1969

State of Utah v. Edward Harold Schad, Jr. : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

EDWARD HAROLD SCHAD, JR.,
Defendant-Appellant.

Case No. 11588

BRIEF OF APPELLANT

Appeal from the Judgment of the Third Judicial District Court, Salt Lake County, State of Utah, Honorable Leonard W. Elton, Presiding.

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the judgment of conviction of murder in the second degree and from the trial court's denial of the motion for a new trial.

DISPOSITION IN THE LOWER COURT

The appellant was charged by information with the crime of murder in the first degree and was tried by a jury which returned a verdict of guilty of murder in the second degree. Appellant's motion for a new trial was denied.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of conviction, or alternatively, to have the trial court's denial of appellant's motion for a new trial reversed and the case remanded for a new trial.

STATEMENT OF FACTS

At 7:30 p.m. on July 5, 1968, Lynda Lea Olson discovered the nude body of her brother, Clare Odell Mortensen, in a closet in his apartment on the lower Avenues in Salt Lake City (T 112). The decedent's hands were bound behind his back with leather thongs and small-diameter nylon cords which were tied rather loosely and with simple overhand knots (T 118, 419). The ankles were also bound (T 155), and two pieces of cloth had been tied around the face and neck (T 157, 403). At the time the body was found the front door of the apartment was locked (T 148), but the back door was ajar (T 105).

A post-mortem examination disclosed that the decedent had engaged in both active and passive anal sodomy (T 405, 417), as well as fellatio (T 416) near the time of death. Bruises and scratches were found on the knees and legs of the deceased and there were superficial abrasions on the penis and scrotum (T 405). Dr. James T. Weston, the medical examiner who per-

formed the autopsy, testified that the cause of death was restricted venous return of blood from the brain caused by the ligature placed about the decedent's neck (T 408). Dr. Weston testified, however, that the ligature was not tight enough to impair the supply of blood to the brain (T 431). From this, Dr. Weston concluded that the purpose of the ligatures had been to heighten erotic stimulus during an act of sodomy immediately prior to death (T 493, 655), and that the death had been accidental (T 494). The time of death was fixed between noon and 10:00 p.m. July 4, 1968 (T 409).

It was shown at trial that the decedent had for a long period of time engaged in acts of anal sodomy (T 405). In addition, he had suffered from paralysis (T 162), which was attributed to a tumor found in the decedent's brain (T 439). There was testimony that the decedent had experienced frequent dizzy spells (T 172) and had constantly used a variety of prescription drugs for his various physical ailments (T 96, 172). Dr. Weston testified that the drugs and the tumor could have contributed to the cause of death (T 435, 442).

Appellant had been seen in the company of decedent at 11:30 p.m. on July 3 (T 89). A neighbor testified that she had talked with appellant outside the decedent's home at 9:15 p.m. on July 4 (T 184), but had not seen appellant enter or leave the decedent's residence at that time (T 226). Another neighbor testified that he had

seen appellant replacing a window screen at the decedent's apartment at 8:15 a.m. on July 5 (T 209). Appellant testified that he had left Ft. Lewis, Washington on July 1, 1968, and arrived in Salt Lake City at 4:45 a.m. on July 3 (T 470, 472). Upon his arrival he went to a cafe, where he met the decedent (T 474), who invited appellant to stay at his apartment (T 475). Appellant accepted, and followed decedent to the apartment at 6:00 a.m. on July 3 (T 477). Thereafter, he accompanied decedent to a local tavern, a friend's house, and another tavern, returning to the apartment at 3:00 p.m. (T 518, 519). At about 4:45 p.m., the two again left the apartment and visited two taverns (T 520, 522). Decedent left appellant alone at midnight (T 522) and appellant accompanied three other persons on a trip to the Great Salt Lake (T 289, 5254). Returning at 6:00 a.m. on July 4, appellant went again to decedent's apartment (T 525, 526). After drinking coffee appellant and the decedent went again to a tavern (T 527) where appellant testified that the decedent carried on an intimate conversation with a heavy-set man (T 530). The two invited appellant to attend a rodeo with them, but appellant declined (T 531). The decedent then took appellant to another tavern and left him there at 12:30 p.m., after which appellant testified he never again saw the decedent (T 531).

Appellant left the tavern at 9:00 p.m. on July 4, and walked to the decedent's apartment (T 533), where he talked with the neighbor and picked up his belongings

from the back porch of the decedent's apartment (T 536). He denied returning to the apartment and replacing a window screen on the morning of July 5 (T 621), and the evidence indicated that the neighbor might well have been mistaken as to the description of the person who replaced the screen (T 467-8).

It was shown at trial that appellant had purchased an airplane ticket to Germany (T 273), and that he had used a credit card belonging to the decedent to obtain money with which to purchase the ticket (T 279). Appellant admitted having used the credit card unlawfully (T 623), and testified that he found it in the pocket of a shirt which he had loaned decedent and which decedent had returned (T 616). There was also testimony that appellant had discarded certain items of the decedent's personal property at a motel where he stayed on July 4 (T 246, 250), but appellant denied this (T 543).

Appellant left Salt Lake City for Germany at 10:30 p.m. on July 5 (T 308), and was arrested by the military authorities in Hauau, Germany, at 11:30 a.m. on July 8, for being absent without leave (T 336). At the request of the American military authorities, the German Police recovered appellant's two suitcases and turned them over to the military approximately one hour after appellant's arrest (T 33). The suitcases and other items taken from appellant were then mailed to the United States Army Criminal Investigator at Fort Douglas, Utah (T 353),

and were opened by a Salt Lake City Police Officer (T 357). Certain items of evidence taken from the suitcases, as well as the suitcases themselves, were admitted in evidence at appellant's trial over the objection of defense counsel (T 341).

At the close of the evidence, the trial court withdrew from the jury's consideration the charge of murder in the first degree (T 690). In its instructions to the jury the court charged that appellant could be found guilty of murder in the second degree if the jury believed that the killing of the decedent was committed by the appellant during the perpetration of an act of sodomy by appellant with the decedent (T 697, R 40). Timely exception was taken to this instruction (T 776-777). The jury returned a verdict of guilty of murder in the second degree (R 29). Appellant's motion for a new trial (T 778, 785) was denied (T 795).

ARGUMENT

POINT I

THE FELONY MURDER INSTRUCTION RELATING TO SODOMY WAS ERROR BECAUSE ONLY FELONIES WHICH ARE IN THEMSELVES INHERENTLY DANGEROUS TO HUMAN LIFE CAN SUPPORT THE APPLICATION OF THE FELONY MURDER RULE.

Under §76-30-3, Utah Code Ann., (1953):

> "Degrees of murder. — Every murder perpetrated by poison, lying in wait or any other kind of wilful, deliberate, malicious and premeditated killing; or committed in the perpertation of, or attempt to perpetrate, any arson, rape, burglary or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than the one who is killed; or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life; — is murder in the first degree. *Any other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree.*" (emphasis added)

In the case at bar, it was the State's theory that if a homicide was committed by appellant during the commission of sodomy, the homicide would constitute murder in the second degree, since at common law a homicide committed during the perpetration of any felony was murder. This theory was embodied in instruction no. 12. It is submitted that the trial court committed reversible error in so instructing the jury, since only felonies which are in themselves inherently dangerous to human life will support application of the felony murder rule.

This Court has not previously spoken on the point now in issue, and it becomes necessary to examine the development of case law in other jurisdictions. In Cali-

fornia, where the second degree felony murder rule is in force, the rule has been strictly limited to cases involving a felony which is inherently dangerous to human life. In *People v. Phillips,* 64 Cal. 2d 574, 51 Cal. Rptr. 225, 414 P. 2d 353 (1966), *noted in* 55 Cal. L. Rev. 329 (1967), the California Supreme Court held that a homicide resulting from the defendant's false representations that he could cure cancer without surgery could not be a second degree felony murder because the underlying felony must be one which is in itself inherently dangerous to human life in order to justify application of the felony murder rule. Since the underlying felony, *viz., l*arceny by false pretenses, was not "inherently dangerous to human life," the court in *Phillips* concluded that a felony murder instruction was error.

Similarly, in *People v. Lovato,* 65 Cal. Rptr. 638 (5th Dist. Ct. App. 1968), it was held that the possession of a concealable weapon by an alien is not a felony "inherently dangerous to human life," so as to make a homicide committed by the alien a second degree felony murder. It is thus clear that the *Phillips* limitation of second degree felony murder to felonies which are inherently dangerous to human life is firmly established in California law. See also *People v. Ireland,* 75 Cal. Rptr. 188, 450 P. 2d 580 (1969) (in bank) *modified on denial of rehearing; People v. Cline,* 75 Cal. Rptr. 459 (4th Dist. Ct. App. 1969) (holding that furnishing of phenolbarbital is "inherently dangerous" felony); *People v. Williams,* 63 Cal. 2d 452, 47 Cal. Rptr. 7, 406 P. 2d 647 (1965) (con-

spiracy to possess methedrine not "inherently dangerous"); *People v. Ford,* 36 Cal. Rptr. 620, 388 P. 2d 892 (1964) (in bank) *rehearing denied.*

In *People v. Williams, supra,* the court noted that the purpose of the felony murder rule was to deter felons from killing negligently or accidentally during the commission of crimes. The court then stated:

> "This purpose may be well served with respect to felonies such as robbery or burglary, but it has little relevance to a felony which is not inherently dangerous. If the felony is not inherently dangerous it is highly improbable that the potential felon will be deterred; he will not anticipate that any injury or death might arise solely from the fact that he will commit the felony." 63 Cal. 2d at 457, 47 Cal. Rptr. at 10, 406 P. 2d at 650.

A recent Delaware case has emphatically accepted the California rule. In *Jenkins v. State,* 230 A. 2d 262 (Delaware 1967), the defendant had been convicted of felony murder where the underlying felony was burglary. In reversing the conviction, the Delaware Court examined the common law felony murder doctrine, noting that in England, even before its complete abolishment in 1957, the doctrine had at an early date been limited to "acts known to be dangerous to life." *Regina v. Serne,* 16 Cox Cr. Cas. 311 (1887). Noting that the California

Court has recently developed a similar limitation upon this application of the felony murder doctrine, the court in *Jenkins* states:

> "In our judgment, the California rule is supported by logic, reason, history and common sense. The only rational function of the felony murder rule is to furnish an added deterrent to the perpetration of felonies which by their nature or by the attendant circumstances create a foreseeable risk of death. This function is not served by application of this rule to felonies not forseeably dangerous. The rule should not be extended beyond its rational function. Moreover, application of the rule to felonies not foreseeably dangerous would be unsound analytically because there is no logical basis for imputing malice from the intent to commit a felony not dangerous to human life....
>
> "(T)he felony second degree murder rule of this State should be limited to homicides proximately caused by the perpetration or attempted perpetration of felonies which are by nature or circumstances forseeably dangerous to human life whether such felonies be common law or statutory." 230 A. 2d at 269.

The California limitation of the felony murder rule to felonies inherently dangerous to human life has also been adopted by the Kansas Supreme Court. In *State v. Moffitt,* 199 Kan. 514, 431 P. 2d 879 (1967), *rehearing denied,* the court held that in order to support the application of the felony murder rule, the attendant felony must be one which is inherently dangerous to human life.

It is therefore apparent that the application of the common law felony murder doctrine in cases involving felonies which do not in themselves pose a danger to human life cannot be justified in light of the experience of modern criminal jurisprudence. The rule itself has been the subject of severe criticism, and it is oft-repeated that the doctrine should not be extended beyond any rational function it is designed to serve. *People v. Washington,* 62 Cal. 2d 777, 44 Cal. Rptr. 442, 446, 402 P. 2d 130 (1965); *Note,* 55 Cal. L. Rev. 329 (1967). It is submitted that the application of the felony murder doctrine in the case at bar amounted to an unwarranted extension of the doctrine, and constituted prejudicial error. Even if it be assumed that the homicide here occurred during the perpetration of an act of sodomy, the homicide, by that fact alone, should not be deemed a second degree murder, since sodomy is not inherently dangerous to human life. Indeed, the application of the felony murder rule in the instant case cannot be justified on any ground. If the felony murder doctrine were to be held applicable to any felony, regardless of its nature, the result would be ludicrous indeed. For example, a homicide which occurred during the commission of a forgery would of necessity be deemed a second degree murder irrespective of the usual elements of malice and intent to kill if such a position were adopted, and even though forgery itself is in no way inherently dangerous. Similarly, numerous other felonies, none of which pose any danger whatsoever to human life, would support application of the rule.

It is clear that to apply the rule in these cases would serve absolutely no purpose, and would run counter to whatever logic the doctrine might still enjoy.

Finally, it is significant that the crime of sodomy, although constituting a felony at the time of the homicide involved in the instant case, has recently been the subject of reconsideration by the Utah Legislature. Under §76-53-22, Utah Code Ann. (1953), as amended by Laws, 1969, Ch. 244, §1, any sodomy which might have been involved in the case at bar would now constitute at most a misdemeanor and would not support application of the felony murder doctrine regardless whether the "inherently dangerous to human life" limitation were to be adopted by this Court. Implicit in our legislature's reduction of consensual sodomy from a felony to a misdemeanor is the recognition that sodomy between consenting adults is not so serious an offense as was once believed. Indeed, it is submitted that the offense of sodomy, when it involves consenting adults, is in no way a threat to human life or health.

Because of this recent- re-evalution of the severity of the crime of sodomy, and because of the fundamentally sound principles involved in the limitation of the felony murder doctrine to felonies inherently dangerous to life, this Court is urged to adopt that limitation and thereby hold that the trial court's instruction no. 12 was prejudicial error.

POINT II

THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO CONVICT APPELLANT.

The evidence adduced to connect appellant with the homicide was entirely circumstantial, as was admitted by the District Attorney in his closing argument (T 712). It is submitted that this evidence was insufficient as a matter of law to support appellant's conviction. In this respect, it is clear that a stricter test will be applied by reviewing courts where the evidence is entirly circumstantial. A case decided during the territorial days of this State illustrate this point. In *People v. Scott,* 10 Utah 217, 37 P. 335 (1894), the defendant was granted a new trial for failure of the trial court to instruct the jury regarding the degree of proof required where the evidence is entirely circumstantial in nature. The court then stated that in such cases, the circumstances proven must be

> "... incompatible, upon any reasonable hypothesis, with the innocence of the accused and incapable of explanation upon any reasonable hypothesis other than the defendant's guilt. The chain of circumstances must be complete and unbroken." 10 Utah at 222, 37 P. at 336.

The rule announced in the *Scott* case was followed in the case of *State v. Erwin,* 101 Utah 365, 120 P. 2d 285 (1941), *rehearing denied,* in which a conviction for conspiracy to

violate anti-vice laws was attacked upon the ground, *inter alia,* that the evidence, entirely circumstantial, was insufficient to support the conviction. In affirming the conviction, the court explained the standard relating to circumstantial proof.

> "(W)here the proof of a necessary fact is dependent solely upon circumstantial evidence, such circumstances must be such as to reasonably exclude every reasonable hypothesis other than the existence of said fact and be consistent with its existence and inconsistent with its nonexistence." 101 Utah at 400, 120 P. 2d at 302.

The Utah Court reaffirmed the *Scott* formulation in *State v. Crawford* 59 Utah 39, 201 P. 1030 (1921). Reversing a conviction for third degree burglary, the Court held that defendant's attempt to escape while in custody for a robbery was not such a circumstance as would permit the inference of the defendant's guilt of a burglary. The court stated that where only circumstantial evidence of guilt exists, in order for a circumstance even to be probative:

> "the circumstance must be such as to exclude every reasonable hypothesis except that of the defendant's guilt . . ." 59 Utah at 45, 201 P. at 1033.

In *State v. Burch,* 100 Utah 414, 115 P. 2d 911 (1941), defendant had been convicted of branding a calf belonging to another person with intent to steal the calf. This

Court, reviewing the evidence, noted that there was "not one ultimate fact necessary for conviction that is substantiated by direct evidence," and that all the evidence had been wholly circumstantial. In reversing the conviction for insufficiency of the evidence the Court said:

> "If circumstantial evidence is submitted to a jury . . . that evidence must exclude every reasonable hypothesis of innocence. . . . But if the evidence is such that reasonable men would not differ upon the fact that it includes such an hypothesis, then it is not a question for the jury, but is one for the court." 100 Utah at 417, 115 P. 2d at 912.

It is thus apparent that the strict rule regarding the sufficiency of circumstantial evidence to suport a criminal conviction as announced in the *Scott* case, *supra,* has been repeatedly reaffirmed by this Court. *See also State v. Garcia,* 11 Utah 2d 67, 355 P. 2d 57 (1960), *cert. denied,* 366 U.S. 970; *State v. Anderson,* 108 Utah 130, 158 P. 2d 127 (1945); *State v. Laub,* 102 Utah 402, 131 P. 2d 805 (1942).

The stricter requirement as to circumstantial evidence has been variously expressed by the courts in other jurisdictions. For example, the California Court has stated:

> "(W)here circumstantial evidence is relied upon as proof of guilt to justify a conviction, the

> facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion." *People v. Watson,* 46 Cal. 2d 818, 299 P.2d 243, 250 (1956) (in bank) *rehearing denied.*

Similarly, the court in *State v. Gunderson,* 444 P. 2d 156 (Wash. 1968), held that if two postulates, guilt and innocence, can be drawn from evidence which is entirely circumstantial, the innocence postulate must be accepted. So too, the Kansas Court in *State v. Tolley,* 196 Kan. 56, 410 P. 2d 267 (1966) stated that where there is only circumstantial evidence, the facts must be inconsistent with any reasonable theory of the defendant's innocence. *See also Jackson v. State,* 403 P. 2d 518 (Okla. 1965); *State v. Johnson,* 57 N.M. 716, 263 P. 2d 283 (1953); *State v. Dennis,* 177 Ore. 73, 159 P. 2d 838 (1945) *rehearing denied.*

From these cases, it is manifest that the evidence in the case at bar was entirely insufficient to support a conviction. No direct proof was adduced to show any connection of appellant whatsoever to the homicide. In fact, there is not a shred of evidence to place appellant at the scene at anytime near the time of death. Tested in light of the rule of the *Scott* case that the evidence, if wholly circumstantial, must be incapable of explanation on any rational hypothesis other than the guilt of the accused, the evidence in the case at bar falls far short of the standard required. For this reason, the conviction should be reversed.

POINT III

THE SEARCH AND SEIZURE OF THE APPELLANT'S SUITCASES AND THE ITEMS CONTAINED THEREIN BY THE GERMAN POLICE, THE U.S. ARMY, AND THE SALT LAKE CITY POLICE WERE UNREASONABLE UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The law is well settled that a search made by official authorities will be reasonable under the Fourth Amendment only under one of the following three circumstances:

(1) Pursuant to a search warrant. *Aguilar v. Texas,* 378 U.S. 108, 12 L. Ed. 2d 723 (1964)

(2) Incident to a lawful arrest. *Ker v. California,* 374 U.S. 23, 10 L. Ed. 2d 726 (1963).

(3) With the consent of the owner of the place or item searched. *Stoner v. California,* 376 U.S. 483, 11 L. 1d. 2d 856 (1964).

In the case at bar, the search made by officer Wesley was admittedly made without a search warrant and without the consent of appellant. Indeed no warrant or official order was issued, even in Germany, by the United States military authorities which directed the seizure of the evidence in question. Accordingly, the search of appellant's suitcases and the use of items taken therefrom

in evidence against appellant at trial were justified only if made incident to a lawful arrest. Clearly, however, such was not the case. In a recent decision, *Chimel v. California*, ... U.S. ....., 5 Cr. L. Rptr. 3131 (1969), the United States Supreme Court examined the purpose of the rule permitting a search incident to a lawful arrest, and noted that the rule was one of necessity to prevent:

> (a) The destruction of evidence by the person arrested; and
>
> (b) the danger to police officer inherent in a situation where the person arrested might be armed, and therefore potentially a threat to the safety of the officer.

Since these two functions may be completely satisfied by a search limited to the arrested person's body and the area within his immediate control, the court in *Chimel* declared that searches incident to a lawful arrest are valid only if they do not extend beyond that area. 5 Cr. L. Rptr. at 3136. However, in the instant case, appellant had no access whatever to his suitcases subsequent to his arrest in Germany, and therefore could not have destroyed any evidence they might contain. Moreover, it is recognized that a search is "incident" to an arrest only if it is reasonably contemporaneous therewith. *Preston v. U.S.*, 376 U.S. 364 (1964). Here, the seizure by German authorities took place *one hour* after appellant's arrest, and the search by the Salt Lake City authorities

occurred *several days* thereafter. Thus, both the seizure and search of the suitcases were in no way sufficiently close in time to appellant's arrest to be deemed "incident" thereto, and therefore cannot be justified on that ground. This, coupled with the fact that the suitcases were far beyond appellant's access and control at the time of the seizure and search, required that the authorities obtain either a search warrant or appellant's consent before proceeding with the search. The record is clear that they did neither. As a result, the seizure of the suitcases by German police at the request of United States Army authorities, and the search by Salt Lake City Police Officials was not a reasonable search under the United States Constitution, and the admission in evidence of items obtained in the search was reversible error. This is especially so in the instant case where the evidence connecting appellant to the homicide was meager both in quantity and probative force. It is submitted that to permit the use by the State of these items consequently amounted to gravely prejudicial error, and requires that this Court reverse the conviction.

CONCLUSION

It is clear that appellant's conviction rests upon an unwarranted extension of a rule of law which itself has little or no logical foundation, and which should be limited to felonies inherently dangerous to human life. Moreover, the evidence, entirely circumstantial in nature, was insufficient in law to warrant the conviction. Finally,

part of that evidence was obtained in violation of the Fourth Amendment to the United States Constitution. These reasons, individually and collectively, compel this Court to reverse the conviction, and, in its discretion, grant appellant a new trial.

Respecfully Submitted,

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