1969

The State of Utah v. Emanual O. Chima, Charles Powell, and Mrs. Pearl Powel : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	)	
	)	
Plaintiff and Respondent,	)	
	)	
-vs-	)	Cases No. 11639
	)	No. 11640
EMANUAL O. CHIMA,	)	
CHARLES POWELL, and	)	
MRS. PEARL POWELL,	)	
	)	
Defendants and Appellants.	)	

BRIEF OF APPELLANTS

APPEAL FROM APPELLANTS' CONVICTION FOR DISTURBING AN ASSEMBLY ON TRIAL DE NOVO ENTERED IN THE DISTRICT COURT, FIRST JUDICIAL DISTRICT, HONORABLE LEWIS JONES PRESIDING.

BRIAN R. FLORENCE
JOHN BLAIR HUTCHISON
AMERICAN CIVIL LIBERTIES UNION
Attorneys for Defendants and Appellants
203 24th Street - Ogden, Utah

VERNON B. ROMNEY
Attorney General
State Capitol
Salt Lake City, Utah
Attorney for Plaintiff and Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	)	
	)	
Plaintiff and Respondent,	)	
	)	
-vs-	)	Cases No. 11639
	)	No. 11640
EMANUAL O. CHIMA,	)	
CHARLES POWELL, and	)	
MRS. PEARL POWELL,	)	
	)	
Defendants and Appellants.	)	

BRIEF OF APPELLANTS

APPEAL FROM APPELLANTS' CONVICTION FOR DISTURBING AN ASSEMBLY ON TRIAL DE NOVO ENTERED IN THE DISTRICT COURT, FIRST JUDICIAL DISTRICT, HONORABLE LEWIS JONES PRESIDING.

BRIAN R. FLORENCE
JOHN BLAIR HUTCHISON
AMERICAN CIVIL LIBERTIES UNION
Attorneys for Defendants and Appellants
203 24th Street - Ogden, Utah

VERNON B. ROMNEY
Attorney General
State Capitol
Salt Lake City, Utah
Attorney for Plaintiff and Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (continued)

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff and Respondent, -vs- EMANUAL O. CHIMA, CHARLES POWELL, and MRS. PEARL POWELL, Defendants and Appellants.	)	Cases No. 11639 No. 11640

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF CASE

Appeal from appellants' conviction for disturbing an assembly.

DISPOSITION IN LOWER COURT

Appellants were tried and convicted in Logan City Court for disturbing an assembly and were fined $35.00 apiece. They appealed to the District Court and were convicted and sentenced to six months in jail. From the conviction and denial of motions to dismiss and the motion to limit the sentence to that of City Court, appellants appeal.

RELIEF SOUGHT ON APPEAL

Appellants respectfully request the court to set aside the conviction on the grounds of a denial of free speech. Alternatively, appellants request the court to set aside the District Court's sentence which increased the punishment.

STATEMENT OF FACTS

On October 18, 1968, appellants attended a public assembly (T 44) on the Utah State University Campus sponsored by the so-called T.A.C.T. Committee (Truth About Civil Turmoil) (T 18). Appellant Emanual Chima, a black student from Biafra attending Utah State University (T 146), and appellants Charles and Pearl Powell, a black couple employed at the Intermountain Indian School (T124), had not met prior to this occasion. They were the only blacks in the audience.

The main attraction of the evening was Julia Brown (T 18), who spoke for about an hour (T 20) on the civil rights movement which she labeled a communist conspiracy. Perhaps the most offensive portions of her speech contained the constantly

repeated allegation that negroes are foolish dupes of the communists (T 126) and that civil rights organizations are mere fronts for the party (tape). The appellants sat quietly while Julia Brown spoke (T 20), even though they were upset by her accusations. All the appellants had been active in the civil rights movement in the past (T 125).

When Julia Brown finished speaking, the meeting was opened to written questions (T 20). At that time Emanual Chima asked to make an oral inquiry and was permitted to do so (T 25). He had said but a few words when Julia Brown retorted: "Are you giving a speech or asking a question?" (T 68). Finally, after explaining that he only wanted to make a few prefatory remarks, he managed to complete his question (T 68). Rather than answer the question, Julia Brown reiterated that there was no legitimate civil rights movement in this country, and that it was all a communist conspiracy (T 68). This caused a mutually sharp verbal exchange (T 96). Part of the audience began threatening Emanual Chima (T 97). He was surrounded

by a group of hostile people (T 97). Then Charles and Pearl Powell asked Julia Brown to answer the question (T 125). Much of the audience began to shout back and forth and Julia Brown -- well prepared for any contingency and apparently fully expecting trouble -- drew a can of Mace from her purse (T 80). In spite of Julia Brown's provocative actions, the meeting returned to order (T 50).

The first written question was read as follows: "How do you know so much more than the F.B.I.?" (T 50). Julia Brown's reply contained the following invitation: ". . . I want to know how you know so much about the F.B.I., and I am talking to the person who wrote this question." (T 51). Charles Powell indicated that he had written the question and attempted to respond (T51). At this point Julia Brown accused him of being a trouble maker who had disrupted her meetings in the past (T 51). This was not true. Pearl Powell came to the defense of her husband, and the audience began to shout and argue. Once again the Powells and Emanual Chima were threatened with physical

harm (T 106, 109, 110). Pearl Powell was hit on the head by a woman with a purse (T 110), and Charles Powell was pushed by one of the complainants (T 110).

Julia Brown's speech was of such a provocative nature as would arouse the emotions and personal pride of black people (T 135). The appellants, in responding to her, were attempting to vindicate theirselves and their race before an audience of whites (T 134, 135). During the question and answer period Julia Brown repeatedly provoked and insulted the appellants. For example, she used terms like "black trash" (T 75), "disgrace to the negro race" (T 72), "communists","comrades" (T 78), which would bring any person to his feet who had any personal pride.

Appellants were tried and convicted in Logan City Court and fined $35.00 apiece (record). On appeal to the District Court appellants moved to set aside the convictions on the grounds of free speech (T 6). Appellants also moved for the District Court to limit itself, in the event

appellants were found guilty, to impose no greater punishment than that imposed in the City Court (T 7). Both motions were denied (T 6, 7).

Appellants were found guilty by the District Court (T 152, 154, 155) and sentenced to serve six months in the county jail (T 160).

ARGUMENTS

POINT I

SECTION 76-52-1 UTAH CODE ANNOTATED, 1953, IS UNCONSTITUTIONALLY VAGUE AND OVERLY BROAD IN SCOPE, AND ON ITS FACE IS UNCONSTITUTIONAL.

It is well established that a statute posing a threat to freedom of speech and discussion must be exact in its language and specifically directed towards evils within the permitted area of state control. This limitation is required in order to prevent curtailment of permitted activities constituting an exercise of free speech; Thornhill v. Alabama 310 U.S. 88 (1940). The power of a state to abridge speech is the exception rather than the rule. Any restriction must find its justification in a reasonable apprehension of danger to the state; Herndon v. Lowry 301 U.S. 242 (1937). Moreover,

the normal presumption of constitutionality of statutes is limited in matters related to first amendment liberties; United States v. Caroline Products 304 U.S. 144 (1938). On the other hand, the accused does not have to sustain the burden of demonstrating that the statute could not have been written in a constitutionally permissable manner; Thornhill v. Alabama, supra.

Section 76-52-1 Utah Code Annotated, 1953, provides as follows:

> Every person who, without authority of law, wilfully disturbs or breaks up any assembly or meeting, not unlawful in its character, is guilty of misdemeanor.

A similar statute to Utah's was reviewed in Cox v. Louisiana 379 U.S. 536 (1965). It provides in part as follows:

> Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby . . . shall be guilty of disturbing the peace.

In Cox, supra, a civil rights leader was convicted for taking part in a demonstration with approximately two thousand negro college students

protesting racial discrimination. The students assembled at the State Capitol building, marched to the courthouse, sang songs, prayed, listened to speeches, and failed to disperse on a police order that they had exceeded the alloted time for the demonstration. The United States Supreme Court reversed the decision for infringing on the First and Fourteenth Amendments rights of free speech and assembly. Justice Goldberg, speaking for the majority, found the Louisiana statute overly broad in scope and observed that when unpopular opinions attract a crowd and necessitate police protection, constitutional rights must be protected in the face of hostility to their assertion or exercise. See also Terminiello v. Chicago 337 U.S. 1 (1949) where the court voided a South Carolina statute defining criminal offense so as to permit conviction if the speech stirred the people to anger, invited public dispute, or brought about a condition of unrest.

POINT II

SECTION 76-52-1 UTAH CODE ANNOTATED WAS UNCONSTITUTIONALLY APPLIED TO THE DEFENDANTS.

The legislature did not intend Utah law to be used as a device to suppress speech or to curtail the open debate and dialogue common to a democratic society. One of the functions of free speech is to invite dispute. A state may not invoke criminal penalties for peaceful expression of unpopular views. Free speech may best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. It may in fact provoke social change by striking at prejudices and misconceptions. For this reason speech is protected from unwarranted censorship or punishment; Terminiello v. Chicago, supra.

In Edwards v. South Carolina 372 U.S. 229 (1963) the United States Supreme Court reversed convictions of negroes charged with the breach of the peace by finding a constitutionally protected right of free speech. The defendants, who had peaceably assembled at the State House to express their grievances, were arrested after failing to obey a police order to disperse.

At page 702, the court said:

> We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case. [citations omitted]. These petitioners were convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court, "not susceptible of exact definition." And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection."

POINT III

BY INCREASING THE CITY COURT'S SENTENCE OF EACH DEFENDANT FROM A $35.00 FINE TO SIX MONTHS IN JAIL, THE DISTRICT COURT VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES.

When a person convicted in City Court is compelled to risk imposition of a greater sentence by the District Court on trial de novo, a violation occurs; Patton v. State of North Carolina 381 F.2d 636 (1967). The law does not confront one with "grisly choice" of either abandoning his search for

legal redress or pursuing that right under the hazard of increased punishment; Fay v. Noie 372 U.S. 391 (1963). Moreover, the defendant does not waive this protection; Green v. United States 355 U.S. 184 (1957). The presumption of injury is irrebutable; Marano v. United States 374 F.2d 583 (1967); Patton, supra.

POINT IV

BY INCREASING THE CITY COURT'S SENTENCE OF EACH DEFENDANT FROM A $35.00 FINE TO SIX MONTHS IN JAIL, THE DISTRICT COURT VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES.

In Patton, supra, Justice Sobeloff of the Fourth Circuit said at page 641:

> The equal protection clause of the Fourteenth Amendment likewise compels a rule barring a sentence in excess of the one invalidated and this protection extends even to one seeking to avail himself of a state's post conviction remedies because of nonconstitutional errors in the original trial.

Anyone choosing not to appeal a conviction is protected from an increased sentence once they commence to serve their term. Thus, the threat of heavier punishment falls solely on those who utilize post conviction remedies. This is an

arbitrary classification offensive to the equal protection clause, Patton, supra.

POINT V

BY INCREASING THE CITY COURT'S SENTENCE OF EACH DEFENDANT FROM A $35.00 FINE TO SIX MONTHS IN JAIL, THE DISTRICT COURT VIOLATED THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY.

As indicated before, many cases hold that a sentence cannot be increased once service has commenced; United States v. Benz 282 U.S. 304 (1931); United States v. Sacco 367 F.2d 368 (1966); United States v. Adams 362 F.2d 210 (1966); Kennedy v. United States 330 F.2d 26 (1964).

These decisions are not meaningfully distinguishable from this case and, consequently, harsher punishment after a trial de novo violates the defendant's constitutional protection against double jeopardy, Patton, supra. See also Green, supra, where the United States Supreme Court held that an accused cannot be retried for first degree murder following his successful appeal from his conviction of second degree murder on the theory that the jury impliedly acquitted him of the charge of first degree murder.

CONCLUSION

The defendants' convictions must be set aside because of their constitutionally protected rights of free speech and because of violations of due process, equal protection, and double jeopardy.

Respectfully submitted,

BRIAN R. FLORENCE
JOHN BLAIR HUTCHISON
AMERICAN CIVIL LIBERTIES UNION
Attorneys for Defendants and Appellants
203 24th Street
Ogden, Utah 84401