1964

State of Utah v. Jean Sinclair : Brief of Appellant in Support of Petition for Rehearing

Utah Supreme Court

Sumner J. Hatch; Attorney for Appellant;
A. Pratt Kesler; Ronald N. Boyce; Attorneys for Respondent;

In the Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff-Respondent,

vs.

JEAN SINCLAIR,

Defendant-Appellant.

Case No. 9971

APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

SUMNER J. HATCH
516 Boston Building
Salt Lake City 11, Utah

Attorney for Appellant

A. PRATT KESLER
Attorney General

RONALD N. BOYCE
Chief Assistant Attorney General

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

In the Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff-Respondent,

vs.

JEAN SINCLAIR,
Defendant-Appellant.

Case No. 9971

APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I

THE COURT HAS MADE UNSUPPORTED CONCLUSIONS NOT BASED IN ANY WAY ON THE EVIDENCE IN THE RECORD OR LOGICAL INFERENCES THEREFROM UPON WHICH THE DECISION WAS BASED, CREATING THE INESCAPABLE CONCLUSION THAT THE OPINION WAS NOT BASED UPON THE RECORD BY WHICH THE COURT IS BOUND.

A careful review of the entire record, both briefs, and the decision of the Court reveals the following discrepancies:

(a) Paragraph 5 of the Court's decision states:

> **"In searching for a solution to this crime the police learned from LaRae Peterson that the defendant Jean Sinclair had manifest a violent animus toward Foster and had made threats upon his life."**

There is no evidence to this effect in the record nor any claim of such evidence in the State's brief. It is interesting to note that such language does appear in a publication of "Master Detective Magazine" for July of 1963 which was distributed in the Salt Lake area during the hearing of the trial in April, 1963.

(b) In paragraph 2, page 2, of the opinion, the Court states:

> **"She was dressed in gray men's pants, had on boots, and had a tan trench coat wrapped around the gun."**

This statement is directly from the State's brief, page 11, and is a misquotation of the record. Kuehne's testimony being at R. 579;

> **"She went out to the car and got *what I later learned* was a *white* trench coat, came back and wrapped the gun in it."**

Again at R. 584, line 12:

> **"a blue parka under a *white* trench coat"**

both statements by the State's witnesses on the State's examination.

(c) In the first paragraph of page 3, the Court sets out as a corroborative circumstance

> **"She was seen driving around in a car with him (Kuehne) (to pick a point of vantage to kill Foster)."**

There is no such testimony in the record. No witness claims to have seen defendant in the car with Kuehne except Vaughn Humpherys, and Humpherys' testimony concerned only the defendant, Kuehne and Humpherys returning from a deer hunt, and had nothing to do with Foster.

(d) In the second paragraph at page 3 of the Court's opinion, it is stated:

> **"A witness, LaMar B. Williams, who was at the Susan Kay Arms apartments testified that shortly after midnight he observed a person, whom he described as resembling Jean Sinclair, and dressed in clothes similar to those she was wearing, in the parking area near where Foster was killed, just a few minutes before it happened. (This the jury could have accepted as placing the defendant at the scene of the crime very close to the time it was committed.)"**

Again, this is a conclusion unsupported by the record. Any fair interpretation of Williams' testimony other than the extraction of one line leaves no resemblance to the defendant and no similarity of the clothes other than the person was dressed in pants and a coat. Kuehne's testimony was that she was wearing gray flannel pants and a white coat that came below her knees, (R. 585). Williams' testimony was a light short coat coming between the knees and the crotch (R. 981). He could not identify the type of coat (R. 981).

In response to the prosecutor's leading question, he stated that he saw someone in the courtroom that resembled the person. He described a person with hair on the darker side, wavy in front, going straight back (R. 980), a man 165 to 180 pounds (R. 983), having a long nose with a cleft chin and receding chin line (R. 980). On being confronted by Miss Sinclair, he admitted she did not have a cleft chin, a receding chin line or dark hair (R. 982), the only resemblances claimed. Further, the person was seen only through a rear view mirror in the dark (R. 979). The area testified to was not in the parking lot where Mr. Foster was killed, but almost a block to the north, with several large apartment buildings between.

(e) The Court sets forth in the third paragraph, page 3 of the opinion, as follows:

> **"Another witness, Boyd K. Harvey, who was driving by at the time, heard a shot and saw a person, dressed similar to the way defendant was (with a trench coat on) run from the apartment into 5th North Street carrying an object extending 18 to 24 inches above he right hand (which could well have been the sawed-off shotgun), and get into a two-toned car which drove away. (The defendant owned a car of this general description.)"**

This statement also is unsupported by the record and seems to be a quotation from page 18 of the respondent's brief. The only item of apparel described by Harvey was "a three-quarter length coat * * just above the knees or right at the break of the knees" (R. 986). A trench coat was not mentioned. Harvey

described the person as being "very agile" and "running fast", and as a "burley man about 5'10" with dark hair" (R. 988). The statement regarding the car again is an incomplete excerpt from the respondent's brief, including the portion in parentheses. Harvey's statement in the record identifies the automobile as a two-tone **Chevrolet** automobile, without equivocation (R. 989) with the lighter part on the bottom (R. 989). The defendant's automobile is a Buick station wagon and was so described by half a dozen witnesses.

(f) At paragraph 4 on page 3 of the opinion, the Court states:

> **"Two neighbors, a Mr. and Mrs. Pieter Combee, who reside immediately west of the Susan Kay Arms Apartments, just after the shooting heard the woman, LaRae Peterson, cry out, 'Oh God, *she* killed him'."**

and ignores entirely the testimony of two other of the State's witnesses, John Storey (R. 383): "Help, he's dead, I know he's dead", and LaRae Peterson herself (at R. 803): "Oh my God, he's been shot". It is simple for an advocate to pick excerpts from almost 1700 pages of testimony that appear inculpatory standing alone but lose any such inference read in context with the entire record.

It is also interesting to note the Court states that the Combees live immediately west of the Susan Kay Arms Apartment, while all the evidence in the record and the exhibits show the Combees' house to be directly south of the Susan Kay apartments and

also south of the area where Foster parked and was killed. A small error, surely, but it follows the pattern of repeated failure of the opinion to be supported by the record in a capital case.

(g) The next succeeding paragraph of the opinion states:

> **"It was shown that the morning after the killing the defendant took a three-quarter length trench coat and some slacks, similar to the clothes she was wearing that night, which had grease spots and dirt on them, to a cleaners. (This connects up with the fact that the defendant had to crawl around cars, and that there was grease and dirt on her clothing)."**

Three persons (all the State's witnesses) testified as to the coat and trousers brought to the cleaners with other clothing by Miss Sinclair. It was a coat that would come a little below the knee. Mr. Allred, the cleaner, testified that it was a full-length coat as distinguished from a three-quarter length coat, and that Miss Sinclair was charged for cleaning a full-length coat (R. 1002). All three described a tan whipcord coat, while Kuehne's testimony was that the coat the defendant was wearing was **white.** The cleaner described the trousers with spot on as "light gray pants", while Williams described the trousers on the person he saw as "darker trousers" (R. 980, 981), and Harvey as "darker than the jacket or coat (R. 989).

(h) The next item claimed to be corroborative in the opinion is the sixth paragraph on page 3:

> **"There is another fact which may be regarded as inculpatory: That upon questioning, the defendant**

> **denied ever having been at the Susan Kay Arms apartments, yet the witness, Gerritadina Combee, testified that some few days earlier, about Christmas time, she had seen Jean Sinclair, dressed in men's clothes, at those apartments in about the same area as the killing."**

Reading the record shows the supposed identification by Mrs. Combee was from a right rear view for only several steps. She never saw the face and could not describe her clothing or other details (R. 921).

POINT II

NO SINGLE ITEM OF EVIDENCE SET FORTH IN THE OPINION AS CORROBORATIVE WITH THE EXCEPTION OF KUEHNE'S TESTIMONY, OR IN COMBINATION OF ANY SUCH INCIDENTS, TENDS TO CONNECT THE DEFENDANT TO THE HOMICIDE WHEN VIEWED IN THE ABSENCE OF OR WITHOUT INTERPRETATION FROM KUEHNE'S TESTIMONY.

Not only does the great weight of case law require that corroborative testimony tend to connect the defendant to the crime in the absence of and without interpretation from the testimony of an accomplice, but our statute, 77-31-18, Utah Code Annotated 1953, demands it as is acknowledged by the Court at the end of page 3 of the opinion.

Applying the test of the statute, "unless he is corroborated by other evidence which in itself and witout the aid of the testimony of the accomplice tends to connect the defendant with the commission

of the offense", to each item of the evidence set forth by the Court in its opinion as being corroborative, it cannot be said that any one piece of evidence or any combination, viewed in the absence of Kuehne's testimony, casts more than a mere suspicion of guilt or is more consistent with guilt than with innocence.

(a) Mrs. Kuene's statement with respect to making money fast, in the absence of Kuehne's testimony of offers of money by Sinclair, means nothing.

(b) The Court's statement that "She was seen driving around in a car with him (to pick a point of vantage to kill Foster);" is not supported by the record in any way.

(c) LaMar B. Williams' testimony, in the absence of Kuehne's testimony regarding clothing, is without meaning or connection with the defendant. See Point I, paragraph (d) of this brief.

(d) The witness Harvey's testimony, without Kuehne's testimony as to the clothing and the sawed-off shotgun (see Court's statement) "(which could well have been the sawed-off shotgun)", does not tend to connect the defendant in any way with the crime. As pointed out in Point I, paragraph (c), the statement as to a two-toned car is an excerpt from the record, ignoring the rest of the statement by Harvey that the car was a Chevrolet. There is no evidence of the defendant owning or possessing a Chevrolet automobile. It should be pointed out that the general description of the person seen by Williams and Harvey, with the exception of a vague sim-

ilarity of a light colored coat, described variously, does not in any way fit the defendant, and the light coat is without meaning in the absence of Kuehne's testimony.

(e) The testimony of the two employees at the cleaners and Officer Paul requires interpretation from Kuehne's testimony to make any connection between the defendant and the crime, i.e. the only testimony as to grease and dust spots comes from Kuehne and the only testimony as to crawling around cars was an extrajudicial statement of the defendant allegedly made to Kuehne.

(f) The statement of Gerritadina Combee identifying the defendant near the scene of the crime some two weeks prior to the crime is again an excerpt from the record and is not borne out by the balance of Mrs. Combee's testimony. Also see **State v. Sommers,** 97 Utah 132, 90 P.2d 273, holding that presence in the vicinity of a crime not at the time of its commission is not sufficient to corroborate.

(g) The Court also indicates at pages 2 and 3 of the opinion that there is evidence from witnesses other than Kuehne "bearing out the facts concerning defendant's unnatural relationship with LaRae Peterson; that she had such an impassioned attachment to her and resentment of Foster that she wanted to resort to fiendish violence to get rid of his rivalry for her favors". This again is an inference unsupported by the record. All Kuehne's testimony pointed to a concern for the child Cheryl Ann, rather than an unnatural relationship with LaRae Peterson, and

the State's other witnesses concerning the alleged attachment brought a direct denial from LaRae Peterson, and State's witness Vaughn Humpherys testified that in all the years he had known them (LaRae Peterson and Jean Sinclair) he had never seen anything he considered improper between them (R. 750). His entire testimony was to the effect that the defendant's concern was over the child (R. 719 to 765).

While it is true that LaRae Peterson refused to answer concerning certain questions as to homosexuality, this Court in reviewing the same facts held these questions were not relevant. The matter of the contempt of LaRae Peterson, 386 P.2d 727, dated November 21, 1963.

It is a simple matter in more than 1600 pages of record to take statements or phrases out of context which reflect an indication of guilt or innocence when not considered with all the evidence. It is our contention that the examples or incidents set forth by the Court as being corroborative are not a fair consideration of the testimony.

POINT III

THIS OPINION IF ALLOWED TO STAND AS WRITTEN WOULD CHANGE THE ENTIRE LAW OF CORROBORATION OF AN ACCOMPLICE IN THIS STATE AND WOULD ABROGATE THE PROVISIONS OF 77-31-18, UTAH CODE ANNOTATED 1953.

The law is well settled in this State regarding corroborative evidence both by statute and by case

law, see cases cited at pages 53 and 54 of appellant's brief in the instant case. The cases over the nation, almost without exception, hold that the connection by the evidence in order to make it corroborative must be "in the absence of and without interpretation from the testimony of an accomplice." The Court herein cites the statute and then chooses to ignore the statute. Probably the best example that can be given is that used by the Court at page 4 concerning a witness seeing X coming from the woods. It is apparent in the example that there was corroborative evidence and the facts set forth make a prima facie case without reference to an accomplice in any way. This cannot be considered an analogy to the present case. May it be noted that in the Court's opinion in many of the examples the Court sets forth in parentheses that the evidence tends to corroborate with Kuehne's testimony as to various items, i.e. the offers of money, the clothes Kuehne says Sinclair was wearing, Kuehne's statement that he sawed off a shotgun; but this is not the test set forth by either case law in this State or by statute, the test being that the evidence tends to connect the defendant to the crime in the **absence** of the testimony of the accomplice.

POINT IV

THIS COURT ON NOVEMBER 21, 1963, HELD THAT QUESTIONS AS TO LESBIAN AND HOMOSEXUALITY AS TO LARAE PETERSON WERE IMMATERIAL, AND YET FAILED TO CONSIDER THIS

HOLDING IN VIEW OF APPELLANT'S POINT XIV IN HER INITIAL BRIEF.

The Court on November 21, 1963 in the case of In re Peterson, supra, arising directly from facts in this case, held that the questions asked LaRae Peterson with regard to homosexual relations were not relevant and were not an issue in the case (see 386 P.2d, page 727), yet the Court in its opinion ignores appellant's claim of error in the trial Court's overruling the appellant's objections to the same questions as being ambiguous, immaterial and irrelevant. In view of the statements in the opinion heretofore set forth regarding the unnatural relationship between Peterson and Sinclair, Sinclair's "violent animus" and desire to resort to "fiendish violence", it can hardly be said that allowing such questions, even without answer, or more cogently, expressly without answer, was not highly prejudicial to the defendant.

POINT V

THE COURT IGNORED AS WITHOUT MERIT SEVERAL POINTS OF APPELLANT'S BRIEF WHICH ARE DIRECTLY SUPPORTED BY CASE LAW FROM THIS COURT.

(a) The Court brushed off some thirteen points of the defendant's as being without merit and without discussion thereof. Among these were several jury incidents including the shaking hands and conversation between witness Gerritadina Combee and

jury foreman Firmage which is so on all fours with the Utah case of **State v. Crank,** 142 P.2d 178, that it is difficult to see how it can be ignored. In addition thereto, the Court's refusal to allow an examination into Kuehne's psychiatric background in view of his relationship to the trial seems to be against the great weight of authority as to the scope of credibility in cross examination.

SUMMARY

It is respectfully submitted that, in view of the matters above set forth which we feel are completely supported by the record and especially in view of the sensational nature of the case and the fact that the case is a capital crime, the defendant should be granted a rehearing.

Respectfully submitted,

SUMNER J. HATCH
Attorney for Appellant