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State of Utah v. Mack Merrill Rivenburgh, Jr. and Leonard Warner Bowne : Brief of Appellant Bowne

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

—vs.—

MACK MERRILL RIVENBURGH, JR.,
and LEONARD WARNER BOWNE,

Defendants and Appellants.

Case No.
9089

Brief of Appellant Bowne

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STATE OF UTAH,

Plaintiff and Respondent,

--vs.--

MACK MERRILL RIVENBURGH, JR.,
and LEONARD WARNER BOWNE,

Defendants and Appellants.

Case No.
9089

Brief of Appellant Bowne

STATEMENT OF FACTS

On the 24th day of August, 1958, at approximately 8:00 p.m., LeRoy Joseph Verner was killed. The decedent was an inmate at the Utah State Prison, and the homicide occurred at the Prison in the attic to Cell Block A. The killing was accomplished by Mack Merrill Rivenburgh, Jr. (R. 513; T. 552, 553, 604-613). There were two other inmates present in the attic at the time of the killing, Jesse M. Garcia, Jr., and the appellant in this matter, Leonard Warner Bowne.

Earlier that day, Rivenburgh had informed Bowne that he intended to perform an act of sodomy with the decedent. He asked Bowne to serve as a lookout in the

attic during the act of perversion (R. 269, 270, 319, 503; T. 253, 584-586, 684, and 694). Because of fear, which Bowne held for Rivenburgh, and the custom of the Prison, Bowne agreed to act as "point man" during the act of sodomy. Pursuant to this, Rivenburgh secured some soiled clothing for Bowne to wear in the dusty attic (R. 503, 504; T. 659). Bowne changed into the soiled clothes, mingled and talked with other inmates in the cell block (T. 229 and 695), and approximately one-half hour later entered the attic with Garcia.

Bowne and Garcia were in the attic about ten minutes prior to the arrival of Rivenburgh and the decedent (T. 639). While waiting they talked casually and smoked a cigarette. After Rivenburgh and the decedent entered the attic, the decedent began to undress in preparation for the act of sodomy (T. 601 and 602). It was dark in the attic. Rivenburgh spoke to Bowne to make sure he and Garcia were "on point," and told Bowne to close the grating which covered the place of entry (R. 512; T. 608, 641, and 698).

Bowne removed his shoes so as to make less noise in crossing the metal deck of the attic (T. 697 and 698). As he passed by Rivenburgh he noticed the decedent undressing and also noticed that Rivenburgh was holding a knife which he frequently carried (T. 836 and 837). Rivenburgh and the decedent were talking in an inconspicuous tone, and Bowne did not pay any attention to what was said (T. 699).

While Bowne was adjusting the loose grating, he had his back to Rivenburgh and the decedent. Bowne heard a

loud scream, pounding on the metal deck, and a great deal of noise which seemed to indicate an intensive struggle between Rivenburgh and the decedent (T. 700 and 736). Rivenburgh cried out. He had lost his knife, and he asked for help in finding it. (T. 701; see also T. 607 and 611).

Governed by instinct and fear, Bowne opened a pocket-knife which he carried with him (T. 701 and 702). Upon quick reflection, Bowne closed the knife and returned it to his pocket (T. 703). He fell on his hands and knees and attempted to find the knife lost by Rivenburgh (T. 701). In this position Bowne was severely cut in the upper portion of his leg, although at no time did he join the struggle or make any physical contact with the decedent (T. 704). While looking for the knife, Bowne felt something warm and sticky which later proved to be blood (T. 703).

Rivenburgh fled the scene; running to the opposite end of the attic, he descended to the catwalk below. Garcia followed Rivenburgh, and Bowne, after having some difficulty finding his shoes, came out of the attic last (T. 705). In the excitement, Bowne had gained possession of two knives which he brought out of the attic (T. 706 and 707).

The three with the help of other inmates cleaned themselves, disposed of the bloody clothing, and established alibis (R. 245, 268; T. 229-243, 707-710). Sometime later Bowne concluded that the decedent had been killed (T. 772). At no time did Bowne take part in any plan to kill the decedent, or entertain any intent to kill (T. 642, 645, 699, 703-706, 710).

Of course there was much conflicting evidence, and the State will rely on facts somewhat different than the essential elements we have set forth above. There was testimony concerning a conversation between Rivenburgh and another inmate, Randel, which took place on the 24th of August prior to the homicide. Bowne was present as the other two discussed the drugged condition of the decedent. The decedent, as well as the other inmates involved, including the witnesses for the State, had taken excessive amounts of amphetimine pills over a period of days prior to the homicide. During this conversation Rivenburgh remarked that somebody was going to cut off the decedent's head if he continued to act as he had (R. 497; T. 221-223, and 691). This led Rivenburgh and Randel to a general discussion of various methods of homicide (T. 245 and 246). Bowne did not pay particular attention to what was said, since such talk was common place at the Prison (R. 276-278, 296, 297, 497; T. 691 and 692). Indulging in amphetimines and other drugs, possessing knives, threatening death, and engaging in acts of sodomy were not unusual activities for inmates of the Utah State Prison at this time—especially Rivenburgh (R. 233-238, 281-283, 285-289, 488-495, 500, 501, 510; T. 251, 252, 609, and 610).

Garcia was tried separately. Rivenburgh and the appellant Bowne were tried jointly and convicted of murder in the first degree. The detailed testimony introduced supports all of these facts. We will refer to the details of the testimony as they become applicable in stating our arguments.

STATEMENT OF POINTS

POINT I.

UTAH CODE ANN. § 77-30-2 (1953) IS UNCONSTITUTIONAL.

A. THE DEFENDANT WAS DENIED DUE PROCESS OF LAW IN THAT *UTAH CODE ANN. § 77-30-2 (1953)* IS VIOLATIVE OF *THE CONSTITUTION OF UTAH, ART. I, § 7,* AND *THE CONSTITUTION OF THE UNITED STATES, AMEND. XIV.*

B. THE DEFENDANT WAS DENIED THE RIGHT TO A FAIR AND IMPARTIAL JURY IN THAT *UTAH CODE ANN. § 77-30-2 (1953)* IS VIOLATIVE OF *THE CONSTITUTION OF UTAH, ART. I, § 12.*

C. THE DEFENDANT WAS DENIED THE EQUAL PROTECTION OF THE LAWS IN THAT *UTAH CODE ANN. § 77-30-2 (1953)* IS VIOLATIVE OF *THE CONSTITUTION OF THE UNITED STATES, AMEND. XIV.*

POINT II.

THE TRIAL JUDGE ABUSED HIS DISCRETION IN NOT GRANTING DEFENDANT'S MOTION FOR A SEPARATE TRIAL.

POINT III

THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO DISMISS SINCE THE JURY COULD NOT HAVE FOUND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS GUILTY OF MURDER.

POINT IV.

THE TRIAL COURT'S INSTRUCTION NO. 15 IS CONFUSING AND IN ERROR BECAUSE IT FAILS TO SEPARATE THE CRIME OF SODOMY FROM THE CRIME OF

MURDER, AND IN ITS ABSTRACT FORM COULD ALLOW THE JURY TO FIND THE DEFENDANT GUILTY OF MURDER IF THEY BELIEVED HE AIDED AND ABETTED IN THE ACT OF SODOMY.

POINT V.

THE TRIAL COURT'S INSTRUCTION NO. 26 IS IN ERROR SINCE IT FAILS TO RESTRICT THE JURY TO A CONSIDERATION OF THE ADMISSIONS AND STIPULATIONS OF THE PARTIES DURING THE TRIAL TO EACH RESPECTIVE PARTY.

POINT VI.

THE TRIAL JUDGE ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 13.

POINT VII.

THE TRIAL JUDGE ERRED IN REFUSING TO GRANT A NEW TRIAL.

POINT VIII.

THE TRIAL COURT ERRED IN FAILING TO COMPEL THE PROSECUTION TO FURNISH TAPE RECORDINGS AND COPIES OF STATEMENTS MADE BY WITNESSES AND DEFENDANTS.

POINT IX.

THE TRIAL COURT ERRED WHEN IT REFUSED TO ADMIT EVIDENCE CONCERNING THE CHARACTER AND REPUTATION OF THE DECEASED.

ARGUMENT

POINT I.

UTAH CODE ANN. § 77-30-2 (1953) IS UNCONSTITUTIONAL.

A. THE DEFENDANT WAS DENIED DUE PROCESS OF LAW IN THAT *UTAH CODE ANN. § 77-30-2 (1953)* IS VIOLATIVE OF *THE CONSTITUTION OF UTAH, ART. I, § 7,* AND *THE CONSTITUTION OF THE UNITED STATES, AMEND. XIV.*

B. THE DEFENDANT WAS DENIED THE RIGHT TO A FAIR AND IMPARTIAL JURY IN THAT *UTAH CODE ANN. § 77-30-2 (1953)* IS VIOLATIVE OF *THE CONSTITUTION OF UTAH, ART. I, § 12.*

C. THE DEFENDANT WAS DENIED THE EQUAL PROTECTION OF THE LAWS IN THAT *UTAH CODE ANN. § 77-30-2 (1953)* IS VIOLATIVE OF *THE CONSTITUTION OF THE UNITED STATES, AMEND. XIV.*

Utah Code Ann. § 77-30-15 (1953), which allows a person charged with a crime to exercise certain peremptory challenges, reads as follows:

“The state and defendant shall each be allowed the following number of peremptory challenges:

- (a) Ten, if the offense charged is punishable by death.
- (b) Four, if the offense charged is a felony not punishable by death.
- (c) Three, if the offense charged is a misdemeanor.”

In the event of a joint trial, this section is modified by the provisions of *Utah Code Ann. § 77-30-2 (1953)*, which states:

"If two or more defendants are jointly tried they shall collectively be allowed the number of peremptory challenges specified in section 77-30-15 only in case they join in such collective challenges, but in addition to such challenges each defendant shall be allowed the following number of peremptory challenges which may be separately exercised:

- (a) Two, if the offense charged is punishable by death.
- (b) One, if the offense charged is not punishable by death."

The two defendants in the instant case could not agree upon the ten peremptory challenges allowed in section 77-30-15 or any of them (T. 64 and 65). Under the terms of section 77-30-2, each defendant would be entitled to exercise only two peremptory challenges. With this in mind, the defendant Bowne conditionally agreed to the selections of defendant Rivenburg in order that the defendant Rivenburg would not be denied his full number of peremptory challenges (T. 64 and 65). This was done with the approval of the trial judge on the express understanding that the defendant Bowne would not thereby sacrifice his objections to the section or waive any right to appeal the question to this Court (T. 65).

Since the defendant was tried jointly and could not agree upon any of the challenges with the other defendant, he was restricted to only two peremptory challenges. Even a defendant charged with a misdemeanor is entitled to three peremptory challenges. *Utah Code Ann.* § 77-30-15 (1953). To allow a defendant who is charged with an offense punishable by death only two such challenges

is certainly unjust, unfair, and violative of the due process provisions of our Constitutions. *Utah Const., art. I, § 7; Const., amend. XIV*. Such a result violates our traditional concepts of fair play and substantial justice, and denies the defendant a trial by a fair and impartial jury. *Utah Const., art. I, § 12*.

This question was first raised in Utah in the case of *People v. O'Laughlin*, 3 Utah 133, 1 Pac. 653 (1882). At that time Utah was a territory, but the statute in question had the same effect as section 77-30-2. The court reviewed the argument of the counsel for the defense as follows:

“[Counsel for the defense argued] that in criminal cases each defendant must plead for himself in person; each makes a separate issue with the people on the question of his guilt. If convicted, each must suffer punishment for himself, or each may be pardoned on his own merits. One can appeal without affecting another. In all this, it is claimed, there is a distinction between criminal and civil cases. In a civil case one judgment only is recorded; one satisfaction pays for all; and therefore, in a criminal case the trial is necessarily separate, to a certain extent; in other words, the word ‘party’ as used in the statute, means each individual defendant.” (Id. at 1 Pac. 655)

The court rejected the defendant's argument that each defendant was entitled to exercise the full number of peremptories and held that the challenges had to be exercised jointly. The reasoning behind this interpretation was stated as follows:

"By the statute riot is made a felony, and section 262 of the criminal procedure act gives to any defendant jointly indicted with another or others, for a felony, the right to a separate trial, if he requires it. All the defendants having waived this privilege and declared their election to be tried jointly, their defense was joint and not several, and no one of them had authority to control the conduct of the defense." (Id. at 1 Pac. 656)

From 1878 until 1935, Utah had a statute which entitled any person charged with a felony to a separate trial. Section 105-32-6 of the Revised Statutes of 1933 read as follows:

"When two or more defendants are jointly charged with a felony any defendant requiring it must be tried separately. In other cases the defendants jointly charged may be tried separately or jointly in the discretion of the court."

See also *Crim. Prac. Act of 1878*, § 262, p. 116; *C. L.* § 5038 (1888); *R.S.* § 4850 (1898); *C. L.* § 4850 (1907); *C.L.* § 5980 (1917).

When a defendant had the right to demand a separate trial, the provisions of section 77-30-2 were not objectionable. If a joint defendant did not agree with the other defendants as to the exercise of the challenges then he could demand a separate trial, and thus take advantage of the full number of challenges allowed by section 77-30-15. On March 14, 1935, section 105-32-6 was amended to read substantially the same as *Utah Code Ann.* § 77-31-6 (1953). From that time until the present date, a joint defendant has had no right to demand a separate

trial. A separate trial may only be granted in the discretion of the trial judge. When there is no way in which a defendant can assure himself of the full number of peremptory challenges granted by section 77-30-15, section 77-30-2, requiring the challenges to be exercised jointly, becomes objectionable and unconstitutional.

In *Carroll v. State*, 139 Fla. 233, 190 So. 437 (1939), the court stated as follows:

"Under the Constitution of the United States and the State of Florida the defendant in a criminal case is guaranteed the right to a trial by an impartial jury and it is to effectuate this guaranty that he may reject a certain number of those who are called to the jury box without giving his reason for not wishing them to pass upon his guilt or innocence. By this means he may escape the judgment of those whom he may consider prejudicial against him but whom he may not be able to show disqualified for causes defined by statute." (Id. at 190 So. 438)

See also *Meade v. State*, 85 So. 2d 613 (Fla. 1956).

There are cases to the effect that peremptory challenges are within the discretion of the legislature. These cases hold that there is no constitutional right to a peremptory challenge as contrasted with a challenge for cause. Even if this view is taken, section 77-30-2 is unconstitutional in that it denied the defendant the equal protection of the law. *Const., amend. XIV.*

When the legislature has provided for peremptory challenges, as the Utah legislature has in section 77-30-

15, rights every bit as real as those created by the Constitution come into being. The Utah legislature went further, however, and in section 77-30-2 it restricted the right to peremptory challenges which a defendant tried jointly might have. In other words, section 77-30-2 differentiates between two types of defendants one of which is excluded from the substantive provisions of section 77-30-15. The effect of this section is to discriminate against any joint defendant who cannot agree with the others. Such discrimination is unreasonable and arbitrary and renders section 77-30-2 unconstitutional.

In *State v. Mason*, 94 Utah 501, 78 P.2d 920 (1938), Justice Wolfe set forth the proper standard with which to determine the constitutionality of an act which is questioned as denying the equal protection of the laws. In doing so he made the following comments:

“A denial of the laws equal protection presupposes an unreasonable discrimination between those included and those excluded from the act whether the act confers a privilege or a right or imposes a duty or an obligation.

“* * *

“Of course, every legislative act is in one sense discriminatory. The legislature cannot legislate as to all persons or all subject matters. It is inclusive as to some class or group and as to some human relationships, transactions, or functions and exclusive as to the remainder. For that reason, to be unconstitutional the discrimination must be unreasonable or arbitrary. A classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for the differentiation between classes

or subject matters included as compared to those excluded from its operation, provided the differentiation bears a reasonable relation to the purposes to be accomplished by the act.

“* * *

“It is only where some persons or transactions excluded from the operation of the law are as to the subject matter of the law in no differentiable class from those included in its operation that the law is discriminatory in the sense of being arbitrary and unconstitutional. If a reasonable basis to differentiate those included from those excluded from its operation can be found, it must be held constitutional.”

The legislature's purpose in enacting section 77-30-15 is obvious. The purpose behind section 77-30-2, which restricts the operation of 77-30-15 in joint trial is not so clear. One purpose certainly was to expedite the administration of justice. However, it seems clear that the legislature did not intend to limit a person charged with a felony to any number of peremptory challenges short of that set forth in 77-30-15. The legislature in fact granted the joint defendant extra challenges which could be exercised separately, and of course if a joint defendant could not agree then he had the right to demand a separate trial. See page 10; *People v. O'Laughlin*, 3 Utah 133, 1 Pac. 653 (1882).

When the defendant could no longer demand a separate trial, it became possible for section 77-30-2 to produce a result contrary to the original legislative intent. Such a result was achieved in the instant case. The defendant failed to agree with his joint defendant, and thus

was excluded from the operation of section 77-30-15 as to its subject matter, and could exercise only the two extra peremptories allowed under section 77-30-2.

The fact that the defendant was tried jointly is not a reasonable differentiation as measured against the standard of *State v. Mason*. The differentiation has nothing to do with the crime with which he was charged. The defendant had to make his own defense, which incidently was antagonistic to that of his joint defendant. If the end result of the trial is adverse to the defendant, then he will have to pay for the crime personally just the same as if he had been tried separately.

The differentiation is unreasonable in view of the fact that the defendant cannot control the class he is in. That is, whether he is included in the operation of section 77-30-15 or excluded by virtue of section 77-30-2 has nothing to do with his own intent or power. Of course he can agree—but if the act is construed as forcing his consent then it certainly discriminates against him. The trial judge can remove the defendant from the operation of section 77-30-2 by granting a separate trial, but the defendant has no right to demand such action. The deputy county attorney who drafts the complaint has more control over the class in which the defendant will be placed than any other person. In fact in the instant case, one of the three persons implicated in the crime was tried separately, while the defendant Bowne was tried jointly with another.

The purpose of expediency is, of course, still present; however, this is not sufficient to justify the arbitrary dif-

ferentiation of the act set forth. Expediency must be weighed against our traditional guarantees of liberty and justice. It is the duty of the court to protect the people from unwarranted inroads made in the guise of efficiency. We rightly have many safeguards surrounding a person accused of the crime of murder. Such an individual should be tried with care which corresponds with the awful responsibility of taking human life to atone for crime.

Even with this purpose in mind it seems clear that the legislators, in part, followed the purpose behind section 77-30-15, since they gave the defendants two extra challenges. At the time the act was passed, this meant if the defendants agreed they would get ten between them and two each separately or a total of fourteen. If they could not agree, then any one of them could demand a separate trial and secure the full ten peremptory challenges. Thus the dominant purpose was still to give the person charged jointly the benefit of any doubt. He could not get less than the number provided in the counterpart of section 77-30-15.

In contrast to the instant situation, it is interesting to note that any challenge of unconstitutionality before 1933 would have to come from a defendant tried separately on the grounds that one tried jointly could secure additional peremptories. In this situation the differentiation would be reasonable with the thought in mind that the joint defendant would have to agree on the ten challenges.

Certainly the statute in question is unreasonable and arbitrary within the meaning of *State v. Mason*. In the instant case it produced a result which denied the defendant of the equal protection of the laws. It is violative of both the Constitution of Utah and the Constitution of the United States. Section 77-30-2 should be struck down as unconstitutional.

POINT II.

THE TRIAL JUDGE ABUSED HIS DISCRETION IN NOT GRANTING DEFENDANT'S MOTION FOR A SEPARATE TRIAL.

Utah Code Ann. § 77-31-6 (1953), provides that when two or more defendants are jointly charged with any offense they shall be tried jointly, "unless the court in its discretion . . . orders separate trials." See page 10. In the instant case the defendant moved for a separate trial on the ground, inter alia, that the defenses of the joint defendants were antagonistic (R. 26-29, 34 and 35). The trial judge denied this motion (R. 27-A), and in so doing abused his discretion.

The discretion entrusted to the court is a *judicial* one, and may not be exercised arbitrarily. See *People v. Lindsay*, 412 Ill. 472, 107 N.E. 2d (1952); *People v. Barbaro*, 395 Ill. 264, 69 N.E. 2d 692 (1946); *People v. Braune*, 363 Ill. 551, 2 N.E. 2d 839 (1936); *People v. Fisher*, 249 N.Y. 419, 164 N.E. 336 (1928). If the order of the court deprives the defendant of a fair trial, then the judge has abused his discretion. See *People v. Minnecci*, 362 Ill. 541, 200 N.E. 853 (1936); *People v. Lindsay*, *supra*.

There is little law in Utah concerning this question. In the case of *State v. Miller*, 111 Utah 255, 177 P. 2d 727 (1947), the defendants were jointly tried for rape. A motion for separate trials was made but no grounds were set forth. No affidavits were filed, and the record failed to show that any oral statement was made giving the reasons for the motion. The Utah court stated as follows:

"The record of this case, while it shows that counsel for appellant made motions for separate trials, it also shows that he did not make known any reason for his motion. There were no affidavits filed and the record fails to show that any oral statement giving the reasons was made. Since the appellant could not demand a severance as a matter of right it must appear that the court had before it the facts which would indicate that the appellant would be unduly prejudiced by a joint trial before we could hold that the court had abused its discretion."

The Utah court also decided the case of *State v. Burke*, 102 Utah 249, 129 P. 2d 560 (1942), which involved joint defendants charged with gambling. The opinion does not disclose whether any sufficient showing was made before the trial judge in this case. The court held, however, that no abuse of discretion was found since the evidence disclosed the participation of both defendants in a *continuing* operation which was part of a business.

The general rule is that separate trials should be granted where the defenses of the defendants are shown to be antagonistic. It is an abuse of discretion to deny a motion based on this ground when a sufficient showing

is made. See *People v. Braune*, 363 Ill. 551, 2 N.E. 2d 839 (1936); *People v. Rose*, 348 Ill. 214, 180 N.E. 791 (1932); *People v. Barbaro*, 395 Ill. 264, 69 N.E. 2d 692 (1946); *State v. Livsey*, 190 La. 474, 182 So. 576 (1938).

In *People v. Braune*, supra, two doctors were tried jointly for criminal abortion. Each moved for a separate trial because of the antagonistic defenses. The court stated as follows:

"It was apparent from the petitions that an actual and substantial hostility existed between the defendants over their lines of defense. Each was protesting his innocence and condemning the other. Each declared the other would take the witness stand and testify to a state of facts which would be ex-culpatory of the witness and condemnatory of his codefendant. Criminations and re-criminations were the inevitable result. Ordinarily the right of one defendant to cross-examine his codefendant does not exist. However, there is an exception to the rule, based on justice and necessity. Where one defendant has given testimony which tends to incriminate the other defendant, the latter, especially where he had no prior notice of such incriminating testimony, may cross-examine the former; but we know of no decided case where such a situation had been brought to the attention of the court prior to the trial and a severance was denied."

In the instant case, one of the three defendants was tried separately. The defenses of the two remaining defendants were antagonistic. Counsel for the defendant Bowne filed an affidavit to the effect that he had personally interviewed the other joint defendant, and that this

defendant asserted a fact situation which was inconsistent with the facts set forth by Bowne. The affidavit also stated that there was continued discord and difference of opinion between the attorneys for the respective defendants (R. 28 and 29).

There were also affidavits filed by associates of Bowne's attorney to the effect that on a specific occasion the attorney for Rivenburgh had advised that the defense set forth by his client "was the only defense in [the] case and if [they] didn't go along with him in that defense he would make first degree murders of Jessie M. Garcia, Jr., and Leonard Warner Bowne." (R. 34 and 35).

The joint defendants were unable to agree even as to the exercise of their peremptory challenges (T. 64 and 65). There was continual disagreement throughout the trial. Because of the fear which the defendant Bowne held for his joint defendant, he in fact testified in an inconsistent manner (T. 711-818). This came as a complete surprise to his attorney who found it necessary to have the defendant recant and tell the truth on redirect examination (T. 826-843). The effect on the jury of the defendant's inconsistent statements was not good. This prejudicial incident was the result of the antagonism between the two defendants.

The defendant claimed nothing as to the effect of the amphetimine pills, while this was the crux of Rivenburgh's defense. The testimony of Dr. Clark was not material as to Bowne (R. 405 et seq.). Yet this testimony was highly prejudicial, especially in view of the long

hypothetical questions which were propounded by the State (R. 418-423). These questions were inaccurate in that they incorporated the test of sanity rather than merely considering the difference between first and second degree murder. They were based on many facts which were not in evidence, and were objected to on this ground (R. 417). The questions advanced all of the points which the State was attempting to prove and amounted to a summation in the middle of the State's case. The ill effect of this testimony could have been avoided in a separate trial, for it was the direct result of the inconsistent defenses of the two joint defendants.

Rivenburgh continued to take pills even during the trial. At one point it became obvious to many present in the court room that Rivenburgh was groggy (T. 906). A motion to dismiss on behalf of Bowne had been argued and denied. The jury had been instructed, and summations were about to begin. Rivenburgh's condition was discussed in chambers (T. 900) on Friday, and a recess was called until the next Monday in order that Rivenburgh would be mentally present at all stages of the proceeding. Everyone having knowledge of the situation was admonished and ordered to maintain secrecy (T. 906).

It is difficult to assess the effect of this incident upon the jury. The jurors all had an opportunity to observe Rivenburgh on Friday. They were all present to notice the confusion of many different persons entering and leaving the judge's chambers. In spite of the admonition, many rumors were about. The newspapers implied

that the reason for the delay was the defendant's motion to dismiss.

Another consideration is that the jury was instructed before the incident on Friday, and did not receive the case for deliberation until the following Monday, three days later. The rather complicated and technical instructions must have been quite remote in their minds at that time. This incident had a prejudicial effect on the defendant Bowne which could have been avoided in a separate trial.

A great deal of testimony, inadmissible as to the defendant, came into evidence as applicable to Rivenburgh. Rivenburgh had conversations with the decedent before entering the attic (R. 498) and again while in the attic (R. 511). He spoke with Dalton as he came down from the attic (R. 513). Rivenburgh's conversations with Dripps relative to standing point (R. 333), his statement to Stark that there was a dead man in the attic (R. 366), the incident between the decedent and Stark in the presence of Rivenburgh when the decedent expressed fear that he would be killed (R. 374), the conversations with Woods concerning the boots (R. 457) and with Randel and Landrum relative to alibis (R. 463, 465, and 466), all were prejudicial to the defendant Bowne. This prejudice could have been avoided by separate trials.

The determination as to whether error was committed must be made in the light of the facts which were before the trial judge at the time of the motion. In *State v. Miller, supra*, this Court said:

“However the present case is decided upon the question of abuse of discretion which arises, if at all, at the time of the ruling upon the motion for separate trials. It is not decided upon the question of prejudicial error, assuming a proper motion.”

See also *People v. Lindsay*, 412 Ill. 472, 107 N.E. 2d 614 (1952).

In *People v. Kisher*, 249 N.Y. 419, 164 N.E. 336 (1928), the appellate court took a retrospective view of the trial in determining whether error had been committed. In this connection the New York court stated:

“[We look to the record of the trial to determine if it] reveal[s] injustice or impairment of substantial rights unseen at the beginning. In a case where, without the existence of a confession by one defendant, the evidence against another would be too weak to justify a conviction or even where a conviction would be doubtful, our review of the judgment would compel us to conclude that an abuse of discretion had been committed.”

If the determination is made on the basis of the circumstances present and before the judge at the time the motion was made, there is error. The affidavits (R. 28, 29, 34, and 35) and the oral argument (which was not included in the record) certainly indicated that the defenses of the two defendants were antagonistic.

If the determination is made on the basis of the entire record, the trial judge's order is equally erroneous. The defendants could not agree as to the exercise of their peremptories, and thus the defendant Bowne could exer-

cise only two such challenges. See page 8; see also T. 64 and 65. The threats of the defendant Rivenburgh caused the defendant Bowne to be inconsistent in setting forth his version of the facts (T. 711-818, 826-843). The defendant Rivenburgh, in effect, confessed during the trial virtually admitting all of the facts set forth by the state (R. 513; T. 552, 553, 604-613). He relied on the use of drugs as his defense. This defense was inconsistent to that of the defendant Bowne and prejudicial testimony, which otherwise would not have been entered, came in. All of these incidents, together with the long and mysterious recess which was called to allow Rivenburgh to recover from his drugged condition, were the result of the trial judge's error in denying the defendant's motion for a separate trial.

It might be argued that any antagonism between the joint defendants could be overcome by proper admonitions or instructions to the jury which would protect the interests of the joint defendants. Such reasoning is false. In *People v. Braune*, 363 Ill. 551, 2 N.E. 2d 838 (1936), the trial judge did not hold the petitions insufficient to set forth antagonism, but rather indicated that the interests of the defendants could be protected. The court on appeal thought otherwise and so ruled.

In *People v. Barbaro*, 395 Ill. 264, 69 N.E. 2d 692, 696 (1946), the court made the following statements:

" . . . but the instruction could not cure the damage already done. Only theoretically did the instruction withdraw the evidence from the consideration of the jury. The prejudicial effect in-

evitably remained. Upon the record made, separation of the admissible evidence from the inadmissible becomes almost impossible—even for a court of review.”

See also *People v. Fisher*, 249 N.Y. 419, 164 N.E. 336, 341 (1928) (dissent); *People v. Wargo*, 149 Misc. 461, 268 N.Y.S. 400 (1933).

As we have already mentioned, one result of the antagonism in the instant case was to deny the defendant the full number of peremptory challenges he would otherwise exercise. Such a result is certainly an element to be considered in determining whether error was committed by the trial judge. See *Carroll v. State*, 139 Fla. 233, 190 So. 437 (1939); *Meade v. State*, 85 So. 2d 613 (Fla. 1956) (question involved consolidation of two charges against one defendant); *People v. Wargo*, 149 Misc. 461, 268 N.Y.S. 400 (1933).

Whether or not the trial judge has abused his discretion in refusing to grant a separate trial is a problem peculiar to each case. Whether fairness demands a separate trial cannot be decided by any rule-of-thumb. See *People v. Fisher*, 249 N.Y. 419, 164 N.E. 336 (1928); 27 Australian L.J. 238 (1953).

In *People v. Wargo*, 149 Misc. 461, 268 N.Y.S. 400 (1933), a defendant charged with murder moved for a separate trial. In considering the motion, the court was concerned with the following elements: (1) The defenses of the two defendants were antagonistic. (2) The moving defendant did not actually participate in the killing but

aided and abetted the other defendant. (3) The other defendant had confessed. (4) The district attorney had indicated that he might call the other defendant (it is not clear how he would be able to do this). (5) The difficulty of instructing the jury as to the admissibility of evidence was recognized. (6) The court also was mindful that, "[u]pon a joint trial either defendant might easily, in his or her own interest, deprive the other of all right to peremptory challenge."

The court in the *Wargo* case granted the motion for a separate trial. In so doing the judge stated as follows:

"Even though there may be basis for the contention that no one of these reasons is sufficient, yet in the aggregate they control the discretion of a trial judge whose practical experience has witnessed their soundness. They minimize to almost nothing the popular demand for greater speed, economy, and convenience in the administration of the law at the sacrifice of justice to the individual. The trial of petty cases in the Supreme Court [a trial court in New York] can very well yield sufficient time for separate trials in a proper case such as this which must be classed as the most important of all litigations because upon its outcome is dependent the guaranteed and inalienable right of human life."

In the instant case each of the grounds which we have discussed have on other occasions been deemed by other courts sufficient to find an abuse of discretion. Certainly all of these elements viewed in the aggregate as *Wargo* suggested, indicate an abuse of discretion. The only way in which the defendant could have been

insured of a fair trial, was the granting of a separate one.

In making his decision, the trial judge was forced to weigh the interest of the community in speedy and inexpensive administration against our traditional guarantees of liberty and justice. Certainly we should not sacrifice the rights of the individual for a little added efficiency. The words of Justice Lehman in *People v. Fisher*, 249 N.Y. 419, 164 N.E. 337 (1928) (dissent), are applicable to the instant case. He stated as follows:

“No considerations of expense to the state, inconvenience to witnesses and public authorities, or even of delay in punishment of the guilty can justify a procedure which results in serious impairment of the rights of an accused to a fair consideration by an impartial jury of the competent testimony produced against him.

“* * *

“We secure greater speed, economy, and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high. Our ideal is that justice should be swift and certain. Human justice is still far from that ideal; and sometimes I feel that a proper zeal to destroy technicalities and achieve a more efficient administration of justice leads us to disregard fundamental principles and guarantees.”

In the instant case the defendant was denied a fair trial. This could have been prevented merely by granting a separate trial. In view of the crime with which the defendant was charged, and the awful punishment which is

prescribed for that crime; and in view of the grounds with which he moved, and the unfair trial which he was actually subjected to, a separate trial most certainly should have been granted. The failure to so order was clearly an abuse of discretion on the part of the trial judge.

POINT III

THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO DISMISS SINCE THE JURY COULD NOT HAVE FOUND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS GUILTY OF MURDER.

In Instruction No. 8 the trial judge instructed the jury as follows:

"If the evidence in the case is susceptible of two constructions or interpretations each of which appears to you to be reasonable and one of which points to the guilt of the defendant and the other to his innocence, it is your duty, under the law, to adopt that interpretation which admits of the defendant's innocence and reject that which points to his guilt."

That this is a proper instruction in Utah cannot be doubted. In *State v. Laub*, 102 Utah 402, 131 P. 2d 805 (1942), this Court stated as follows:

". . . the prosecution still has the burden of proving beyond a reasonable doubt that the defendant is guilty. Or stated another way, the prosecution must 'not only show . . . that the alleged facts and circumstances are true, but they must also be such facts and circumstances that are incompatible upon any reasonable hypothesis,

with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than the defendant's guilt. . . . all the circumstances as proved must be consistent with each other, and they are to be taken together as proved. Being consistent with each other and taken together they must point surely and unerringly in the direction of guilt.'

"Hence, if two reasonable hypothesis are pointed out by the evidence and one of them points to the defendant's innocence, it would then be difficult to see how any jury could be convinced beyond a reasonable doubt of the defendant's guilt."

See also *State v. Anderson*, 108 Utah 130, 158 P.2d 127 (1945); *State v. Burch*, 100 Utah 414, 115 P.2d 911 (1941); *State v. Crawford*, 59 Utah 39, 201 Pac. 1030 (1921); *People v. Scott*, 10 Utah 217, 37 Pac. 335 (1894); *State v. Erwin*, 101 Utah 365, 120 P. 2d 285, 302 (1941).

If the evidence indicates a reasonable hypothesis as to innocence, the case should not be allowed to go to the jury. If the facts relied on by the State are not inconsistent with defendant's innocence, the innocence of the defendant is established as a matter of law. See *State v. Anderson*, *supra*; *State v. Erwin*, *supra*.

The State relied on the fact that Rivenburgh before entering the attic disclosed a plan to kill the decedent. The decedent was killed in the attic and defendant was there at the time.

The defendant admits that he heard Rivenburgh disclose a plan to kill, but, like the State's witnesses, did not believe Rivenburgh was serious. Bowne thought, as did

the State's witnesses, that Rivenburgh was going to the attic to commit sodomy.

It is *reasonable* to believe that Bowne thought Rivenburgh was not going to kill the decedent but instead was going to commit sodomy because of the following facts:

1. Neither the defendant nor the State's witnesses thought Rivenburgh was serious when he disclosed a plan to kill, e.g.:

(a) Dripps was told by Rivenburgh to stand point for sodomy (R. 333). He was not concerned when he heard the scream (R. 351), and did not think there had been a death.

(b) Stark did not think the decedent would be killed in spite of what he said as he was entering the attic (R. 374).

(c) Rivenburgh did not tell Woods of an intent to kill anyone when he borrowed his boots (R. 457).

(d) Dripps told Rasmussen to stand point but not for murder (R. 332 and 334).

(e) Randel heard Rivenburgh and the decedent talk of the decedent's sex activities in the attic the afternoon of the preceding day (R. 494 and 495). He heard Bowne say he would have no part of killing the decedent (T. 231 and 246). Bowne told Randel he was in the attic to stand point for sodomy, and that he did not know there would be a killing (R. 269). Randel said Bowne was framed (R.

249 and 290). Rivenburgh laughed when Randel said he would have no part of the killing of the decedent (T. 575). Randel never told the guards of any plan to kill the decedent because he did not think Rivenburgh was serious (T. 254).

(f) Dalton heard that Rivenburgh was going to the attic to engage in sodomy (R. 319 and 327).

(g) Rivenburgh talked to the decedent about going to the attic for sodomy (R. 498). He first got the intent to kill the decedent while in the attic (R. 511). He had no intent to have Bowne aid, abet or assist in killing the decedent (T. 642). Rivenburgh had no knowledge as to the State's contention that Bowne had a scissor lock on the decedent's head (T. 644, and 645).

(h) Garcia knew of no plan to kill. He was told to stand point for sodomy (R. 503).

(i) Bowne did not think Rivenburgh was serious when he talked about killing the decedent (R. 267-278, 296, 297, 497; T. 691 and 692). He was later told to go to the attic with Garcia to stand point for sodomy (R. 269, 270, 319, 503; T. 253, 584-586, 684 and 694).

2. It was common at the Prison to hear of plans to kill others (R. 255).

3. It was common to hear of threats to other inmates (R. 276 and 278).

4. It was common to stand point in the attic and elsewhere for sodomy (R. 279).

5. It was common to carry knives in the Prison.
See page 4.

6. It was common to practice sodomy at the Prison.
See page 4.

7. The use of Amphetamine pills was common at the Prison. At 6:30 p.m., Rivenburgh was high on pills, and he talked about killing the decedent. No one thought him serious because of previous plans, threats, and "big talk" induced by the pills.

8. Other inmates who were witnesses for the State and who knew of Rivenburgh's "plan," stood point, destroyed evidence and joined in alibis; yet they were charged with nothing. They could not receive immunity for turning state's evidence. Immunity can only be afforded a *defendant* and that requires court approval. *Utah Code Ann.* § 77-31-7 (1953). The reason they were not charged along with the defendants, as asserted by the prosecuting attorney's office, was because they had no intent or knowledge that the decedent was going to be killed. The reason they had no intent was because they did not think Rivenburgh was serious. There is no reason why Bowne should have thought him serious. It is *reasonable* to believe Bowne was there to stand point for sodomy.

Even if it is reasonable to believe that a plan was effected; it is also reasonable to believe that Bowne was in the attic to stand point for sodomy. Even if the facts relied on by the State are consistent with the defendant's

guilt, they do not “. . . exclude every reasonable hypothesis other than the existence of such fact . . .” *State v. Anderson*, 108 Utah 130, 158 P.2d 127 (1945).

POINT IV.

THE TRIAL COURT'S INSTRUCTION NO. 15 IS CONFUSING AND IN ERROR BECAUSE IT FAILS TO SEPARATE THE CRIME OF SODOMY FROM THE CRIME OF MURDER, AND IN ITS ABSTRACT FORM COULD ALLOW THE JURY TO FIND THE DEFENDANT GUILTY OF MURDER IF THEY BELIEVED HE AIDED AND ABETTED IN THE ACT OF SODOMY.

Instruction No. 15 is the trial court's instruction on “aiding and abetting” (R. 151 and 152). It would not be objectionable if it were not for the fact that in the instant case more than one crime was involved. Much of the testimony introduced involved the crime of sodomy (T. 251, 252, 609, and 610). This crime was inextricably connected with the fact situation. Sodomy, the crime against nature, is capable of engendering deep seated prejudices against anyone connected with it. Indeed it must have been difficult for the jury in the instant case to appreciate the fact that no one was being prosecuted for this act of perversion. In view of this, it was error for the court to instruct as in Instruction No. 15.

In Instruction No. 15, the court fails to specify which crime it is speaking of. The Instruction reads in part as follows: “You are instructed that all persons concerned in the commission of *a crime*, whether they directly commit the act constituting the offense, or aid and abet in its commission, are principals in *any crime* so com-

mitted." (Emphasis added) (R. 151). When read in the context of the evidence, the court literally seems to tell the jury that if the defendant was concerned in the commission of "a crime" (the crime of sodomy perhaps), then he is a principal in "any crime" so committed (the crime of murder included).

The defendant was charged only with murder. It was error not to specify which crime the jury was to consider. The defendant admitted his part in the crime of sodomy. This, in fact, was his defense to the crime of murder. Yet in Instruction No. 15, the trial judge failed to specify which crime the aiding and abetting of would render the defendant guilty. The jury, while still under the impact of a sordid story of sexual perversion, was free to consider the defendant's part in the sexual activities as acts capable of rendering him guilty on the charge of murder. If the jury chose to follow this instruction, the fact that the defendant stood point (look-out) for an act of sodomy was sufficient to make him a principal in the crime of murder.

This Court has expressed itself on many occasions in regard to the use of abstract instructions. See *State v. Thompson*, 110 Utah 113, 170 P.2d 153 (1946), and cases cited therein. Instruction No. 15 is needlessly abstract in failing to substitute the term "murder" for the general term "crime." In view of the peculiar facts of this case, the shocking and highly distasteful facts involving sodomy, the failure of the trial court to indicate that it was the aiding and abetting of murder and only murder

which would make the defendant a principal in the crime charged was greatly prejudicial.

The prejudicial nature of this instruction was not cured by a correct statement of the law elsewhere in the instructions. See *Soda v. Marriott*, 118 Cal. App. 635, 5 P.2d 675, 677 (1931). This rule is especially true in a criminal case where the crime charged is punishable by death. The trial judge in his instructions should take special care to remove any material which is erroneous or unnecessarily abstract and thus prejudicial to the defendant.

POINT V.

THE TRIAL COURT'S INSTRUCTION NO. 26 IS IN ERROR SINCE IT FAILS TO RESTRICT THE JURY TO A CONSIDERATION OF THE ADMISSIONS AND STIPULATIONS OF THE PARTIES DURING THE TRIAL TO EACH RESPECTIVE PARTY.

In Instruction No. 26 the trial court instructed the jury as follows:

"You must arrive at your decision solely from the evidence submitted to you during the trial, and the natural inferences which may be reasonably drawn therefrom, together with the *admissions and stipulations of the parties* during the trial..." (Emphasis added.) (R. 164).

The trial judge erred in not restricting the admissions of a party to that party. Certainly the admissions of one joint defendant cannot bind another. The error is intensified if we interpret the term "party" to mean "plaintiff" and "defendant." This is illustrative of the

mischief which arises when two defendants are tried together in an improper case. See page 16.

In a joint trial, the judge has the important responsibility to restrict evidence admissible only as to one of the defendants to *that* defendant. This is the only way in which the other defendant can be saved from prejudice. As we pointed out in the argument to Point II, the theory is that any prejudice is removed by an admonition or instruction to the jury to forget what they have heard in regard to a certain defendant. See page 23. While this is woefully inadequate and not realistic, it is certainly better than the instruction we now except to. Instruction No. 26 invites and commands the jury to consider the admissions and stipulations of the parties in any way it sees fit.

The defendant Rivenburgh in effect confessed during the trial (R. 513; T. 552, 553, 604-613). The jury properly could consider his admissions only as against him. Such admissions were prejudicial to the defendant Bowne merely because of their presence in the trial. These admissions should have been considered only as against the defendant Rivenburgh. The trial judge improperly instructed the jury to consider "the admissions and stipulations of the parties during the trial" and did not restrict that consideration to the respective party who made the admission.

POINT VI.

THE TRIAL JUDGE ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 13.

Defendants requested instruction No. 13 reads as follows:

"You are instructed that if after a consideration of all of the evidence you conclude that it is reasonable to believe that the defendant Leonard Warner Browne intended to stand point while defendant Mack Merrill Rivenberg (sic) and the deceased Leroy Joseph Verner mutually engaged in an act of sodomy, and did not intend to be a participant in an act of murder, you should find the defendant Leonard Warner Bowne "Not Guilty." (R. 59).

This in substance was defendant's defense. He went to the attic to function as a lookout during an act of perversion. He did not intend to kill, or to do great bodily harm to the decedent or anyone else. He was not aware of any plan or intent on behalf of Rivenburgh. If the jury thought it reasonable to believe the defendant, then certainly he was not guilty of murder in the first degree.

Defendant had a right to have the jury instructed as in his requested instruction No. 13. It was prejudicial to him not to have his theory of defense before the jury. This is especially so in view of the instruction the court did give in the form of Instruction No. 15 (R. 151 and 152). See page 32.

POINT VII.

THE TRIAL JUDGE ERRED IN REFUSING TO GRANT A NEW TRIAL.

A new trial should have been granted for the following reasons:

1. Assuming that the trial judge did not abuse his discretion in failing to grant the motion for separate trials, a new trial should have been granted *after the trial* because of the prejudice which developed during the trial. See argument for Point II, page 16.

2. The jury was separated during its deliberations in that the bailiff took six jurors at a time down an elevator for purposes of going to the rest room. This was brought to the attention of the court.

3. After many hours of deliberation, the court instructed the bailiff to admonish the jurors they would be taken to a hotel for the night. The foreman told the bailiff that the jury was deadlocked. At that moment, another juror asked for an additional fifteen minutes deliberation before leaving for the hotel. The jurors were left to deliberate. In ten minutes, at about 3:00 a.m.—after approximately nine hours deliberation—they returned with a verdict of guilty *beyond* a reasonable doubt (T. 1036). This indicates the verdict was reached by means other than a fair expression of opinion by all the jurors.

4. The court erred in permitting the prosecution to call Jessie Garcia to the witness stand. Garcia was a

co-defendant to be tried separately at a later date (R. 480). Counsel for Bowne was also counsel for Garcia. When advised that the prosecutor intended to call Garcia as a witness, counsel for Bowne and Garcia informed the prosecution that he would not permit Garcia to testify in the Bowne trial (R. 476). The prosecution still called Garcia as a witness *in the presence of the jury* (R. 475). The jury was excused while law was argued and Garcia refused to testify on the grounds of self-incrimination. (R. 477-479).

When the jury returned, the court admonished the jury as to why Garcia did not testify (R. 480). The prosecution knew that Garcia would refuse, but called him anyway in an effort to prejudice the jury. The jury probably thought that Bowne and Rivenburgh were guilty since Bowne, Rivenburgh and Garcia were all charged with the same killing and Garcia would incriminate himself by testifying in the Bowne-Rivenburgh trial. The misconduct of the prosecutor was beyond the limits of propriety and prejudicial to the defendant (R. 477).

5. Rivenburgh was questioned on direct examination by his counsel; he was cross-examined by the prosecution on matters touched on direct. Upon completion of the prosecution's cross-examination, Rivenburgh was cross-examined by counsel for Bowne on matters touched on direct and adverse to the interests of Bowne. Before counsel for Rivenburgh was permitted to examine on re-direct, the court permitted the prosecution to cross-examine Rivenburgh on matters touched on cross-examination by counsel for Bowne (T. 647 et seq.).

The procedure was objected to by counsel for Bowne on the grounds that cross-examination must be limited to matters touched on direct-examination and not permitted as to matters touched on cross-examination (even though the cross-examination was by counsel for a co-defendant) (T. 647 and 650).

The court erred in permitting the *cross-examination on the cross-examination*, and also, prejudiced the defendant by affording the prosecution undue repetition in having two cross-examinations.

6. No motive was asserted or shown as far as Bowne was concerned. The absence of any proof as to motive tends to indicate innocence. See *People v. Tom Woo*, 181 Cal. 315, 184 Pac. 389 (1919). Where reliance is placed entirely on circumstantial evidence to establish a crime, absence of motive is a circumstance tending to clear the accused. See *Slater v. State*, 224 Ind. 627, 70 N.E. 2d 425 (1947). Presence or absence of motive is not proof of a substantive fact, though its absence strengthens the presumption of innocence. See *Thomas v. Comm.*, 187 Va. 265, 46 S.E. 2d 388 (1948).

POINT VIII.

THE TRIAL COURT ERRED IN FAILING TO COMPEL THE PROSECUTION TO FURNISH TAPE RECORDINGS AND COPIES OF STATEMENTS MADE BY WITNESSES AND DEFENDANTS.

The Prosecution was permitted, while examining witnesses and defendants at trial, to refer to notes, contents of tape recordings and statements taken during the State's investigation of the facts.

The full contents of such documents should have been afforded counsel for the defendant as argued in his Motion For Production of Documents (R. 24 and 25). The prosecution had the unfair advantage of quoting words out of context. This jeopardized counsel for the defendant in his cross-examination and re-direct. Quoting words out of context is especially unfair and prejudicial in the instant case because of the great amount of circumstantial evidence.

In his cross-examination, the prosecution was in a position to impress the jury that everything he stated was contained in the notes, tape recordings or statements, when in fact it might never have been. Because the witness could not remember everything that was said at a definite time and place many months prior to trial, it was implied that he was falsely testifying. This could have been cured by refreshing the witness's memory on re-direct. Without the proper documents, support was impossible.

An unfair and prejudicial advantage was afforded the prosecution by the error committed by the trial court in failing to compel the production of documents as requested in defendant's motion (R. 24, 25, and 27-A).

POINT IX.

THE TRIAL COURT ERRED WHEN IT REFUSED TO ADMIT EVIDENCE CONCERNING THE CHARACTER AND REPUTATION OF THE DECEASED.

As a general rule, the character and reputation of the deceased is inadmissible as being immaterial. How-

ever, it was proper evidence in the instant case for the purpose of showing that it was reasonable to believe the decedent was willingly going to the attic to practice sodomy with Rivenburgh.

Defendant contends he was to stand point in the attic while the decedent and Rivenburgh engaged in sodomy. The State contends he was there for murder. Consistent with the theory of other reasonable hypothesis, evidence of the character and reputation of the deceased should have been admitted to show the defendant's contention was reasonable. The trial court erred in refusing to admit evidence of the decedent's character and reputation for this purpose.

CONCLUSION

The defendant Bowne has been denied the due process of law and the equal protection of the laws which is guaranteed by our Constitutions. He has been deprived of a fair trial before an impartial jury. The evidence in this case did not warrant submission to the jury on the question of Murder in the First Degree, and the defendant's conviction of such charge is not substantiated by the evidence. The trial and verdict constitute a miscarriage of justice and should be reversed.

Respectfully submitted,

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