1967

The State Of Utah v. Norbert Nelson Aka Carl Douglas : Appellant-Bondsmen's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

NORBET NELSON aka CARL DOUGLAS,
Defendant.

Case No. 10918

APPELLANT-BONDSMEN'S BRIEF

Appeal from Judgment of the Seventh Judicial District Court For Carbon County, Utah Honorable F. W. Keller, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

NORBET NELSON aka CARL DOUGLAS,
Defendant.

Case No. 1793

APPELLANT-BONDSMEN'S BRIEF

STATEMENT OF THE KIND OF CASE

This is a matter wherein the Bondsmen, Dewey L. Sanone and Samuel Sanone, attempt to set a Bail Forfeiture aside.

DISPOSITION IN THE LOWER COURT

On November 28, 1966, upon motion of Boyd Bunnell, District Attorney in and for the Seventh Judicial District, the Honorable Henry Ruggeri entered an Order Forfeiting Bail. On January 11, 1967, the Bondsmen's Motion to set Forfeiture Aside was

filed and the same was argued and denied February 7, 1967, by the Honorable F. W. Keller. A Notice of Appeal was filed by the Bondsmen February 15, 1967, and said appeal was voluntarily dismissed by the Bondsmen March 30, 1967. The matter was remitted by the Supreme Court to the District Court on April 5, 1967. Judgment was entered against Dewey L. Sanone and Samuel Sanone on May 2, 1967, and this Appeal is taken from that Judgment.

RELIEF SOUGHT ON APPEAL

The Appellant-Bondsmen seek a decision from this Court overruling the Order denying the setting aside of the Bail Forfeiture and vacating the Judgment or that failing a modificaton of the Judgment to the extent that the ultimate liability on the Judgment be held in abeyance until the State of Tennessee releases the principal with the requirement that the Bondsmen indemnify the State of Utah in the return of the principal to Utah to stand trial.

STATEMENT OF FACTS

The principal, Carl Douglas, also known as Norbet Nelson, appeared before the Honorable Edward Sheya, Judge of the City Court of Price, Carbon County, on the 13th day of October, 1966, for arraignment on a complaint filed in said court wherein the defendant was charged with the commission of the crime of Grand

Larceny. At said arraignment, the Judge of said court fixed bail in the sum of $1,000.00 whether cash or surety bond and ordered the principal remanded to the Carbon County Sheriff until bail was posted or until the principal was otherwise discharged.

On October 25, 1966, the Appellant, Dewey L. Sanone and Samuel Sanone, posted a surety bond in the sum of $1,000.00. Said bond was approved by the Court and the principal released from the custody of the Sheriff.

A Preliminary Hearing was conducted on October 27, 1966, and the principal bound over to answer to the crime of attempted Grand Larceny. Thereafter the principal failed to appear for arraignment in the District Court and the Honorable Henry Ruggeri on the 28th day of November, 1966, entered an order forfeiting bail. Appellant moved the Court to set this forfeiture aside and the same was argued and denied February 7, 1967. Judgment was entered against the Appellants herein on May 2, 1967, from which this Appeal was taken.

ARGUMENT

POINT I

THE TRIAL JUDGE ERRED IN DENYING THE APPELLANT'S MOTION TO SET THE FORFEITURE ASIDE AS THE BONDSMEN'S OBLIGATION IS EXCUSABLE UPON ADEQUATE REASON.

A prisoner released on Bail is regarded as being transferred from the custody of the public officials charged with his confinement to that of the sureties on his bail bond or recognizance. The sureties (appellant herein) are then charged with the duty of producing him to answer the charges against him at the proper time and are liable for a failure to do so, unless the failure is excused for reasons which the courts regard as adequate. What reasons are so regarded have varied from time to time and from jurisdiction to jurisdiction, but in general it has been said that a default in appearance will be excused only by an act of God, an act of the law, an act of the obligee, or an act of the public enemy. American Jurisprudence 2nd, Volume 8, Sections 177-184, Bail and Recognizance.

It should be noted that the legislators saw fit to employ the general principles previously enunciated and did so in promulgating, Title 77, Chapter 43, Section 25,

> FORFEITURE OF BAIL BY NONAPPEARANCE—EXCUSE
>
> "If, without sufficient excuse, the defendant neglects to appear for arraignment or for trial or judgment, or upon any other occasion where his presence in court is lawfully required, or to surrender himself in execution of the judgment, the Court must direct the fact to be entered upon its minutes, and the undertaking of bail, or the money deposited instead of bail as the case may be, shall thereupon be declared forfeited, but if at any time before the final judgment of the

Court the defendant or his bail appears and satisfactorily excuses his neglect, the Court may direct the forfeiture of the undertaking of the deposit to be discharged upon such terms as may be just."

The Supreme Court of the State of Washington has examined a similar fact situation in *State vs. Reed*, 127 Wash. 166, 219 P 833 (1923), and that Court concluded that an order requiring the Bondsmen to repay the State's costs incurred was appropriate and affirmed the lower court's order staying action against the Bondsmen until a reasonable time after the prisoner is released from custody of the other State.

Patricia Reed was charged with a felony in Washington, admitted to bail, and the Bail Bond executed and filed. The case was called for trial and the defendant failed to appear. Whereupon the sureties located her in California serving an indeterminate sentence in the Pentientiary of California.

The sureties in the Reed case contended that Court is vested with discretion to set aside a forfeiture and stay further proceedings until the principal can be produced. The Utah code section previously cited appears to vest the identical discretion with the Utah trial courts. The Court refers to the rationale behind the granting of bail in Washington by relying upon *State vs. Johnson*, 69 Wash. 612, 126 56, (1912), and *State vs. Jakshitz*, 76 Wash. 253, 136 P 132 (1913).

Appellant contends that the underlying thesis in

the Washington cases are inherent in a liberal reading of the Utah Code section. This policy was adhered to in *State vs. Jakshitz,* supra, and it was added that:

> "The 'giving of bail' should be encouraged for various reasons: That the State may be relieved of the burden of keeping an accused person; that the innocent shall not be confined pending a trial and formal acquittal; that in cases of flight, a recapture may be aided by the bondsmen who, it is presumed, will be moved by an incentive to prevent judgment, or if it has been entered, to absolve it and to mitigate its penalties. To accomplish these things and others, courts have been liberal in vacating judgments entered on Bail Bonds, exercising always a broad discretion and in proper cases preserving the equities of the public by deducting such costs and expenses as may have been incurred by the State. To hold otherwise, would discourage the giving of bail and defeat the manifest purpose of the Statute."

The Colorado Supreme Court has addressed itself to this problem in *J. R. Allison, et al vs. The People of the State of Colorado,* 286 P2d 1102 (1955). In the *Allison* case, the defendant was admitted to bail on bond and, while at liberty pending trial was convicted of a felony in foreign jurisdiction aind confined to prison in that state so that he coud not appear for trial pursuant to the condition of the bail bond. The Colorado Court relieved the surety from forfeiture of bail bond upon offer to defray costs and expenses involved in returning defendant upon completion of imprisonment.

The *Allison* case supports its holding by reference to *People vs. Pollock,* 65 Colo. 275, 176 P 329, 330 (1918), wherein the Colorado Court quoted from the opinion in *United States vs. Lee,* D.C. 170 F. 163, as follows:

> "The purpose of a recognizance is not to enrich the treasury, but to serve the convenience of the party accused, but not convicted, without interfering with or defeating the administration of justice . . ."

It is conceded that factually the matter herein is distinguishable from the line of authority just announced. However, the principle is not distinguishable. In both the *Reed* and *Allison* cases, the defendant was held in the foreign jurisdiction beyond the time he was to have appeared in the jurisdiction he was formerly admitted to bail in. Appellant contends it should make no difference that the defendant was held in the foreign jurisdiction beyond the time he was required to appear, as a result of a conviction, as opposed to being held awaiting trial under a judicial declaration that he was not to have bail.

In either situation the restraint and confinement is permanent and beyond the power of influence by the surety. The surety in the case at bar as well as the cases cited as authority could not perform the condition of the appearance bond because of the authority exercised by the foreign jurisdiction. He therefore should be excused from the performance upon the rationale and reasons set forth in the authority cited.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SET THE FORFEITURE ASIDE AS THE BONDSMEN'S OBLIGATION IS ESSENTIALLY CONTRACTUAL AND THE BONDSMEN CAN RAISE THOSE DEFENSES ATTENDANT TO CONTRACT.

The appellant's obligation to the state is essentially contractual. Appellant contends that he is entitled to raise those defenses attendant to contract including excuse of his performance based upon impossibility. There can be no doubt that appellant bound himself by an absolute contract to perform an act in the future which subsequently he could not perform and which objectively could not be performed by anyone else.

The subsequent incarceration cannot reasonably be supposed to have been within the contemplation of the contracting parties when the contract was made. The Bondsmen should be held to anticipate the principal's acts and not to an event beyond his control producing effects not in his power to remedy. Appellant cannot exercise any influence whatsoever upon the officials of Shelby County in Tennessee.

That a Bondsmen's obligation is contractual is abundantly supported in the law. American Jurisprudence Volume 50 on Suretyship Sections 1-3. The

nature and definition of the relationship is defined as follows by the American Law Institute's restatement of the Law of Security Sectoin 82,

> "Suretyship is the relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and as between the two who are bound ,one rather than the other should perform."

It is the essence of the Surety's contract that he will see that defendant appears. When the defendant fails to appear, the Bondsmen's obligation is direct and primary to the State.

This direct responsibility being contractual is not absolute. Within the framework of recognized contract principals, the Bondsmen's contractual obligation can be discharged or held in abeyance by the doctrine of impossibility of performance.

Impossibility of performance is defined in the American Law Institute's Restatement of the Law of Contracts in Section 454 as follows:

> "Impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury, or loss involved."

Comments in the notes following point out that impossibility thus precludes or discharges a promisor's duty.

The American Law Institute's Restatement of the Law of Contract in Section 458 provides the theoretical justification for appellant's contention in being relieved from performance. It is there stated:

> "A contractual duty or a duty to make compensation is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prevented or prohibited.
>
> A. . . .
>
> B. By a judicial, executive, or administrative order made with due authority by a Judge or other officer of the United States, or of any one of the United States."

The Bondsmen's payment of money is not regarded as an alternative performance which he is still capable of performing. Forfeiture as an alternative does not produce indemnification. This States does not permit a bail forfeiture in a felony. No alternative exists. The one obligation of producing the defendant had been rendered impossible of performance and as has been suggested by section 458 (b) supra, the judicial order of incarceration without bail in the foreign jurisdiction discharged the bondsmen. (See defendant's Exhibit #1).

The United States Supreme Court has recognized the principle of supervening prevention by law resulting in a discharge of the promisor. In the case of *Texas*

Company vs. Hogarth Shipping Company, Ltd, 256 US 619, 415 CT 612, the Court in its opinion said:

> "Here the ship was although still in existence and entirely seaworthy, was rendered unavailable for the performance of the charter party by the requisition. By that supervening act she was impressed into the service of the British Government for a period extending beyond . . . the time for the charter voyage. In other words, compliance with the charter party was made impossible by an act of the State."

When application is made of the foregoing principles, it is apparent as here that appellant should be discharged from his performance. The unilateral act of the State of Tennessee had made the Bondsmen's performance impossible. The appellant by contractual stipulation would have to assume the risk of the happening of the event before he could be bound.

Contractual defenses are available to this appellant. When application of those principles are made, it is apparent that appellant's obligation is discharged or held in abeyance until the State of Tennessee makes its disposition.

CONCLUSION

The appellants respectfully submit that the Order of Forfeiture and Judgment should be set aside as against the announced public policy asserted in the cases cited by appellant. The relationship which existed

was essentially contract and as such the appellants should be permitted to raise those defenses attendant to contract.

Respectfully submitted,

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