

1962

# State of Utah v. Salamon Julian Sanchez : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

STATE OF UTAH,

Supreme Court, Utah

*Respondent,*

vs.

Case No.

UNIVERSITY UTAH  
9640

SALAMON JULIAN SANCHEZ,

JUN 1 1962

*Appellant.*

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BRIEF OF APPELLANT

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IN THE SUPREME COURT  
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STATE OF UTAH,

*Respondent,*

vs.

SALAMON JULIAN SANCHEZ,

*Appellant.*

Case No.

9640

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BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On the 22nd day of November, 1961, in the Third Judicial District Court, Defendant was convicted of having fraudulently obtained a narcotic drug in violation of Title 58, Chapter 13, Section 35, Utah Code Annotated

1953, as amended, 1961. Defendant prays for reversal on the grounds that: (1) The Trial Court committed error in refusing defense counsel the right to obtain information necessary to his defense, and (2) The statute upon which Defendant's conviction stands is vague and ambiguous as applied in this case, and, therefore, void under the Due Process Clauses of our State and Federal Constitutions.

### DISPOSITION MADE IN LOWER COURT

The trial was held on June 16, 1961, before the Honorable Joseph G. Jeppson, Judge of the Third Judicial District Court, Salt Lake City, Salt Lake County, State of Utah. A jury was impanelled and the trial proceeded.

The State and the defense, having presented their cases, were advised by the Court of the proposed jury instructions. Counsel for the Defendant excepted to one of the proposed instructions and also excepted to the Court's refusal to give two of the Defendant's requested instructions.

Thereupon, counsel for the defense moved for the dismissal of the jury and submitted the case for the Court's disposition.

The Defendant was found guilty as charged in the information.

## RELIEF SOUGHT ON APPEAL

Reversal of Trial Court's Judgment.

## STATEMENT OF FACTS

A complaint was issued on the 26th of June, 1961, charging the Defendant, SALAMON JULIAN SANCHEZ, with the violation of Title 58, Chapter 13a, Section 35, Utah Code Annotated 1953, as amended, by Laws of Utah 1955, Chapter 94, as follows:

“That the said Salamon Julian Sanchez . . . , at the time aforesaid, did wilfully and unlawfully obtain a narcotic drug, to wit: Paregoric, by the use of fraud, deceit, misrepresentation, or subterfuge.” (R-10)

On October 24, 1961, at 10:00 o'clock a.m., Defendant appeared with counsel and preliminary hearing was held. (R-2)

Defendant was duly arraigned on November 6, 1961, and entered a plea of not guilty. (R-13)

At trial, the evidence tended to show that the Defendant and two others obtained paregoric from the Corner Drug Store at 401 South 9th East. The trio obtained the paregoric after a member of the trio, other than the Defendant, persuaded a Dr. Ludlow of Spanish

Fork, Utah, to authorize the purchase of the paregoric, upon the representation that a sister of one of the trio was ill and in need of the paregoric. (R-16, 17). Earlier evidence tended to show that in fact, the representations made to Dr. Ludlow were false. R-16, 17)

The State then called upon two witnesses. Mr. Trosper, the pharmacist at the Corner Drug Store, was called upon to testify that the paregoric which was sold to the Defendant's co-conspirator and the paregoric sample admitted into evidence were both taken from the same container. (R-20, 21)

Mr. Elmer Christensen, the State Chemist, was called next and testified that he conducted a chemical analysis of the paregoric sample which was admitted into evidence. He further testified that he established the presence of codeine in the paregoric sample, but that he did not determine the percentage of codeine or the number of grains of codeine per fluid ounce. (R-23)

The State rested and the Defendant was called upon to testify in his own behalf. The defense rested after the Defendant was cross-examined. (R-25)

Upon the Trial Court's refusal to include Defendant's requested instructions numbered one and two, and upon the Court's insistence of giving instruction number



4-A of the Court's proposed instructions, defense counsel moved to dismiss the jury and the case was submitted to the trial judge for determination. (R-26, 27, 28)

The Defendant was found guilty as charged and the matter was referred to the Adult Probation Board for the pre-sentence report. (R-28, 29)

## STATEMENT OF POINTS

### POINT I

THE TRIAL JUDGE COMMITTED ERROR IN DENYING DEFENSE COUNSEL THE RIGHT TO OBTAIN INFORMATION NECESSARY TO THE DEFENSE.

### POINT II

THE STATUE UPON WHICH THE DEFENDANT'S CONVICTION STANDS IS VAGUE AND AMBIGUOUS AS APPLIED TO THIS CASE, AND THEREFORE, VIOLATES THE DUE PROCESS CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS.

## ARGUMENT

### POINT I

THE TRIAL JUDGE COMMITTED ERROR IN DENYING DEFENSE COUNSEL THE RIGHT TO OBTAIN INFORMATION NECESSARY TO THE DEFENSE.

The Defendant, in the case at bar, was charged and convicted for violating Section 58-13-35, Utah Code Annotated 1953, as amended 1961. This section of the Uniform Narcotic Drug act reads:

“No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug, (1) by fraud, deceit, misrepresentation, or subterfuge, or (2) by the forgery or alteration of a prescription or of any written order, or (3) by the concealment of a material fact, or (4) by the use of a false name or the giving of a false address.”

The legislature has stated that the term “narcotic drug” means:

“Coco leaves, opium, cannabis, and every substance neither chemically nor physically distinguishable from them . . .” Sec. 58-13-1, Utah Code Annotated 1953.

Isolated and read separately from the rest of the provisions of the Narcotics Drug Act, these two sections lead one to believe that the prosecution unquestionably established a *prima facie* case against the Defendant inasmuch as the defense counsel stipulated to the facts as presented by the State (R-16-19) and the State subsequently established by testimony that the paregoric sample which was introduced into evidence contained codeine, a derivative of opium, although the quantity of codeine per fluid ounce was not established. (R-23)

However, if the entire Uniform Narcotic Drug Act is read as a whole, and as it should be, we find that the legislature did not intend to make this Act applicable to all narcotic drug traffic irrespective of the quantity of narcotic in the drug involved. On the contrary, by virtue of Section 58-13-17, of our Code, as amended, by Section 58-13a-17, the legislature has exempted from the scope of the Act, any drugs or medicinal preparation which contain less than a specified quantity of narcotics. Section 58-13a-17 reads:

“Except as otherwise in this act specifically provided this Act shall not apply to the following cases:

1) Administering, dispensing, or selling at retail of any medicinal preparation that contains in one fluid ounce, or if a solid or semi-solid preparation, in one avoirdupois ounce, not more than one grain of codeine or any of its salts.”

At trial, no evidence was presented by the prosecution which would have established the narcotic content in the paregoric which the Defendant allegedly obtained. The State Chemist testified that he conducted a chemical analysis of the paregoric. However, he further testified that his only purpose in conducting the analysis was to determine whether the paregoric contained any codeine,, not to determine the exact quantity of codeine. (R-23) The exception of Section 58-13a-17 was not overcome by proof.

Notwithstanding the prosecution's failure to prove away the exception of Section 58-13a-17, the State may rely upon Section 58-13-42 which states:

"In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provision of this Act, it shall not be necessary to negative any exception, excuse, proviso, or exemption, contained in this Act, and the burden of proof of any exemptions, proviso, or exemption shall be upon the Defendant."

Assuming for this case, the validity of Section 58-13a-42, the Trial Court's error in restricting the information demanded by defense counsel by his request for a Bill of Particulars is unquestionable.

The record discloses that defense counsel, at the time of arraignment, requested a Bill of Particulars for the following questions:

"1. Does the [sic] 'paragoric' involved in this case contain codeine or any of its salts?"

"2. If the answer to #1 is 'yes,' how many grains of codeine or its salts per fluid ounce does it contain?"

"3. Does the [sic] 'paragoric' involved in this case contain any other narcotic drug?"

“4. Does the [sic] ‘paragoric’ involved in this case contain any other medicinal elements or compounds in addition to its narcotic drug content?”  
(R-30)

The answers which the Defendant demanded would have afforded him the opportunity to carry the burden of proving the exemption of Section 58-13a-17, in compliance with Section 58-13a-42. Utah Code Annotated 1953, as amended. The State was in possession of the paragoric sample. The District Attorney could have determined the answers to the questions submitted by Defendant’s request for a Bill of Particulars.

The legislature has explicitly provided, in circumstances such as this, that the Defendant may demand information if the information demanded is necessary to his defense. Section 77-21-9 of our Code reads:

“1. When an information or indictment charges an offense in accordance with the provisions of Section 77-21-8, but fails to inform the Defendant of the particulars of the offense, sufficiently to enable him to prepare his defense, or to give him such information as he is entitled under the Constitution of this State, the court may, of its own motion, and shall at the request of the Defendant, order the prosecuting attorney to furnish a Bill of Particulars containing such information as may be necessary for these purposes . . .”

This section appears to provide the defense, as a matter of right, information necessary to his defense if the circumstances justify the demand. The legislature states that the Defendant *shall* be furnished a Bill of Particulars containing such information necessary to his defense. In *State vs. Solomon*, 93 U. 619, 71 P2d 104, 106, our Supreme Court *held*:

“The granting of the Bill of Particulars is not discretionary with the court as it was in common-law, but it is a right which the Defendant can demand and which the court must grant if the statutory conditions exists.”

Certainly, the defense is not entitled to a complete disclosure of the prosecution's case, but inasmuch as the Defendant was confronted with the burden of proving any and all exemptions and exceptions to the Narcotic Drug Act, and inasmuch as the evidence was in the sole custody of the prosecution, the defense was entitled to information which would have aided him in carrying his burden. More specifically, Defendant should have been provided with information as to the codeine content per fluid ounce in the paregoric. Also, it should be noted that the use of the Bill of Particulars is not limited to incidents where the indictment or information is defective. On the contrary, the statute specifically provides for the use of the Bill of Particulars even “when an information or indictment charges an offense in accordance with the provisions of Section 77-21-8.” Section 77-21-9 U.C.A., 1953.

If we assume that the State has the burden of proving the entire case including the burden of proving away the exceptions, we must further assume that the State failed to establish a *prima facie* case inasmuch as the quantity of codeine per fluid ounce of the paregoric in question was not established and the exception of Section 58-13a-17 was not overcome.

On the other hand, if, pursuant to Section 58-13a-42, the Defendant has the burden of proving the exceptions and exemptions of our Uniform Narcotic Drug Act, there is no doubt that Defendant should have been provided with a complete and responsive bill of particulars so as to provide Defendant the opportunity of determining the quantity of codeine in the paregoric sample. As an alternative to this, the Trial Judge, having denied the Defendant the right to obtain the necessary information, should have placed upon the prosecution, the burden of proving away the exceptions. Unless this is done, a Defendant in similar cases would be faced with this dilemma; he would be obliged to assume the burden of proving the exceptions and exemptions as provided by statute, but he would be unable to do so because of the limitations placed upon him by the Trial Court's ruling.

Finally, some questions may arise as to the applicability of the exemption under Section 58-13a-17 to this case. In *Folenius vs. Eckle*, 164 NE 2d, 458, 460, 109 Ohio App. 152, (1960), the Defendant was charged with hav-

ing unlawfully obtained a narcotic drug, to wit: Paregoric, in violation of the Ohio Uniform Narcotic Drug Act. Also included in this act is an exemption similar to that of Section 58-13a-17 of our Code. The Ohio Revised Code, Sec. 3719.15 reads:

“The act shall not apply:

(a) Where a practitioner administers or dispenses; or where a pharmacist or owner of a pharmacy sells at retail any medicinal preparation that contains in one fluid ounce, or is a solid or semi-solid preparation, in one avoirdupois ounce:

(1) not more than two grains of opium,

(2) not more than one quarter a grain of morphine or any of its salts;

(3) not more than one grain of codeine or any of its salts.”

Upon a petition for a Writ of Habeas Corpus, the Defendant was released. The Supreme Court of Ohio, in its opinion *stated*:

“Pharmacopeia, of which we take judicial notice, states that in 1000 ml of paregoric there are 40 ml opium tincture. When the formula is reduced to grains, it appears that paregoric contains 1.82 grains of opium in each fluid ounce.



Consequently, paregoric contains less than 2 grains of opium in each fluid ounce, which bring the preparation within the exception of the statute."

Also, in *People vs. Kaluna*, 335 P2d, 246, 168 C.A. 2d 34, although the court was called upon to resolve a somewhat different problem, throughout the opinion, the California Court implies that if the exemption had been proved, the Defendant would not have been convicted. The same is true in *United States vs. Lauers*, C.A. 7th Cir., 1961) 287 F.2d 633.

If any distinctions exist between *Folenius vs. Eckle* and the case at bar, it would merely be that in the former case, the court was concerned with the opium content and not the codeine content of paregoric. To digress for a moment, if we assume that certain paregoric mixtures contain 1.82 grains of opium per fluid ounce, and if we further assume, as the record discloses, (R-23) that codeine is a derivative of opium, is it not highly possible that certain paregoric mixtures contain less than 1 grain of codeine per fluid ounce? If the paregoric sample in question contained less than one grain of codeine per fluid ounce, would the case not fall under the exemption of Section 58-13a-17 of our Code? Both of these questions should unquestionably be answered in the affirmative.

Our penal statutes should not be construed and employed in a manner which would render a defense im-

possible. The Defendant, having had the burden of proving the exemptions of the Uniform Narcotic Drug Act, in compliance with Section 58-13a-42 of our Code, should have been provided with the information demanded by his request for a Bill of Particulars. The Trial Court, having denied this demand, should have placed upon the prosecution, the burden of proving away the exemptions and exceptions.

The Defendant respectfully submits that the Trial Court committed error in denying Defendant information necessary to his defense and this cause should, therefore, be reversed and remanded for a trial *de novo*.

## POINT II.

THE STATUTES UPON WHICH THE DEFENDANT'S CONVICTION STANDS, AS APPLIED IN THIS CASE, ARE UNCERTAIN AND AMBIGUOUS AND, THEREFORE, VIOLATE THE DUE PROCESS CLAUSES OF OUR FEDERAL AND STATE CONSTITUTIONS.

In the case at bar, the only means by which the Defendant's conviction could be upheld is to assume that the defense, in failing to prove the exemption of Section 58-13a-17 of our Code, failed to overcome the evidence presented by the State.

If we assume that the conviction as it stands, is valid, and if we further assume that the facts and evidence in this case, are sufficient to uphold the conviction, we are logically compelled to make the ultimate assumption that for this case, Section 58-13a-17 and 77-21-9 are without force and effect.

For example, we are involved here with a statute which prohibits the fraudulent obtaining of *any* narcotic drugs. Still another provision exempts certain drugs which do not contain the specified amount of narcotics. A third provision states that in any trial involving the fraudulent obtaining of narcotics, the Defendant is obliged to carry the burden of proving the exemptions. A fourth statutory provision provides Defendant with the necessary tool by which he may demand from the State, information necessary for his defense, to wit: a Bill of Particulars.

The State initiates criminal proceedings upon the first statute; the court, pursuant to the third statute places the burden of proving the exemptions of the second statute upon the Defendant.

In an attempt to comply with the fourth statutory provision, the Defendant demands information from the State but such demands are, for all intensive purposes, denied by the court.

If we accept as correct, the premise that the Bill of Particulars need not provide the Defendant with evidentiary information, although such information is necessary for the defense, and if the State has possession of the only evidence, (R-25), what effect does the exemption of Section 58-13a-17 carry, so far as this Defendant is concerned. Obviously, none.

In a case involving the interpretation of alien registration laws, the United States Supreme Court clearly indicated that, "a statute though plain and unambiguous on its face, may when applied, violate the due process law." *United States vs. Spector*, 72 S. Ct. 591, 343 U.S. 169, 96 L. Ed. 863, 865. (See also Dissenting Opinion.) Would it not logically follow that statutes, when construed to frustrate the Defendant's legal rights, fall within the prohibition against indefinite and ambiguous laws?

As early as 1889, the Utah Supreme Court announced that due process means every person shall have his day in court. *Jensen vs. Union Pacific Railroad Company*, 6 U. 253, 21 P. 994, 995. (See also *Christensen vs. Harris* 109 U. 1, 163 P2d. 314.) Certainly, this would suggest that the "day in court" is not merely physical appearance in Court, but is rather a right to appear in Court for the purpose of defending with the opportunity of exercising every constitutional and statutory right provided him by our Federal and State governments. The right to

demand information necessary for the defense would seem to be one of such rights. Whether the information requested by the defense counsel falls within the terminology of "evidentiary matters" is yet another problem.

Our Uniform Narcotic Drugs Act exempts from the scope of its prohibition, any drug which contains medicinal qualities and which contains less than one grain of codeine per fluid ounce. Yet, one might ask, had evidence been offered which would have proved that the paregoric in evidence fell within the above exemption, would the conviction in the instant case still stand? Judging from the disposition made in the Trial Court of this case, it appears safe to conclude that the conviction would nevertheless stand. Still, such a judgment could be rendered only if we ignore one or more of the pertinent statutory provisions involved in this case.

It is convenient to re-emphasize here that the complaint of uncertainty is not directed to the wording of the statutory provisions as such. The indefiniteness and uncertainty of which we complain is such as arises from the application of the pertinent provisions to the facts before the court.

It should be noted, also, that one of the reasons the courts demand clarity and indefiniteness in the wording and application of statutes is to make it possible for attorneys to advise clients as to the meaning of the statutes

and the possible ramifications which may be involved. The statutes must be sufficiently clear so as to serve as a guide, to courts and counsels alike, in the adjudication of rights and duties of the individual. *Due Process Requirements of Definiteness in Statutes*, 62 Harv. L. Rev. 77, (1948). In alluding to the record on appeal, it is apparent that neither counsel for the defense nor the court were guided by the statutory provisions but were, on the contrary, left to speculate as to their meaning and application.

The Defendant respectfully submits the Utah Uniform Narcotics Drug Act, as applied in this case, is unconstitutional for uncertainty and indefiniteness and the conviction should, therefore, be reversed and the cause remanded for a trial *de novo*.

## CONCLUSION

Defendant, in the case at bar, was clearly denied his statutory right under Section 77-21-9, Utah Code Annotated 1953; namely, the right to obtain, by Bill of Particulars, information necessary for his defense.

Moreover, the provisions of the Utah Uniform Narcotic Drugs Act, as applied to the Defendant's case, were uncertain and indefinite, and, thus, violated the Due

Process Clause of the Fifth and Fourteenth Amendments of the Federal Constitution and the Section Seven of our State Due Process Clause.

Defendant respectfully submits that the judgment should be reversed and cause remanded for a trial *de novo*.

Respectfully submitted,

MITSUNAGA & ROSS and  
KENNETH M. HISATAKE