

1967

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IN THE SUPREME COURT OF THE STATE OF UTAH

ALEX ORNELAS,

Appellant,

vs.

STATE OF UTAH,

Respondent,

Case No.
10879

BRIEF OF APPELLANT

Appeal from the Judgment of the Juvenile Court of the
Second District of Salt Lake County
Honorable Regnal Garff, Judge

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FILED

JUN 20 1967

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,	:	
	:	
Respondent,	:	PETITION FOR REHEARING
	:	
vs.	:	
	:	
ALEX ORNELAS,	:	Case No. 10879
	:	
Appellant.	:	

=====

Appellant moves the court for a rehearing on appellant's appeal and for modification of the Court's order for a new trial, to grant the defendant herein an acquittal on said matters.

1. The decision of the court granting a new trial in the above entitled matter, is contrary to law. At trial the defendant was found guilty of contributing to the delinquency of a minor in that defendant "took Wanda Palmer" without the knowledge or consent of the parents. However, defendant was charged with contributing to the delinquency of a minor "by hypodermically administering drugs." Defendant is entitled to be charged with a specific crime so that he may know the nature and cause of the accusation against him, and the effect of the judgment of guilty of "taking" is to find him not guilty of "administering drugs", which was the only violation of which defendant has been charged. Defendant was thereby substantially prejudiced in his defense upon the merits and is entitled to an acquittal.

2. Defendant's constitutional rights entitling him to due process of law, were violated in that he was convicted upon a charge that was not made against him. It is clear that where a charge is not substantiated by the evidence introduced, it amounts to a due process violation to impose a conviction on other grounds.

3. Defendant has been placed in jeopardy once on the basis of the acts here in question, before competent court and that court failed to find defendant guilty of the violations charged. The constitution prohibits

the courts from again placing defendant in jeopardy for the same offense. Double jeopardy is not against double punishment for the same offense, but is protection against double jeopardy, that is a second trial for the same offense. The idea underlying the doctrine is that the state with all its resources and power, should not be allowed to place a person in jeopardy more than once for the same offense thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. Having been brought before a competent court once on the basis of his alleged actions and the court having failed to find him guilty, defendant is entitled to an acquittal in the above entitled matter.

ARGUMENT

The decision of this court on defendant's appeal seems to be based on a finding that the trial court erred in convicting him for violation of U.C.A. § 55-10-80(3) when he was charged with a violation of § 55-10-80(1). However, there is nothing in the trial court record or in the briefs of appellant or respondent to allege error on the part of the trial court. The case of Cobb v. Snow, 14 Utah 2d 170, 380 P. 2d 457 (1963), has been cited by the court for the proposition that "where defendant claims of error and a judgment is nullified at his request, what he is entitled to is a fair trial eliminating the error." That case deals with the situation in which there has been a trial, evidence presented on the issues, but errors committed therein are sufficient to deny him justice. However, that case did not even consider the question in point here as to when the court finds defendant guilty of a violation with which he has not been charged or in other words not insufficiency of evidence or error therein, but a total absence of admissible evidence on the crime with which he was convicted. Cobb v. Snow is clearly not in point here, and to find defendant guilty of an offense of which he has not been charged, is contrary to the law.

In State v. Spencer, 101 Utah 274, 111 P. 2d 455 (1942) this Court observed:

"The purpose of a bill of particulars, is to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense."

It is clear that at common law, a variance WITH RESPECT TO A MATERIAL MATTER was fatal and entitled the defendant to an acquittal. The Utah Code provides that:

"No variance between the allegations of an information, indictment, or bill of particulars, which state the particulars of an offense, whether amended or not, and the evidence offered in support thereof shall be grounds for an acquittal of the defendant." U.C.A. § 77-21-43(2) (1953).

This court in State v. Meyers, 5 Utah 2d 365, 302 P. 2d 276 (1956), noted that the foregoing statute applies to matters of form NOT SUBSTANCE, and that the statute could not override the constitutional guarantee that "the accused shall have the right to demand the nature and the cause of the accusation against him." The court concluded:

"It would be a mockery of the Constitutional right of a defendant to allow the state to falsely state the particulars of the offense charged, and then without amendment, and without giving defendant additional time to meet new evidence beyond these particulars obtain a conviction founded on these particulars To be material the variance must go to the extent of showing the offense proved is not the offense charged."

It is a rule of universal recognition that the allegations and the proof must correspond and if there is a variance as to a matter of substance and which is material to the proof of said charges it is the basis for acquittal thereon. The fatality of the variance depends "not on whether it is in respect of a material matter, BUT on whether the VARIANCE ITSELF is material, or affects the substantial right of the accused." (Emphasis added.) 42 CJS, Indictments and Information § 254.

This court reversed the conviction of a defendant charged with embezzling concluding:

"In a criminal proceeding it is not sufficient to show merely that the accused has been dishonest, or that he is a cheater, or otherwise bad character. He is entitled to be charged with a specific crime so that he may know the nature and cause of the accusation against him, and the STATE MUST PROVE SUBSTANTIALLY AS CHARGED, the offense it relies upon for conviction." State v. Taylor, 14 Utah 2d 104, 378 P. 2d 352 (1963).

The conviction of defendant upon grounds with which he was not charged, was in violation of his constitutional right entitling him to due process of law under Utah Constitution, Article 1, § 7 and the 14th Amendment of the United States Constitution. In 21 Am. Jur. 2d, Criminal Law, § 226 instructions of the U.S. Supreme Court were outlined:

"It is similarly a violation of due process to convict a man upon a charge which was not made, (Thornhill v. Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093; DeJonge v. Oregon, 299 U.S. 353, 59 S. Ct. 255, 81 L. Ed. 278). Accordingly where a conviction is so devoid of evidentiary support as to amount to a due process violation, THE COURT CANNOT concern itself with whether the evidence proves commission of some other crime, Garner v. Louisiana, 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 207."

In addition to the foregoing, defendant has now been placed in jeopardy once on the charge of contributing to the delinquency of a minor "by administering drugs." He was brought before a competent court and tried for his actions and it is clear that to require him to come before the court again on the same charge, would place him in double jeopardy in violation of Article 1 § 12 of the Utah Constitution and the Fifth Amendment of the Constitution of the United States.

"Where an accused has once been placed on trial in a court competent to try an offense of the character charged, and has been found not guilty of said offense, the state can never place him on trial again for the same offense no matter how irregular the proceedings have been." 22 CJS, Criminal Law, § 268.

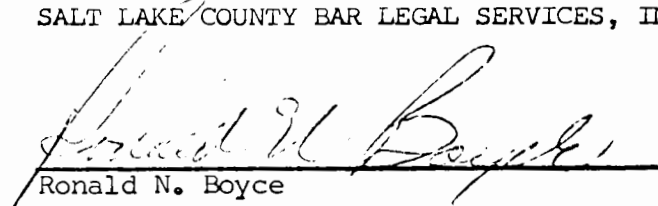
Defendant was charged with violation of § 55-10-80(1) and found guilty of violating § 55-10-80(3). The effect of such a conviction is to find him not guilty of violating § 55-10-80(1). The State cannot therefore retry defendant for his actions once he has already been placed in jeopardy for the same acts. This court in discussing double jeopardy stated that the plea of double jeopardy is sufficient whenever it shows that the second trial is based on the same criminal act, both in fact and in law, which was the basis of an indictment on which the defendant was formerly brought to trial. State v. Thompson, 58 Utah 291, 199 Pac. 161 (1921); see also, Price v. United States, 156 Fed. 950 (9th Cir. 1907); Dill v. Colorado, 19 Colo. 469, 36 Pac. 229 (1894); State v. Danhof, 161 Wash. 441, 297 Pac. 195 (1931).

The court has therefore placed defendant in the position where he cannot be tried again without violation of his constitutional rights, but yet he is deprived of his freedom on the basis of a conviction which this court has reversed.

WHEREFORE, appellant prays that the court grant him a rehearing of appellant's appeal for a modification of the court's order for a new trial to grant the defendant herein, an acquittal on said matter.

DATED this 30th day of October, 1967.

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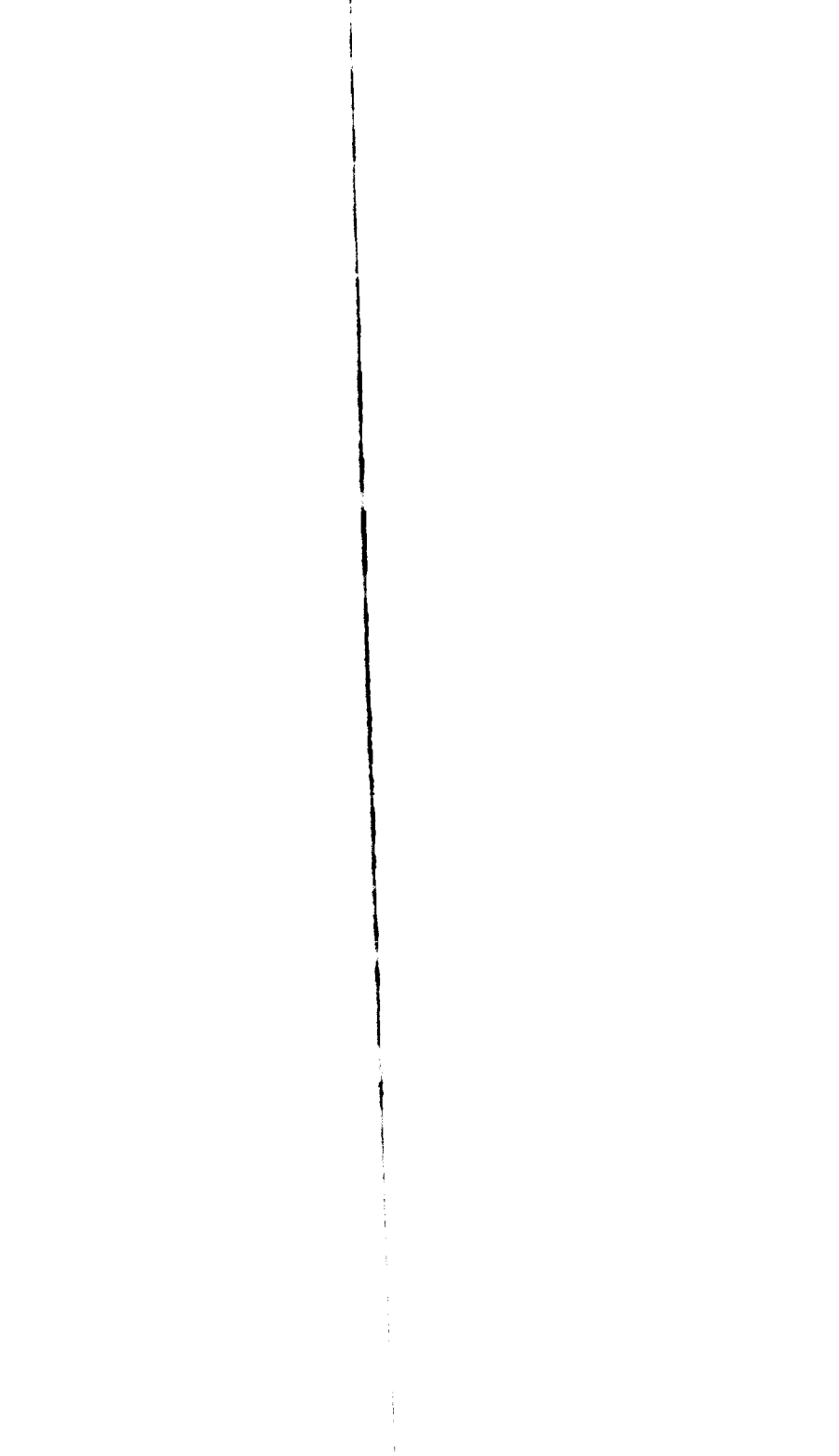


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IN THE SUPREME COURT OF THE STATE OF UTAH

ALEX ORNELAS,

Appellant,

vs.

STATE OF UTAH,

Respondent,

Case No.
10879

BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

The appellant, Alex Ornelas, appeals his conviction in the Juvenile Court of the Second District Court, State of Utah for the crime of contributing to the delinquency of a minor.

DISPOSITION IN THE LOWER COURT

The appellant was charged with contributing to the delinquency of a minor by hypodermically admin-

istering drugs. The trial court found the appellant guilty of contributing to the delinquency of a minor, but not by the manner and means alleged in the complaint. Subsequent to conviction the court entered judgment imposing a sentence of confinement to jail for six months, suspended upon condition that the appellant be committed to the Utah State Prison on parole violation. The appellant is presently in the Utah State Penitentiary on the conviction in the instant case for which his parole was violated.

RELIEF SOUGHT ON APPEAL

Appellant submits the decision of the trial court should be dismissed and a judgment of acquittal granted.

STATEMENT OF FACTS

The complaint in the instant case charged appellant with contributing to the delinquency of a minor by "hypodermically administering drugs" to the complaining witness (R. 60). The trial judge in his findings of fact and conclusions of law found that appellant "took Wanda Palmer" without the consent of her parents, thereby contributing to the delinquency of a minor (R. 47).

The complaining witness was released temporarily from the Utah State Mental Hospital for appearance at trial. She had been sent to the hospital, in the words

of the complaining witness, "for sniffing glue and for using dope". (Tr. line 17, p. 2).

The complaining witness testified that a friend of hers took her to the defendant's apartment. When asked by the prosecutor to give the name of the friend she said, "I won't answer that." (Tr. line 29, p. 4). When told by the prosecutor that she must answer, she responded, "No, I won't" (Tr. line 32, p. 4).

She did not know even the general location of the apartment where she was taken, but merely that it was in the city (Tr. line 23, p. 4). The prosecutor then asked what she did after meeting appellant in his apartment. He said, "did you go anywhere with him, did you do anything with him, did you have any further contacts with him?" and she answered, "No" (Tr. line 12, p. 5). When asked if there were other people in the apartment she said, "I don't know" (Tr. line 3, p. 5). When asked the same question again by the prosecutor she said, "I think so" (Tr. line 32, p. 5). The same question rephrased by the prosecutor produced the response, "I don't know" (Tr. line 18, p. 6).

When asked whether she used the needle herself the record shows, "Miss Palmer: (inaudible)" (Tr. 32, p. 6). When again asked what happened to the needle she said, "I used it . . . I stuck it in me" (Tr. line 4 & 6, p. 8). When asked once more, "did you stick it in yourself?" (Tr. line 7, p. 8), she said, "I can't remember" (Tr. line 8, p. 8). Later she said with

reference to the needle, "He let me . . . He gave me an injection of" (Tr. line 10 and 12, p. 9).

The contents of the needle were said to be a white liquid (Tr. line 2, p. 8). The fact that the liquid was a drug and not sugar and water, or milk was not proven at trial.

After leaving appellant's apartment the complaining witness stayed four days in a hotel during which time she did not see appellant (Tr. line 32, p. 10). During those four days she admitted that the people whom she was staying with gave her drugs three times a day (Tr. line 19, p. 17). At the end of four days she went to see her sister-in-law, whose immediate response was, in the words of the complaining witness as follows:

"(S)he thought something was wrong. She thought I had been sniffing glue . . ." (Tr. line 1, p. 19).

Her sister-in-law then took her to the University Hospital where a medical student asked to give her a physical examination and she refused. He said that her arms had puncture holes in them but could form no opinion as to how long it had been since the initial punctures. (Tr. line 2, p. 30). The medical student testified that he took some blood to test the barbituate level. He did not make the test himself, (Tr. line 12, p. 31), and there was no evidence introduced at trial as to what the results of the test produced.

The trial judge made findings that the appellant "took Wanda Palmer" without the consent of her par-

ents (R. 47). He did not find that the appellant "administered drugs" to the complaining witness as charged in the complaint (R. 60). On the contrary, based on the above evidence the trial judge found appellant guilty of contributing to the delinquency of a minor by taking without the consent of her parents, and sentenced him to six months in the county jail, the maximum for a misdemeanor.

ARGUMENT

POINT I

MATERIAL VARIANCE BETWEEN PLEADING AND PROOF IS FATAL AND ENTITLES APPELLANT TO AN ACQUIT- TAL.

The complaint alleged in this case that the defendant contributed to the delinquency of a minor by "*hypodermically administering drugs* to the said child and this without the knowledge or consent of the parents" (R. 47). The trial judge in his findings of fact found a violation of a separate offense. He found that the defendant "*took Wanda Palmer* without the knowledge or consent of the parents" (R. 60). The only language in the Juvenile Act that has any reference to taking is found in Utah Code Annotated of 1953, Section 55-10-80(3) Laws of Utah (1965) as follows:

"(a)ny person who *forcibly takes* a child from, or encourages him to leave the legal or physical

custody of any person, agency or institution *in which the child has been legally placed for the purpose of care . . .*”

Since the complaining witness left home and was taken by a friend of hers (Tr. line 27, p. 4), whom she is either shielding or can't identify, the statute obviously has no application to defendant. The *defendant did not take the complaining witness*, nor was she at any time in *the legal custody of any person, agency or institution for the purpose of care*. Even assuming *arguendo* that the defendant took her from the custody of the unknown driver (the record states that the driver took the complaining witness to defendant's apartment, (Tr. line 27, p. 4)), she certainly was not in the legal custody of the driver who picked her up. The statute was aimed at the evil of preventing parents from removing children from the homes they had been placed in for adoption or temporary custody pending a determination of a charge of parental abuse. The policy of the statute is not frustrated nor is it applicable in this case where the complaining witness left home on her own volition, without inducement on the part of the defendant.

It is, therefore, clear that the defendant-appellant was neither charged with nor were there facts sufficient to prove a violation of Utah Code Annotated of 1953, Section 55-10-80(3) Laws of Utah (1965).

The general offense of contributing to the delinquency of a minor has been repealed, Section 55-10-51, Utah Code Annotated (1953). The only provision

other than 55-10-80(3) which could apply to the facts is 55-10-80(1). The juvenile court's jurisdiction must have been exercised under the section which states that "(a)ny person who . . . contributes to, or becomes responsible for the neglect or delinquency of a minor . . . " Utah Code Annotated, 1953, Section 55-10-80 (1) added by Laws of Utah (1965). Since defendant was charged with a violation of 55-10-80(1) and the trial judge found a violation of 55-10-80(3) the defendant had no opportunity to defend himself against the offense in the code charged in the complaint and the state failed to meet its burden of proof. *State v. Beckendorff*, 4 Utah 79, 10 P. 1073 (1923).

This court in *State v. Spencer*, 101 Utah 274, 111 P. 2d 455 (1942) observed:

"The purpose of a bill of particulars is to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense."

It is at once apparent that the purpose of the bill of particulars or complaint was subverted in this case where the defendant-appellant was charged with one offense and found guilty of another without an opportunity to prepare a defense.

A material variance between pleading and proof entitled the defendant to an acquittal. In 42 C.J.S. *Indictments and Informations*, § 254 (1944), the following historical summary is found:

“While it has been held that a variance with respect to a material matter is fatal and entitles the accused to an acquittal, this being the rule at common law, the rule has been radically changed. The fatality of the variance depending not on whether it is in respect of a material matter, but on whether the variance itself is material or affects the substantial rights of the accused.”

In Utah the common law has been altered in Section 77-21-43(2), Utah Code Annotated, 1953, as follows:

“No variance between the allegations of an information, indictment or bill of particulars, which state the particulars of an offense, whether amended or not, and the evidence offered in support thereof shall be grounds for acquittal of the defendant. The court may at any time cause the information, indictment, or variance to conform to the evidence.”

This court in *State v. Meyers*, 5 Utah 2d 365, 302 P. 2d 276 (1956), in noting that the foregoing statute applies to matters of form, not substance and that the statute could not be used to override the constitutional guarantee that “the accused shall have the right . . . to demand the nature and cause of the accusation against him.” UTAH CONST., Art. I § 12, observed:

“It would be a mockery of the constitutional right of a defendant to allow the state to falsely state the particulars of the offense charged and then without amendment, and without giving defendant additional time to meet new evidence beyond these particulars, obtain a conviction founded on such evidence.”

Therefore, the common law rule that a variance entitles the defendant to an acquittal has been altered in Utah only with regard to matters of form. This court's interpretation of the statute is further supported by a provision in that same section which gives defendant a right to appeal based on a variance where he has been prejudiced in his defense upon the merits. Section 77-21-43(4), Utah Code Annotated, 1953, provides:

"No appeal, or motion made after verdict, based on any such defect, imperfection, omission or variance shall be sustained unless it is affirmatively shown that the defendant was in fact prejudiced thereby in his defense upon the merits."

Since defendant was charged with "hypodermically administering drugs" to the complaining witness and the trial judge made findings of fact that he "took her" without the consent of her parents it is at once obvious that the defendant was prejudiced in his defense upon the merits for he was completely surprised. He had no warning that he had been charged with taking the complaining witness and the first notification of that charge came in the trial judge's findings of fact at the conclusion of the trial. While this court has stated that it would be a mockery of justice to introduce evidence falsely stating the particulars of an offense, *State v. Meyers*, supra, how much more of a mockery would it be to falsely accuse of one offense and then without any evidence find a violation of a separate offense as in the instant case?

Where a person is charged with a lesser included offense, petty larceny, and the state attempts to prove grand larceny the defendant is entitled to a new trial to afford him time to meet the further allegations as to value. This court observed in *State v. Meyers*, supra:

“Thus in the instant case had the bill of particulars alleged the value of the property stolen from Luck to have been \$3 for the wallet, \$20 cash, \$60 for the watch and \$45 for the glasses and the proof had shown them to be worth \$2, \$10, \$50, and \$30 respectively, no substantial prejudice to defendant's right would be shown and the conviction would be affirmed on that ground. When, however, the bill alleged \$22 total value and the state offers to and contends it did prove \$92, the defendant must be afforded time to meet such further allegations of value.”

But where one is charged with one offense and found guilty of another separate offense he is entitled to an acquittal. In *State v. Taylor*, 14 Utah 2d 107, 378 P. 2d 252 (1961), this court held that a person charged with embezzlement may not be convicted, even though he admits in court to having stolen the goods, for the state must prove that he obtained the goods through a trust. One who wrongfully obtains goods cannot have obtained them through a trust and converted them for his own use. Thus in acquitting and reversing the judgment against the defendant this court observed:

“The judgment must stand or fall upon the proof or lack thereof, of the crime with which the state charged the defendant, essayed to prove,

and of which he stands convicted. . . . Since the state did not prove the charge upon which the conviction is grounded it is reversed."

Massachusetts has a statute similar to the Utah statute on variance which has also been interpreted as being applicable to matters of form and not substance. In fact the statute specifically provides that an acquittal is proper when the defendant has been prejudiced in his defense. In *Commonwealth v. Stone*, 300 Mass. 160, 14 N.E. 2d 158 (1938), the Massachusetts court observed:

"(T)he provision of G. L. (Ter. Ed.) c. 277, § 35 that 'a defendant shall not be acquitted on the grounds of a variance between the allegations and the proof if the essential elements of the crime are correctly stated, unless the defendant is duly prejudiced thereby' does not apply. . . (T)he evidence adduced at trial was not sufficient to prove the commission of the offense in the manner charged in the indictment, and that the denial of defendant's motion for a directed verdict of not guilty was prejudicial error."

In the instant case, not having sufficient evidence to prove the commission of the offense in the manner charged, the trial judge then made findings of fact of an offense which had never been lodged against defendant. Defendant-appellant was charged with "hypodermically administering drugs", a point on which the evidence is at best equivocal (Tr. line 2, p. 7; line 4, p. 8), and found guilty of taking the complaining

witness “without the knowledge or consent of the parents”, an offense which is inapplicable to the facts as stated previously. This court in *State v. Beckendorff*, supra, observed that though an offense may be committed in a number of ways, the state has the burden of proving the crime was committed in the mode charged in the complaint.

On the basis of the record, as in the Stone and Taylor cases, the evidence adduced at trial was not sufficient to prove the commission of the offense in the manner charged and defendant was materially prejudiced in his defense thereby affording grounds for an acquittal.

POINT II

FAILURE OF DEFENDANT TO WAIVE HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL IN OPEN COURT AS REQUIRED BY LAW IS REVERSIBLE ERROR AND THE CASE SHOULD BE REMANDED FOR A NEW TRIAL.

An extensive search of the record reveals that the defendant was denied his constitutional right to “ . . . have a speedy public trial by an impartial jury. UTAH CONST. Art. I, § 12. The record is barren of any reference whatsoever to defendant’s having waived his right to a jury trial. This right has been implemented by a statute which requires that in criminal cases “(i)ssues of fact *must be tried by a jury . . .*” Section

77-27-2, Utah Code Annotated, 1953. That the constitutional right to a jury trial was not intended to be abridged in criminal cases involving adult offenders in the juvenile court is made clear in Utah Code Annotated, 1953, Section 55-10-81 added by ch. 165 Section 19 (1965) as follows:

“In proceedings in adult cases the practice and procedure of the juvenile court shall conform to the practices and procedure provided by law or rule of court for criminal proceedings in the district court, except that the proceedings may be commenced by complaint and *a trial by jury shall consist of four jurors.*”

Further, that the legislature deemed the right to jury trial applicable to misdemeanors as well as to felonies in district court proceedings to which Section 55-10-81 applies, and that the right is inviolate unless waived in open court is demonstrated in Section 77-1-11, Utah Code Annotated, 1953, as follows:

“No person shall be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the court or upon a plea of guilty, or upon a judgment against him upon a demurrer when he refused to plead or upon a judgment of a court for a public offense not amounting to a felony, a jury having been waived.”

The sanctity of this right is further demonstrated by the mandate that the right may only be waived in open court. Section 77-27-2, Utah Code Annotated, 1953, provides as follows:

“Issues of fact must be tried by a jury, but in all cases except when a sentence of death may be imposed trial by jury may be waived by the defendant. *Such waiver shall be made in open court and entered in the minutes.*”

According to a similar provision in the California Constitution, consent may not be implied but must expressly appear in the court records. The pertinent part of that provision states that a trial by jury may be waived in all criminal cases when “. . . *expressed in open court by the defendant and his counsel.*” CALIF. CONST. Art I, § 7. Where counsel for the defendant and the district attorney stipulated in open court that the right to jury trial had been waived the California court in reversing and remanding for a new trial stated in *People v. Spinale*, 100 C.A. 600, 280 Pac. 691 (1940) that:

“When the Constitution has prescribed the method and form of such waiver, it cannot otherwise be accomplished.”

In a similar case involving counsel’s attempted waiver of defendant’s right to a jury trial the same court in *People v. Garcia*, 98 Cal. App. 702, 277 Pac. 747 (1929), observed:

“It is quite apparent that respondent was deprived of a Constitutional right which he did not waive in the manner required by the organic law of this state, and that the order entered pursuant to an attempted but abortive waiver was error which the trial court had power to rectify upon a motion for a new trial . . . From the pre-

vious rulings and the express language of the Constitution, it is at once obvious that this inviolate constitutional right may not be taken away in disregard of the fundamental legal privilege and power of election guaranteed to the party charged, by attempting to vest in his representative the dual capacity and authority of counsel and accused."

Further, it has been held that where the clerk's minutes showed that all defendants waived their rights to a jury trial but the reporter's transcript did not show a waiver by the appellant-defendant, the doubt should be resolved in favor of the defendant and a new trial granted in order to protect the constitutional right to a jury trial. The California court in *People v. Washington*, 95 C.A. 2d 454, 213 P. 2d 70 (1950), observed:

"Under the circumstances in the present case *it is not clear that the defendant Washington personally expressed in open court that he consented to a waiver of the trial by jury*, and for that reason the judgment as to the defendant Washington and the order denying his motion for a new trial should be reversed, and the case as to said defendant should be remanded for a new trial."

The Word Demand Should Not Be Interpreted In The Abstract, But In The Sense Intended In The Act.

While it is possible to argue to the contrary it is not reasonable to presume that the legislature intended to restrict the right to jury trial in cases of adult offend-

ers in the juvenile court merely because of language which uses the word "*demand*" in reference to the procedure for transferring a case to a city or county court in the event that a defendant does not plead guilty or waive his right to a jury trial. The Juvenile Court Act provides in Utah Code Annotated, 1953, Section 55-10-81, added by ch. 165 Section 19 (1965) as follows:

"If the defendant in proceedings under this section *shall demand* a jury trial, the court may transfer the case to a city court or county court if such a court is in existence in the county in which the offense was committed."

To construe that provision as requiring the defendant to demand a jury or waive his constitutional right would be inconsistent with the first paragraph in the same section. Utah Code Annotated of 1953, Section 55-10-81 added by ch. 165 Section 19 (1965) provides in the first paragraph as follows:

"In proceedings in adult cases the practice and procedure of the juvenile court shall conform to the *practice and procedure provided by law or rule of court for criminal proceedings in the district court*, except that the proceedings may be commenced by complaint and a trial by jury shall consist of four jurors."

As noted previously in the district courts the right to a jury trial in misdemeanor charges must be "*. . . waived in open court and entered in the minutes.*" Section 77-27-2, Utah Code Annotated, 1953, see also

Section 77-1-11, Utah Code Annotated, 1953. It is submitted that the intent of the legislature was merely to provide the juvenile court with a means for transferring jury cases due to the fact that city and district courts are better equipped to handle jury trials. While it is an elementary rule of statutory construction that effect must be given, if possible, to every word in a statute, this is not an inflexible doctrine requiring blind application as is noted in SUTHERLAND, STATUTORY CONSTRUCTION § 4706 (3rd. Ed. 1943) as follows:

“The literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislature and if the words are sufficiently flexible to admit of a construction which will effectuate the legislative intention. . . . The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense were they intended to be used in the act.”

Since Section 55-10-81 does not state that the defendant must demand a jury trial or be deemed to have waived his constitutional right, the apparent intent of the legislature to insure equal treatment to those charged with a misdemeanor whether in the district or juvenile court should not be frustrated by implication.

The word “demand” is flexible when viewed in context, for the paragraph in which it is found is designed to give the juvenile court judge the power to transfer cases wherein the defendant has not pleaded

guilty or waived his right to a jury trial. Since the right of a jury trial is inviolate, the word demand merely states the obvious, that is, in the absence of a waiver there is a conclusive presumption of a demand for a jury trial.

Further, if the legislature intended to provide that the right to a jury trial would be waived if not demanded they would have provided a third exception to the first paragraph of Utah Code Annotated, 1953, Section 55-10-81 added by ch. 165, Section 19 (1965) as follows:

“In proceedings in adult cases the practice and procedure . . . shall conform to the practice and procedure by law or rule of court for criminal proceedings in the district court, *except that the proceedings may be commenced by complaint and a trial by jury shall consist of four jurors,*” and . . . the right to a jury trial is waived if not expressly demanded (suggested revision to comport with possible construction).

The Constitutional right to a jury trial is founded upon the principles that the collective judgments of an impartial tribunal are, perhaps, less subject to prejudice, that there is a great value in the participation of citizens in the process of government and that juries are agencies of mitigation in that they serve to bring the law up to date by applying it in a way consistent with present day community values. That a judge may not invade the province of the jury even in a non-capital case for the reason that the accused is entitled to a

trial by jury on "all questoins of fact" was made clear in *State v. Brune*, 69 Utah 444, 256 Pac. 109 (1927) in accordance with the statutory mandate in Section 77-27-2, Utah Code Annotated, 1953.

Conviction of an adult offender for contributing to the delinquency of a minor without the Constitutional guarantee of a trial by jury or the express waiver of that right as required by law is reversible error.

POINT III

AN INCOMPLETE RECORD BASED ON THE USE OF A DICTAPHONE WHERE APPEAL IS A MATTER OF RIGHT NECESSITATES A REMAND FOR NEW TRIAL BECAUSE:

- 1) APPELLANT HAS BEEN DENIED DUE PROCESS AND EQUAL PROTECTION OF LAWS.
- 2) THIS COURT HAS NOTHING TO REVIEW WITH RESPECT TO THE OMITTED TESTIMONY.
- 3) THE USE OF A MECHANICAL DEVICE IS NOT AN AUTHORIZED DEVICE FOR RECORDING TESTIMONY IN AN ADULT OFFENDER CASE IN THE JUVENILE COURT AND THE DISTORTION OF THE RECORD SUB-

VERTS APPELLANT'S STATUTORY
RIGHT TO APPEAL FROM A FINAL
CONVICTION.

* * *

1) AN INCOMPLETE RECORD IS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION WHERE APPEAL IS A MATTER OF RIGHT.

Equal Protection:

Where appeal is a matter of right exercisable only by the defendant who has means enough to pay the cost of a transcript in advance there is denial of equal protection within the meaning of the 14th Amendment. The reasoning of the court is that the financial ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and cannot be used to justify depriving defendant of a fair trial. Further, there is no meaningful distinction between a rule which would deny the poor the right to defend themselves in court and one which effectively denies the poor of an adequate appellate review by demanding costs be paid in advance. *Griffin v. Illinois*, 351 U.S. 12 (1956).

The financial ability to pay bears no more rational relationship to a defendant's guilt or innocence than does the accident of the forum and neither can be used to justify depriving a defendant of a fair trial. If appellant had been charged with a misdemeanor in the district court he would have been supplied with a ver-

batim record for purposes of appeal, since a reporter would have been present during the trial. Having been charged, however, in the juvenile court he was unable to obtain a complete record. The mechanical recorder used in the juvenile court was unable to accurately record the proceedings.

In Utah "(a)n appeal may be taken by the defendant, (1) from a final judgment of conviction." Section 77-39-3, Utah Code Annotated, 1953. Thus, appeal being a matter of right exercisable only by a defendant who has an accurate record on which the appellate court can review the action of the trial court, appellant was denied due process and equal protection within the meaning of the 14th Amendment. It is not sufficient to state that the part of the transcript which is audible is sufficient to provide a clear record from which to exercise the right to appeal for no one can say that what is missing is immaterial without knowing exactly what information is being discounted. An incomplete record is just as bad as no record at all for the testimony or evidence which was most clearly prejudicial or erroneous affording grounds for a new trial may very well be that which reads "inaudible" on the transcript. There is no rational basis for distinguishing between treatment in the district court and in the juvenile court with regard to an adult offender charged with a misdemeanor for the reason that the rehabilitative purpose with regard to juveniles cannot be said to apply equally to adult offenders.

The following are examples of such “inaudible” areas on the dictaphone belt:

Line 21	Judge Garff:	(Inaudible)	Page 1
Line 22	Mr. Grousman:	(Inaudible)	Page 6
Line 31	Mr. Grousman:	(Did you use it yourself?)	Page 6 referring to needle
Line 32	Miss Palmer:	(Inaudible)	Page 6
Line 23	Mr. Grousman:	(Did you stay in the apartment the entire two days?)	Page 8
Line 24		(Next part inaudible on the dictaphone belt)	Page 8
Line 25		(Next part inaudible on the dictaphone belt)	Page 8
Line 26	Miss Palmer:	(If I could have some)	Page 8
Line 5	Judge Garff:	(You're forgetting about Wanda's rights.)	Page 25
Line 6	Mr. Gundry:	(This witness has waived her rights by taking the stand against this man.)	Page 25
Line 8	Judge Garff:	(. . more time.)	Page 25

Due Process

In a case where the court reporter had died prior to completing the transcription of his notes and another person was allowed to try and decipher the notes with the aid of statements from the judge and the prosecutor, in the face of a formal protest from the Court Reporters' Association of Los Angeles to the effect that there was grave doubt that anyone could furnish a usable transcript from the notes due to the fact that many portions were completely indecipherable, the Supreme Court held that an *ex parte* settlement of the state court record violated petitioner's right to procedural due process in not having been represented at the hearings either in person or by counsel. The order of the court was to remand to the district court to enter an order to allow California a reasonable time to perfect the record, petitioner being represented at such hearings and that failing to do so within six months petitioner should be released. The reasoning of the court was that the due process clause of the 14th Amendment required the opportunity for review on a reviewable record. *Chessman v. Teets*, 354 U.S. 156 (1957).

In *Palko v. Connecticut*, 302 U.S. 319 (1937), the Supreme Court laid down the following guide lines as to whether state procedure violates 14th Amendment standards of due process:

“Does it violate those fundamental principles of liberty and justice which die at the base of all our civil and political institutions?” . . . Or is it

“so acute and shocking that our policy will not endure it?”

The court in *Palko* in rejecting the defendant's claim of double-jeopardy as a bar to a new trial reasoned that “if the trial had been infected with error adverse to the accused, there might have been a review at his instance, and as often as necessary to purge the taint. A reciprocal privilege has now been granted the state.” *Palko v. Connecticut*, *supra*.

In the instant case appellant's contention that an incomplete record is a denial of due process for purposes of perfecting his right to an appeal unless the court grants appellant a new trial. It is a violation of fundamental principles of liberty and justice to say that one has a right to appeal on the basis of error as shown by the record when the means used to record the trial produces an incomplete record. The very error which might have deprived appellant of due process may be hidden by a caption on the record which reads “inaudible”.

2) THIS COURT HAS NOTHING TO REVIEW WITH RESPECT TO THE OMITTED TESTIMONY.

Even if this court finds that due process was not violated the absence of a complete record for purposes of review is prejudicial error. In a case where the reporter was not present during oral argument to the jury the court stated that the judge is required to

make a proper record of the proceedings at the time of their occurrence. If he cannot recall what was said he must determine the facts from the next best evidence, the testimony of those who were present. But, of course, where the litigants are in dispute it would be impossible to fairly reconstruct what was said and the appellate court with respect to the omitted argument, having nothing it can review, is forced to remand for a new trial. *State v. Baum*, 47 Utah 7, 151 Pac. 518 (1915).

Since defendant has been charged with "administering drugs" to the complaining witness it is crucial that the appellate court has a complete record of her testimony. However, when she was asked, with reference to the hypodermic needle, "(d)id you use it yourself?" (Tr. line 31, p. 6), the record reads "inaudible" (Tr. line 32, p. 6). When asked if she stayed in the apartment the entire two days the record reads "next part inaudible on the dictaphone belt" (Tr. lines 24 & 25, p. 8). Further when defendant's counsel objected to the complaining witness's refusal to testify except as to selected matters the trial judge stated "(y)ou're forgetting about Wanda's rights" (Tr. line 5, p. 25). Defendant's attorney then objected saying "(t)he witness has waived her rights by taking a stand against this man" (Tr. line 6, p. 25). The ruling on the objection is not ascertainable for all that appears is "... more time." (Tr. line 8, p. 25). Other inaudible portions of the record are found on line 21, p. 1, trial judge and line 22, p. 6, prosecuting attorney.

There is no distinguishable difference between the absence in the record on appeal of oral argument to the jury and the inaudible and thus absent statements of court, counsel and complaining witness, as in the instant case. In either case the appellate court has nothing to review, having no magic powers to perceive what was said and not recorded, and must, therefore, order a new trial.

3) THE USE OF A MECHANICAL DEVICE IS NOT AN AUTHORIZED DEVICE FOR RECORDING TESTIMONY IN AN ADULT OFFENDER CASE IN THE JUVENILE COURT AND THE DISTORTION OF THE RECORD SUBVERTS APPELLANT'S STATUTORY RIGHT TO APPEAL FROM A FINAL CONVICTION.

A recording device is not authorized as the proper means of making a verbatim record when trying an adult offender in the juvenile court. With regard to hearings, the Juvenile Court Act in Utah Code Annotated of 1953, § 55-10-96, added by ch. 165, § 35 (1965), provides:

“(a) verbatim record of the proceedings shall be taken, by a court stenographer or by means of a mechanical recording device, in all cases which might result in deprivation of custody. In all other cases a verbatim record shall also be made, unless dispensed with by the court.”

The words deprivation of custody in the first sentence indicate that the legislature intended the section allowing mechanical recording devices to apply only to cases involved juvenile offenders. The second sentence seems to indicate that in all other cases the testimony may be recorded by a mechanical device, but a reading of the statute on adult offenses demonstrates that the legislature did not mean to include the phrase "other cases" those involving adult offenses. Utah Code Annotated, 1953, § 55-1--81 added by ch. 165, § 19 (1965) provides:

"In proceedings in adult cases the practice and procedure of the juvenile court shall conform to the practice and procedure provided by law or rule of court for criminal proceedings in the district court."

In the district courts there is no procedure allowing the use of mechanical recording devices but on the contrary the statute provides that "(t)he judge of the district court may appoint *shorthand reporters* to report the proceedings of the court." Utah Code Annotated, 78-56-1, (1953). Further, the shorthand reporter has a statutory duty to attend all sessions of court. Section 78-56-2, Utah Code Annotated, 1953, provides:

"It shall be the duty of the shorthand reporter to attend all sessions of court, and to take full stenographer notes of the evidence given and of all proceedings therein had, except when the judge dispenses with his services in a particular cause or with respect to a portion of the proceedings thereof."

While the statute allows the judge to dispense with the services of a reporter, *it does not* authorize him to use any other means of reporting, and further the discretion of the judge to dispense with the reporter has been severely limited by judicial interpretation. Where testimony is disputed on appeal and the trial judge cannot recall what was said the appellate court will reverse and remand for a new trial, having nothing it can review with respect to the testimony in question. *State v. Baum*, *supra*.

Further, assuming for the sake of argument that a recording device is permissible, in the trial of an adult offender, an inaudible and thus incomplete record would not meet the statutory command of "verbatim record" Utah Code Annotated, 1953, Section 55-10-96, added by ch. 165, § 35 (1965). That a verbatim record may not be dispensed with in cases where deprivation of custody might result demonstrates the legislature's intent to make certain that when the treatment of juveniles is penal in nature the right to appeal should not be thwarted due to the absence of a verbatim record for purposes of appellate review. Certainly, no lesser protection was intended for adult offenders who might lose their freedom by receiving a six month jail sentence.

There are good reasons why the legislature has not provided for reporting by means of a mechanical device. A committee of judges and lawyers studied the effects of the latest types of tape recording equipment in the U. S. District Court in Washington, D.C., and

submitted a report on May 11, 1961. Their report gave the following reasons for rejecting the recording devices in favor of maintaining the court reporter system:

“The machine possesses too great a sensitivity in that it records not only the spoken word, but coughing, footsteps, rustling of paper and other extraneous noises. Speech which takes place beyond the perimeter of the microphone is inaudible. In other instances involving proceedings with multiple parties or multiple counsel, it is difficult to distinguish from one sound tape precisely what has occurred or who was speaking. “The machine, therefore, lacks the very important human function of discriminating intelligently as to what transpired.” Everett G. Rodebaugh, *Sound Recording in the Courtroom: A Reappraisal*, 47 ABA J 1185 (1961).

Due to the defects in the quality of producing the verbatim record the Legislature has wisely not allowed mechanical recording devices to be used in the district courts. To do so would subvert the purpose of the statute providing for court reporters which is to afford assistance to the court and counsel in conducting the trial and drawing up findings and *bills of exception*, 82 C.J.S. *Stenographers*, § 9 (1953). Since the legislature has not allowed mechanical recording devices, their use in this case where the record is incomplete is prejudicial error.

An incomplete record makes meaningful appeal impossible. Where the Code of Criminal Procedure gives a right to appeal within the terms of the statute,

the use of a reporting device which produces an incomplete record would be prejudicial to the rights of the accused and costly to the state who would have to grant a new trial on the ground that the record affords nothing to review. "An appeal may be taken by the defendant (1) from a final judgment of conviction." Utah Code Annotated, 77-39-3 (1953). It has been held that where a stenographer loses his notes so that a complete record cannot be presented, the trial court should grant a new trial and save the expense of taking the case to the appellate court who will review and remand for a new trial. *Elliott v. State*, 5 Okl. Crim. Reporter 63, 113 Pac. 213 (1911).

Even when the parties cannot reach an agreement as to the unrecorded testimony or the trial judge cannot recall what was said the court should reverse and remand a new trial. See *State v. Baum*, supra.

Since, however, memories have faded since the trial and the possibility of obtaining an accurate record is highly dubious due to the fact that line 21, page 1; line 22, page 6; line 32, page 6; line 24., page 8; line 25, page 8; and line 8, page 25 are inaudible as indicated by the record on appeal, appellant should be granted a new trial.

POINT IV

THERE WAS A COMPLETE ABSENCE
OF PROOF THAT THE COMPLAINING WIT-

NESS WAS INJECTED WITH A DRUG AND THAT THE ACTS COMPLAINED OF WERE DONE WITHOUT THE KNOWLEDGE OR CONSENT OF THE COMPLAINING WITNESS' PARENTS OR THAT THE ACTS CONTRIBUTED TO THE MINOR'S DELINQUENCY.

Defendant was found guilty of contributing to the delinquency of a minor by "hypodermically administering drugs" to the complaining witness. But a thorough search of the record has failed to produce any evidence which could in the least substantiate that finding. The prosecution has left a void in a most essential step in proving the guilt of the accused. To convict a man of administering drugs without any proof whatsoever that what was administered was a drug is unthinkable.

The complaining witness could only testify that there was "something in a needle" (R. p. 5, 1.23); that it "was white liquid" (R. p. 8, 1.2). Milk is a white liquid. A mixture of sugar and water is a white liquid. In response to the question: "Do you know what was in that needle?" (R. p. 9 1.23), she could only reply "No" (R. p. 9, 1.24). But compare that answer with her unequivocal response to the prosecutor's question concerning her dealings with others after she left defendant: the prosecutor's question: "Did they give you any drugs?" (R. p. 16 1.17), and her reply, "Yes" (R. p. 16 1.20).

The closest the prosecution could come in establishing that a drug had been administered was in eliciting the complaining witness' reaction to the injection, and that consisted solely of "I felt kind of drowsy and I felt really good." (R. p. 9 1.32). It is common knowledge that even a psychological reaction can go much further than those simple effects (to which this witness is certainly subject, no derogation of the witness intended). See in general, Aldrich, *Dynamic Psychiatry* (1966).

The complaining witness did not say she was under the influence of drugs while with defendant, but again in relating her activities with people other than defendant she stated then she was under the influence of drugs. (See R. p. 18 1.24 & 25). To convict the defendant of such a serious offense, that of administering drugs to a minor, upon the vapor thin evidence described above, is unwise at best. Surely the state ought to be required to prove its case.

The defendant was convicted of administering drugs to a minor "without the knowledge or consent of the parents". (Complaint). Here appellant is confronted with a hiatus in the prosecution's duty to prove its case. Appellant is not quibbling with every jot and tittle, but with what appears to be a serious omission. Nowhere in the record is there to be found so much as a single statement that what was done was done without the knowledge or consent of the parents. We cannot assume that the parents would object to what was done.

What was plead must be proved even if just a semblance of proof is all that can be found.

Assuming *arguendo* that drugs were administered, there was no proof that they in fact, contributed to any delinquent behavior on the part of the complaining witness. The statute states (and the complaint charges in almost the exact language) that anyone "who aids, contributes to, or becomes responsible for the neglect or delinquency of any child", is guilty of the offense. Section 55-10-80(3), Utah Code Annotated, 1953. Of necessity we cannot avoid being repetitious, there was absolutely no evidence produced which indicated in any way that the acts alleged produced any behavior which could be called delinquent. Without such proof the mandate of the statute has not been fulfilled, and it cannot be assumed that the legislature intended the courts to eliminate their requirements.

All in all there has been a laxness in this case which cannot be tolerated in the field of criminal law. The prosecution has failed to prove that (1) the complaining witness was injected with a drug; (2) that the acts alleged were done without the knowledge or consent of the complaining witness' parents; and (3) that the acts alleged contributed to delinquent behavior of the complaining witness. Without proof of even one of the above the case must fall; but without proof as to any of the elements of the offense charged, the decision is beyond question.

The Legislature has enacted two statutes which must be distinguished. The first states: "Any person . . . who tends to cause children to become delinquent, "55-10-80 (1), Utah Code Annotated, 1953, is guilty of the crime stated. It is obvious that the provision refers to acts which in some way tend to cause delinquency in a child. Thus, it is not necessary that the child become a delinquent as a result of the acts. But the second provision under consideration, and the one which appellant has been charged with violating, is as follows: "Any person . . . who aids, contributes to, or becomes responsible for the neglect or delinquency of any child", Section 55-10-80(3) Utah Code Annotated, 1953, is guilty of the crime stated. The second provision "contemplates an existing delinquency and that such situation has been contributed to by another . . . " *State v. Clark*, 92 Ohio App. 382, 110 N.E. 2d 433 (1952). In such a case the complaint must allege and the prosecution must prove that the complaining witness is or was a delinquent and the defendant to some degree caused or contributed to that status. See *State v. Clark*, supra and *Peefer v. State*, 42 Ohio App. 276. 182 N.E. 117 (1931).

In the instant case the appellant was charged with contribunting to the delinquency of a minor, but there was no evidence that the acts complained of caused or contributed to any delinquent behavior attributed to the complaining witness. It would indeed be an extreme view to say that an individual could be convicted of

contributing to the delinquency of a minor without requiring that the minor actually is or was a delinquent.

The interpretation of the statute sought above seems to be an intermediate view, one which both protects an accused from harrassment, but also meets the intent of the legislature. It has already been pointed out that one extreme is represented by the New York court in *People v. Smith*, 41 N.Y.S. 2d 512, 266 App. Div. 57 (1943), where the court requires that the minor actually be adjudged a delinquent before the defendant can be charged.

Since the evidence was wholly insufficient to convict appellant of the crime charged, reversal is required.

Respectfully submitted,

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