1967

The State of Utah v. Richard Earl Lancaster : Brief of Appellant

IN THE SUPREME COURT
of the
STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

RICHARD EARL LANCASTER,
Defendant and Appellant.

BRIEF OF APPE[illegible]

Appeal from the Judgment of [illegible]
District Court for Salt [illegible]
Hon. Marcellus K. [illegible]

HATCH & [illegible]
Attorneys
707 Boston [illegible]
Salt Lake [illegible]

PHIL L. HANSEN
Attorney General
Attorney for Respondent
State Capitol
Salt Lake City, Utah

INDEX

CASES CITED

TEXTS CITED

STATUTES CITED

IN THE SUPREME COURT

of the

STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

RICHARD EARL LANCASTER,
Defendant and Appellant.

Case No.
10787

BRIEF OF APPELLANT

STATEMENT OF KIND OF CASE

This is an appeal from a verdict of guilty by a jury and a sentence to one year in the county jail on a charge of involuntary manslaughter.

DISPOSITION IN THE LOWER COURT

The defendant was charged with involuntary manslaughter in Salt Lake County, State of Utah, convicted by a jury, and sentenced by Judge Marcellus K. Snow to the maximum of one year in the county jail.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the verdict and judgment.

STATEMENT OF FACTS

Bobby Davis, the 5-year-old stepson of the defendant, was struck numerous times with a belt, the reason for the chastisement being either to stop him from holding his breath in the bathtub to the point of losing consciousness (R. 97), which he had done before, causing his parents great concern (R. 99-100) from the statement of the defendant, or as punishment for pulling down the bathroom curtains. He was struck several times with a doubled belt, "He didn't recall how many times" (R. 97), when he noticed the boy wasn't breathing (R. 97); some type of moisture was coming out of the boy's mouth. The defendant tried mouth-to-mouth resuscitation without success (R. 98).

Thereafter the child was rushed to the Cottonwood Hospital where he was determined to be dead by Dr. Horne.

Dr. Shelley Swift, pathologist whose qualifications were stipulated to, did an autopsy on the deceased the next day, finding numerous bruises and superficial abrasions on the body confined to the right side of the face, right side of the forehead and right ear, on the buttocks and one bruise on the scrotum and base of the penis

(R. 79). He determined that the cause of death was due "to aspiration of vomitus in the lungs" (R. 80). The witness testified that the combination of all the factors of trauma would not be sufficient to be disabling or incapacitating to a normal child of that age in his daily routine (R. 85); that the actual trauma itself is not sufficient to cause death (R. 84); that aspiration of vomitus may be caused by emotional upset (R. 86).

In answer to the question, "I'll ask you, Doctor, is there any probability of death from that amount of trauma without the intervening basis of the aspiration?" the witness testified as follows:

A. "You say any?

Q. Probability. I'm not asking about possibility; probability.

A. No, sir.

Q. Then, am I correct in stating that if this child hadn't aspirated the vomitus, the regurgitation, that death would not probably have arisen from the trauma to the buttocks, the scrotum, the cheek or any combination thereof?

A. That's right.

Q. Now, you indicate, also, I believe, that there are many things that can cause this aspiration, is that correct?

A. Uh-huh.

Q. And one of them is emotions, is that correct? And emotional upset combined with crying?

A. Combined with crying.

Q. And I'll — emotional upset need not be caused by pain, need it, Doctor?

A. No, Sir.

Q. Might be caused by fear, is that correct?

A. Yes.

Q. Or anger?

A. Yes, sir.

Q. Or a tantrum?

A. Well —

Q. Doctor, do you have an opinion from your medical practice as to how often an aspiration is caused in a child of the age of five to six years from an emotional status?

A. How often an aspiration is caused?

Q. That's correct.

A. I believe I just got through saying it is not seen in just simple emotion. It requires an act of crying along with it.

Q. All right. An emotional status combined with crying in a child of this age?

A. Yes, when a child is crying they exhaust themselves of air and have to breath before they completely expel the vomitus. It's pure emotional will cause this.

Q. But it must be combined with the crying?

A. Crying, yes.

Q. Do you have an opinion based on your medical experience how often this combination of things occurs with the child in this age group, that is, five to six years old?

A. I don't have any statistics, no.

Q. How many times have you seen this condition in a child of that age in your practice?

A. Oh, about three or four times.

Q. Out of how many children of that age that you've examined; autopsy?

A. I can recall about three cases we've had in the last about ten years.

Q. As I say, how many children of that age that you've performed autopsies with or examined?

A. Not many.

Q. I don't think you're understanding me, Doctor. You say you've had three or four. Now, I'm asking you how many children of that age have you examined or performed autopsies over that same period?

A. Are you talking about children ill with diseases or children involved in these things?

Q. Children involved with trauma.

A. There wouldn't be more than about ten or fifteen.

Q. Do you have an opinion based on reasonable medical certainty as to whether a basis of aspiration from a combination of crying and emotion would be foreseeable on chastisement of a child.

A. No, sir. I have no information on that." (R. 87-89)

He further testified that the bruise on the scrotum between the legs, in all likelihood, could not have been caused by a trashing with a belt; also, that the bruise could have been up to five hours old (R. 91). Again at R. 91, he testified as follows:

Q. "Now, once more, Doctor. Is it at all probable that the combination of all the trauma you found evidence of without the intervening basis of the aspiration causing death of this child?

A. No, sir."

At R. 92:

Q. "Can you state with any degree of certainty, Doctor, what did cause the regurgitation and/or the crying?

A. No, with certainty, no, sir.' '

Counsel for defendant made a motion for dismissal on the failure of the State to make a prima facia case at the end of the State's evidence.

Defendant did not testify but his statement to the officers immediately following the tragedy was testified to by Captain Andrus of the Sheriff's Department, without objection.

Defendant's counsel renewed his motion to dismiss in the nature of a motion for directed verdict, upon both sides resting.

The court denied both motions, the jury retired and came in with a verdict, being followed by the judgment, both of which are here appealed.

POINTS ON APPEAL

POINT I

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT.

POINT II

THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS AT THE END OF THE STATE'S CASE.

POINT III

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE.

POINT IV

THE COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 6.

ARGUMENT

The four points listed herein while technically separate points are so interlaced with the law and facts applicable thereto that they will be discussed together.

The defendant was charged under 76-30-5(2), Utah Code Annotated 1953, which defines manslaughter and reads as follows:

> "(2) Involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection."

The information (R. 1) charges as follows:

> ". . . INVOLUNTARY MANSLAUGHTER, in violation of Title 76, Chapter 30, Section 5 (2), Utah Code Annotated 1953, as follows, to-wit: "That on or about the 8th day of November 1965 at the County of Salt Lake, State of Utah, the said RICHARD EARL LANCASTER, unlawfully killed Robert Lee Davis without malice;"

The information does not set out nor did the State differentiate between the two breakdowns of subsection (2) of 76-30-5, Utah Code Annotated 1953, supra, and in no place did they allege an unlawful act not amounting to

a felony. In no place did they prove a lawful act which might produce death in an unlawful manner or without due caution or circumspection.

The doctor performing the autopsy, an admittedly qualified pathologist, testified as set forth in the statement of facts, supra, that death was caused "by aspiration of vomitus." He further testified that the combination of all or any of the injuries evidenced by trauma to the body not only would not cause death, but further stated (R. 87-89) that in his opinion there was no probability of them causing death in the absence of the intervening basis of the aspiration. In fact, he testified that the trauma would not even limit the child in its daily activities.

The annotation at 26 A.L.R. 192, citing *Copeland v. Tenn., 285 SW 2d 566,* which is further annotated at *Tenn., 286 SW 2d 565,* which is further annotated at 49 A.L.R. 605, states:

> "To warrant a conviction for this homicide, the death must be the natural probable consequence of the unlawful act and not the result of an independent intervening cause in which the accused did not participate and which he could not foresee."

Dr. Swift testified that many things — fear, anger, tantrums, as well as pain — could cause an emotional upset resulting in regurgitation followed by aspiration.

Dr. Swift was very careful to point out that any

opinion he had as to causation arising from trauma was on an indirect basis and that the death did not result directly from this trauma.

Citing from 31 A.L.R. 2d another annotation on manslaughter at page 704, the case of *Witt v. Commonwealth,* a 1947 case, *305 Ky. 31, 202 SW2d 612,* in which there was evidence that the deceased had been assaulted, the defendants were in a highly intoxicated condition. After a conviction the court reversed, using the following language:

> "In establishing that death is the result of a criminal agency, it is not sufficient merely to establish that a crime has been committed; death must be shown to have been the result of the crime proved. It is not always necessary to prove the cause of death by medical testimony. . . . Such a fact, as any other, may be proved by circumstantial evidence. But where circumstantial evidence alone is relied upon to establish the cause of death, the facts proved must be such that a layman of average intelligence would know of his own knowledge, gained from his own experience, that the injuries described are sufficient to produce death. . . . Since the medical testimony as to the cause of death was neutral, the jury could determine that death resulted from a criminal agency only from the nature of the wounds described; and such determination in a criminal case must be made to the exclusion of a reasonable doubt. Applying the rule in the cases above cited: We have evidence of death; we also have evidence that the crime of assault and battery was committed; but we do not have clear and cogent evi-

> dence that death was the result of the crime. By clear and cogent evidence we do not mean that the evidence must be without contradiction, or such as to command belief; but it must present more than a mere possibility of the existence of the fact or the happening of the act which the jury is called on to determine. . . . Because the wounds observed by the attending physician were of such superficial character, he refused to express an opinion that the force which produced them caused the death of the person upon who they were inflicted; and, for the same reason, we hold that they do not present cogent evidence for the Court or jury to so conclude as an ultimate fact. That being true, the Commonwealth failed to establish the corpus delicti, not because the evidence fails to show that death occurred or that a crime was committed, but because it fails to show that the crime, if committed, was the cause of death."

As the court will note, in the Witt case the physician was neutral as to the cause of death. In this case, Dr. Swift was not only not neutral, but was emphatic in this statements that the trauma not only would not, but could not, have caused the death. His finding as the cause of death was explicit — aspiration of vomitus causing asphyxiation. His testimony was also explicit that it would require an emotional basis.

There is no evidence by the State whatsoever to show that such a matter is foreseeable. Counsel for the defendant in his requested instruction No. 6, which was refused by the court (R. 11), asked the court to instruct as to foreseeability. As indicated, the court refused.

Counsel made a motion for a dismissal at the end of the State's case based on the State's failure to prove that the cause of death was (a) in the commission of an unlawful act not amounting to a felony, or (b) in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection.

Unfortunately, most of the cases in this State under 76-30-5, Utah Code Annotated 1953, which have had occasion to go to the Appellate Court were the various cases arising from criminal negligence or recklessness in the handling of automobiles prior to our legislation on negligent homicide and automobile homicide, some of those cases being *State v. Lingman, 97 Utah 180, 91 P2d 457, State v. Barker, 113 Utah 514, 192 P2d 723,* and *State v. Adamson, 101 Utah 534, 125 P2d 492.* In all those cases, the implication is that the negligence or recklessness to replace intent comes from driving of an automobile in such a manner as to create an implication that it may or will have a propensity to cause death or grave bodily injury. In the instant case, there is no evidence or implication that the nature of the chastisement of the child by the defendant would cause death or grievous bodily injury. The only evidence is that of the State's expert's opinion — a combination of all the trauma would not be sufficient to cause death, nor would it seriously impair a youngster of that age in his normal daily activities.

In the annotations of 31 A.L.R. 2d, supra, at subhead 6, page 702, there are certain cases upholding findings by laymen where there was an absence of medical testimony. In the instant case, there is no such absence, but on the contrary, the testimony of a highly qualified pathologist.

The State did not allege commission of a crime not amounting to a felony, nor did they prove one. The State further failed to prove the cause of an injury between the child's legs, the only testimony being that of Dr. Swift that chastisement with a belt, as shown by the testimonial evidence and the bruises on the buttocks and legs, was improbable as the cause of that bruise. However, a certain picture, Exhibit No. 7, indicates the nature and position of the bruise or contusion, and the pictures of the dead infant (considering their nature and the age of the child) must necessarily be inflammatory to the jury.

Under all the evidence in this case, it being all that of the State, the matter should not have been allowed to go to the jury. The defendant made proper motions both for a dismissal and for a directed verdict after the defendant had rested, without putting on evidence. Defendant further requested an instruction requiring foreseeability of the likelihood of death arising under the phrase in the statute, 76-30-5(2), Utah Code Annotated 1953: ". . . a lawful act which might produce death in an unlawful manner without due caution or circumspection." The court refused to give such an instruction.

CONCLUSION

It is our contention, as set forth in points on appeal, that:

1. The evidence is insufficient to support the verdict.

2. The evidence being in the status as shown by the transcript, the court should have granted the defendant's motion to dismiss at the end of the State's case.

3. The court should have granted defendant's motion for a directed verdict, either as verbally read into the record or by giving defendant's requested instruction No. 1 (R. 8).

4. The jury was not properly instructed as to the requirement of foreseeability or probability of death or grievous bodily injury.

It is respectfully submitted that the verdict of the jury and the judgment of the trial court should be reversed and the case dismissed.

HATCH & McRAE
Attorneys for Defendant
707 Boston Building
Salt Lake City, Utah 84111