1969

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

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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 RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Edward Schad, appeals from his conviction for murder in the second degree, said judgment rendered on December 11, 1968, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, with the Honorable Leonard W. Elton, Judge, presiding.

DISPOSITION IN THE LOWER COURT

The appellant was sentenced as provided by law for the crime of second degree murder.

RELIEF SOUGHT ON APPEAL

Respondent asks this Court to affirm the judgment of the Third District Court.

STATEMENT OF FACTS

The body of Clare Odell Mortensen was discovered by his sister. The body was in a closet, nude (T. 213). A cloth was around the decedent's face tight enough to be in his mouth (T. 507). He was bound by leather thongs and a silk-like cord. The thongs were tied around the victim's wrist and interwoven between the silk-like cord which tied the ankles to the wrists (T. 508). The back door of the residence was ajar (T. 206).

According to expert testimony, the cause of the death of Clare Odell Mortensen was the ligature around his neck which restricted the flow of blood from the head which caused the blood vessels on the brain to swell and burst (T. 512). This was caused by a cloth tied around his neck tight enough that one would have difficulty putting his finger underneath it (T. 508). Dr. James T. Weston, the medical examiner who performed the autopsy, concluded that the purpose of the cloth was to heighten erotic stimulus during an act of sodomy and that it was placed there by one who assisted in the

erotic act (T. 759). The time of death was between noon and 10:00 p.m. July 4, 1968 (T. 513).

Dr. James T. Weston also found that there was a high concentration of acid phosphate within the decedent's rectum as well as within his mouth (T. 520). Acid phosphate is one of the enzymes present in male semen. Fecal material was found on the decendent's penis (T. 521).

The night before his death, the victim was seen in the company of the appellant at a nightclub by the victim's mother (T. 190). Another witness, Sandra Twitchell, noticed the victim and the appellant enter the nightclub together and she observed the victim invite the appellant to go home with him, to which the appellant refused (T. 392). At about 6:00 a.m. on the 4th of July, the appellant was again with the decedent, at the decedent's apartment (T. 631). The appellant testified that after 12:30 p.m. on the 4th of July he never saw the decedent again (T. 626).

On July 4, 1968, at about 2:00 p.m. the decedent and the appellant were seen by the bartender at The Lounge (T. 775). They left together at about 4:00 p.m. (T. 776). No other witness was found who saw them together that afternoon.

On the night of the murder, the appellant met Sandra Twitchell at the Roundup at about 8:30 p.m. The

appellant told her that he wanted to move into a motel and that the decedent had flown to Seattle (T. 395). Appellant also told this witness that the victim was "kind of queer" and that appellant had busted him (T. 396). She testified that the appellant seemed much more shaky or nervous than before (T. 398).

A neighbor to the decedent testified that she had talked with appellant outside the decedent's home at 9:15 p.m. on July 4 (T. 285). Appellant told this lady that his friend (the decedent) had been called unexpectedly out of town (T. 286).

Another neighbor testified that he had seen the appellant replace a screen on a window in decedent's apartment on the day after the killing (T. 310). Appellant himself testified that he picked up his belongings (T. 641).

The evidence at the trial showed that the silk-like cord used to tie the decedent's wrists and ankles was a lace from combat boots (T. 482). The manager of the motel where appellant stayed observed appellant's combat boots and testified that they were lacking laces (T. 345).

The appellant moved to a motel and discarded certain items of the decedent's personal property (including decedent's wallet) in a trash barrel at the motel (T. 350). The defendant then used the decedent's Walker

Bankard to obtain money for an airline ticket to Germany. The appellant was arrested by the military authorities in Germany (T. 440).

ARGUMENT

POINT I

THE FACTS OF THIS CASE WOULD PERMIT THIS COURT TO SUSTAIN THE CONVICTION OF DEFENDANT EVEN IF IT APPLIED THE INHERENTLY DANGEROUS LIMITATION TO THE FELONY-MURDER RULE.

Appellant suggests, with numerous citations to authorities of other jurisdictions, (*Appellant*, at 8-11,) that Utah should adopt a rule which would limit application of the felony-murder rule to homicides occurring during the perpetration of a felony that is inherently dangerous to human life. Arguing for reversal of his conviction, appellant claims that sodomy between consenting adults is not inherently dangerous to human life, so that any homicide resulting therefrom is not susceptible of inclusion within the felony-murder rule. It is argued that the purpose of the rule is to deter felons from killing negligently or accidentally during the commission of crimes, and that sodomists will not be deterred by such a rule.

Respondent most vigorously urges this Court to reject the line of reasoning employed by the appellant. The general effect of the felony-murder rule is to supply the element of malice and intent in an unlawful

killing that otherwise might be manslaughter, and the adoption of the inherently dangerous limitation is not, as appellant argues (*Brief*, at 11) necessary to supply the intent element.

Appellant lists a variety of felonies which are normally not inherently dangerous to human life, and which would not under the suggested limitation, permit application of the felony-murder rule: forgery, possession of a concealed weapon, conspiracy to possess methedrine.

What appellant does not realize, and what respondend would urge this Court to consider, is that the method in which a felony is committed may make an otherwise "innocuous" felony one which is inherently dangerous to human life.

For example, if the felony is "carrying a concealed weapon," and the weapon is a vial of sensitive nitroglycerine, a homicide occasioned by that felony might logically support application of the felony-murder rule, since this felony, *as practiced*, is indeed inherently dangerous to human life.

In the instant case, there is testimony in the record indicating that the act of sodomy which resulted in the death of Clay Mortensen involved elements of sadism and masochism, from which the jury could have logically inferred that this act of sodomy was, *as practiced*, inherently dangerous to human life.

The evidence at trial clearly showed, and appellant does not dispute, that the deceased was trussed up by leather thongs and that a ligature around the victim's neck was so tight the State Medical Examiner could not get his finger under it (T. 232, 237, 238, 544).

Dr. James T. Weston, Utah State Medical Examiner, testified that the cause of death was the ligature around the victim's neck which restricted the flow of blood from the brain (T. 512, 545). Dr. Weston further testified that the victim could not have tied himself up, and that someone else had put the ligature on his neck and the towel on his face (T. 609-611).

Respondent makes no claims of expertise in the field pioneered by Dr. Sigmund Freud, but submits that the evidence of the nature of the sodomy that caused the death of the victim was such that with the extra elements of sadism and masochism the jury might have logically found that this act of sodomy was inherently dangerous to human life.

Appellant contends that recent legislative enactments have changed the law of sodomy so that the act which caused the death of the victim in this case would now be a misdemeanor, and hence beyond application of the felony-murder rule (*Appellant*, at 12). There are in the new act (*Laws of Utah* 1969, Chapter 244, Sec. 1,) several types of sodomy which are still felonies, including victims incapable of giving legal consent, a victim

who resists but is overcome by force or violence, threats of bodily harm, intoxication, a victim overcome by a narcotic or anaesthetic substance, *et al.* It is readily apparent that even if the newest statutory amendment had been in effect at the time of the commission of the crime, the State might still have been able to bring this act of sodomy within the felony provisions, and not the misdemeanor section. Appellant's argument is speculative at best.

As noted in Appellant's Brief (*Appellant*, at 7,) Utah Code Ann. 1953, 76-30-3, enumerates the degrees of murder. Only felonies that admittedly are inherently dangerous to human life support a charge of first degree murder, to-wit: arson, rape, burglary or robbery. The statute concludes:

> "Any other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree."

It is clear that sodomy was a felony at common law, and also that at common law a homicide committed in the course of the perpetration of a felony is murder. 1 Wharton, *Criminal Law*, Sec. 251, p. 539 (Anderson, Ed.) *See: State v. Schwensen, Oregon*, 392 P.2d 328 (1964). Therefore, the judge's charge (T. 40) and the jury's verdict of guilty of second degree murder is clearly in conformity with the Utah statutes.

Appellant urges the Court to adopt the limitation that the felony-murder rule only apply to felonies inherently dangerous to human life. However, in Utah the Legislature has clearly spoken on the subject and the current statutory definition of degrees of murder (76-30-3, Utah Code Ann., *supra*), precludes the matter from judicial consideration. Any changes, if they are in fact necessary, must come through the Utah Legislature, and not by judicial fiat.

POINT II

THE JURY WAS PROPERLY INSTRUCTED AS TO THE BURDEN ON CIRCUMSTANTIAL EVIDENCE AND THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUSTAIN ITS VERDICT.

Appellant argues that the State failed to produce sufficient evidence of a circumstantial nature to sustain the conviction of guilty of second degree murder. Implicit in this argument is an inference that the jury was uninformed as to the degree of proof necessary to convict in a case based on circumstantial evidence.

Respondent does not differ in principle with the line of reasoning laid down in the Utah cases cited by appellant. (*Appellant's Brief*, at 13-15.) It is clear that when circumstantial evidence of guilt is submitted to a jury it must be accompanied by an instruction that in order to convict upon such evidence, all reasonable hypothesis of innocence must be excluded by such evidence. *State v. Burch*, 100 Utah 414, 417, 115 P.2d 911 (1941).

The Utah Court had occasion to review again the area of circumstantial evidence, and its sufficiency, later the same year as the *Burch* case, *supra*, in *State v. Ercin*, 101 Utah 365, 120 P.2d 285 (1941), *reh. denied* March 24, 1942.

Ercin is a complicated conspiracy case that involved several prominent city officials and law enforcement personnel. On the issue of circumstantial evidence, the court said, as appellant points out, (*Brief*, at 14,) that circumstantial evidence of a fact must reasonably exclude every other hypothesis except the existence of that fact. *Id.*, at 400, 401. Further, the Court said,

> "It is not necessary that each circumstance in itself establish the guilt of the defendant, but the whole chain of circumstances, taken together, must produce the required proof. (*Citations omitted.*)
>
> "On the other hand, if there is any substantial evidence which satisfies the above requirements, then the weight of the evidence is for the jury, and the Court will not disturb the verdict." (*Citations omitted.*)

Id., at 401.

As to the required instruction on circumstantial evidence, the court below fulfilled its duty admirably, as shown in its instructions 6 and 22.

Instruction No. 6.

* * *

"To warrant you in convicting the defendant, the evidence must to your minds exclude every reasonable hypothesis other than that of the guilt of the defendant. That is to say, if after an entire consideration and comparison of all the testimony in the case you can reasonably explain the facts given in evidence on any reasonable ground other than the guilt of the defendant, you should acquit him." (T. 34.)

The above instruction, when considered with Instruction No. 22 (T. 50), set forth clearly to the jury the Utah requirements on circumstantial evidence, and the degree of proof necessary to convict. The instructions amply meet the clarity requirement set forth in *State v. Garcia*, 11 Utah 2d 67, 71, 355 P.2d 57 (1960).

It is not feasible for respondent to cite *en toto* the chain of circumstantial evidence adduced at trial which connected the appellant with the homicide of the victim Clay Mortensen. The trial transcript alone totals 796 legal-size, typewritten pages. Appellant has failed to point out specific flaws in the chain of evidence that might exclude the hypothesis of his guilt. As was said in *Ercia, supra*, the weight of the evidence is for the jury, and will not be disturbed by the court unless the evidence fails to exclude all reasonable hypothesis of the defendant's innocence. *Ercia, op. cit.*, at 400-401. *See*

also: State v. Fischer, 232 Oregon 558, 376 P.2d 418, 419 (1962).

Respondent submits that the evidence at trial and the instructions given by the presiding judge guaranteed to appellant every consideration to which he was entitled under Utah law and that the jury must have felt the circumstantial evidence formed a chain of guilt that excluded every other reasonable hypothesis except the guilt of the appellant.

POINT III

THE ADMISSION OF EVIDENCE WHICH WAS ACQUIRED THROUGH AN ALLEGEDLY ILLEGAL SEARCH AND SEIZURE AT THE TRIAL OF APPELLANT WAS HARMLESS ERROR AND IS NOT GROUNDS FOR REVERSAL.

Appellant finally contends that the seizure by German authorities of his suitcases, and the resultant search thereof several days later in Salt Lake City by an officer of the City Police was unconstitutional under the Fourth Amendment to the United States Constitution, as that amendment has been construed in recent United States Supreme Court decision. (*Appellant's Brief*, pp. 17-19.) Therefore, appellant argues, admission in evidence of certain items obtained by the search was prejudicial and requires this Court to reverse his conviction.

In 1963, the United States Supreme Court was asked to consider whether the erroneous admission of evidence

obtained through an illegal search and seizure can be subject to the federal "harmless error" rule. *Fahy v. Connecticuct*, 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963). Some authorities had argued that any constitutional error was inherently prejudicial, and required automatic reversal. The Court declined to rule on the issue in *Fahy* (375 U.S., at 86,), but four years later faced it again without any available retreat path.

Chapman v. California, 386 U.S. 18, ... L. Ed. 2d ....., 87 S. Ct. 824 (1967) involved a pair convicted of first-degree murder, first-degree robbery, and kidnapping. In granting certiorari, the Court limited itself to considering whether there can ever be harmless constitutional error and whether the error in that instance was harmless.

Initially, the Court in *Chapman* ruled that federal law governs the question of denial of federal constitutional rights in a conviction in state courts. *Id.*, at 20, 21.

The Court then declined the view, urged by petitioners, that all federal constitutional errors must be deemed harmful. *Id.*, at 21, 22. As the court observed, 28 U.S.C.A. 2111 provides a form of "harmless error" rule:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without

> regard to errors or defects which do not affect the substantial rights of the parties."

Federal Rule Criminal Procedure 52(a), provides:

> "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Emphasizing the word "substantial" in the prior statute and rule, *supra*, the court felt the following holding in *Fahy v. Connecticut, supra,* to be controlling:

> "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

Fahy, op. cit., at 86-87.

Returning to the *Chapman* opinion, the Court said:

> "We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."

Chapman, op. cit., at 22.

The only guideline imposed in *Chapman* to help a court determine what is harmless constitutional error is that the reviewing court have a belief that the federal

constitutional error was "harmless beyond a reasonable doubt." *Id.*, at 24.

In a decision handed down last June 2, (1969), the Supreme Court re-affirmed the *Chapman* rule in holding the denial of Sixth Amendment (confrontation) rights was harmless beyond a reasonable doubt, when aside from the co-defendant's confession, the evidence of petitioner's guilt was overwhelming. *Harrington v. California*, ... U.S. ....., 89 S. Ct. 1726 (1969). The basis of the Court's decision, which serves as a guide to any court determining whether a federal constitutional error was harmless, is set forth by Justice Douglas:

> "It is argued that we must reverse if we can imagine a single juror whose mind might have been made up because of Cooper's and Bosby's confessions and who otherwise would have remained in doubt and unconvinced. We of course do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average juror."

89 S. Ct., at 1728.

Under the tests set forth in *Chapman* and *Harrington*, then, the task of this Court is to determine whether the evidence obtained and introduced at trial as a result of the allegedly illegal search and seizure resulted in

prejudicial error, or if the denial of the defendant's right to be free from "unreasonable searches and seizures" was harmless beyond a reasonable doubt.

The United States Supreme Court has indicated that only a perusal of the record can reveal the answers to this issue. Respondent will not attempt to reproduce all testimony linking appellant with the death of the victim, except to point out that only two items from the suitcases were ever introduced at trial: a coat belonging to the victim (T, at 461-462,) and leather name tags with the name of the appellant appearing thereon: "Edward H. Schad, Jr." (T, at 472.)

The name tags introduced at trial were appellant's, so it is hard to conceive any prejudice resulting from their introduction. The defense attorney did not contest that the suitcases seized by German authorities and turned over to the United States Army in Germany for shipment to Salt Lake City were the defendant's. (*See: Transcript,* pp. 443-461, for testimony relating to the seizure and transmision of the suitcases.)

State's Exhibit No. 27, the victim's coat, was the only other item of evidence introduced at trial that came from the allegedly illegal search and seizure of appellant's suitcases (T., at 461-462.) During the course of his testimony at trial, the appellant explained that the victim had given the coat to him during his stay in Salt Lake City (T, at 643-644.)

The respondent feels that these two exhibits, although possibly seized contrary to federal constitutional rights, did not result in prejudicial error to appellant, and that the rest of the evidence establishes beyond a reasonable doubt the correctness of the jury judgment of guilty.

This case is one which meets completely the *Chapman* rule (*supra*), in that the error complained of by appellant was harmless beyond a reasonable doubt.

CONCLUSION

Appying the tests of harmless constitutional error to the alleged search and seizure, and applying the Utah case and decisional law on the felony-murder rule, this Court should affirm the conviction of the appellant.

Respectfully submitted,
VERNON B. ROMNEY
Attorney General

LAUREN N. BEASLEY
Chief Assistant Attorney General

Attorneys for Respondent