

1963

The State of Utah v. Jerry Peloud Leggroat : Brief of Appellant

Utah Supreme Court

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In The
SUPREME COURT
OF The
STATE OF UTAH

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THE STATE OF UTAH,

Plaintiff and Respondent,

vs.

JERRY PELOUD LEGGROAN,

Defendant and Appellant.

Clerk Supreme Court Utah

Case No.
10004

BRIEF OF APPELLANT

Appeal of the Judgment of the
Third Judicial District Court for Salt Lake County
Honorable Marcellus K. Snow, Judge

A. PRATT KESLER,
Attorney General for
the State of Utah
Attorney for Respondent

ROBERT M. McRAE
of Tuft, Marshall & McRae
Attorney for Appellant

TABLE OF CONTENTS

STATEMENT OF KIND OF CASE	2
DISPOSITION IN THE LOWER COURT	2
RELIEF SOUGHT ON APPEAL	3
STATEMENT OF FACTS	3
POINTS ON APPEAL	12
POINT I	12
The transcript of the preliminary examination of the witness Robert S. Ross should not have been received in evidence in lieu of direct testimony. .	12
POINT II	
That portion of the transcript of the preliminary hearing, wherein the testimony of Robert S. Ross was read into the record should not be received as evidence in lieu of personal testimony . . .	17
POINT III	
The errors committed Were of Sufficient Weight to Prejudice the Trial of Appellant	22
CONCLUSION	25

CASES CITED

State v. Jordan	
320 P. 2d 446, 357 U.S. 922	14
State v. Fouquette	
221 P. 2d 404, 67 Nev. 505	
341 U.S. 932, 342 U.S. 928	15
Rowley v. Public Service Commission	
185 P. 2d 514, 112 Ut. 116	19
Mt. States Tel & Tel v. Pub. Serv. Comm.	
155 P. 2d 184, 107 Ut 502	19
Gibbs v. Gibbs	
75 P. 641, 653, 26 Ut. 382	20

TABLE OF CONTENTS (Cont.)

Glenn v. Farrell	
304 P. 2d 380, 382, 5 Ut. 2d 439	20
State v. Lyman	
348 P. 2d, 340, 10 Ut. 2d 58	23

STATUTES CITED

Utah Code Annotated 1953	
77-45-13	13
77-15-14	18
77-42-1	23
A.R.S. Sec. 13-1863	14
California Statutes Annot. Sec. 1334	15
TREATISES	
97 C.J.S., Sec. 17, p. 367-368	14

IN THE SUPREME COURT

of the

STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,)

vs.)

JERRY DELOUD LEGGROAN,)

Defendant and Appellant.)

**Case No.
10004**

BRIEF OF APPELLANT

STATEMENT OF KIND OF CASE

**This is a criminal action in which the
defendant was convicted of the crime of robbery.**

DISPOSITION IN THE LOWER COURT

Defendant was charged, along with Jack

Kenneth Leggroat, of the crime of robbery.

**The case was tried to a jury, which rendered
a verdict of guilty to the principal crime of**

robbery, but did not render a verdict on the included offense of assault. From the guilty verdict on the charge of robbery, the defendant Jerry Deloud Leggrosan appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the jury verdict and for an order remanding this case to the District Court of Salt Lake County for a new trial.

STATEMENT OF FACTS

As set forth in the complaint on file herein (R.5) an alleged offense of robbery was committed by appellant on or about the first day of May, 1963. At the preliminary hearing, which occurred on May 7, 1963, before the Honorable J. Patton Neeley, one of the judges of the City Court of Salt Lake City, State of Utah, appeared Mr. Kenneth M. Hisatake Attorney-at-Law licensed to practice in the

State of Utah, on behalf of appellant. Subsequent to the preliminary hearing, Mr. Hisatake withdrew as counsel for appellant (R. 23), and appellant's attorney herein was requested by the Honorable Marcellus K. Snow to represent appellant in the District Court stage of the proceedings. Trial commenced June 28, 1963, with a jury. At the trial the co-defendant was represented by William Oswald, a licensed attorney in the State of Utah, because of the possible conflict of defenses between the respective defendants.

Called as the State's first witness was Katsuye Oike, who testified, through the means of a Japanese interpreter, that she was walking with another of the State's witnesses on the south side of South Temple, in an easterly direction as they approached the Greyhound bus depot at the southwest corner

of South Temple and West Temple in Salt Lake City, Utah, at approximately 8:00 P.M., on the evening of May 1, 1963 (R. 70). Mrs. Oike further testified that she was beaten and assaulted and knocked to the ground (R. 71). She described the wearing apparel of the man perpetrating this assault and at a jail lineup identified the assailant as being the co-defendant of appellant (R. 72). Mrs. Oike testified that her purse had been taken, that it contained an envelope containing four \$1.00 bills, 50¢ in coin, belonging to a church, and that an inner change purse and wallet contained two \$5.00 bills, a 50¢ piece, one or two quarters, some dimes, nickels and pennies (R. 73,74). No identification was made of appellant throughout the course of her testimony, either by face or clothing description.

The next witness was Mrs. Oike's friend, Mrs. Hide Nishida, who also testified through the means of a Japanese interpreter. Identical testimony was adduced that appellant's co-defendant also assaulted this witness, holding her by the neck and throwing her to the ground (R. 82). A facial description was made of appellant's co-defendant (R. 83):

"Q. Did she identify either or both of these men at the jail?

A. I recognized this tall person who I saw after Mrs. Oike was knocked down and then later pulled me down. I saw him. I identified him at the jail."

No identification was made by either witness as to which, if either of the defendants, took the purse from Mrs. Oike's person (R. 10,18). The police authorities were

called to investigate and subsequently arrested appellant and his co-defendant, after which time a formal warrant of arrest and complaint issued (R. 4,5). Salt Lake City police officer Alex L. Pahl testified that he searched the person of appellant; that on appellant's person was found two \$5.00 bills, four \$1.00 bills, two 50¢ pieces, one quarter, two dimes, three nickles, fifteen pennies, and one Salt Lake City bus token (R. 102). He also testified that no money was found on the person of the co-defendant (R. 103). This witness also testified that Mrs. Oike's purse was recovered (R. 106) and that no fingerprints of appellant were found on it, though the purse was processed for prints (R. 107).

David Felt was called as a witness. He testified that he was also assaulted by appellant's co-defendant, Jack Leggroat as he and a friend entered the Greyhound bus depot (R. 112).

By means of stipulation, trial counsel for the State and the respective defendants stipulated that if Deputy Sheriff Palmquist, of the Salt Lake County Sheriff's office, were called as a witness, that he would testify to his attempts to locate one Robert S. Ross in Salt Lake City, Utah, his last-known address being North Temple Travelodge No. 10, Salt Lake City, Utah. The stipulation also stated that his investigation revealed Mr. Ross had left a forwarding address of Sausalito, California, being the same city and state that Mr. Ross testified to in the preliminary hearing (R.14)_7.

Deputy Palmquist would further testify, if called, that he had checked the power company, the gas company and city directory and was unable to locate a Robert S. Ross (R. 115). Based upon the inability of Deputy Palmquist to locate Robert S. Ross to serve him with subpoena compelling his attendance as a witness to the trial, the State offered a transcript of the preliminary hearing in lieu of a personal appearance by Mr. Ross for the purpose of testifying in this trial (R. 115). This offer of evidence was resisted, argued and submitted to the Court, upon which the Court ruled that the transcript of preliminary hearing covering the testimony of Robert S. Ross could be read into the record, in lieu of his personal testimony (R. 116-118). In the transcript of testimony, Mr. Ross testified that each

of the defendants participated in the assault on Mrs. Oike and Mrs. Nishida, and that a purse was taken from one of the ladies (R. 121). Mr. Ross identified the defendants (R. 122) as being the perpetrators of the assault and alleged robbery. Evelyn Leggroan, appellant's mother, was called as a witness by appellant (R. 124). She testified that on the preceding Sunday, April 28, she had given her son a birthday present of four \$1.00 bills (R. 125). Charles Brown was also called as a witness for appellant (R. 125). He testified that he was with appellant and the co-defendant until early evening on May 1, 1963, at which time appellant borrowed his automobile for the purpose of taking the co-defendant home (R. 127). He also testified that during the afternoon of May 1, while he had been

with appellant, that he had occasion to view the amount of money which appellant had on his person and that it was in the approximate sum of \$20.00 (R. 128, 129). The co-defendant was called as a witness on his own behalf by his attorney. He testified that he had no part in the assault on Mrs. Oike or Mrs. Nishida and that the assault and robbery was perpetrated by appellant (R. 132, 136). He also denied assaulting David Felt (R. 137). Appellant was called to testify in his own behalf and explained the circumstances of having on his person approximately \$20.00, and from whence he derived the money, substantiating his mother's testimony (R. 142). Appellant also denied having any physical contact with either Mrs. Oike or Mrs.

Nishida, or committing the robbery, either directly or indirectly (R. 142).

The case was submitted to the jury from which a verdict of guilty to the crime of robbery was returned as to both defendants, from which verdict and subsequent judgment of the Court defendant Jerry Deloud Leggroat herewith appeals.

POINTS ON APPEAL

POINT I

THE TRANSCRIPT OF THE PRELIMINARY EXAMINATION OF THE WITNESS ROBERT S. ROSS SHOULD NOT HAVE BEEN RECEIVED IN EVIDENCE IN LIEU OF DIRECT TESTIMONY, BECAUSE NO EVIDENCE WAS BEFORE THE COURT THAT THE PROVISIONS OF 77-45-13, UTAH CODE ANNOTATED, 1953, WERE MET, AND THE RECORD DOES NOT CONTAIN ANY EVIDENCE THAT THE ABSENT WITNESS COULD NOT BE PRODUCED FOR TESTIMONY PURPOSES THEREOF.

In the stipulation between the State's attorney and counsel for the respective defendants regarding the attempt of Deputy sheriff Palmquist to locate Robert S. Ross

for the purpose of serving him with a subpoena compelling his attendance at the trial of this case, no evidence was offered, stipulated to, or otherwise received showing that any attempt was made to secure the attendance of Mr. Ross by means of the commonly called Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases, as set forth in 77-45-13, Utah Code Annotated 1953:

"If a person in any state which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, . . . a judge of such court may issue a certificate under the seal of the court stating these facts and specify the number of days the witness will be required."

The Act goes on to set forth means of paying fees and being summoned for purposes of testifying. In interpreting the scope

of this Act and its authority, the court's attention is directed to the adoption of the same by Arizona, A.R.S., Section 13-1863, and their interpretation of this Act:

"The Uniform Act providing for securing the attendance of witnesses from without the state in criminal proceedings does not extend the jurisdiction of the courts beyond its territorial limits, and the operation of the Act depends upon principles of comunity, and it has no efficacy except through the adoption of the same Act by another state."

(State v. Jordan, 320 Pac. 2d 446, 357 U.S. 922.)

The court's attention is also directed to 97 C.J.S. Section 17, page 367-368, where, under the caption of "Witnesses" is found the following:

"Under the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases. Material witnesses from without the state may, under

certain conditions, be commanded to attend and testify in criminal prosecutions in the state."

This treatise cites the following case. in support of this proposition: State vs. Fouquette, 221 Pac. 2d 404, 67 Nev. 505, certiorari denied twice. 341 U.S. 932, 342 U.S. 928.

California has adopted the Uniform Act, the terminology of the same being almost verbatim to that of the State of Utah. (California Statutes Annotated, Section 1334). Since both Utah and California have codified the Act, it now has legal efficacy in this state. To rule otherwise would mean that it has no meaning or force and its presence in our code of criminal procedure is valueless. Appellant submits that a means existed to secure the presence of Robert S. Ross to

testify and that in absence of testimony or evidence that this witness could not be located through his admittedly known California address, and that attempts of the local California court to obtain jurisdiction over this witness in order to compel his attendance in Utah were of no avail, then and only then, do the provisions of our code of criminal procedure apply in order to allow the use of transcribed testimony in lieu of personal testimony. We have not argued in this brief that our court has extraterritorial jurisdiction, as such. We do argue that for the purpose of compelling the attendance of a non-resident witness, our court does have the power to compel the attendance of out-of-state witnesses. We further argue that appellant is entitled to the benefits of

personal testimony regarding the alleged facts so as to enable himself to properly confront these witnesses at the time of trial when the tryor of the facts must find guilt beyond a reasonable doubt.

POINT II

THAT PORTION OF THE TRANSCRIPT OF THE PRELIMINARY HEARING, WHEREIN THE TESTIMONY OF ROBERT S. ROSS WAS READ INTO THE RECORD SHOULD NOT BE RECEIVED AS EVIDENCE IN LIEU OF PERSONAL TESTIMONY, BECAUSE THE PROVISIONS OF 77-15-14 UTAH CODE ANNOTATED 1953 WERE NOT MET AS THE TERMINOLOGY THEREOF CREATES A MANDATORY OBLIGATION UPON THE PROSECUTING ATTORNEY WHO REQUESTS THE REPORTING OF TESTIMONY IN THE FORM OF A DEPOSITION FOR USE AT LATER PROCEEDINGS TO ASK NOT ONLY THE NAME AND ADDRESS OF THE WITNESS, BUT THE BUSINESS OR OCCUPATION OF THE WITNESS.

Russell E. Hervey, a certified shorthand reporter, was sworn by the Clerk of the City Court of Salt Lake City, State of Utah, to report the proceedings of the preliminary hearing (R. 8). He certified

to the reported proceedings and that the transcript of testimony was true and correct. (R. 21). This transcript contained testimony of Robert S. Ross, who, when called as a witness by Mark S. Miner, Deputy County Attorney in and for Salt Lake County, testified that his name was Robert S. Ross and that his home address was 309-A North Street, Sausalito, California (R. 14). Nowhere in the reported testimony of Mr. Ross is his occupation asked. In 77-15-14 Utah Code Annotated 1953, is found the following:

"The deposition or testimony of the witness must be authenticated in the following form:

(1) It must state the name of the witness, his place of residence and business or profession."

This section of the code of criminal procedure goes on to further state that all

questions, answers and objections must be reported and the form certifying to the transcribed shorthand notes, none of the rest of which is pertinent to this appeal.

In Rowley v. Public Service Commission, 185 Pac. 2d 514, 112 Utah 116, is found the following:

"The court will not attribute to lawmaking power a purpose to disregard sound public policy except upon the most cogent evidence, and the court has duty to interpret laws to promote protection of the public."
(Emphasis ours)

In Mountain States Tel. and Tel. vs. Public Service Commission, 155 Pac. 2d 184, 107 Utah 502, this court stated:

"Interpretation of statutes must be based upon the language used, and the courts have no power to rewrite a statute to make it conform to an intention not expressed."

In Gibbs v. Gibbs, 75 Pac. 641, 653,

26 Utah 382, this court stated:

"It is true that the word 'must' is sometimes construed as 'may', permissive - but this only when the context requires it. When the context plainly shows the provision to be mandatory, the word 'must' is a command, and cannot be construed as permissive, but must be given the signification which it imparts."

In a recent decision of this court governing the interpretation of the word in question, this court stated:

"The word 'must', when used in a statute, is mandatory unless some compelling reason indicating a contrary intent appears."

(Glenn v. Farrell, 304 Pac. 2d 380, 382, 5 Utah 2d 439.)

The apparent legislative intent is obvious. It is quite apparent that our lawmakers were interested in knowing more than a witness' name and address, but also

the type of business or profession he resorted to as part of giving credibility to the testimony. Obviously, if it were known that Mr. Ross were employed as a police officer, greater credence would be given to his testimony than if he testified that he was unemployed or was engaged in a disreputable occupation. Appellant submits that no discretion exists in the courts to circumvent the mandatory language of the legislature who established for the protection of the public a condition precedent to the receipt of transcribed testimony in lieu of personal testimony. This statute is designed for the benefit of the accused so as to set forth adequate safeguards, both in identifying a witness who the jury will not have an opportunity to view, but also protection in the manner in which testimony

is to be recorded and preserved for use in the event the witness cannot be secured to personally testify. Without these safeguards and standards, loose practices could be indulged in by the prosecuting attorneys in various stages of the criminal proceedings, and it would be incumbent upon the defendant to insure that all of the various statutory provisions of procedure were met, rather than incumbent upon the State to properly prove its case before the defendant need come forth with the burden of proving innocence.

POINT III

THE ERRORS COMMITTED WERE OF SUFFICIENT WEIGHT TO PREJUDICE THE TRIAL OF APPELLANT

It is a well-known rule of law that error in a criminal proceeding must be sufficient to prejudice the minds of the

jury in order to obtain a reversal of a conviction in the instant case. Our legislature has defined this rule as affecting "substantial rights of the parties" and has gone on to state that a legal presumption exists that error does not result in prejudice, 77-42-1 Utah Code Annotated 1953. This court has upheld this statutory rule of law in one of its more recent decisions: State vs. Lyman, 348 Pac. 2d, 340, 10 Utah 2d 58. In the instant case a substantial right has been affected by allowing the testimony of Robert S. Ross to be received in evidence by the use of a transcription of the preliminary hearing. Nowhere in the trial transcript is any identification made of appellant as being a perpetrator of the crime charged, except by Mr. Ross' testimony and the testimony of

appellant's co-defendant. Both Mrs. Oike and Mrs. Nishida testified that Jack Leggroat, the co-defendant, assaulted one and then the other of these two ladies. Neither of these witnesses identified appellant as having ever so much as laid a hand upon them and, further, neither testified that appellant took Mrs. Oike's purse, which effectuated the crime of robbery. The testimony of the victim and her friend is contrary to the testimony of Mr. Ross and, but for the receipt of his transcribed testimony in evidence, appellant would not be associated with the crime in question, and therefore would have been entitled to an acquittal. Nowhere in the evidence exists any proof of a conspiracy to steal Mrs. Oike's purse and, in fact, excepting for the testimony

of Mr. Ross, no criminal intent of appellant is proved to connect appellant with the crime for which he was convicted. Appellant respectfully submits that by receiving the transcript of the testimony of Robert Ross, a substantial right of appellant has been affected and prejudicial error has been committed which resulted in his conviction of the crime of robbery, without any other unexplainable proof whatsoever that appellant either perpetrated or associated in the perpetration of the crime in question.

CONCLUSION

Appellant respectfully requests this court to find as a matter of law that the testimony of Robert S. Ross should not be received in evidence by the use of a

transcription and for a reversal of the jury verdict in this case, and for an order remanding the same to the District Court of the Third Judicial District of Salt Lake County for such further proceedings as that court may order.

Respectfully submitted,

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McRae
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and Appellant