

1960

# State of Utah v. Sherrill Z. Chesnut : Brief of Appellant

Utah Supreme Court

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Galen Ross; Attorney for Appellant;

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## Recommended Citation

Brief of Appellant, *State v. Smith*, No. 9258 (Utah Supreme Court, 1960).  
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**IN THE SUPREME COURT  
OF THE STATE OF UTAH**

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STATE OF UTAH,

*Respondent.*

vs.

RAY J. SMITH,

*Appellant,*

**FILED**

AUG.

Clerk No. 9260

Utah

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**APPEAL FROM THE DISTRICT COURT OF THE  
STATE OF UTAH, COUNTY OF DAVIS  
WAHLQUIST, Judge**

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**BRIEF OF APPELLANT**

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# INDEX

|                                 | <i>Page</i> |
|---------------------------------|-------------|
| TABLE OF CASES . . . . .        | <i>ii</i>   |
| STATEMENT OF THE CASE . . . . . | 1           |
| ASSIGNMENT OF ERROR . . . . .   | 6           |
| CONCLUSION . . . . .            | 10          |

## TABLE OF CASES

| CASES   | <i>Page</i> |
|---|-------------|
| <i>Griffin v. United States</i> (CCA 3d 1924)   |             |
| 295 Fed 432 . . . . .   | 9           |
| <i>Harrison v. U.S.</i> (CCA 6th 1912) 200  |             |
| Fed 662 . . . . .   | 9           |
| <i>Howard R. Marshall v. U.S.</i> (360 U.S. 310,<br>3 L. Ed. (2d) 1250, 79 S. Ct. 1171) . . | 10          |
| <i>Krulewitch v. United States</i> 336 U.S.   |             |
| 440, 69 S. Ct. 130, 93 I. Ed. 790 . . .   | 8           |
| <i>Meyer v. Cadwalder</i> (D.C. Penn. 1891)   |             |
| 49 Fed. 32 . . . . .  | 9           |
| <i>People v. Murawski</i> (Ill. 1946) 68 N.E.   |             |
| (2d) 272 . . . . .  | 9           |
| <i>People v. Wong Tong</i> (Cal. 1911) 114  |             |
| Pac. 829 . . . . .  | 9           |
| <i>State v. Claypool</i> (1925) 135 Wash. 295 .   | 9           |
| <i>U.S. v. Montgomery</i> (D.C. NY 1930) 42   |             |
| Fed. (2d) 254 . . . . .   | 9           |
| <i>U.S. v. Ogden</i> (D.C. Penn. 1900) 105  |             |
| Fed. 371 . . . . .  | 9           |

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**BRIEF OF APPELLANT**

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**STATEMENT OF THE CASE**

This is an appeal from a verdict against appellant for perjury in the second degree.

The accusation against the appellant (which was by Indictment returned by the Grand Jury

of Davis County on 14 Oct., 1960, rather than by information) changed as follows:

Ray J. Smith committed perjury in the second degree in testifying as follows under oath by giving the following answers to the following questions:

QUESTION: "You know Van Hoff pretty well, don't you?"

ANSWER: "No, I don't."

QUESTION: "As a matter of fact you saw him last night, didn't you?"

ANSWER: "No."

QUESTION: "You took papers out to him last night, didn't you?"

ANSWER: "No, I didn't."

QUESTION: "Where did you take the papers?"

ANSWER: "Well, I can't remember where I took them."

QUESTION: "Now come on, you tell me where you took those papers."

ANSWER: "Well, it has been what now, five or six days ago, five days ago, I can't remember."

QUESTION: "When was it you saw Dan Probert and turn the badge over to him?"

ANSWER: "That I can't remember. You will have to talk to him. I can't remember."

QUESTION: "I am talking to you now and I am asking you when that was and I want you to tell me when it was, was it yesterday?"

ANSWER: "To tell you, I can't remember."

QUESTION: "When did you take that badge back?"

ANSWER: "I can't remember what day it was."

QUESTION: "Well you know whether it was yesterday or the day before?"

ANSWER: "It wasn't yesterday, I know that."

QUESTION: "Where is Van Hoff?"

ANSWER: "I don't know."

QUESTION: "You swear absolutely that you didn't see Geyard Van Hoff yesterday?"

ANSWER: "I didn't see him yesterday."

QUESTION: "Or the day before?"

ANSWER: "About the only time I remember I seen him is out to work eating with him is all."

QUESTION: "All right now. Do you swear then that you had no contact other than seeing him?"

ANSWER: "I have had no contact with the man."

However, a bill of particulars and a motion made before the case was submitted to the jury narrowed the alleged perjury to the following four parts:

*Part 1:* QUESTION: "Where did you take the papers?"

ANSWER: "Well, I can't remember where I took them."

*Part 2:* QUESTION: "Now, come on, you tell me where you took those papers."

ANSWER: "Well, it has been now five or six days ago, five days ago, I can't remember."

*Part 3:* QUESTION: "When was it you saw Dan Probert and turned the badge over to him?"

ANSWER: "That, I can't remember. You will have to talk to him. I can't remember."

*Part 4:* QUESTION: "When did you take the badge back?"

ANSWER: "To tell you, I can't remember."  
The jury found appellant guilty to part one and two.

Prior to the trial the appellant filed the following pleadings:

1. Motion to inspect the Grand Jury transcript.
2. Affidavit of prejudice against the judge.
3. Motion for a continuance and change of venue, based upon the contention that it would be impossible for the appellant to obtain a fair trial because of publicity being circulated throughout the jurisdiction of the court. This motion was accompanied by affidavits from citizens of Davis County.

Only the first motion was granted.

## ASSIGNMENTS OF ERROR

In this case it is possible to make quite a few assignments of error. For example, the judge's refusal to leave the bench or the insufficiency of the proof, which is stricter in perjury cases. However, because this is but a misdemeanor and the sentence was only three months in jail, there would be no satisfaction in appeal unless this case could stand for a greater principal. The only assignment of error made is that the court erred in denying appellant's motion for a continuance or change of venue.

The newspaper publicity given, both this case and the Davis County Grand Jury inquisition was outstanding. I am sure that no barrister can claim more publicity on a misdemeanor. There was more notoriety in this case than most felonies. The whole county, if not the state, was enraged at the polygamy problem. So enraged that a Grand Jury was formed and this was to be the first person on whom they could take their vengeance.

The voir dire examination of the trial jurors shows the effect of this publicity.

“Prejudice might enter in”

“Would you be willing to be tried by jurors of your same frame of mind.”

“It might be risky.” (St. 33)

It might be argued that this man was dismissed for cause but he was just a bit more frank than the 100% Mormon jury panel that tried the defendant.

It is true that courts and lawyers have, for many years, indulged in the fiction that jurors can, by instruction, be made to ignore or disregard opinions and ideas which may be fixed in their conscious or subconscious minds. But, a more realistic philosophy has more recently been recognized and adopted. Thus in the case of *Krulewitch vs. United States*, 336 U.S. 440, 69 S. Ct. 130, 93 L. Ed. 790, Justice Jackson stated (p 453) :

“The naive assumption that prejudice can be overcome by instruction to the jury . . . all practicing lawyers know to be unmitigated fiction.

In any event this fiction should not be applied in this case even though the trial judge to explain the duty of jurors. Jurors might be capable of laying aside preconceived ideas and opinions and driving at conclusions from particular facts and not considering others. But this is an attribute of mind that is acquired by special training and education and is not an acquirement possessed by the ordinary jurymen, especially one brought up in a contrary theological atmosphere to that of the philosophical views of the man on trial.

In many cases it has been held that adverse publicity, creates a presumption of prejudice which cannot be overcome by the instructions of the trial court.

State v. Claypool (1925) 135 Wash. 295

People v. Murawski (Ill. 1946) 68 N.E. (2d)  
272.

People v. Wong Tong (Cal. 1911) 114 Pac.  
829.

Meyer v. Cadwalder (D.C. Penn. 1891) 49  
Fed. 32.

Griffin v. United States (CCA 3d 1924) 295  
Fed 432.

U.S. v. Ogden (D.C. Penn. 1900) 105 Fed.  
371.

U.S. v. Montgomery (D.C. NY 1930) 42 Fed.  
(2d) 254

Harrison v. U.S. (C.C.A. 6th 1912) 200 Fed  
662

There are many cases holding contrary to these cases especially where the account contains nothing which is of unfair nature or prejudicial to the defendant. Many citations can be found in 31 A.L.R. 2d 422. However, even though it might be said that the newspaper articles in this case were not especially unfair or

prejudicial, the cumulative effect of the articles, about appellant, the general publicity on the Grand Jury in its probe against polygamy and the contra religious nature of the community made a prejudicial jury.

## **CONCLUSION**

When two basic premises meet, one must give way if the other is to be kept pure. The premise of freedom of the press, made so valuable to Americans by propaganda of the press, is at last meeting head on with the premise of a right to a free trial. The rule of the press is about to be defeated.

Howard R. Marshall v. U.S. (360 U.S. 310, 3 L. Ed. (2d) 1250, 79 S. Ct. 1171) was a 10th circuit case which was granted certori to the Supreme Court on June 15, 1959. It was an eight-to-one decision with Justice Black dissenting without opinion. The court held that even though the jurors stated that they would not be

prejudiced after seeing news accounts of previous criminal activities of the defendant such information gleaned through the newspapers was more prejudicial than when it comes out at trial where it is tempered by protective procedures. If I may look to the future, this is the first of a series, ending the reign of freedom of the press and commencing the regime of the right to a free trial. Justice Black's dissent without written opinion forebodes that this will not come to pass without a fight. I hope that Utah will be a leader rather than a follower in the struggle.

Respectfully submitted,

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