, and as such there were no other facts, circumstances or testimony which would in any way allow the court to come to any conclusion by which it could be determined that the crime, if committed, could have been committed on or about the 9th day of February, 1967.

Point 2.

EVIDENCE WAS INSUFFICIENT TO SUSTAIN CONVICTION.

As stated previously, the only evidence presented by the State was the testimony of the two minor children, ages six and seven (R. 4 through R. 36). From the general reading of the testimony of these young young childretn, the court should have dismissed the action as being not in harmony with general experience,

coupled with the doubtful testamentary capacity of said minor children, and further, from a general reading of the testimony it should appear clear to this court that said children did not have testamentary capacity. In regard to capacity, see the questioning by Mr. Hansen of Shana Sleater, R. 4, wherein Shana gave no answers which appear on the record as to ability of whether Shana knew the difference between right and wrong or the penalty or punishment as to lying, and further, see the following testimony as to lying:

Q. Do you ever lie?

A. Sometimes. (R. 5, L. 9)

Further, on cross examination by the defendant's attorney:

Q. Do you know what a lie is, Shana?

A. No. (R. 18, L. 13)

Q. Have you ever had a whipping for telling lies?

A. Yes. (R. 21, L. 8)

See also cross examination of Christine Sleater by defendant's attorney:

Q. Now, Christy, have you ever had a spanking for telling lies?

A. Yes. (R. 28, L. 17)

In regard to testimony as to the coaching of the children, see the following on cross examination by defendant's attorney of Shana Sleater:

Q. Now, Shana, did somebody tell you to say these things in court today?

A. My mother did.

Q. Your mother did? Have you talked to your grandmother about it?

A. Yes.

Q. Did she go over the story with you?

A. Yes. (R. 12, L through 14)

Q. Did your grandmother tell you to tell these things in court?

A. Yes. (R. 13, L. 24)

Also, in examination by defendant's attorney of Mrs. Oneta Hedberg, the children's grandmother, with whom the children had been living, Mrs. Hedberg admitted going over the story with the children both prior to talking to the Deputy County Attorney and before coming to court (R. 73 and 74).

In the examination by Nolan J. Olsen, attorney for defendant, of Mrs. Carolyn Tayor, the mother of the children, Mrs. Taylor stated emphatically that the children had never at any time mentioned the alleged occurrence to their mother. More particularly, see testimony questions and answers as follows:

Q. Did these children ever mention anything to you about an alleged offense?

A. No.

Q. Never?

A. Never.

Q. When did you first hear about this offense?

A. On February 14.

Q. But they never said anything to you?

A. They never said anything to me. (R. 46 and 47)

In regard to testamentary capacity, it is admitted that a child of any age can testify if they meet certain qualifications. In this regard, Whigmore on Evidence, Section 495, sets out the basis as follows:

> "(1) First, it involves a capacity mentally at understand the nature of questions put and to form and communicate intelligent answers.
>
> (2) Secondly, does it involves a sense of moral responsibility, of the duty to make the narration correspond to the recollection and knowledge ,that is, to speak the truth as he sees it? It would seem that the clear absence of such a sense would disqualify the witness."

This test was set forth in *State v .Williams,* 111 Ut. 347, 180 P. 2d 551, which was a case involving the rape of a thirteen (13 year old girl, in which case the court decided that the thirteen year old girl, who had a mental age of between eight and ten, did not meet the test set forth by Mr. Whigmore. Further, the court stated:

> "We have before us not merely a happening which must be considered not in harmony with general experience, coupled with the doubtful testimonial capacity of the only witness to the principal fact in issue."

In the case of *State v. Madrid,* 74 Ida. 200, 259 P. 2d. 1044, the father of an eleven (11) year old daughter was convicted of committing lewd and lascivious acts upon her, and the Idaho court reversed, stating:

> "Our public policy requires corrobation of testimony of the complaining witness in the prosecution for lewd and lascivious acts, either by direct evidence or evidence of surrounding circumstances, which clearly corroborate the statements made by the complaining witness."

Further, in *People v. Evans,* 39 C.A. 2d., 242, 246 P. 2d, 636, the California court in reversing a conviction for molesting of a 10½ year old girl stated:

> "Although her testimony was not inherently improbable as to be worthy of no belief, it was open to attack on the ground that it shows that she had been suggestively questioned as to the crime by the police."

In the text, General View of the Criminal Law of England, by J. F. Stephen, the following appears:

> "A child will have been taught to say that, if it tells a lie, it will go to the bad place when it dies (which, usually taken to show that it knows the meaning of an oath) long before it has any real notion of the practical importance of its evidence in a temporal point of view; and also long before it has learned to distinguish between its memory and its imagination, or to understand in the least degree, what is meant by accuracy of expression. It is hardly possible to cross examine a child, for the test to too rough for an

> immature mind. However gently the questions may be put, the witness grows confused and frightened, partly by the tax on its memory, partly by the strangeness of the scene; and the result is that its evidence goes to the jury practically unchecked, and has usually greater weight than it deserves, for the sympathies of the jury are always with it. This is a considerable evil, for in infancy the strength of the imagination is out of all proportion to the power of the other faculties; and children constantly say what is not true, not from deceitfulness, but simply because they have come to think so, by talking or dreaming of what has passed."

Based upon the evidence and the general tenor of testimony of the two young girls as to understanding, coupled with the fact that testimony was given as to coaching, and, further, that the children at no time had ever mentioned the acts in question to their mother, and, further, coupled with the evidence of the grandparents and the mother as to the bitterness and hatred toward the defendant by the grandparents, the Hedbergs, the court should have granted a dismissal on the basis that the prosecution did not meet the burden of proving beyond a reasonable doubt that the defendant was guilty of the crime as alleged.

Point 3.

THE COURT ABUSED ITS DISCRETION IN NOT ALLOWING DEFENDANT TO RECALL PROSECUTION WITNESSES FOR FURTHER CROSS EXAMINATION.

Because of the inconsistency in the testimony of the grandparents, Hedbergs, and the mother, Carolyn Taylor, and the testimony of the two infant children, defendant should have been given an opportunity to further cross examine the said children.

In this regard, it is recognized that it is left to the court's discretion as to recalling a witness for further cross examination unless it can be shown that the denial to recall said witness is a manifest abuse of discretion.

Due to the fact that the entire case of the prosecution was based on the testimony of the two young girls, a recall of said girls should have been allowed.

CONCLUSION

It is submitted that the trial court erred in not granting defendant's motion to dismiss at the conclusion of the State's evidence based on the State's failure to show a time sequence as alleged by the Complaint wherein the Complaint alleged that the act occurred on or about the 9th day of February, 1967, and having made an election as to the time of said act the State was required to show that the act was committed on or about said date. Further, based on the over-all testimony, the court should have granted a dismissal based on the failure of the State to meet the burden of proof as being not in harmony with general experience, coupled with the doubtful testimonial capacity of the

two very young witnesses, and it is submitted that the judgment heretofore entered by the Juvenile Court should be dismissed, or, in the alternative, that it be remanded to the Juvenile Court for a new trial.

Respectfully submitted,

NOLAN J. OLSEN

Attorney for Defendant-Appellant
Val Taylor