1964

State of Utah v. Donald Gene Kazda : Brief of Appellant

Utah Supreme Court

A. Pratt Kesler; Ronald N. Boyce; Attorneys for Respondent;
Donald Gene Kazda; Appellant;

IN THE SUPREME COURT
OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent.

vs.

DONALD GENE KAZDA,
Defendant and Appellant.

Case No.
10046

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE
FOURTH DISTRICT COURT FOR DUCHESNE COUNTY
HON. R. L. TUCKETT, JUDGE

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Reference in Appellant's Brief to the transcript of proceedings will be designated by the letters "TR" and the main record by the letter "R".

STATEMENT OF FACTS

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent.

vs.

DONALD GLENN RAGAN,

Defendant and Appellant.

Case No.
10041

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Reference in Appellant's Brief to the transcript of proceedings will be designated by the letters "TR" and the main record by the letter "R".

STATEMENT OF FACTS

Defendant appeals from a jury verdict finding him guilty of the crime of assault with intent to commit murder upon one Eldon Brady on or about February 20, 1962 at Bridgeland, Utah in violation of 76-30-14, Utah Code Annotated 1953 and of the crime of robbery of the said Eldon Brady on or about February 20, 1962 at Bridgeland, Utah, in violation of 76-56-1, Utah Code Annotated 1953 (R. p. 5).

All of the evidence before the trial court was presented by the prosecution, a principal witness being one Mrs. Norma Rae Barker, who was an accessory and accomplice (TR. p. 18, 20-26 and R. p. 22, Instruction No. 10), and one Johnnie Buck (TR. pp. 63-65), said Johnnie Buck being an absent witness at the instant trial.

Appellant called one witness, his brother, Dennis Dale Kazda, who previously had pleaded guilty to the assault to murder and robbery charged herein (TR. pp. 68-80). Appellant elected not to testify in his own behalf.

A former trial resulting in conviction of appellant was reversed

and remanded for new trial (R. p. 46) by this Court on July 5, 1963. (See, also: Opinion, Utah Supreme Court, Case No. 9792, June 14, 1963, R. p. 47).

STATEMENT OF POINTS

POINT I.

Trial court denying appellant's motion for change of venue and motion for continuance erred in proceeding to trial over objection of appellant where appellant fully informed court petition for restraining order, petition for writ of certiorari, writ of prohibition and writ of mandamus was then pending before Utah Supreme Court.

POINT II.

Confinement of material witness in penitentiary without State of Utah did not place such witness beyond jurisdiction of trial court hence such confinement is not ground for admission of testimony given at former trial by such witness where ample provision is made by Utah statute for securing

testimony of such witness confined in penitentiary, by deposition or by securing attendance of such witness, and it was error to admit former testimony over objection of appellant.

POINT III.

Testimony given at former trial may not be used by State to corroborate testimony of convicted accessory where statute provides means to procure attendance, or take deposition, of absent witness whose testimony given at former trial is admitted over objection of appellant nor does mere presence at scene of crime tend to corroborate testimony of such accessory where there is an absence of constructive presence or any intent to aid or abet.

POINT IV.

Trial court erred denying appellant's motion to dismiss charge of assault with intent to commit murder where State failed to prove intent to commit murder.

POINT V.

State erred in reading to jury, over objection of appellant, inadmissible testimony of absent witness and State erred placing appellant's character in issue before jury where appellant had not offered evidence of his own good character.

ARGUMENT

TRIAL COURT DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE AND MOTION FOR CONTINUANCE ERRED IN PROCEEDING TO TRIAL OVER OBJECTION OF APPELLANT WHERE APPELLANT FULLY INFORMED COURT PETITION FOR RESTRAINING ORDER, PETITION FOR WRIT OF CERTIORARI, WRIT OF PROHIBITION AND WRIT OF MANDAMUS WAS THEN PENDING BEFORE UTAH SUPREME COURT.

Prior to trial in the instant case, on September 10, 1963, appellant filed timely motion for change of venue and motion for continuance (R. p. 59).

Said motion for change of venue and motion for continuance came on for hearing on September 18, 1963. (See: Transcript of Motion for Change of Venue and Motion for Continuance, Case No. 526).

While it is largely true the trial court is vested with great discretion in the matter of granting or denying a motion for change of venue or continuance in a criminal matter, in the present instance, appellant urges that the trial court exceeded its jurisdiction, if indeed it did not abuse its discretion, where appellant, having been denied change of venue and continuance, informed the trial court (Transcript of Motion, p. 13), as follows:

> " MR. DONALD KAZDA: The defendant wishes to inform the Court that on September 17, 1963, defendant mailed by special delivery to the Utah Supreme Court his Petition for a Restraining Order, Petition for the Writ of Prohibition, Petition for the Writ of Certiorari and Writ of Mandamus to stay these proceedings today."

Further, the record also shows, to wit:

> " The defendant therefore again renews his motion for continuance in this matter of trial in order that the Utah Supreme Court may have time to review the defendant's motion for change of venue. (Emphasis added).

" And let the record show that I enter my objection to proceeding to trial in Duchesne County today." (See: Transcript of Motion, p. 13, 17-22).

Appellant's renewal of motion for continuance and objection was rejected by the trial court, as follows:

" THE COURT: Let the record show that this Court has communicated by telephone with the Chief Justice. He informed this Court that no petition has been received by that Court and that Court will not issue any such writ." (Emphasis added).

From the foregoing, there can be little doubt the trial court communicated with the Chief Justice but appellant urges that the Chief Justice knowingly would not have mislead the trial court into erroneously believing that "that Court will not issue any such writ" for the obvious reason this Court in Robinson vs. District Court of Second Judicial District, 38 Utah 379, 113 P. 1026, held:

" Supreme Court, and not justice thereof, is authorized to issue writ of certiorari, and statute, which con-

" fers such power on justice of Supreme Court must give way to Constitution."

While it is true that a petition for the writ of certiorari is premature until there is a judgment or final determination of the case, for until such time, the Supreme Court cannot tell whether the inferior board, tribunal or office has 'regularly pursued' its authority (In re Bates, 1 Utah 213), the telephone communication, as related by the record, between the trial court and the Chief Justice clearly infers that appellant's petition for certiorari was not received by the Supreme Court prematurely - i.e., before the trial court's final judgment denying motion for change of venue and motion for continuance - and, further, the record on the hearing of appellant's motions aforesaid is plain that appellant fully informed the trial court as to his petition to the Supreme Court for a restraining order, writ of certiorari, writ of prohibition and writ of mandamus. Further, appellant directed the trial court's attention to the fact that said petitions had been mailed to the Supreme Court on September 17, 1963, as attested by the notary seal affixed thereon.

In the face of the foregoing record, appellant submits that the trial court denying motion for change of venue and renewal of motion for continuance acted arbitrarily and capriciously, thus constituting an abuse of discretion. Under the circumstances, denial of appellant's motions denied appellant due process of law - in this instance, his statutory right to request that the Supreme Court be afforded time to act upon the petitions appellant filed and it was error, therefore, for the trial court to force him to trial over his objection. (See: Rule 65 (b)(2) and Rule 65 (b)(3), Utah Code Annotated 1953.

To refuse or allow a petition for the writ of certiorari rests in the discretion of this Court alone. It is submitted, therefore, that this Court should have been afforded an opportunity to make up its own mind as to the merit, or lack of merit, of appellant's petitions. In Olson vs. District Court of Salt Lake County, 93 Utah 145, 71 P. 2d 529, 112 A.L.R. 458, this Court stated:

" Although absolute lack or excess of jurisdiction cannot be shown,

" writ of certiorari will issue in sound judgment of court."

Appellant properly sought a remedy to the precise problem confronting him by petitioning this Court for a restraining order to stay the proceedings in the trial court. Appellant, petitioning from a prison cell, was well aware that his petition for certiorari might be premature and he sought to remedy such error by petitioning, also, for the writ of prohibition and mandamus (R. p. 68). On this subject, appellant used as a guide the rule of this Court in Child vs. Ogden State Bank, 81 Utah 464, 20 P. 2d 599, 88 A.L.R. 1284:

" Where situation revealed called for relief more clearly analogous to purpose of writ of mandamus rather than to writ of prohibition, and neither standing alone would bring about the desired result, Supreme Court had authority to issue writ of mandamus and writ of prohibition."

In Sammis vs. Marks, Judge, 69 Utah 26, 252 P. 270, this Court held, to wit:

" Certiorari will not lie to annul

" order or proceedings where excess or lack of jurisdiction was not called to the attention of the court whose orders are questioned."

Where it can be shown, as here, that excess or lack of jurisdiction was called to the attention of the trial court (Transcript of Motion, p. 13, 11-16), it is only equitable to assume that certiorari will lie to annul an order or proceeding adverse to appellant's best interest. In this instance, appellant submits it was error for the trial court to force him to trial over his objection.

POINT II.

CONFINEMENT OF MATERIAL WITNESS IN PENITENTIARY WITHOUT STATE OF UTAH DID NOT PLACE SUCH WITNESS BEYOND JURISDICTION OF TRIAL COURT HENCE SUCH CONFINEMENT IS NOT GROUND FOR ADMISSION OF TESTIMONY GIVEN AT FORMER TRIAL BY SUCH WITNESS WHERE AMPLE PROVISION IS MADE BY UTAH STATUTE FOR SECURING TESTIMONY OF SUCH WITNESS CONFINED IN PENITENTIARY, BY DEPOSITION OR BY SECURING ATTENDANCE OF SUCH WITNESS, AND IT WAS ERROR TO ADMIT FORMER TESTIMONY OVER OBJECTION OF APPELLANT.

In connection with the

instant trial of appellant for robbery and assault to commit murder, appellant objected to admission of previous testimony given by one Johnnie Buck at a former trial of appellant at which appellant was convicted and sentenced for robbery and assault to commit murder (TR. pp. 58-61) and the trial court denied appellant's objection (TR. p. 61, 26). On this point, appellant submits error.

Appellant objected to admission of the former testimony of the said Johnnie Buck on the ground that our statutes, 77-45-12 and 77-45-13, Utah Code Annotated 1953, provide means for procuring a witness from another state to come to this state and, reciprocally, how other states can procure witnesses from our state to go to their state (TR. p. 60, 4-11). Further, appellant objected to admission of such former testimony on the ground respondent had failed to even attempt to comply with our statute (TR. p. 60, 30). Appellant argued the admissibility of such former testimony on the ground respondent had failed to follow statutory procedure (TR. p. 61, 10-12) and appellant urged it was incompetent to read the former testimony of the absent witness, Johnnie Buck,

into the trial record (T.R. p. 61, 23-24).

Section 77-45-12, 'Procedure to secure attendance in another state', Utah Code Annotated 1953, sets forth the statutory guide whereby another state may procure a witness from this State and, for the purposes of the discussion herein, it is not necessary to quote the statute at length.

Section 77-45-13, 'Procedure to secure attendance of witness from without state', Utah Code Annotated 1953, provides, to wit:

> " 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, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into custody and delivered to an officer of this state to assure

" his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

" If the witness is summoned to attend and testify in this state he shall be tendered such sum as may be required by the laws of the state in which the witness is found, not exceeding the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and $ 5 for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate unless otherwise ordered by the court. If such witness, after coming into this state fails without good cause to attend and testify as directed in the summons he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state."

Respondent (TR. p. 61, 14-17) appears to have relied upon 77-44-3, Utah Code Annotated 1953, to convince the trial court as to admissibility of the former testimony of the absent witness, Johnnie Buck.

Appellant renewed his objection to admissibility of such former testimony on the grounds of incompetency (TR. p. 61, 23-24). But the trial court, apparently persuaded by 77-44-3, denied the objection (TR. p. 61, 26). Section 77-44-3, 'Reported testimony used on subsequent trial, when', Utah Code Annotated 1953, provides:

> " Whenever in any court of record the testimony of any witness in any criminal case shall be stenographically reported by an official court reporter, and thereafter such witness shall die or be beyond the jurisdiction of the court in which the cause is pending, either party to the action may read in evidence the testimony of such witness, when duly certified by the reporter to be correct, on any subsequent trial of, or proceeding had in, the same cause, subject only to the same objections that might be made, if such witness were upon the stand and testifying in open court." (Emphasis added).

In the instant case, the record shows respondent caused to be transmitted to George Marett, Sheriff of Duchesne County, a subpoena (R. p. 55) for the absent witness, Johnnie Buck (TR. p. 38, 19-24). That said Sheriff Marett located the said Johnnie Buck in the Nebraska State Penitentiary (R. p. 54;

(TR. p. 41, 18-30 and TR. p. 42, 1-21). That said Johnnie Buck was found to be serving sentence for a felony, non-support (TR. p. 42, 25-27). That said Johnnie Buck was a material witness in the prosecution of appellant for the crimes of robbery and assault to commit murder (TR. p. 98, 23-30 and TR. p. 99, 1-9). That, in fact, respondent considered the testimony of the said Johnnie Buck its best testimony (TR. p. 99, 10-12). That respondent considered the testimony of the said Johnnie Buck as tending to corroborate the testimony of confessed accomplice Norma Rae Barker (TR. p. 107, 3-6).

From the foregoing, it is plain that the absent witness, Johnnie Buck, was a material witness in the prosecution of appellant for robbery and assault to commit murder. Obvious, also, is the fact that the said Johnnie Buck was found by the State seeking to use his testimony neither dead, insane, nor beyond the jurisdiction of the trial court within the meaning of 77-44-3, Utah Code Annotated 1953. The trial record shows no attempt by the State to secure the attendance, or take the deposition of, its absent witness. Appellant timely objected to admission of the former testimony of such

absent witness and appellant respectfully submits that the admission of such former testimony constitutes reversible error.

On the subject of admissibility of former evidence, the attention of this Court is invited to 23 C.J.S., Criminal Law, Sec't. 892 - Admissibility:

" a. Testimony of Witnesses in General:

Testimony given by a witness on a former trial or on a preliminary examination ordinarily is not admissible on a subsequent trial in the absence of some adequate justification and proper predication therefor or of an agreement of counsel. In the absence of justification for its admission, the testimony given by a witness on a preliminary examination or on a former trial is not admissible." (Emphasis supplied).

Fla.- Davis vs. State, 65 So. 2d 307.

Ga.- Mosley vs. State, 92 SE 2d 860, 212 Ga. 356.

Kan.- State vs. Lillian, 305 P. 2d 828, 180 Kan. 640.

State vs. Mason, 186 P. 2d 269, 163 Kan. 765.

State vs. McClellan, 98 P. 209, 79 Kan. 11, 12, Ann Cas 106.

Ky.- Powell vs. Commonwealth, 214 SW 2d 1002, 308 Ky. 467.

Raney vs. Commonwealth, 166 SW 2d 844, 293 Ky. 381.

Mo.- State vs. Purl, 183 SW 2d 903, 904.

Neb.- Dolen vs. State, 36 N[illegible] 2d 566, 151 Neb. 76.

N.Y.- People vs. Ferraro, 53 NE 2d 861, 293 N.Y. 51.

People vs. Melvin, 125 N.Y.S. 2d 221, 282 App. Div. 950.

N.C.- State vs. Kisiah, 8 SE 2d 474, 217 N.C. 399.

Okla.- Hodges vs. State, 222 P. 2d 386, 92 Okla. 176.

S.D.- State vs. Thompson, 24 NW 2d 10, 71 S.D. 319.

State vs. Carr, 294 NW 2d 174, 67 S.D. 481.

Tex.- Ambrose vs. State, 165 SW 2d 188, 145 Tex. Cr. 1.

16 C.J., Criminal Law, p. 757, note 43, among other authorities, cites the following:

" The testimony given by a witness at a former trial may not be given in evidence as a matter of course. Some adequate justification therefor must exist." State vs. McClelland, 98 P. 209, 79 Kan. 11, 12, 17 Ann Cas 106.

" Confinement of a witness in the penitentiary is not ground for the admission of his testimony given on a former trial, ample provision having been made by law for securing the testimony

" of one confined in the penitentiary, by deposition, or by securing the attendance of the witness. (Emphasis added). Hayden vs. Commonwealth, 140 Ky. 634, 131 SW 521 (or) 131 SW 521, 140 Ky. 634.

23 C.J.S., Criminal Law, Sec'ts. 1003, 1004, on admissibility as affected by right of accused to confront witnesses, relates:

" The mere fact that testimony has been given upon a former trial in a cause between the same parties is no ground of itself for admitting it in evidence upon a subsequent trial." Woodward vs. State, 109 So. 119, 120, 21 Ala. App. 417.

22 C.J., Evidence, Sec't. 517 (E) - Excuses for Nonproduction of Witnesses - In General, relates:

" It is universally agreed that the party seeking to use the former testimony must show that it is impossible for him to procure the attendance and testimony of the witness." Provo City vs. Shurtliff, 4 Utah 15, 5 P. 302.

(a.) Reason for rule:

" Testimony given in a former trial is regarded as secondary evidence." Dover vs. Greenwood, 177 F. 946, 949, (reversed on other grounds 194 F. 91, 114 C.C.A. 169).

(b). Diligence in attempting to procure the attendance of a witness must clearly be shown:

Colo.- Daniels vs. Stock, 23 Colo. 529, 130 P. 1031.

Iowa.- Iowa L. Ins. Co. vs. Haughton, (Ins.A.) 85 NE 127.

N.C.- Smith vs. Moore, 149 N.C. 185, 62 SE 892, 63 SE 735.

(c). A party who fails to subpoena a witness, relying on his promise to appear, cannot introduce the former testimony of the witness if he fails to attend:

U.S.- Chicago, etc., R. Co. vs. Newsome, 174 F. 394, 98 C.C.A. 1.

Utah.- Provo City vs. Curtliff, 4 Utah 15, 5 P. 302.

Numerous authorities go even further and require a showing that it has been made to secure the deposition of the witness for use on the trial:

Colo.- Daniels vs. Stock, 23 Colo. A. 529, 130 P. 1031.

Emerson vs. Burnett, 11 Colo. A. 86, 52 P. 752.

Ill.- Devine vs. Chicago City R. Co., 182 Ill. A. 366.

Ind.- Levi vs. State, 182 Ind. 185, 104 NE 765, 105 NE 898, Ann Cas 1917 A 654.

Schearer vs. Harbor, 36 Ind. 536.

Ky.- Southern R. Co. vs. Owen, 164 Ky. 571, 176 SW 25.

Dye vs. Commonwealth, 3 Bush. 3.

Minn.- Wilder vs. St. Paul, 186 Minn. 366, 152 NW 965.

Mo.- Augusta Wine Co. vs. Weipert, 14 Mo. A. 483.

N.H.- Young vs. Dearborn, 22 N.H. 372.

N.M.- Kircher vs. Laughlin, 5 N. Mex. 365, 23 P. 175.

S.C.- McCall vs. Alexander, 84 S.C. 187, 65 SE 1021.

Tex.- Sullivan vs. State, 6 Tex. A. 319, 343, 32 AmR 580.

Va.- Wise Terminal Co. vs. McCormick, 107 Va. 376, 379, 58 SE 584 (quot Cyc).

Wash.- Kennedy vs. Canadian Pac. R. Co., 87 Wash. 134, 151 P. 252.

Wisc.- Pfeiffer vs. Chicago, etc., R. Co., 163 Wisc. 317, 156 NW 952.

Ont.- Cuff vs. Storage, etc., Co., 14 Ont. 263, 9 Ont. AR 691.

(d). The proof in this respect should be full and convincing:

Colo.- Daniels vs. Stock, 23 Colo. A. 529, 130 P. 1031.

Mich.- Krouse vs. Detroit United R. Co., 170 Mich. 438, 136 NW 434.

Tex.- Sullivan vs. State, 6 Tex. A. 319, 32 AmR 580.

Va.- Wise Terminal Co. vs. McCormick, 107 Va. 376, 379, 58 SE 584 (quot Cyc).

22 C.J., Evidence, Sec't. 519 (3), relates:

" Former testimony may be received where the witness is beyond the jurisdiction of the court.....

Utah.- Reese vs. Morgan Silver Min. Co., 17 Utah 489, 54 P. 759.

" Or the party offering the evidence has made diligent but fruitless efforts to locate the witness.....

U.S.- Salt Lake City vs. Smith, 104 F. 457, 43 C.C.A. 637.

Neb.- Vandewege vs. Peter, 83 Neb. 140, 119 NW 226, wherein it was held:

' To entitle a party to reproduce the testimony of a witness given on a former trial, he must show that, by exercising reasonable diligence, he has been unable to secure the attendance of such witness at the trial.'

" And it has been impossible to secure his deposition for use on the trial .....

Ga.- Tillman vs. Bomar, 134 Ga. 660, 68 SE 504.

Ill.- Stephens vs. Hoffman, 275 Ill. 497, 114 NE 142, 144 (cit Cyc).

Casady vs. School Trustees, [illegible] 737. 103 Ill. 560. 473.

Devine vs. Chicago City R. Co., 182 Ill. A. 366 (quot Cyc). 137.

Ky.- Harbison vs. White, 114 SW 250.

Mass.- LeBaron vs. Crombie, 14 Mass. 234.

Ark.- Vaughn vs. State, 58 Ark. 353, 24 SW 885.

Colo.- Daniels vs. Stock, 23 Colo. A. 529, 130 P. 1031.

Mich.- Krouse vs. Detroit United R. Co., 170 Mich. 438, 443, 136 NW 434.

Mo.- Bender vs. Bender, (A.) 193 SW 294.

Tex.- Sullivan vs. State, 6 Tex. A. 319, 32 AmR 580, wherein the court held:

> ' Inasmuch as this species of testimony is admitted as a sort of judicial necessity, the proof of the facts which constitute the necessity for the departure from general rules ought to be clearly established before the testimony is admitted. The proof on this subject should be complete and satisfactory, as the question of the sufficiency of this proof would necessarily be confided largely to the discretion of the judge, and not be revisable on appeal when properly exercised.'

Va.- Wise Terminal Co. vs. McCormick, 107 Va. 376, 379, 58 SE 534 (quot Cyc).

" The court should find the facts in regard to the reason alleged for inability to produce the witness or take his deposition.....

N.C.- Smith vs. Moore, 149 N.C. 185, 62 SE 892, 150 N.C. 158, 63 SE 737.

Miss.- Gastrell vs. Phillips, 64 Miss. 473, 1 S. 729.

N.J.- Berney vs. Mitchell, 34 N.J.L. 337, wherein the court held:

' In my opinion, neither legal principle nor sound policy will justify the admission of the evidence given on a former trial, except in case of the death or insanity of the witness, or where it appears at the time of the trial, that, by reason of physical inability of a permanent nature, he is unable to be examined, and that, by the exercise of due diligence, his deposition could not have been taken. If we extend the rule beyond this limit, we must include within it all cases in which the rejection of the evidence would work an apparent hardship. If the rule goes thus far, we must admit the evidence of witnesses who have become infamous, who have been kept away by the practice of the opposite party, of those whose residence is unknown, and many others. Under such rule, the evidence of a witness examined in Jersey or Camden, before a justice of the peace, could be proved on appeal, though

' the witness were actually a resident of New York or Philidelphia, if the party could prove, by his own oath or otherwise, that he could not, after diligent search, find the witness. The evil which would flow from such a rule may readily be imagined. I am not willing to admit that any such exists.'"

" But it is incumbent on the party seeking to introduce the former evidence to show the existence of these circumstances, failing in which the evidence cannot be received....."

U.S.- Dover vs. Greenwood, 177 F. 946, 949, (reversed on other grounds 194 F. 91, 114 C.C.A. 169, and cit Cyc).

United States vs. Angell, 11 F. 34.

Ala.- Southern R. Co. vs. Bonner, 141 Ala. 517, 37 S. 702.

Ark.- St. Louis, etc., R. Co. vs. Ingram, 118 Ark. 377, 176 SW 692.

Clinton vs. Estes, 20 Ark. 216.

Ga.- Brinson R. Co. vs. Beard, 11 Ga. 737, 76 SE 76.

Gruma vs. Allen, 11 Ga. A. 203, 75 SE 108.

Ill.- Sebree vs. Chicago Bd. of Education, 254 Ill. 438, 98 NE 931.

Bergen vs. People, 17 Ill. 426, 65 AmD 672.

Iowa.- Klusser vs. Burlington, 47 Iowa 300.

Ky.- Collins vs. Commonwealth, 12 Bush 271.

La.- State vs. Wheat, 11 La. 860, 55 S. 955.

Miss.- Owens vs. State, 63 Miss. 450.

Mo.- State vs. Riddle, 179 Mo. 287, 78 SW 606.

Mont.- Reynolds vs. Fitzpatrick, 28 Mont. 170, 72 P. 510.

Nev.- Gerhauser vs. North British, etc. Ins. Co., 7 Nev. 174.

N.H.- State vs. Staples, 47 N.H. 113, 90 AmD 565.

N.Y.- People vs. Newman, 5 Hill 295.

N.C.- Dupree vs. Virginia Home Ins. Co., 92 N.C. 417.

Pa.- Ferguson vs. Barber Asphalt Pav. Co., 59 Pa. Super. 386.

S.C.- Bishop vs. Tucker, 38 S.C.L. 178.

S.D.- Wren vs. Rehfeld, 37 S.D. 201, 157 NW 323.

Tex.- Missouri K. Co. vs. Nesbitt, 43 Tex. Civ. A. 630, 97 SW 825.

Sullivan vs. State, 6 Tex. A. 319, 32 AmR 580.

Va.- Brogy vs. Commonwealth, 10 Gratt (51 Va.) 722.

Eng.- Robinson vs. Markis, 2 M & Rob. 375.

Of the foregoing, appellant respectfully submits that the absent witness,

Johnnie Buck, was not beyond the jurisdiction of the trial court. That the said Johnnie Buck was not dead, insane or physically inable to attend appellant's trial. That the State failed to avail itself of its statutory authority to compel or procure the attendance of the said Johnnie Buck at appellant's trial nor did the State make any effort to procure the said Johnnie Buck's deposition. That the said Johnnie Buck was a material witness for the State and the only State witness whose testimony was intended to corroborate the robbery and assault alleged. That appellant made timely and repeated objection to the admission of the testimony of the said Johnnie Buck given at a former trial of appellant and, on these grounds, appellant submits reversible error.

POINT III.

TESTIMONY GIVEN AT FORMER TRIAL MAY NOT BE USED BY STATE TO CORROBORATE TESTIMONY OF CONVICTED ACCESSORY WHERE STATUTE PROVIDES MEANS TO PROCURE ATTENDANCE, OR TAKE DEPOSITION, OF ABSENT WITNESS WHOSE TESTIMONY AT FORMER TRIAL IS ADMITTED OVER OBJECTION OF APPELLANT NOR DOES MERE PRESENCE AT SCENE OF CRIME TEND TO CORROBORATE TESTIMONY OF SUCH ACCESSORY WHERE THERE IS AN ABSENCE OF CONSTRUCTIVE PRESENCE OR ANY INTENT TO AID OR ABET.

Norma Rae Barker, who testified for the State, was a convicted accessory to armed robbery in the instant case (TR. p. 18, 20-26 and R. p. 22, Instruction No. 10).

Excluding the testimony given at a former trial of appellant by the witness, Johnnie Buck (TR. pp. 63-65), said Johnnie Buck being an absent witness at the present trial, Norma Rae Barker remains uncorroborated by any evidence adduced from the testimony of any witness proffered by the State for the purpose of implication, or tending to implicate, appellant as a principal in the offenses charged (TR. pp. 8-94).

Appellant admitted his presence at the scene of the crime to the witness, James Mullaney, but denied any participation in the crime (TR. p. 58, 12-15) and Mullaney is corroborated by the witness, Dennis Dale Kazda (TR. p. 69, 15-20) who, for the record here, previously pleaded guilty to the robbery and assault charged herein. In the instant trial, appellant pleaded not guilty and did not testify in his own behalf.

Our statute, 77-31-18, 'Conviction on testimony of accomplice', Utah Code Annotated 1953, relates:

" A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offenses; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof." (Emphasis added).

Force and effect of section:

" Under this section, jury has no legal right to convict defendant upon uncorroborated testimony of accomplice, even though they believe testimony of accomplice to be true as to every material fact, and are convinced by it of guilt of defendant beyond reasonable doubt."

Utah.- State vs. Lay, 38 Utah 143, 110 P. 986.

" Under this section, conviction cannot be based on the testimony of accomplice alone."

Utah.- State vs. Somers, 97 Utah 132, 90 P. 2d 273.

Sufficiency of corrob-

orative evidence:

" While the corroborative evidence required by this section need not be sufficient, in itself, to support a conviction, yet it must implicate the accused in the offense charged, and be inconsistent with his innocence, otherwise it is the duty of the trial court to direct a verdict for the defendant. (State vs. Corelos, 74 Utah 94, 103, 277 P. 203; State vs. Cox, 74 Utah 149, 277 P. 972, and cases cited), and it is insufficient if it merely casts a grave suspicion on accused. (Emphasis added). State vs. Butterfield, 70 Utah 529, 261 P. 804; State vs. Laris, 78 Utah 183, 190, 2 P. 243, citing prior Utah cases; State vs. Gardner, 83 Utah 145, 27 P. 2d 51."

To the same effect:

Utah.- State vs. Kimball, 45 Utah 443, 146 P. 313.

State vs. Spencer, 15 Utah 149, 49 P. 302.

People vs. Chadwick, 7 Utah 134, 25 P. 737.

In the instant case, appellant pleaded not guilty to the charges of robbery and assault with intent to commit murder.

By his plea of not guilty, he cast upon the State the burden of proving every essential element of the offenses charged by evidence sufficient to convince the jury beyond a reasonable doubt. State vs. Lawrence, (Utah) 234 P. 2d 600, 601.

In the instant charge of robbery and assault with intent to commit murder, the State failed to corroborate the testimony of its accessory witness, Norma Rae Barker.

Seeking to corroborate Norma Rae Barker, the State relied upon the testimony given at a former trial of appellant by one Johnnie Buck, an absent witness at the present trial. Johnnie Buck was a material witness in the prosecution of appellant for robbery and assault to commit murder (TR. p. 98, 23-30 and TR. p. 99, 1-9). The State considered the testimony of Johnnie Buck to be its best testimony (TR. p. 99, 10-12). The State considered the testimony of Johnnie Buck as tending to corroborate the testimony of Norma Rae Barker (TR. p. 107, 3-6).

For the reasons and upon the grounds discussed at length under Point II hereinbefore, the testimony given by Johnnie

Buck at a former trial of appellant could not lawfully be used in the present trial to corroborate the testimony of Norma Rae Barker and it was error to admit such testimony of the absent witness Johnnie Buck over the objection of appellant (TR. pp. 58-61); (TR. p. 61, 26); (TR. p. 60, 30); (TR. p. 61, 1-12) and (TR. p. 61, 23-24).

As noted heretofore, evidence was adduced that appellant admitted his presence at the scene of the crime to the witness Mullaney, but denied any participation in said crime (TR. p. 58, 12-15) and Mullaney is corroborated by Dennis Dale Kazda (TR. p. 69, 15-20).

Appellant submits that his presence at the scene of the offenses committed was not a constructive presence within the meaning of the law interpreting such constructive presence as the State sought to show. Mullaney testified that appellant made the admission, to wit: (TR. p. 58, 12-15):

" A. Yes. He said, ' You could consider me an accessory to the fact. I was in the back seat drunk. The man was robbed by my brother, Dennis, and Norma Barker.' He said, ' Norma Barker did the shooting.'"

Dennis Dale Kanda,

corroborating Mullaney (TR. p. 69, 15-20),

testified:

" A. No. Just me and her. Don was asleep.

Q. Who was driving the car?

A. She was.

Q. Where was each party in the car?

A. Don was in the back asleep, she was driving, and I was sitting on the other side."

22 C.J.S., Criminal Law, Sec't. 86 (b), on constructive presence, relates:

" The presence at the time and place of the crime required to make one a principal in the second degree, or an aider or abettor, or a 'statutory principal', may be constructive, as where one, acting with another in the pursuance of a criminal design, is so situated when the crime is committed as to be able to assist in its commission....."

Fla.- Hornbeck vs. State, 77 So. 2d 876, 879,

Henderson vs. State, 70 So. 2d 358, 359.

Kauz vs. State, 124 So. 177, 98 Fla. 687.

Pennington vs. State, 107 So. 331, 91 Fla. 446.

Pope vs. State, 94 So. 865, 871, 84 Fla. 428.

Ky.- Hartman vs. Commonwealth, 282 SW 2d 48.

Baisden vs. Commonwealth, 114 SW 2d 73, 272 Ky. 267.

Clark vs. Commonwealth, 108 SW 2d 1036, 1039, 269 Ky. 833.

Miss.- Walters vs. State, 65 So. 2d 465, 218 Miss. 166.

Ohio.- English vs. Matowitz, 72 NE 2d 898, 148 Ohio St. 39.

16 C.J., Criminal Law, p. 126, note 53.

" As a general rule, one is to be deemed constructively present if he is at the time performing any act in furtherance of the felony or is in a position to give information to the principal which would be helpful to the end in view, or would prevent others from doing any act by way of warning which would put an obstacle in the way of the consummation of the crime or render its consummation more difficult ....."

La.- State vs. Rodosta, 138 So. 124, 126, 173 La. 623.

16 C.J., Criminal Law, p. 127, note 54.

" Constructive presence means being so situated when the crime is committed as to be able to assist in its commission; that is, to be able to render some assistance, whether by watching to prevent his companions from being surprised, or stationed so as to give an alarm in order to aid in their escape, or stationed as to come to their assistance if necessary; that is, so

" stationed or situated as to be helpful to the end in view." State vs. Bolosta, supra.

Applying the evidence adduced at the trial herein against the rule of constructive presence as related aforesaid, appellant asleep and drunk in the back seat of a car being used by confessed perpetrators to commit robbery and assault to commit murder falls far short of the requirements necessary to show appellant an aider or abettor, or a 'statutory principal'.

Absolutely no valid corroboration of Norma Rae Barker's testimony appears in this trial record and it is only fair to appellant presently serving two terms of imprisonment which may be for life for this Court to take cognizance of the fact that Norma Rae Barker, although an accessory to robbery and sentenced for that crime (TR. p. 18, 20-26) now resides in Salmon, Idaho (TR. p. 18, 18-19) rather than at the Utah State Prison wherein her co-defendant, Dennis Dale Mazda, who likewise pleaded guilty, presently is serving a sentence of not less than five years and which may be for life (TR. p. 68, 10-14).

Absent witness Johnnie Buck, whose attendance or deposition the State failed to procure at the instant trial and whose testimony given at the former trial was held to corroborate Norma Rae Barker's testimony at the former trial, all of which resulted in appellant being convicted and sentenced to serve two life terms, said terms to run consecutively, but by this Court reversed and remanded for new trial (Case No. 9792; R. pp. 47, 48), now languishes in the Nebraska State Penitentiary (TR. p. 41, 18-30 and TR. p. 42, 1-21), a situation he may well have been facing at the time he gave the corroborative testimony which sent appellant to prison upon the first conviction.

16 C.J., Criminal Law, p. 133, note 141, cites an interesting common-law rule which, under the circumstances peculiar to this trial, may well have application here, to wit:

> " ....if A. happeneth to be present at for instance a murder, and taketh no part in it, nor endeavoreth to prevent it, nor apprehendeth the murderer, nor levyeth hue and cry after him, this strange behavior of his, though highly criminal, will not of itself render him either principal or accessory." Foster Crown L. p. 350.

POINT IV.

TRIAL COURT ERRED DENYING APPELLANT'S MOTION TO DISMISS CHARGE OF ASSAULT WITH INTENT TO COMMIT MURDER WHERE STATE FAILED TO PROVE INTENT TO COMMIT MURDER.

In Count One of the Information (R. p. 5), appellant was charged with the crime of assault with intent to commit murder. Appellant timely moved to dismiss charge of assault with intent to commit murder on the ground that the State completely failed to prove any intent to commit murder (TR. p. 66, 16-17). That evidence relating to assault with intent to commit murder had never been mentioned (TR. p. 66, 18). That there was evidence brought out that there was an assault, but that no intent was proven (TR. 66, 18-20). That from the evidence adduced there was no variance between the crime of assault to do great bodily harm and that of assault with intent to commit murder (TR. p. 66, 20-24). That if the evidence adduced cannot distinguish which crime is being prosecuted, the State certainly had not made out a crime of intent to commit murder (TR. p. 66, 24-26). Further, appellant submitted that the whole testimony of Mrs. Norma Rae Barker

related to conversations about a robbery which was going to be committed (TR. p. 66, 29). That all of the other witnesses who testified in the trial of this matter gave testimony relating to robbery (TR. p. 66, 29-30). That there was no shred of evidence brought out by the State, by a single witness, to show an intent to murder (TR. p. 67, 1-2). But, despite the foregoing, the trial court denied appellant's motion (TR. p. 67, 24).

For error, appellant respectfully submits that the whole testimony of the witness, Mrs. Norma Rae Barker, fails to disclose any evidence remotely applicable to an intent to commit murder (TR. pp. 8-20). That the whole testimony of the witness, Melvin Hackford, fails to disclose any evidence remotely applicable to an intent to commit murder (TR. pp. 21-25 and TR. pp. 43-44). That the whole testimony of the witness, George Marett, fails to disclose any evidence remotely applicable to an intent to commit murder (TR. pp. 25-42 and TR. pp. 83-90). That the whole testimony of the witness, Lynn Nickell, fails to disclose any evidence remotely applicable to an intent to commit murder (TR. pp. 44-46). That the whole testimony of the

witness, Reed Stansfield, fails to disclose any evidence remotely applicable to an intent to commit murder (TR. pp. 93-94). That the whole testimony of the witness, LaMar Stevenson, fails to disclose any evidence remotely applicable to an intent to commit murder (TR. pp. 52-53). That the whole testimony of the witness, Edith Brady, fails to disclose any evidence remotely applicable to an intent to commit murder (TR. pp. 53-54 and TR. pp. 80-83). That the whole testimony of the witness, James Mullaney, fails to disclose any evidence remotely applicable to an intent to commit murder (TR. pp. 55-58). That the whole testimony of the witness, Dennis Dale Kasda, fails to disclose any evidence remotely applicable to an intent to commit murder (TR. pp. 68-80). That the whole testimony of the witness, Erma Mahew, fails to disclose any evidence remotely applicable to an intent to commit murder (TR. pp. 90-93). That the whole testimony of the witness, Johnnie Buck, said testimony given at a former trial of appellant and read into the record of the instant trial (TR. pp. 63-65) over objection of appellant (TR. pp. 60-61), was and is inadmissible on the ground and for the lawful reasons submitted heretofore under Point IV.

In the instant case, Count One of the Information (R. p. 5) alleged, as follows:

> " Allen B. Sorensen, District Attorney for the Fourth Judicial District of the State of Utah, accuses Donald Gene Kasda of the crime of assault with the intent to commit murder and charges that on or about February 20, 1962 at Bridgeland, Duchesne County, Utah said defendant assaulted Eldon Brady with intent to murder him, in violation of 76-30-14, Utah Code Annotated 1953." (Emphasis added).

Obviously, from the foregoing, an essential element of the crime charged as related in Count One aforesaid was an assault 'with the intent to commit murder'. Appellant respectfully submits that the State failed to prove, or adduce from the testimony of any of its witnesses, the essential element required to bring conviction upon an assault with the intent to commit murder.

On the subject of what constitutes an 'essential element', 23 C.J.S., Criminal Law, Sec't. 918, relates:

> " Every essential element of the crime charged must be established beyond a reasonable doubt by direct or circum-

stantial evidence....."

There are no presumptions against a person accused:

Fla.- Frank vs. State, 163 So. 223, 121 Fla. 53.
Sykes vs. State, 82 So. 778, 78 Fla. 167.

The essential elements of the crime cannot be presumed:

Ill.- People vs. Serrielle, 188 NE 375, 354 Ill. 182.

Or left to inference or conjecture:

Fla.- Frank vs. State, 163 So. 233, 121 Fla. 53.
Carnley vs. State, 89 So. 808, 82 Fla. 282.

And, to justify a conviction, the evidence must establish every essential element of the offense charged:

Idaho.-State vs. Rankin, 50 P. 2d 3, 56 Idaho 64.

Calif.-People vs. Domenghini, 254 P. 292, 81 A.A. 484.

Iowa.- State vs. Howard, 297 NW 821, 230 Iowa 365.

U.S.- Morton vs. United States, C.C.A. Ga., 151 F. 2d 406.

Boatright vs. United States, C.C.A. Mo., 105 F. 2d 237.

D.C.- Egan vs. United States, 287 F. 958, 52 App. D.C. 384.

Fla.- Henderson vs. State, 20 So. 2d 649, 155 Fla. 487.

Frank vs. State, 163 So. 223, 121 Fla. 53.

Turnett vs. State, 156 So. 538, 116 Fla. 562.

Hart vs. State, 110 So. 253, 92 Fla. 809.

Carnley vs. State, 89 So. 808, 82 Fla. 282.

Ga.- Harris vs. State, 100 SE 2d 120, 96 Ga. App. 395.

Stebbins vs. State, 51 SE 2d 592, 78 Ga. App. 534.

Ind.- Dudley vs. State, 165 NE 2d 380.

Baker vs. State, 138 NE 2d 641, 236 Ind. 55.

Stokes vs. State, 115 NE 2d 442, 233 Ind. 10, rehearing denied 116 NE 2d 296, 233 Ind. 10.

Carrier vs. State, 89 NE 2d 74, 227 Ind. 726.

White vs. State, 79 NE 2d 771, 226 Ind. 309.

Trainer vs. State, 154 NE 273, 198 Ind. 502.

Ky.- Bickett vs. Commonwealth, 172 SW 2d 439, 294 Ky. 671.

Neb.- Whemble vs. State, 10 N.W. 2d 627, 629, 143 Neb. 667.

Gerdes vs. State, 175 NW 606, 1023, 104 Neb. 35.

N.H.- State vs. LeNoir, 92 A. 2d 159, 97 N.H. 462.

N.Y.- People vs. Graf, 24 N.Y.S. 2d 683, 261 App. Div. 188.

N.Y.- People vs. Hopkins, 129 N.Y.S. 2d 851, 205 Misc. 666.

N.C.- State vs. Madden, 192 SE 859, 212 N.C. 56.

State vs. Ferguson, 132 SE 664, 191 N.C. 668.

Ohio.- State vs. Martin, 128 NE 2d 7, 164 Ohio St. 54.

Okla.- Ritter vs. State, 183 P. 2d 257, 84 Okla. Cr. 418.

Bristow vs. State, 94 P. 2d 254, 67 Okla. Cr. 355.

Simpson vs. City of Tulsa, 93 P. 2d 539, 67 Okla. Cr. 224.

Morgan vs. State, 249 P. 354, 35 Okla. Cr. 100.

Brennan vs. State, 240 P. 1084, 32 Okla. Cr. 284.

Pa.- Commonwealth vs. Rymsza, 6 Sch. Reg. 237.

S.C.- State vs. Biggs, 5 SE 2d 563, 192 S.C. 49.

16 C.J., Criminal Law, p. 773, note 37.

c@, * Conviction must be based on substantial evidence as to every material element of crime:

Ala.- White vs. State, 69 So. 2d 874, 37 Ala. App. 424.

Massengale vs. State, 54 So. 2d 85, 36 Ala. App. 195.

Deal vs. State, 13 So. 2d 688, 31 Ala. App. 183.

Fla.- Adams vs. State, 118 So. 204, 96 Fla. 356.

In order to warrant a conviction, as to degree of proof, every element of the offense must be established, by either direct or circumstantial evidence, to the satisfaction of the jury beyond a reasonable doubt:

Utah.- State vs. Hendricks, 258 P. 2d 452, 123 Utah 267.

State vs. Clark, 223 P. 2d 184, et to sa- 118 Utah 517. tion:

State vs. Whitely, 110 P. 2d 337, 100 Utah 14.

State vs. Adamson, 125 P. 2d 429, 101 Utah 534.

State vs. Gutheil, 98 P. 2d 943, 98 Utah 205.

Where, as here, a particular intent is an essential element of the crime charged, the evidence, which may be direct or circumstantial, must establish it beyond a reasonable doubt:

23 C.J.S., Criminal Law, Sec't. 919.

Iowa.- State vs. Cook, 176 NW 674, 188 Iowa 655.

Neb.- Pew vs. State, 83 NW 2d 377, 164 Neb. 735.

West vs. State, 230 NW 504, 119 Neb. 633.

Intent is a matter of

fact and cannot be implied as a matter of law:

Ill.- People vs. Weiss, 12 NE 2d 652, 367 Ill. 580.

People vs. Martishuis, 197 NE 531, 361 Ill. 178.

Va.- Dixon vs. Commonwealth, 89 SE 2d 344, 197 Va. 380.

Where a particular intent is a necessary ingredient of the offense charged, the evidence must be sufficient to establish it in order to warrant a conviction:

Neb.- Gerdes vs. State, 175 NW 606, 1023, 104 Neb. 35.

16 C.J., Criminal Law, p. 773, note 42.

As this Court noted in State vs. Lawrence, 234 P. 2d 600, appellant's plea of not guilty cast upon the State the burden of proving every essential element of the offense by evidence sufficient to convince the jury beyond a reasonable doubt.

In the instant case, appellant respectfully submits that the State has failed to prove assault with the intent to commit murder.

POINT V.

STATE ERRED IN READING TO JURY, OVER OBJECTION OF APPELLANT, INADMISSIBLE TESTIMONY OF ABSENT WITNESS AND STATE ERRED PLACING APPELLANT'S CHARACTER IN ISSUE BEFORE JURY WHEN APPELLANT HAD NOT OFFERED EVIDENCE OF HIS OWN GOOD CHARACTER.

Under Point II, at length, appellant submitted discussion as to admissibility or inadmissibility of testimony given at a former trial of appellant by the absent witness, Johnnie Buck.

Here again, over the objection of appellant (TR. p. 98, 1-10), the State seeking improperly to influence and prejudice the jury read into the trial record excerpts from the testimony of the absent witness, Johnnie Buck (TR. p. 97, 19-30), said testimony having been given by the said Johnnie Buck at a former trial which resulted in conviction of appellant.

Aforesaid excerpt of such testimony objected to by appellant but allowed by the trial court to be read to the jury (TR. p. 98, 23-30 and TR. p. 99, 1-12) relates, as follows:

" MR. IVINS: Mr. Johnnie Buck in his previous testimony said:

' Well, he told me that he had robbed a service station in the state of Utah and that he went into a house where the old man lived'

" Bear in mind this is Mr. Donald Kazda talking.

' The old man was there by himself and he said he got the old man out of the house; took him outside to get into the station--he called it a station--and some way or another the old man apparently, from what he says, dropped the keys, and he said he thought he was just fooling around, so he hit him with a gun that he had in his hands. He didn't say what kind of a gun at the time. And he hit him, the way he said, several times. And then the old man kicked him in the testicles. ' And I just shot the old son of a bitch and I think I killed him.' And he said, ' I sure like a shotgun, but they make too damn much noise.'

" There is our best testimony, Mrs. Harrison and gentlemen, as to what Mr. Donald Kazda said in an unguarded moment."

Appellant submits that the State erred reading to the jury, over objection of appellant, the foregoing testimony of the absent witness, Johnnie Buck.

On the subject of error in regards to placing appellant's character in

issue when appellant had not offered evidence of his own good character, the attention of this Court is invited to the following: (TR. p. 108, 29-30 and TR. p. 109, 1):

> " (MR. IVINS) We have a man charged here with the most henous-cruel type of an offense for which he has shown no compassion, for which he has not shown any sign of regret." (Emphasis added).

Discussing this point for error, appellant submits that 'compassion' and 'regret' - or quality of, or quantity of, or lack of either or both - are attributes of character and where appellant elected not to place his character in evidence in electing not to testify in his own behalf, he was safeguarded from any attack on or reference to his character on the ground such reference to his character was incompetent and prejudicial.

Okla.- Pressley vs. State, 71 Okla. Cr. 436, 112 P. 2d 809.

Brown vs. State, 72 Okla. Cr. 333, 116 P. 2d 216.

CONCLUSION

1. Trial court erred in

proceeding to trial over objection of appellant where trial court was confronted by evidence motions were pending in Utah Supreme Court to stay proceedings and, therefore, trial held over appellant's objection is subject to annulment.

2. Admission over objection of appellant to testimony given at former trial by absent witness at present trial constitutes prejudicial and reversible error.

3. Where inadmissible testimony of absent witness is used to corroborate testimony of accomplice and where appellant's presence at scene of crime was not a constructive presence, appellant was entitled to a directed verdict of acquittal on charge of robbery on his motion for such directed verdict.

4. Where State failed to prove essential element of intent to commit murder, appellant was entitled to a directed verdict of acquittal on charge of assault with intent to commit murder on his motion for such directed verdict.

5. Where State read inadmissible testimony of absent witness to jury

over objection of appellant and State placed appellant's character in issue when appellant had not offered evidence of his own good character, such reading of such testimony and such improper reference to character was incompetent and prejudicial.

Respectfully submitted,

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