

1960

# The State of Utah v. Ruben B. Sanchez : Brief of Appellant

Utah Supreme Court

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Thomas P. Vuyk; Attorney for Ruben B. Sanchez;

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IN THE SUPREME COURT

FILED

DEC 14 1960

of the

STATE OF UTAH

Clerk, Supreme Court, Utah

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THE STATE OF UTAH,

)

Respondent,

)

vs.

Case No. <sup>9298</sup>~~6278~~

RUBEN B. SANCHEZ,

)

Criminal

Appellant.

)  
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BRIEF OF APPELLANT

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

-----  
THE STATE OF UTAH,

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Respondent,

)

vs.

RUBEN B. SANCHEZ,

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Case No. 6478  
Criminal

Appellant.

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BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case comes before this Honorable Court on appeal from a judgment rendered in the Second Judicial District Court of the State of Utah, in and for Weber County, Criminal File No. 6478. For purposes of this brief the record shall be referred to as "R", followed by the page number, a comma, followed by the line. For purposes of brevity and for this brief, the parties hereto shall be referred to as they were in the

lower court. Therefore, Mr. Sanchez will be referred to as the defendant and not the appellant.

### STATEMENT OF FACTS

Defendant Ruben Sanchez was charged with a violation of Section 76-53-15 Utah Code Annotated 1953, to-wit: That he, Ruben Sanchez, raped Beverly Garcia by committing an act of sexual intercourse with the said Beverly Garcia, who was not the wife of said Ruben Sanchez at a time when the said Beverly Garcia was under the age of thirteen years, to-wit: ten years.

The complaint was filed in the City Court, City of Ogden, County of Weber, State of Utah, on the 19th day of February, 1960.

The defendant, Ruben Sanchez, entered a plea of not guilty and has at all times maintained that he did not commit the act alleged. The case was tried in the District Court of the Second Judicial District, Weber County, State of Utah, with the Honorable Judge Parley E. Norseth, presiding. R, page 1, line 10: Whereupon a jury trial was had and the State of Utah called certain witnesses to testify to the effect that the

defendant herein committed the act alleged.

The testimony of the prosecutrix, Beverly Garcia, R. page 18 through 32, was to the effect that on or about the month of July, 1959, said Ruben Sanchez did forcibly have sexual relations with the prosecutrix. R. page 19, line 25.

Further testimony was to the effect that the prosecutrix was taken from her mother at a later date and put in the foster home of one Marguerite Kidd. Some four months after the alleged act prosecutrix claimed she had been raped. R. page 41. The prosecutrix was then given a physical examination by one Doctor Jay McEntire. His testimony was to the effect that it was possible for the girl to have had sexual intercourse. R. page 35. But no evidence was shown to prove she had been raped.

The defendant testified that he knew the prosecutrix but swore he had not committed the act alleged. R. page 50, lines 20-25.

The jury brought in a verdict of Guilty as Charged, R. page 66, and the defendant was given a

sentence of imprisonment in the Utah State Prison for a term of not less than twenty (20) years or which may be for life. Thereafter, the defendant Ruben Sanchez was committed to the Utah State Penitentiary. It is from this proceeding and trial that the defendant appeals his cause to this Honorable Court.

### STATEMENT OF POINTS

#### POINT I

THE COURT ERRED IN CONCLUDING THERE WAS SUFFICIENT PROOF OF PENETRATION AS ALL EVIDENCE THEREOF IS UNCLEAR AND CONTRADICTORY.

#### POINT II

THE COURT ERRED IN ADMITTING DR. McENTIRE'S TESTIMONY.

#### POINT III

THE COURT ERRED IN ADMITTING TESTIMONY OF CAPT. AUGUST NUSSBAUM.

#### POINT IV

THE VOIR DIRE OF THE ALLEGED VICTIM WAS INSUFFICIENT AND THE COURT ERRED IN ALLOWING HER TESTIMONY.

#### POINT V

THE COURT ERRED IN ALLOWING BEVERLY GARCIA'S TESTIMONY IN THAT SHE BEING A MINOR DID NOT SUFFICIENTLY



UNDERSTAND THE QUESTIONS THAT WERE ASKED, REFUSED TO ANSWER OTHERS, HAD TO HAVE MANY REPHRASED.

#### POINT VI

THE COURT ERRED IN ADMITTING TESTIMONY OF HAROLD GIBBS.

#### POINT VII

THE COURT ERRED IN ALLOWING THE TESTIMONY IN REFERENCE TO OTHER ALLEGED CRIMES BY OTHER PARTIES AND OTHER ALLEGED CRIMES BY THE DEFENDANT HEREIN.

#### POINT VIII

THE COURT ERRED IN ADMITTING THE TESTIMONY OF REBECCA GARCIA.

#### ARGUMENT

The defendant is cognizant of the general rule that in order to make assignments of error on appeal one must first have made objections or taken exceptions at the time of trial. However, an exception to this rule has been recognized by this court in the case of State vs. Cobo, 90 Utah 89, 60 P2d 92. The court said:

"That in capital cases and in cases of grave and serious charged offenses and convictions of long terms of imprisonment, cases involving the life

and liberty of the citizen, we think that when palpable error is made to appear on the face of the record and to the manifest prejudice of the accused, the court has the power to notice such error and to correct the same, though no formal exception was taken to the ruling."

The defendant, therefore, asks the court to assert its "power to notice such error" as are stated below and were admittedly not objected to or exceptions made thereto during the course of the trial.

#### POINT I

THE COURT ERRED IN CONCLUDING THERE WAS SUFFICIENT PROOF OF PENETRATION AS ALL EVIDENCE THEREOF IS UNCLEAR AND CONTRADICTORY.

Section 76-53-17 Utah Code Annotated 1953 provides:

"The essential guilt of rape consists in the outrage to the person and feeling of the female. Any sexual penetration, however slight, is sufficient to complete the crime."

The only evidence relating to penetration is found in the prosecutrix' testimony. The prosecutrix' testimony on this point is as follows:

"Q Now you tell us what happened then.

"A Well, I had a dress on, and he

tore it off me. And then he put me on the bed, and he got on top of me, and he put his penis in me.

"Q What do you mean by that?

Would you tell me what you mean by that? Could you tell us what he did to you?

"A Well, he got his penis, and put it between my legs. (Emphasis our.)

"Q Pardon me?

"A He put his penis between my legs." (Emphasis our.) Transcript Page 19, Line 24 to Page 20, Line 2.

"Q Tell me now particularly with you, if you would, Beverly, what did Ruben Sanchez do to you at that particular time?

"A Well, he took me in the other room and put me on the bed, and told me to take my clothes off, and I wouldn't, and so he pulled off my dress and pulled down my pants, and he took his clothes

off, and I was screaming and I wouldn't let him, so then he kept doing it to me. He opened my legs.

"Q He kept what?

"A He kept doing it to me. He opened up my legs, and put his penis in me." Transcript, Page 21, Line 9 to Line 19.

It has stated in 75 C.J.S. 472:

"Carnal knowledge or sexual intercourse denotes penetration; actual contact of the sexual organs of a man and woman and an actual penetration into the body of the latter. There can be no carnal knowledge without penetration. Sexual penetration of the female is necessary element to the crime of rape, and actual penetration into the body of the female being essential. Emissio seminis is not rape without penetration. Carnal knowledge is complete upon actual penetration, and it has been stated to be sufficient to constitute an offense on a female below the age of consent.

"Penetration means that the sexual organ of the male entered and penetrated the sexual organ of the female; mere actual contact of the sexual organs is not sufficient..."

In the case of Lovings vs. State, 62 NW2d 672,

158 Neb. 134, the rule was established that in order to prove the charge of rape it was the State's burden to prove, beyond a reasonable doubt, that penetration had occurred. It is clear from reading the prosecutrix' testimony that she was uncertain as to what actually took place and her testimony is contradictory in many areas and certainly leaves a reasonable doubt concerning penetration.

## POINT II

THE COURT ERRED IN ADMITTING DR. McENTIRE'S TESTIMONY.

The testimony of Dr. McEntire was entered by the prosecution in an effort to prove that the prosecuting witness had been raped. Such testimony did not prove rape and did not prove that this prosecutrix had been raped.

It is essential to note that the doctor's examination of the prosecutrix occurred four months after the time of the alleged act. It would thus seem apparent that this testimony was immaterial and its

admission amounted to prejudicial error on the part of the court.

A reading of Dr. McEntire's testimony beginning on Page 35, Line 28 of the Transcript, does not prove the prosecutrix was raped. In fact, it proves only that she is mature for her age and capable of engaging in sexual intercourse and even these facts are only true at the time of the doctor's examination, and not at the time of the alleged act. Therefore, the only purpose the testimony served was that of prejudicing the minds of the jury and was clearly inadmissible and was prejudicial to the defendant's cause.

### POINT III

THE COURT ERRED IN ADMITTING TESTIMONY OF CAPTAIN AUGUST NUSSBAUM.

The testimony of Captain August Nussbaum found on Page 45 of the Record was to the effect that when the defendant was arrested certain conversations were had with him to the effect that he knew Beverly Garcia and knew Rebecca Garcia.

a. It is essential to note that the testimony

of Captain Nussbaum was allowed over objections as to hearsay as to the statements made by the accused following his apprehension. Effect of the testimony was that after denying knowing the victim's mother, being in the home of the victim, the accused admitted knowing the mother and being in the home, but he denied commission of the offense. These statements clearly were sought to prove the truth of the matters asserted and were hearsay. Such statements were only admissible if they were an admission and thus an exception to the hearsay rule. According to Wharton on Criminal Evidence, Sections 400 through 405, an admission must show (1) intent; (2) guilty knowledge; (3) identity; (4) one of the elements of the crime charged; or (5) must tend to incriminate the accused and connect him with the crime.

b. The testimony was certainly prejudicial inasmuch as it brought contradictory statements before the jury. It is a general rule that if prejudicial, reversal is required. The testimony admitted does not show guilty knowledge, it only shows that the accused was acquainted with the mother of the alleged victim



and was in her home on different occasions. Therefore, the only purpose the testimony served is that of prejudicing the minds of the jury and was clearly inadmissible and prejudicial to the defendant's cause.

#### POINT IV

THE VOIR DIRE OF THE ALLEGED VICTIM WAS INSUFFICIENT AND THE COURT ERRED IN ALLOWING HER TESTIMONY.

It has been a general rule of law established by this court in State vs. Zeezich, 61 Utah 61, 210 P927, the testimony of a girl of tender years "who on voir dire examination testified that she knew what it is to tell the truth and what it is to tell a lie, and that she would be punished if she told a lie, and that her mother and District Attorney had instructed her and told her to tell the truth, held admissible although she testified she never went to Sunday School and knew nothing about God." It is clear that the voir dire of the witness found on pages 15, 16, 17 and 18 of the Record is clearly insufficient to allow the testimony of the witness. The witness was asked on several occasions if she knew what would happen if she



did not tell the truth. R. 16, Line 30; page 17,  
line 1:

"Q What do you think would happen  
if you don't tell the truth? Do you  
know?

"A No."

The witness clearly indicated that she had no fear of punishment, the only testimony which she gave was that to tell the truth was not to lie. There was no indication that there would be any punishment if she did tell a lie or any consequences if she told a lie. Further, there was no indication that the witness had any real sense of the impropriety of telling a falsehood. The only fact which she stated was that to tell the truth was not to lie and not to lie was to tell the truth. Clearly, such a distinction without the accompanying implications are insufficient and improper on voir dire to allow the testimony of a witness of such tender age. The admission of her testimony as the prosecuting witness in this case without the proper voir dire and without sufficient indication as to the consequences of a lie, are clearly prejudicial to the

defendant's cause and should not have been allowed.  
Her testimony should have been stricken sua sponte.

#### POINT V

THE COURT ERRED IN ALLOWING BEVERLY GARCIA'S TESTIMONY IN THAT SHE BEING A MINOR DID NOT SUFFICIENTLY UNDERSTAND THE QUESTIONS THAT WERE ASKED, REFUSED TO ANSWER OTHERS, HAD TO HAVE MANY REPHRASED.

a. According to 3 Wharton on Criminal Law,  
Section 63, "if a minor cannot understand the questions asked, the court must exclude her entire testimony."  
Here the witness, Beverly Garcia, had to have many questions rephrased; for example, page 31, Lines 1-20:

"Q Do you have any reason not to  
tell the truth about Mr. Sanchez?

"A (No answer.)

"THE COURT: Do you understand the  
question, Beverly?

"THE WITNESS: No.

"MR. PHILLIPS: I will rephrase it.

"MR. PHILLIPS: Q Is there any reason  
that you would tell lies about Mr.  
Sanchez and not tell the truth?

"A (No answer.)

"THE COURT: Just a minute.

"(To Reporter) Mr. Seely, read it back.

"(To Witness) Now you listen to what this man reads to you and then you answer it if you can. Just pay attention.

"(Question read.)

"THE COURT: (To witness) Do you understand the question?

"WITNESS: Well, I wasn't telling lies."

## POINT VI

THE COURT ERRED IN ADMITTING TESTIMONY OF HAROLD GIBBS.

a. The testimony of Harold Gibbs should not have been admitted in that it was absolutely irrelevant, immaterial, and improper. And, further, it served no purpose other than to provoke sympathy for the alleged victim. The testimony of Harold Gibbs was to the effect that on a certain day in July, 1959, he as an Ogden City police officer, made a call to the home of the prosecuting

witness and that he on this day took the prosecuting witness, her sister, and two brothers to the hospital and the Detention Home. The testimony was not related to the alleged crime committed nor to the proof or implication that the defendant herein was guilty of said crime, and it was clearly prejudicial and should not have been admitted, and the court erred in allowing its use.

#### POINT VII

THE COURT ERRED IN ALLOWING THE TESTIMONY IN REFERENCE TO OTHER ALLEGED CRIMES BY OTHER PARTIES AND OTHER ALLEGED CRIMES BY THE DEFENDANT HEREIN.

In the State's direct examination of Beverly Garcia, testimony was given to the effect that on a certain occasion the defendant came to her home with several other men and that the other men took her sister and were taking turns with her. R. page 21, line 5. Further, testimony was allowed to the effect that other men came to her home and also committed an act of sexual relations with the prosecutrix. R page 26, lines 22 through 30; Page 27, Lines 1 through 13.

Such testimony clearly was inadmissible in that it was inflammatory, prejudicial, and should never

have been permitted. Such testimony served only to inflame the jury against the defendant. There was no charge that the defendant herein was involved in other relations with other girls or that other men were being charged with the same crime. 1 Wharton, Section 325, Page 587, clearly indicates that when such testimony is allowed, there should be a reversal as it is prejudicial and harmful to the cause of the defendant.

#### POINT VIII

THE COURT ERRED IN ADMITTING THE TESTIMONY OF REBECCA GARCIA.

The testimony of the mother, Rebecca Garcia, was speculative and based on hearsay and as such, should have been stricken. R. Page 10, Line 30, Rebecca Garcia stated:

"...There were some times that I came out and Beverly stayed with the kids. And those times I think he was at the house.

"Q Pardon?

"A He was at the house. Down to the home. And I used to be out.

"Q Who do you mean by 'he?'

"A Ruben. (Pointing)"

Such testimony is really speculative and hearsay and serves no purpose. The witness by her own testimony had no knowledge as to when or who was at her home and her statement clearly was inflammatory, prejudicial and in no wise should have been admitted. Such testimony does not fall within any of the exceptions to the hearsay rule and though not objected to is of such a prejudicial nature that the court should take notice of the same and provide for a reversal.

#### CONCLUSION

Based upon the errors adduced in the foregoing argument, defendant urges that the judgment of the 10th day of May, 1960, committing said defendant to the Utah State Penitentiary be reversed and defendant be given a new trial.

Respectfully submitted,

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