

1959

# State of Utah v. Danny Glispy and James Hallam : Brief of Appellants

Utah Supreme Court

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## Recommended Citation

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**In the Supreme Court of the  
State of Utah**

**FILED**

SEP 15 1959

**STATE OF UTAH,**  
Plaintiff and Respondent,

vs.

**DANNY GLISPY, and  
JAMES HALLAM,**  
Defendants and Appellants.

Clerk, Supreme Court, Utah

# 9116

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**BRIEF OF APPELLANTS**

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NEW CONCEPT PRINTING CO., PICTON, UTAH

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# **In the Supreme Court of the State of Utah**

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STATE OF UTAH,  
Plaintiff and Respondent,

vs.

DANNY GLISPY, and  
JAMES HALLAM,  
Defendants and Appellants.

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## **BRIEF OF APPELLANTS**

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Appeal from a verdict of Guilty to a charge of Rape, and from the judgment and sentence imposed thereupon by the Honorable Maurice Harding, District Judge of the Fourth Judicial District of the State of Utah, in and for Utah County.

The appellants will hereinafter be referred to as the Defendants and the plaintiff and respondent will be referred to as the State.

## STATEMENT OF FACTS

Defendants Danny Glispy and James Hallam were charged in the Fourth District Court in and for Utah County, State of Utah, with the crime of rape, allegedly committed on the 27th day of August, 1958, in Utah County, Utah, as follows, to-wit:

"That they, the said Danny Glispy and James Hallam at the time and place aforesaid, did then and there wilfully, unlawfully and feloniously, with force and violence, ravish and carnally know and have sexual intercourse with Hermer Linda Martinez, who was then and there not the wife of the defendants Danny Glispy and James Hallam, and without her consent and against her will and resistance, and overcoming her resistance with force and violence." (R. 6). To the charge contained in the information each defendant entered a plea of "Not Guilty", and the case was set to be tried before a jury on February 2, 1959 (R. 9). At the conclusion of the trial on February 3, 1959, the jury was unable to reach a verdict and the case was ordered reset for a new trial (R. 14). At the conclusion of the second trial on May 4, 1959, the jury returned a verdict as to each defendant of "Guilty of rape as charged", (R. 23; R. 24; R. 63), and on May 22, 1959 the trial judge sentenced each defendant to confinement in the Utah State Prison for an indeterminate term of not less than 10 years (R. 64). Notice of appeal as to each defendant from such verdict and judgment was filed on May 29, 1959 (R. 56) and the matter is now before the Court.

Upon the trial of the case the State called as witnesses Dr. A. L. Curtis (Tr. 4), Hermer Linda Martinez (Tr. 10), Rosalie Kinser Dudley (Tr. 40), Marcia Hallam Rowley

(Tr. 45), and Truman Hood (Tr. 50). The defendants called as witnesses James Hallam, one of the defendants (Tr. 55), Bruce White (Tr. 81) and John S. Niemiec (Tr. 84).

From the evidence introduced it appears without substantial conflict that on or about the 27th of August, 1958, in the evening of that day, the defendant Danny Glispy was driving a Nash Automobile belonging to his mother-in-law, and that he had with him the defendant James Hallam, Rosalie Kinser (now Rosalie Dudley), and Marsha Hallam (now Marsha Rowley), and that after seeing the complaining witness, Hermer Linda Martinez at the Payson carnival they picked her up in said Automobile in the vicinity of her home in Payson (Tr. 14; 41; 46;) and went for a ride up Payson Canyon. Miss Martinez fixed the time of their leaving for the Canyon at fifteen or twenty minutes after eight (Tr. 15); Rosalie Kinser at "around 8:30 or 9:00 o'clock" (Tr. 41); Marcia Hallam at "around 9:00 o'clock" (Tr. 46) and defendant Hallam at "right around nine o'clock" (Tr. 56). With defendant Glispy driving they rode up Payson Canyon for about five miles to Walker Flat where they stayed for about fifteen minutes (Tr. 16, 17, 42, 46, 56), and then they drove back down the Canyon for a distance of some two miles and stopped again on the side of the road where Rosalie Kinser and Marsha Hallam got out of the car and walked back up the road a short distance to "use the bathroom" (Tr. 20, 43, 47, 57).

At this point the testimony of Miss Martinez, the complaining witness, diverges substantially from the other witnesses. She testified that after the other two girls had gone back up the road, the defendants forced her to remain in the car (Tr. 21), put the back of the right front

seat into a reclining position (Tr. 23), proceeded to hold her down while taking her pedal pushers and pants off (Tr. 24, 25), and then first defendant Hallam and then defendant Glispy, while threatening her, forceably had intercourse with her over her violent protests and objections (Tr. 26, 27). She further testified that she was restrained by the defendants in the car while the above activity took place "for about an hour" (Tr. 33), and on cross-examination she stated that during all of such time she was kicking, cursing and yelling loudly (Tr. 36).

The other witnesses for the State, Rosalie Kinser and Marcia Hallam testified concerning this second stop to the effect that they got out of the car and went back up the road for a short distance to "use the bathroom" (Tr. 43 and 47); that they were at all times in view of the car; (Tr. 43 and 47); that they were gone from the car for only five minutes (Tr. 43 and 47); that they heard no noises coming from the car while they were gone, and if someone had yelled or screamed in the car they would easily have heard it (Tr. 43, 45, 47). Defendant Hallam testified relative to this period that when the two girls left the car, the two defendants started "messaging around a little bit" with the complaining witness (Tr. 57), and when she started to resist by kicking and hollering they immediately stopped (Tr. 58). On cross-examination defendant Hallam testified that in "messaging around" with the complaining witness he felt her breasts and that as they tried to get her pants down a little ways she called them names, started fighting and kicking and hollering so they immediately quit (Tr. 73-74), and he testified that neither of the defendants had anymore to do with the complaining witness (Tr. 66).

The complaining witness further testified on direct examination that after the other two girls came back to the car, she had a conversation with them concerning what had supposedly happened in the car (Tr. 33), but on cross-examination she admitted that she did not even mention to either of the other girls anything about what she claimed happened in their absence (Tr. 37). Witness for the State, Rosalie Kinser, further testified that when she returned to the car she did not notice anything unusual about the actions of the complaining witness (Tr. 44), although the complaining witness testified she was crying and very upset (Tr. 30).

All witnesses were in agreement that after leaving the second parking spot in Payson Canyon, they drove to the carnival in Payson where they separated and the complaining witness said she was going home (Tr. 35, 44, 49). Witnesses for the State, Rosalie Kinser and Marsha Hallam, testified that they arrived back at the Payson carnival at ten minutes to ten (Tr. 45 and Tr. 49).

The complaining witness testified further that as she was walking home from the carnival she was picked up by one Bill Hood (Tr. 35) who gave her a ride to Santaquin (Tr. 35), and that on the way back she first told Hood what had supposedly happened to her earlier in the evening (Tr. 35), and he thereupon took her home and then to the Police Station (Tr. 36) from where she was taken to the office of Dr. A. L. Curtis for a physical examination at about 11:30 p. m.

Truman Hood was called by the State and he testified that he first saw the complaining witness about 10:30 p. m. on the day in question as she was crying and staggering down the street (Tr. 51); that he took her for a ride to



Santaquin and on the way back the complaining witness first told him of what supposedly happened to her up Payson Canyon (Tr. 53). Hood then testified that the only unusual things he noticed about the complaining witness when he picked her up was a torn blouse and that she was more quiet than usual (Tr. 53, 54).

Dr. A. L. Curtis testified for the State that he examined the complaining witness around midnight of the day in question (Tr. 4), completing the examination at 12:30 a. m. (Tr. 8), and that he found blood, and spermatozoa in her vagina and evidence of a recent tear of the hymen of complaining witness (Tr. 6). Over objection of counsel for the defendants, Dr. Curtis was permitted by the Court to testify that an intact hymen normally indicates a person who is a virgin (Tr. 6). Dr. Curtis further testified that in his opinion the damage to the female organs of the complaining witness occurred within one or two hours of her examination (Tr. 7).

Other than the defendant Hallam, the only witnesses called on behalf of the defendants were Bruce White and John S. Niemiec, police officers of Salt Lake City, Utah, who testified that on or about the 14th day of September, 1958, the complaining witness stated to them that the two boys at Payson who had been charged with raping her had not actually made any penetration (Tr. 83 and Tr. 86).

At the conclusion of the evidence, defendants filed a written request that the Court instruct the jury to return a verdict of "not guilty" as to each defendant on the basis that as a matter of law the evidence produced by the State was not sufficient to support a conviction for rape. The Trial Court refused to so instruct the jury (R. 41, 42), and the defendants took due exception to this refusal (Tr. 89).

## STATEMENT OF POINTS

### POINT I

THE COURT ERRED IN PERMITTING WITNESS FOR THE STATE, DR. A. L. CURTIS, TO TESTIFY THAT RESULTS OF HIS EXAMINATION INDICATED THAT PRIOR TO THE DAY IN QUESTION THE COMPLAINING WITNESS HAD BEEN A VIRGIN.

### POINT II

THE COURT ERRED IN REFUSING TO GIVE DEFENDANTS REQUESTED INSTRUCTION NUMBER 1 TO THE JURY DIRECTING THE JURY TO RETURN A VERDICT OF "NOT GUILTY" AS TO EACH DEFENDANT.

## ARGUMENT

### POINT I

THE COURT ERRED IN PERMITTING WITNESS FOR THE STATE, DR. A. L. CURTIS, TO TESTIFY THAT RESULTS OF HIS EXAMINATION INDICATED THAT PRIOR TO THE DAY IN QUESTION THE COMPLAINING WITNESS HAD BEEN A VIRGIN.

The general rule is that in prosecutions for rape by force and without consent, evidence of the prior chastity of the prosecutrix is inadmissible as a substantive defense (44 American Jurisprudence 958). The Utah Supreme Court so held in the case of *State vs. Scott* 188 P. 860, and also in the case of *State vs. Jameson* 134 P. 2d, 173, a carnal knowledge case, approved an instruction of the trial court to the effect "that the chastity or lack of chastity of

the prosecutrix is immaterial in the offense with which defendant was charged”.

Defendants submit that if such evidence is inadmissible as a substantive defense, it is likewise immaterial and inadmissible when offered by the State in a forceable rape case. Testimony indicating the prior virginity of the complaining witness, in this case a fifteen year old girl, could have no other effect upon the jury than to excite passion and prejudice against the defendants in the minds of the jurors and the failure of the trial court to exclude such testimony over the objection of counsel for the defendants could likewise have no other effect upon the jury than to make it appear that the virginity of the prosecuting witness was a material part of the case. Such a result is even more likely as a consequence of the way in which such testimony was elicited by counsel for the State (Tr. 6). Dr. Curtis had testified as to what physical facts his examination of the complaining witness had revealed with no reference specifically to her virginity or non-virginity when the following occurred: (Tr. 6) Question by Mr. Frazier, attorney for the State: “Now does a hymen which is intact normally indicate a person who is a virgin?” Mr. Christenson, attorney for the defendant: “We object to that as being immaterial”. The Court: “He may answer”. Answer by Dr. Curtis: “Yes”. Question: “and you say in this case the hymen had been torn?” Answer “Yes”.

Defendants contend that such testimony was clearly inadmissible, no question of the reputation of the complaining witness being involved, and the failure of the Trial Court to exclude such testimony was highly prejudicial to the defendants and precluded them from having a fair trial in this matter.

## POINT II

THE COURT ERRED IN REFUSING TO GIVE DEFENDANTS REQUESTED INSTRUCTION NUMBER 1 TO THE JURY DIRECTING THE JURY TO RETURN A VERDICT OF "NOT GUILTY" AS TO EACH DEFENDANT.

The defendants did not file a motion for a new trial in the instant case, but it is their contention that the question of the sufficiency of the evidence to sustain the verdict of the jury is properly before this Court. Defendants strongly contend that the evidence does not sustain the verdict of the jury as a matter of law.

Section 77-37-4, Utah Code Annotated, reads as follows:

"When written requests to charge have been presented and given modified or refused, the questions presented in such requests need not be excepted to or embodied in the bill of exceptions, but such written requests to charge, with the endorsements thereon showing the action of the Court, form part of the record, and any error in the decision of the Court thereon may be taken advantage of on appeal in the same manner as if presented in a bill of exceptions."

This Court further said in the case of Law vs. Smith, 98 P. 300:

"If the trial Court has passed upon a matter in the course of a trial and an exception is taken or is given by the statute, the ruling or decision made by the trial court, if assigned as error, is before this court for review on appeal."

During the course of the trial the defendants did submit written requests for instructions to the jury, number

1 of which and which was refused by the trial Court, reads as follows (R. 41, 42):

"You are instructed that there has not been sufficient evidence produced by the State to support a conviction of the defendants, or either of them, and you are therefore directed to return a verdict of "not guilty" as to each defendant."

Exception to the trial Court's refusal to give such instruction was taken by the defendants (Tr. 89).

This Court held in the case of State vs. Laub, 131 P. 2d 805, that:

"It is not our province on appeal to judge the credibility of witness when their testimony is in direct conflict. We are concerned only with the question of the sufficiency of the evidence to sustain the conviction by showing that the jury could have found beyond a reasonable doubt that the defendants were guilty."

However, in the case at hand conflicts in testimony exist not only between some witnesses for the State and those for the defendants, but two of the State's own witnesses directly contradict much of the critical testimony of the complaining witness relative to the commission of the alleged crime.

The Court said in the case of Schlatter vs. McCarthy, 196 P. 2d 968:

"Generally, a party who calls a witness vouches for his veracity and cannot afterwards impeach such witness, either by testimony of an impeaching witness or by argument to the jury and he may not argue to the jury that such witness is unworthy of belief."

Certain exceptions to the above rule do exist, such as when the witness is called as an adverse witness or when a calling party is surprised by the unexpected testimony of the witness, but in this case the State did not call Marcia Hallam and Rosalie Kinser as adverse witnesses nor claim them to be so, nor could the State, or did it, claim surprise as to their testimony since the State was fully aware of what their testimony was, having heard both testify substantially the same at the first trial of the case.

In respect of the time when the alleged attack occurred, the complaining witness testified that she was held in the car against her will by the defendants for about an hour (Tr. 33), while the other two girls were absent from the car. On the other hand, witnesses for the State Rosalie Kinser and Marsha Hallam, each testified that they were away from the car for only five minutes (Tr. 43, 47). The complaining witness testified that all during the time she was held in the car by the defendants she was kicking, cursing, and yelling loudly (Tr. 36), while the two girls called as witnesses by the State testified that they were only a short distance from the car, only 30 paces away, according to Marcia Hallam (Tr. 47), always in view of the car (Tr. 43), and yet they saw no commotion, nor heard any shouting or yelling from the car and that had there been such a ruckus as the complaining witness described, they would have heard it (Tr. 45, 47). Complaining witness testified that when she was finally let out of the car by the defendants she was crying and couldn't calm down (Tr. 30), yet State's witness Rosalie Kinser observed nothing unusual about the complaining witness at the time (Tr. 44). Complaining witness testified on direct examination that when the defendants let her out of the car she talked

with the other two girls about what had happened to her (Tr. 32, 33), which was denied by the other two witnesses for the State (Tr. 44, 48), but on cross-examination the complaining witness admitted that she had said nothing to the other two girls regarding what supposedly happened to her in the car (Tr. 37),

There is no conflict in the testimony with respect to the time the occupants of the car arrived back at the carnival in Payson, both State witnesses Marcia Hallam and Rosalie Kinser fixing such time at ten minutes to ten (Tr. 45, 49), so it is clear that if the complaining witness was attacked by the defendants, as she claims, such attack would have had to occur at least several minutes prior to the ten minutes to ten, since it would have taken some time to walk around up the canyon after the attack as complaining witness claimed she did (Tr. 31, 32), and to have driven back down the Canyon to the Payson carnival. In view of this evidence offered by the State, it is clear that considerably more than two hours elapsed between the time of the alleged attack and the time at midnight when the complaining witness was examined by Dr. Curtis (Tr. 4), who stated that the physical injuries to her would have had to occur within one or two hours.

In view of these substantial conflicts of testimony among the various witnesses called by the State as to what happened in respect to much of the critical evidence in the case, defendants earnestly contend that the jury as a matter of law could not reasonably have found that there was no reasonable doubt about the guilt of the defendants. In order to find as they did the jury had to disregard almost the entire testimony of two of the witnesses called by the State, the veracity of whom the State vouched for by

calling them to the stand. This is not a case where the Supreme Court is called upon to judge the credibility of witnesses for the State as compared to those for the defense, something which it has said it will not do, but it is rather a case where to sustain the verdict of the jury, the Court must, as the jury obviously did, make a selection from among witnesses for the State to find evidence to support a conviction and thereby disregard equally competent testimony from other State witnesses, which testimony at least gives rise to a very grave doubt as to the guilt of the defendants, and all without extending any credibility to the testimony offered by the defendants.

The complaining witness doubtless had intercourse with someone on the night in question, but to say that the evidence produced by the State, as much in conflict within itself as it was, could justify the jury in finding beyond a reasonable doubt that the defendants were guilty of rape, does great violence to the idea of justice.

### CONCLUSION

In conclusion, the defendants earnestly assert that they were denied a fair trial in the Court below by reason of the admission of testimony respecting the prior virginity of the complaining witness, which testimony was wholly immaterial and was calculated to and doubtless did incite prejudice in the minds of the jury against the defendants. They further assert that, even without considering the evidence produced by the defendants as to their innocence, the evidence produced by the State was so much in conflict with itself, the jury could not as a matter of law reasonably have found beyond a reasonable doubt that the defendants



were guilty of rape. Consequently the verdict of the jury below and the judgment thereupon should be reversed.

Respectfully submitted,

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Attorneys for Appellants