1964

State of Utah v. Leo J. Nuttall : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

— vs. —

LEO J. NUTTALL,
Defendant-Appellant.

Case No. 10189

BRIEF OF RESPONDENT

Appeal From the Judgment of the
First Judicial District Court for Cache County
Hon. Lewis H. Jones, *Judge*

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IN THE SUPREME COURT
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STATE OF UTAH,
Plaintiff-Respondent,

— vs. —

LEO J. NUTTALL,
Defendant-Appellant.

Case No. 10189

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant was convicted of obtaining a chose in action by false pretenses in violation of 76–20–8, Utah Code Annotated 1953, in the First Judicial District Court, Cache County, and appeals from the conviction.

DISPOSITION IN THE LOWER COURT

The appellant was tried on April 9, 1964, on the crime charged by jury trial, the Honorable Lewis H. Jones, Judge, presiding, and was found guilty and judgment was entered thereon on the 27th day of April, 1964.

RELIEF SOUGHT ON APPEAL

The respondent, State of Utah, submits the judgment of the trial court should be affirmed.

STATEMENT OF FACTS

Respondent submits the following statement of facts.

On or about the 25th day of October, 1962, the appellant, Leo J. Nuttall, approached Richard B. Gittens, a service station owner in Cache County with whom he had prior acquaintance (T. 9). Nuttall advised Gittens and other persons who were present that he knew of a means by which they could make some money without any investment. He would sell Gittens a tractor and Gittens would lease the tractor back to him and he in turn would lease the tractor to third persons (T. 11). No money or any investment would have to be made by Gittens, nor would he have to make a payment (T. 11). After a period of time, Gittens was lead to believe he could have $300 or a used tractor (T. 11). Gittens was advised that Nuttall had one tractor left to use in the transaction (T. 12). It was understood that the payments to be made on the tractor would be made from monies derived by Gittens leasing the tractor back to Nuttall who in turn would re-lease to other persons. Gittens was not advised that his contract to purchase the tractor would be discounted for finance purposes or that a finance company was to be involved. He was merely advised that he need not put up any money, but that in three years he could receive either money or a used tractor (T. 15, 16). As a consequence of Nuttall's representation, Gittens executed plaintiff's Exhibits 1, 2 and 3. Exhibit 2 is a conditional sales contract whereby Gittens would buy from Leo J. Nuttall d b a Universal Equipment Company, a used Ford tractor and blade. Exhibit 1 was an equipment lease of the same Ford tractor from Gittens back to Universal Equipment Rentals. The lease was to be for 60 months for a total of $1650 to be paid at $27.50 per month. Subsequent

to signing the contract, Gittens heard nothing further. Thereafter, approximately a year or so later, he received delinquent notices from Pacific Finance Company of Logan informing him that payments were due to them under the contract and lease. The evidence disclosed that Mr. Gene Bronson, the manager of Pacific Finance Company, was approached by Mr. Nuttall relative to discounting Mr. Gittens contract and other contracts which were of the same order which he had received from other persons (T. 45–48). Mr. Bronson gave him a $550 loan on the contract and made a check payable to Leo Nuttall of Universal Equipment Company. The evidence at trial disclosed that Mr. Nuttall had made generally the same representations concerning a tractor lease and purchase agreement to various other persons as well as Mr. Gittens. These persons had also entered into contracts with Mr. Nuttall (Exhibits 5–16) on generally the same terms and had the same experience. Mr. Nuttall has also discounted these contracts with Mr. Bronson (T. 55–58, 43–48). Subsequent to Mr. Gittens being informed that he had to make payments to Pacific Finance Company, he and several other persons confronted Mr. Nuttall who, in their presence, admitted that there were "no tractors" (T. 13, 26, 62). The tractor which was allegedly sold by Mr. Nuttall to Mr. Gittens bore Serial No. 378432. A tractor with that serial number was present at trial but various experts testified that the serial number appeared to be not the original number on the tractor but had been stamped over after having been ground down (T. 82, 77, 17). Further no company by the name of Universal Equipment Rentals of Salt Lake City could be located (T. 64). The evidence at trial further disclosed that Mr. Gittens had not as yet had to pay any money to anyone

on account of the transaction. Based upon the above evidence, the jury returned a verdict of guilty.

ARGUMENT

POINT I

THE EVIDENCE IS SUFFICIENT TO SHOW THAT THE APPELLANT DID IN FACT COMMIT A FRAUD.

The appellant contends that the evidence is insufficient to prove the crime charged. It is submitted that the evidence is overwhelming to prove each of the elements essential to the crime. It appears that at the time Gittens was induced to sign the contract of purchase and then turn over the contract of purchase to the appellant, representations were made that he would be buying a tractor which the appellant presently had. The tractor would then be leased back to the appellant or his company and he would in turn re-lease to a third person and the income from the latter lease would pay the contract payments on the tractor purchased. It appears that there was no such company in existence as Universal Equipment Rentals of Salt Lake City (T. 64). Further, there never were any tractors, thus the representation that Leo Nuttall made that he had one tractor left which would be the subject of the sale and resulting leaseback was a false representation of a present material fact. As a consequence of the representations, Gittens was induced to sign the contract and parted with the contract, turning it over to Nuttall for the purposes of the transaction. Nuttall in turn used the contract to obtain money from Pacific Finance Company, a transaction which had not been contemplated by the parties. Additionally, it should be noted that Nuttall made the same representation to various other people, going through the same scheme, which demonstrates that he had a design to obtain money when

he knew that his representations were false. Further, he made the same admission, that there were never any tractors, in front of several witnesses. It is clear that these facts evidence the crime of obtaining a chose in action by false pretenses. The crime of obtaining chose in action by false pretenses is merely an extension of the common law crime of obtaining money or property by false pretenses. Clark and Marshall, *Crimes,* 6th Ed., section 1223. Thus 76–20–8, Utah Code Annotated 1953, groups the crimes of obtaining money, goods, wares, choses of action, or chattels, by false pretenses all under one heading. The same elements are essential to the crime, only the object is different.

In *State v. Howd*, 55 U. 527, 188 P. 628 (1920), this court acknowledged that under the provisions of 103–18–8, Revised Statutes 1933, which is the same statute as presently designated 76–20–8, UCA, 1953, that there must be:

1. An intent to cheat or defraud,
2. An actual fraud committed,
3. A fraudulent representation for the purpose of perpetrating a fraud, and
4. That the fraudulent representation induced the person to part with his property.

In this instance, the evidence fully discloses that each of these elements was met. The intent to cheat and defraud is apparent from the facts themselves, i.e. the absence of any tractor, the discounting of the contract with the finance company where such act was not indicated as being contemplated at the time the contract was entered into, and the numerous instances in which the same scheme was employed. That an actual fraud was committed is apparent from the fact that Gittens was induced to enter into the contract and transfer the same to the appellant on the basis

that there was a present tractor in existence and actually no tractor was in existence, nor was the program as outlined capable of being performed. There was a fraudulent representation as to the existence not only of the tractor, but apparently as to the status of Mr. Nuttall's business since it does not appear of record that there was any such business leasing tractors as Mr. Nuttall represented. Finally, the fraudulent and false representations of the appellant caused the victim to part with his chose in action. The appellant confuses the fact that Gittens has not sustained any monetary loss as yet with whether he has in fact sustained a loss. When he parted with his contract, he parted with what purported to be a binding legal obligation capable of rendering him from benefit. A chose in action is merely an intangible opportunity to have the substance of a chose become a reality. By parting with the chose in action, the fraud was complete and Gittens had parted with his rights under the contract and with his expected return. Choses in action have various values. This is evidenced in this case by the fact that the contract and leasing agreement were sufficiently valuable that a finance company was willing to pay $550 for the agreement. Mr. Gittens lost the value of that chose in action when he gave it over to Mr. Nuttall; and where the fraud of Nuttall set up and executed the whole scheme, Gittens lost a valuable expectancy. Further, whether Gittens may or may not ultimately be called upon to respond is immaterial to the issues of the case. The crime charged was not obtaining money by false pretenses, but was complete when Gittens parted with the contract and rental agreement.

The doctrine of the *Howd* case has been followed in various subsequent cases. In *State v. Timmerman*, 88 U. 481, 55 P.2d 1320 (1936), the elements expressed in the *Howd*

case were expanded to some extent. Essentially, however, the requirements of a fraudulent representation knowingly made with the purpose of defrauding a person and obtaining something of value were still required. Further, it was recognized that the party must part with something of value in reliance upon the false and fraudulent representation. There is no question but what the execution of a chose in action is something of value. It may be valuable to each party to a chose in action, which is in the form of a contract. It has a readily identifiable market value. A value, therefore, can be placed on a contract and it is, therefore, obvious that the victim in this case parted with something of value.

In *Balline v. The District Court*, 107 U. 247, 152 P.2d 265 (1945), this court recognized that fraud by silence may occur where the circumstances require an honest disclosure and that fraud may occur when there is a material misrepresentation of a fact which had the victim known of the truth of the matter, he would not have parted with his money, property, or chose in action. In that case, this court affirmed a conviction where the misrepresentation was as to encumbrances against an automobile and where the circumstances involved a failure to disclose the status of the title, coupled with such representations as would lead a person to believe he was receiving a vehicle free of any impediments to clear title. The facts, although in a different setting, are not unlike those in the present case. This court found the fraud to be sufficiently proved so as to allow the conviction to be sustained. See also *State v. Cobb*, 13 U.2d 376, 374 P.2d 845 (1962). The scheme in the *Cobb* case bears some resemblance to the scheme in the instant case although it involved a credit card situation. This court observed as to the contention that the evidence was insufficient that "We can answer only that there appears to have

been too much to convict." As a consequence, there is no merit to the appellant's position that a fraud was not shown.

POINT II

THE TRIAL COURT DID NOT ERR IN ALLOWING OTHER WITNESSES TO TESTIFY CONCERNING SIMILAR DEALINGS WITH THE APPELLANT.

During the course of the trial, after the victim identified in the information, Mr. Richard Gittens, had testified, the court allowed other witnesses who had been the victims of the same scheme to testify. Mr. Gittens was the first witness and testified as to the execution of Exhibits 1 and 2, the representation made that a tractor was in existence, and as to the contemplated course of dealing between Mr. Gittens and the appellant. He further testified as to receiving notices from the finance company as to the necessity of making contract payments where at the time of the agreement it was not contemplated that the parties would be involved with a finance company. Further, Mr. Gittens testified that as to the tractor which was present at the time of trial that the serial number which it had did not appear to be its true serial number. All of this evidence was sufficient to show a probability that a crime had been committed. Further, the appellant's admission that there had never been any tractors was received in evidence through Mr. Gittens (T. 13). The appellant argues that there was not sufficient corpus delicti to prove the crime; therefore, it was improper to allow other witnesses to testify as to similar dealings. The appellant's argument is a non sequitur. The two concepts (corpus delicti and proof of other crimes) are not related and the appellant has confused legal propositions which are independent of each other. The rule as to corpus delicti is that a confession in and of itself will not support a convic-

tion but it must be corroborated by other facts which show a probability that the crime charged has in fact been committed. In the absence of a corpus delicti, a confession may not be received. Further, in the absence of a corpus delicti, a crime has not been proved. However, the corpus delicti need not prove the guilt of the appellant beyond a reasonable doubt, but need only show some evidence that a crime in fact had been committed. In the instant case, no confession as such was received into evidence. As a consequence, the corpus delicti rule is not strictly raised.

In *State v. Ferry*, 2 U.2d 371, 275 P.2d 173 (1954), it was stated:

> "In State v. Wells, 1909, 35 Utah 400, 100 P. 681, 136 Am. St. Rep. 1059, 19 Ann. Cas. 631, we held the independent evidence must prove the corpus delicti beyond a reasonable doubt; in State v. Johnson, 1938, 95 Utah 572, 83 P. 2d 1010, we softened that rule by saying such proof need not be conclusive; we ennunciate the rule in our present decision, to clarify the matter, feeling that such rule, already announced in Arizona in Burrows v. State, 8 Ariz. 99, 297 P. 1029, is the soundest of those heretofore enunciated by the authorities. See also, State v. Crank, 1943, 105 Utah 332, 142 P. 2d 178, 170 A.L.R. 542."

The rule now in effect in this state is that the corroboration for corpus delicti need only be "independent, clear and convincing." *State v. Ferry*, supra; *State v. Weldon*, 6 U.2d 372, 314 P.2d 353 (1957).

It is submitted that the evidence in the instant case, even apart from the admission of the appellant, is sufficient to show a probability that a crime was committed. Evidence of the false representations of the appellant, or at least the failure to disclose matters which at the time of contracting

would definitely mislead the victim, is evidenced by the fact that there was no Universal Equipment Rentals of Salt Lake City (T. 64). This, coupled with the presence of a finance company when none was contemplated and the failure of the agreement to assume the form which the parties contemplated, was sufficient evidence to be added to the other evidence so as to prove the guilt of the appellant. Further, the employment of the same scheme in other instances evidence the fraud and leads to the inference of a wrongful scheme. Therefore, it is apparent that the concept of corpus delicti offers the appellant no basis for reversal. However, it does not appear that concept of corpus delicti is tied in with the concept of showing a scheme or design to defraud. Indeed, the evidence of other contracts under similar circumstances and the defalcations of those contracts tends to support a conclusion that the contractual situation which was the subject of the information was merely a part of a scheme. Thus, in *State v. Tacconi*, 110 U. 212, 171 P.2d 388 (1946), this court recognized that it is permissible to show other acts of an accused which may evidence guilty knowledge or show a scheme or design to perpetrate a crime. McCormick *Evidence* (1954), page 328, notes that evidence of other crimes may be introduced "to prove the evidence of a larger continuing plan, scheme or conspiracy of which the present crime on trial is a part." It is, therefore, perfectly permissible to allow the other witnesses to testify to demonstrate the full scheme or plan that was involved. See *State v. Nemier*, 106 U. 307, 148 P.2d 327 (1944); *State v. Scott*, 111 U. 9, 175 P.2d 1016 (1947). In the *Scott* case, this court approved receipt into evidence of other crimes of the accused tending to show a connection with the confidence game. This court felt it was relevant to

show the full scheme and design and thus the criminality of the accused's involvement. See *State v. Lyman*, 10 U.2d 58, 348 P.2d 340 (1960). There was, therefore, no impropriety on the part of the trial court in allowing the other witnesses to testify since the evidence was not relevant simply for the purpose of demonstrating the appellant's proclivity towards crime, but rather was directly related to the scheme and design involved in the commission of the instant crime and could form a part of the corpus delicti which would justify the receipt of any confession of the accused, and in this case the admission of the accused.

POINT III

THE TRIAL COURT DID NOT COMMIT ERROR IN ALLOWING EVIDENCE OF THE STATUS OF OTHER CONTRACTS WHICH WERE A PART OF THE APPELLANT'S SCHEME.

As can be seen from Point II, the trial court was perfectly justified in receiving the testimony of similar fraudulent actions by the appellant in obtaining contracts from other persons. This evidence tended to show the criminal purpose, scheme and design of the appellant's operation and as noted before was admissible and probative of the criminality charged under the information. Equally relevant was the status of the contracts. Whether payments were made or were not made would directly relate to whether there were tractors in existence which were being released by the appellant to provide income to pay off the contracts. The delinquency in the contracts would tend to support a conclusion that there was no leasing being carried on and thus that there were no tractors in existence. The trial court, therefore, acted properly in receiving such evidence.

POINT IV

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN ITS INSTRUCTIONS TO THE JURY.

The trial court instructed the jury orally on the elements of the crime and the law applicable to the case (T. 83). The Instructions covered the various elements and definitions of terms. The appellant contends that at one point in the court's instructions the Judge, in effect, commented on the evidence and thereby committed prejudicial error. The part which the appellant contends prejudiced him relates to the court's discussion on the requirement of an intent to defraud (T. 85). What the court stated which is deemed prejudicial is as follows:

> "* * * There must be an affirmative finding of a separate evil intent to defraud at the time the signature of Mr. Gittens was obtained on those papers. *Now there are enough facts and circumstances here, if you accept the inferences and the theory of the state, to sustain that.* But if you don't accept the inferences and all of the elements which counsel will discuss, then of course the state has failed to prove its case."

Thereafter the trial court again reminded the jury of the rule of reasonable doubt and referred to his previous instructions on the issue. Subsequently, the court instructed on its intent, this time without commenting as to whether the facts were or were not sufficient. The court stated (T. 86):

> "We're talking about this intent. This jury must look into the mind of this defendant and resolve that question of whether he had this evil intent to bilk Gittens by either not buying the tractor or not making the payments at the time the contract was signed."

Finally, the jury was admonished again on the necessity of finding guilt beyond a reasonable doubt, was advised that they were at liberty to believe whom and what they would.

The objectionable portion of the trial court's instruction may at first blush seem like a comment on the evidence. However, it is submitted that it in fact when read in the context with other instructions was no more than an inept means of setting out the alternative choices for the jury. It is recognized that in *State v. Green*, 78 U. 580, 6 P.2d 177, this court reversed a conviction where the trial court commented during its instructions on the sufficiency of the evidence. In that case, however, the comment was to the effect that the evidence was "uncontroverted" and thus left the jury no room within which to exercise their right to accept or reject the evidence. In the instant case, the instructions must be viewed as a whole and when so viewed, it is apparent that the court's comment was no more than an innocuous reference cured by the overall tenor of the instructions. The trial court instructed the jury that they were the sole judges of the evidence, instructed them on the necessity of finding guilt beyond a reasonable doubt, all subsequent to the offensive instruction, and again instructed the jury on the intent and did not use the same offensive language. It is submitted, therefore, that the facts of the insant case are not as aggravated as those in *State v. Green*, but rather fit in the category of remarks found to be nonprejudicial in *State v. Kallas*, 97 U. 492, 94 P.2d 414 and *State v. Musser*, 110 U. 534, 175 P.2d 724. In the case of *State v. Dixson*, 260 P. 138 (Mont. 1927), the defendant was convicted of the crime of first degree murder. The trial court in the presence of the jury stated, "I think there is evidence sufficient to show that a crime has been committed." The Montana Supreme Court acknowledged that the trial court's

statement was improper, but found that it was nonprejudicial in view of the curative instructions and other instructions of a nature that when the alleged offensive instruction is read in context with all of the instructions given, no prejudice could result. In 24A, C.J.S. *Criminal Law*, Section 1901, it is observed:

> "An appellate court should be slow to reverse for misconduct of the trial court, unless it appears that the conduct complained of was intended or calculated to disparage accused in the eyes of the jury and to prevent the jury from exercising an impartial judgment on the merits; and misconduct of a trial judge which will warrant a reversal should be so definite and apparent as to leave little doubt that it resulted in depriving accused of a fair and impartial trial. Improper remarks of the trial judge, or his misconduct during the course of the trial, will not be ground for reversal where no prejudice resulted therefrom.
>
> "The test of prejudicial error, in this connection, is whether such a fixed impression was made on the minds of the jury as to influence the verdict and whether any admonition by the court had the effect of removing the harmful impression already made; and a conviction should not be reversed because of the action of the trial court unless the reviewing court can say, after review of the whole record, that the action of the trial court resulted in a miscarriage of justice and was so grossly improper that it denied accused a fair trial. * * *"

This rule has in effect been codified by the Legislature in 77–42–1, Utah Code Annotated 1953, providing that the prejudicial error will not be presumed and that this court should not reverse a judgment unless it is satisfied that the substantial rights of a party have been affected. See also, *State v. St. Clair*, 5 U.2d 342, 301 P.2d 752; *State v. Lanoss*,

63 U. 151, 223 P. 1065. It is submitted that in the instant case the posture of the evidence, the nature of the instructions and the relative insignificance of the alleged prejudicial remark are such that no prejudice could have resulted to the appellant.

CONCLUSION

An analysis of the evidence in the instant case clearly shows that it was sufficient to prove the appellant's guilt beyond a reasonable doubt. He was afforded a full and fair trial by a jury who, after viewing the evidence, found the accused guilty. The alleged claims of prejudicial error afford no basis for relief and this court should affirm.

Respectfully submitted,

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