1964

State of Utah v. William Keith Burris : Appellant's Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

Patrick H. Fenton; Attorney for Appellant;

In the Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

WILLIAM KEITH BURRIS,
Defendant and Appellant.

Case No. 9939

APPELLANT'S PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

ON APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF UTAH, IN AND FOR IRON COUNTY, UTAH

Hon. C. NELSON DAY, Judge

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AUTHORITIES CITED

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STATEMENT OF THE CASE AND THE ISSUES INVOLVED

This matter came before the court upon an information charging the defendant with Bastardy, charging in effect that as the result of acts of sexual intercourse on or about the 2nd day of February, 1962, and on or about the 11th day of February, 1962, in Cedar City, Iron County, Utah, with one Bonne Ann Bauer, an unmarried female, said Bonnie Ann Bauer became pregnant and that the defendant was the father of said child.

A plea of not guilty was entered by the defendant and

the matter was tried in December of 1962 before an Iron County jury which unanimously found him guilty. Judgment was entered by the District Court of Iron County, Utah on or about the 14th day of February, 1963. At the time of the trial defendant's defense was primarily an attempt to prove to the jury that the prosecutrix testimony was subject to many questions of creditability and should not be accepted by the jury. At the time of the trial the complaint, the amended complaint and the information were exhibited to the jury and copies thereof were placed in evidence and were sent to the jury room as such.

At the time of the trial the jury was instructed by the District Judge and instruction No. 8 in effect instructed the jury to Disregard these items of pleadings that had been entered in evidence.

An appeal was taken before the supreme court of the state of Utah by the appellant which was decided and filed on 15 January, 1964. In said appeal Point III of the appellant was as follows: "The trial judge instructed the jury to disregard some of the evidence."

This point is not mentioned in the opinion of the Supreme Court filed 15 January, 1964, and is not decided thereby.

"ARGUMENT"

POINT I

POINT NO. III OF THE APPEAL, "THE TRIAL JUDGE INSTRUCTED THE JURY TO DISREGARD SOME OF THE EVIDENCE" SHOULD HAVE A SPECIFIC FINDING.

There can be no argument as to the content of Instruction No. 8 as submitted to the jury by the trial judge. It is as follows, to-wit:

"You are instructed that this matter arose and came before the court based upon the complaint of Bonnie Ann Bauer and the information filed by the District Attorney. The complaint and the information are in substance and effect legal pleadings and a way of getting the matter before the court for determination. However, such documents

are not evidence and the fact that an accusation is made is not evidence; also the fact that the court instructs you concerning the making of an accusation against the defendant is in itself no evidence and is not to be taken as any indication that the court either believes or does not believe the allegation of the said legal pleadings."

This is a stock instruction given in most criminal cases and in many civil cases and except for the use of these documents in attempting to attack the creditability of the prosecutrix would have been correct. Inasmuch as the documents had been entered in evidence and copies thereof sent to the jury room as exhibits it amounts to an instruction to disregard a portion of the evidence and is prejudicial and is reversible error.

The trial court admitted that it was in error on the motion for rehearing with the finding and decision that this instruction was error but that it was not material. Can one say this when from a practical standpoint the only issue to the jury is the creditability of the prosecutrix. One of the time honored and always accepted ways of attacking the creditability of any witness is the proof of conflicting statements. The pleadings offered in evidence were proof of prior inconsistent statements under oath. At the time they were offered in evidence they were not objected to on the grounds of materiality and if so the objection would have been overruled. For the purpose offered they were material and were correctly introduced in evidence. Thereafter the jury was instructed by the court to disregard them which amounted to an instruction to disregard some of the evidence. Is there any reason ever to put evidence in front of a jury if they are afterwards to be instructed to disregard it? What is the purpose of evidence? His Honor, the District Judge, felt that the instruction was error but that the error was not material.

The Attorney General of the state of Utah has adopted a very strange position in connection with this point. In the last paragraph on page 9 of Respondent's Brief are found the following sentences, to-wit: "Therefore, it is obvious that the instruction pertained to the original complaint, which was filed in the matter, and had absolutely nothing to do with the copies which were introduced by defendant in the course of the trial as evidence. These, of course, were

submitted to the jury for inspection and for their consideration, and there can be no doubt that the jury understood that this instruction pertained to the original complaint and not to the copies which were introduced for the purposes of impeachment by defending counsel." The undersigned is of the opinion that the attorney general had his tongue in his cheek while sponsoring this thought. Also if the memory of the undersigned is correct the original documents were placed in evidence and exhibited to the jury and the copies placed into the evidence file in lieu of the originals and the copies were sent to the jury room as such.

To take the position that a jury can distinguish between copies and originals in applying an instruction to disregard pleadings is according to the limited experience of the undersigned quite unrealistic, and possibly placing an undue stress upon the ability of a jury to apply instructions. Considering the great and wide trial experience of the attorney general and his staff in the light of the respondent's position as quoted above one cannot believe that the attorney general would be willing to apply the same reasoning to the same instruction in all instances where pleadings are submitted in evidence for the purpose of impeachment by the use of prior sworn statements.

CONCLUSION

When the only defense of one accused of Bastardy is the impeachment of the prosecutrix by attacking her creditability, and this is done by the use of prior, sworn, inconsistent statements, even though they be pleadings, an instruction to disregard these items is material, is error, is reversible error and was before the court in the appeal on this matter and should have resulted in a reversal of the conviction of the appellant in the District Court and should now result in a reversal.

Respectfully Submitted,

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Attorney for Appellant.