1970

State of Utah v. Roy Lee Poe : Brief of Appellant

In the Supreme Co
of the State of U

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Plaintiff and Respon

vs.

LEE POE,

Defendant and App

BRIEF OF

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CASES

In the Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

ROY LEE POE,
Defendant and Appellant.

Case No. 11836

BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

The appellant, Roy Lee Poe, appeals from his conviction of *Murder in the First Degree* in violation of *Section 76-30-3, Utah Code Annotated, 1953,* upon jury trial in the Fifth Judicial District Court of Iron County, State of Utah. The Honorable C. Nelson Day presided, and the appellant was sentenced to life imprisonment.

DISPOSITION IN THE LOWER COURT

The appellant was charged with the crime of murder in the first degree by information filed in the District Court of the Fifth Judicial District, Washington County, State of Utah. He was first arraigned on January 14,

1966, and entered a plea of "not guilty." Trial by jur
was commenced in the first action on March 28, 1966 a
concluded April 1, 1966. After presentation of evide
the appellant was found guilty of murder in the fir
degree and, the jury in those proceedings having ma
no recommendation for mercy, the Honorable C. Nels
Day, District Court Judge, entered judgment upon t
verdict and sentenced the appellant to death by shootin
at the Utah State Prison. The appellant was committ
to the Utah State Prison on April 18, 1966, to await ex
ecution. On May 10, 1966, Judge Day ordered a st
of execution pending appeal to the Utah Supreme Cou
The Utah Supreme Court on the 4th day of June, 196
reversed the decision of the lower court and remande
the case back to the Fifth Judicial Court, Washingto
County, State of Utah, for a new trial.

The appellant filed various motions with the Di
trict Court in and for Washington County, State o
Utah, requesting a change of venue from Washingto
County. The District Court considered the motions, ev
dence and testimony adduced at the hearings on the re
quest for the change of venue and the Court entered a
order changing the venue from Washington County, Ut
to Iron County, Utah. The trial commenced on the 12t
day of May, 1969 and concluded on the 20th day of Ma
1969. After presentation of the evidence the appella
was found guilty of murder in the first degree provide

however, the jury made a recommendation for mercy. Judge C. Nelson Day entered the judgment upon the verdict and sentenced the appellant to life imprisonment. The appellant was committed to the Utah State Prison on the 22nd day of May, 1969.

RELIEF SOUGHT ON APPEAL

The appellant submits that the conviction should be reversed, and that a new trial be granted.

STATEMENT OF FACT

The following is a summary of the evidence offered at trial. Mr. Kenneth Hall was shot twice through the head by a firearm, presumably a .22 calibre rifle. (Tr. 440). The body of the deceased was found late in the afternoon of November 9, 1965, when his brother, Leland Hall, obtained access to the deceased's home near St. George, Utah, by breaking into said home (Tr. 190). The deceased was found on his back, his arms crossed, one arm over the other and situated on the upper portion of his body (Tr. 191). Leland Hall identified the body as that of his brother, Kenneth Hall. Leland Hall further testified that Kenneth Hall had been a resident of St. George for some years.

Various investigating authorities commenced an investigation and a search of the deceased's home on the 10th day of November. The local peace officers were aided by Lt. Clarence Evans, Salt Lake County Sheriff's

Office, and Capt. Ferris Andrus, Salt Lake County Sheriff's Office. Capt. Andrus testified that there were fingerprints taken and Lt. Clarence Evans testified that there were not any fingerprints taken. Numerous photographs of the area were taken. The photographs included the outside portions of the house, the inside portions of the house and the general area around the house of the deceased (Tr. 462-500).

The deceased's body was taken from the home and transported to Utah Valley Hospital in Provo, Utah (Tr. 405-510). Dr. Wilford Le Cheminant removed two fragments of metal from the deceased (Tr. 435). The metal fragments were shipped to the Federal Bureau of Investigation and Richard J. Poppleton, a special agent for the F. B. I., identified the fragments as rifle slugs. Mr. Poppleton stated that the two slugs had the same characteristics as some bullets which he tested from a .22 calibre rifle that had been loaned to the deceased and which was State's Exhibit 22 (Tr. 563).

LaVar Hall testified that he went to the residence of Ken Hall on November 6, 1965. He testified that while at the residence of Ken Hall he saw Roy Pe the defendant in these proceedings. LaVar Hall testified that he was indebted to Ken Hall and that on the 6th of November, 1965, he gave Ken Hall $25.00 for a freezer (Tr. 262, 264). Eldon Hafen testified that Kenneth Hall came into his store known as the O. K. Tir

Store in St. George, Utah, some time in the afternoon of November 6, 1965. Mr. Hafen stated that Roy Poe was with Ken Hall at the time he came to the store provided, however, that Roy Poe did not come into the store. Mickey Clark testified that at the time Ken Hall was in the store of Eldon Hafen that he, Mickey Clark, had a conversation with Roy Poe outside of the Tire Store. Mickey Clark testified that Roy Poe asked to borrow $10.00 so that he could visit his relatives in Las Vegas, Nevada (Tr. 283). Irwin Pace testified that Ken Hall and Roy Poe were in the Sun Bowl Club at St. George, Utah, on November 6, 1965, between 9:30 and 10:00 P. M. Irwin Pace also testified that Ken Hall gave him a ride home in his 1957 Plymouth Station Wagon on November 6, 1965. He indicated that Ken Hall dropped him off at about 10:15 to 10:18 P. M. (Tr. 300).

Vern Phillips testified that Roy Poe was in the Sun Bowl Club on the same evening and that he, Roy Poe, sold him two rifles, one of which was a .22 calibre (Exhibit No. 22) (Tr. 830). The witness then proceeded to give some conflicting evidence as to the conduct of the defendant.

David Holtz testified that Roy Poe came into the gas station where he was working near St. George, Utah, at approximately 11:30 P. M. November 6, 1965 (Tr. 697). Mr. Holtz testified that he filled the car Mr. Poe was driving with gas and overheard Mr. Poe discussing

something about his going to Las Vegas, Nevada (Tr. 700, 703).

Gerald Hickey, a Las Vegas, Nevada, police officer, testified that he arrested Roy Lee Poe in Las Vegas, Nevada (Tr. 509). The defendant waived extradition and the following day was transferred from Las Vegas, Nevada to St. George, Utah by Sheriff Evan Whitehead of the Washington County Sheriff's Office.

During the trial the prosecution introduced several pictures of the deceased. The initial use of the photographs was to establish identity of the deceased and was not in dispute. However, the prosecution continued to introduce the photographs and to exhibit the same to each and every witness. On each occasion the prosecution emphasized the blood on the victim as well as surrounding the victim on the wall and bed covering. The defendant did not dispute that the deceased had been shot twice in the head and died from the wounds. The photographs established these facts upon the first presentation of the same and the repeated presentation and efforts by the prosecution to review the exhibits time and time again with each witness, over the objection of the defense, were unrelated to the culpability of the accused if guilty and were inflammatory.

Byron Lee Wulffenstein, a witness called by the defense, testified that Roy Poe, Kenneth Hall and Mr. Wulffenstein, together with Mr. Wulffenstein's lady

friend, were together on the night of November 6, 1965, until near 10:00 P. M.

Joseph Dean Anderson was called as a witness for the defense and testified that he was a friend of Roy Lee Poe and that on the evening of Friday, November 5, 1965, Mr. Poe was present with him in the Sun Bowl Club at St. George, Utah (Tr. 896, 897). Mr. Anderson further testified that he had a conversation with Mr. Poe about selling some guns. Mr. Anderson testified that Mr. Poe had a conversation with Mr. Vern Phillips and left the Sun Bowl Club with Mr. Phillips, later returning.

Mr. Dean Anderson testified that he was present with the defendant, Roy Lee Poe, on Saturday, November 6, 1965 around 10:00 to 10:30 P. M. (Tr. 900). That he, Roy Poe, and others remained in the Sun Bowl Club at St. George, Utah, until around 11:00 P .M. Mr. Anderson further testified that they went from the Sun Bowl Club to a place known as Pete's Wagon Wheel (Tr. 903). Mr. Anderson then testified that the group drove from St. George, Utah, west toward Nevada. Mr. Anderson testified that he became ill somewhere along the road and that they were required to stop. He testified that he recalls that Mr. Poe was in the group at the time they stopped and was also in the group at the time they arrived in Mesquite, Nevada (Tr. 906). He further testified that Mr. Poe was left in Mesquite and

did not return to St. George with the rest of the group.

The defendant, Roy Lee Poe, took the witness stand and testified in his own defense. He testified that he did in fact know the deceased and that he and the deceased had worked together on a job several days prior to the 6th of November, 1965. He further testified that on Friday evening, the 5th of November, 1965, that he saw the deceased's two rifles in the back of the deceased's car when he had it to the gas station to check the tires. He admitted that he then took the two rifles on that same Friday night and sold them to Mr. Vern Phillips (Tr. 968).

It is important to note that other testimony of the State's witnesses indicated that there was a question as to whether the said rifles were in the deceased's home on Saturday the 6th.

Mr. Poe testified that he spent the day of Saturday, November 6th, with Mr. Hall and during the evening of that day they took their evening meal with Mr. Byron Lee Wulffenstein and his lady friend Wanda. He then stated that after the evening meal that he showed his friends how to bone out a deer. Late in the evening, after 10:00 P. M., he testified that he and Mr. Hall went to the Sun Bowl Club (Tr. 970-975). He last saw his friend, Mr. Hall, when he departed with Mr. Pace. Mr. Poe later left the Sun Bowl Club with his friend Mr. Dean Anderson and a couple of other fellows. They

purchased more beer and after going for a short visit to another bar or club left for Mesquite, Nevada (Tr. 975-978). He was involved in a fight in Mesquite right after they arrived and he testified that he obtained a room for the night and did not return to St. George with his friends (Tr. 979). He explained to Dr. McGregor when he was examined after his arrest that he was hurt in a fight and this was substantiated by Dr. McGregor's testimony and report (Tr. 389-395). Mr. Poe denied that he was involved in any way with the death of Mr. Hall, his friend (Tr. 983).

FACTS RELEVANT TO THE COMPOSITION OF JURY

The record reflects that the defendant, Roy Lee Poe, was completely unknown by every member of the jury including the members of the potential jury panel. The record further establishes that almost every potential juror and particularly the jurors making up the jury were acquainted with the attorneys for the prosecution and were acquainted with many of the witnesses called for the state.

ARGUMENT

POINT I

The Trial Court Committed Prejudicial Error by Refusing to Allow the Defendant's Counsel to Determine by Direct Voir Dire Examination or by Voir Dire Examination of the Court the Answers to Questions as to the Religion and Re-

ligious Attitudes of the Prospective Jurors and also the Method of Selecting Additional Veniremen, Thereby Denying the Defendant Due Process of Law Under the Constitution of the United States, Amendment XIV.

Prior to the selection of the final jury panel the defendant, by and through his counsel, requested that the Court individually voir dire each prospective juror and determine their religion and also determine as to whether or not by virtue of their religion they had established a moral or religious attitude regarding the death sentence in first degree murder cases (Tr. 64). The Court refused to allow the extended voir dire requested by the defendant (Tr. 70). The case of *Witherspoon v. Illinois, 291 U. S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776* holds that a jury from which veniremen having moral or religious scruples against capital punishment are excluded falls short of that impartiality to which a defendant is entitled under the Sixth and Fourteenth Amendments. In the instant case the Court refused to allow the defendant the right to determine the religious scruples and attitudes of the prospective jury members.

Courts are generally agreed that the jurors may be interrogated on voir dire as to whether prejudice exists which is based on racial, religious, economic, social or political prejudices. Courts almost universally hold that such prejudices may be proper subject of inquiry, even though, if established, might not afford ground for chal-

lenge for cause. However, this allows the defense to reasonably and properly evaluate the prospective jurors and to exercise an intelligent and meaningful preemptive challenge based upon knowledge gained from this inquiry.

The Court refused on request in chambers of defense counsel to dismiss Mr. George Milton Sealey, a prospective juror (Tr. 63). Mr. Sealey was a special deputy for a law enforcement agency in Southern Utah and as such admitted to attending various schools, holding himself out as a member of the law enforcement group in Southern Utah or in Iron County. Had the Court dismissed Mr. Sealey for cause the defendant would have been able to make a more meaningful use of his preemptive challenges.

The Court erred in directing the Deputy Sheriff in Iron County, Utah to provide six (6) additional jurors (Tr. 100). *Section 77-28-1* of the Utah Code Annotated provides that juries for criminal trials are formed in the same manner as provided in *U. R. C. P. 47 (g)*. *Utah Code Annotated 78-46-23* provides that if additional trial jurors are necessary, additional names shall be drawn from the box; but if, in the judgment of the Court, the attendance of any drawn from the box cannot be obtained, they may be laid aside and other names drawn. "If all names become exhausted at any term, the Judge may order an open venire for such number

of jurors as he deems necessary, who shall be summoned to serve."

It is clear that the Judge failed to follow the requirements of the Utah Code Annotated as above set forth in selecting the additional jurors. The proper procedure was to draw the additional names from the jury venire previously prepared and drawn for the county for the existing term of court. However, Judge Day in the instant case directed Mr. Hyatt Bentley, the Deputy Sheriff, to obtain six (6) additional jurors from streets and businesses of Parowan, Utah. Counsel for the defendant properly objected to this procedure (Tr. 134).

In *State vs. Cluff, 158 Pac. 705,* the Court held that under the existing statutes of the State of Utah the venire of jurors for the term must first be exhausted by drawing additional names from the box containing all veniremen. The names of jurors not readily accessible because they reside at a distance may properly be laid aside and other names drawn.

It was an error to disregard the requirements of the Utah Code and to direct the Deputy Sheriff to go into the Parowan area and obtain the six (6) additional prospective jurors to complete the jury panel.

Glasser vs. United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680, held,

"A jury should be a body truly representative

> of the community or the district from which it is to be chosen. There must not be conditions which lead Courts or officials into selections of juries or jurymen which do not comport with the concept of the jury as a cross-section of the community from which it is chosen."

Parowan, Utah, the county seat of Iron County, Utah is a small community of approximately 1500 people. Iron County, the general area from which the jury venire is drawn, comprises a much larger area and has a population in excess of 10,000 people. The Court was in error to arbitrarily assume that the persons selected from the small community of Parowan immediately near the court house would be truly representative of the district from which the jury venire is chosen.

The Utah Court has held in the *State of Utah vs. Dodge, 365 P. 2d 798, 12 Utah 2d 293,* that

> "The constitutional right to trial by jury is the right to trial by a fair and impartial jury, drawn from the cross-section of the community."

People vs. White, 278 P. 2d 9, 43 C. 2d 740, supports the general rule with the following comments:

> "Trial by jury necessarily contemplates an impartial jury drawn from a cross-section of the community and selected by court officials without systematic and intentional exclusion of any of these groups."

The case of *People vs. Carter, 364 P. 2d 477, 56 C. 2d* 549, set forth on page 489 thereof that the proper method

of selection of jury is by alphabet with no reference to address and goes on to infer that there should be no attempt to exclude any geographical segment of the county's population.

In the instant case the method used by the court in directing the deputy sheriff to obtain additional jurors in the Parowan area was, in fact, a calculated and direct means of geographically eliminating persons who were, in fact, subject to jury service that resided elsewhere in Iron County.

It seems abundantly clear that the court should have recessed the proceedings and directed the County Clerk and other Jury Commissioners to draw from the jury venire the prospective jury panel to supplement the existing jury panel. During the late afternoon hours, evening and morning prior to trial on the following date the Sheriff and/or other process servers could have adequately and timely served the prospective members within the county and required their appearance as prospective jurors. Contrarywise, the court disregarded this requirement and indulged in a method of obtaining six (6) prospective jurors in a manner which was prejudicial to the defendant. The jurors came from the small community of Parowan where the trial was being held and there was a greater opportunity for prospective jurors to have formulated biases and prejudices toward the defendant.

POINT II

The Trial Court Committed Prejudicial Errer by Admission of Testimony from Prior Trial

Utah Code Annotated 77-44-3 provides that when testimony in prior hearing has been transcribed by official Court Reporter and *thereafter such witness shall die or be beyond the jurisdiction of the court,* either party may read in evidence the testimony of such witness, when duly certified by the reporter to be correct, in any subsequent trial, subject only to the same objections that might be made if such witness were on the stand and testifying in open court. (Emphasis added).

In the case of *State vs. Kazda, 320 P. 2d 486, 15 Ut. 2d 313,* the court held that a witness who was outside of the state is "beyond the jurisdiction of the court." It provided, however, that there must be a showing that the witness is in fact beyond the jurisdiction of the court. In the instant case, there was much testimony introduced by the various witnesses in behalf of the prosecution to establish that certain witnesses were outside the jurisdiction of the court. The testimony so provided failed to show that a due, diligent and proper search had been made to determine if the persons were in fact outside of the jurisdiction of the court. The court ruled on at least two occasions during the proceedings that the testimony provided regarding the unavailability of Lewis P. Lagana as a witness before the court in these pro-

ceedings was inadequate. However, the court granted the state and prosecution time within which to make an additional search and recessed for these purposes.

It appears that the general rule in such cases is set forth in *Corpus Juris Secundum, Evidence, Section 393*, which indicates that due diligence must be proven. That is to say, due diligence must be shown on the part of the sheriff and/or other authorities seeking the whereabouts of the witness and that due diligence is so established when there is an issuance of subpeonas and the delivery of the same to the sheriff and a search for the witness with a return of the subpeonas showing an endorsement by the sheriff that the witness could not be found.

A review of the evidence of the parties testifying regarding their efforts to locate Lewis P. Lagana and also Mary Miner clearly establishes that due diligence was not in fact exercised to locate the said witnesses.

Jones on Evidence, in Sections 313 and 314, indicates that the seriousness of a criminal matter has prompted some courts to hold that testimony produced at earlier trials may not be admitted even when the witness is shown to be dead. However, there are authorities which hold that the proper procedure is to take the deposition of the witness if he can be found and that the mere absence from the state is not one of the grounds for admitting testimony which has been taken at a for-

mer trial.

In the case of *Long vs. California-Western States Life Insurance Co., 279 P.2d 43, 43 C. 2d 871,* the court infers that the standard of "due diligence" might be that there be unserved subpeonas returned by constables along with information that witnesses are deceased or that the witness is in a foreign state.

In the instant case the testimony of Clark Robinson (Tr. 742), Harry McCoy (Tr. 750) and Evan G. Whitehead (Tr. 760) clearly show that certain efforts were made to establish the whereabouts of the witnesses Lagana and Miner, provided, however, the testimony clearly establishes that no effort whatsoever was made to check employment records, Social Security records, postal authority records, former friends and associates and such persons as could reasonably be clothed with any knowledge whatsoever about the whereabouts of said witnesses.

The defendant is prejudiced by lack of opportunity to cross-examine the witnesses whose testimony is allowed to be read before the jury. The right to observe the attitude, expression and demeanor of the witnesses, both by the defendant, his counsel and particularly by the jury, is an integral part and a necessary aspect of the trial proceedings. To have the testimony read to the jury without the opportunity to observe these characteristics of the witness and without the opportunity

of proper cross-examination is prejudicial to the defendant in such proceedings.

There is a reasonable inference by an intelligent jury that the testimony from previous hearings which is read into the record indicates a conviction at the previous trial and a reversal on a technicality. It is reasonable to assume that an intelligent jury would understand and know that a person would not be tried twice for the same crime and that, had the previous trial resulted in an acquittal, the matter would have been concluded at that point. Consequently, it is reasonable that the jury would assume that, if there were in fact transcripts of a previous hearing and trial, the defendant must have been convicted at the previous trial and that the matter as presented is a retrial. This conclusion, which must be emphasized as reasonable, is prejudicial to the defendant and is prompted by the use of previous trial transcripts.

POINT III

The Trial Court Abused its Discretion by Admitting Into Evidence Gruesome and Gory Pictures of the Deceased When Discovered with the Inflammatory Nature and Prejudicial Effects of Such Photographs Overshadowed Any Possible Probative Value with Respect to a Fact in Issue.

When photographs or demonstrative evidence are offered into evidence for a demonstration to the jury, their admissibility depends upon whether the inflam-

matory nature of such evidence is outweighed by their probative value with respect to a fact in issue. See *State of Utah vs. Poe, 21 Ut. 2d 113, 441 P. 2d 512 (1968), and State of Utah vs. Renzo, 21 Ut. 2d 205, 443 P. 2d 392 (1698).*

Exhibits 8 and 9 as offered by the prosecution and admitted into evidence by the court (Tr. 199) were black and white pictures of the deceased as found by his brother, Leland Hall, and the police officers. The pictures were close-ups of the deceased's upper body showing the blood on his head, on the bedding, and upon the wall near the victim. Counsel for Defendant-Appellant fails to see the purpose or relevance of the admitted pictures. No one ever disputed the fact that the deceased person was Kenneth Hall nor the fact that his life was taken by gunshot wounds to the head. There was never any question of the deceased's death or its cause. No one questioned the identity of the deceased. There was no fact in issue that these pictures would help the jury solve. Thus, there was no purpose served by the admission of the photographs other than to inflame the jurors' emotions.

The trial court abused its discretion by admitting the pictures over the proper objections of defendant's counsel (Tr. 200). Defendant-Appellant submits that the inflammatory nature and prejudicial effect of such photographs overshadowed any possible probative value

with respect to the fact in issue, therefore not satisfying the test that the Utah Court has proposed in the *Poe* and *Renzo* cases.

POINT IV

The Trial Court Committed Prejudicial Error by Requiring the Jury to Retire and Consider Their Verdict at Such a Late Hour in the Day and by Refusing to Allow the Jury to be Taken to an Appropriate and Proper Place to Retire for the Evening, to Return the Following Day and Continue Their Deliberations.

The record of these proceedings will show (Tr. 1,063) that the jury retired to consider their verdict at 7:38 P. M. This was during the evening hours of the sixth full and long day of trial proceedings. Numerous exhibits had been introduced in the proceedings and admitted by the court for the jury's consideration. It was obvious that it would take several hours to review the exhibits, consider the material and evaluate the facts and circumstances surrounding the case. The court erred in charging the jury with the responsibility of considering the verdict at such a late hour on the date and further erred in refusing to order the jury to be taken to a proper place and be allowed to retire for the night and return the following morning to further consider the verdict.

At the hour of approximately 2:45 A. M., after several hours of deliberation, the bailiff charged with the

responsibility of caring for the jury during their deliberations advised the court that the jury had some questions regarding the penalties for conviction of murder. The first question: "What would be the maximum penalty for second degree murder?" The second question: "What would be the maximum penalty for first degree murder?" and, the third question: "If first degree murder is our decision, with leniency, when would he, 'Mr. Poe', be eligible for parole?" (Tr. 1,066).

The court erred in not allowing the jury to be taken to a proper place to retire and rest prior to continuing their deliberations. The court erred in overruling the objection (Tr. 1,057-8, 1,073) of the defendant regarding the allowance of the jury to proceed with their deliberations at such a late hour when it was obvious that they were very tired.

In the case of *Cowperthwaite vs. Jones (Ct. Com. Pl. Philadelphia), 2 Dall. 55, 1 L. Ed. 287,* the Court held "a new trial should be held for actual and manifest injustice done." In the *Glasser vs. United States* case, supra, the Court held that the right to a jury trial embraces the right to a proper trial. The Court said:

> "Where scales of justice are delicately poised between guilt and innocence, error, which under some circumstances would not be grounds for reversal, cannot be brushed aside as immaterial. The proper jury must be an impartial and objective cross section from the community from which it is chosen."

It is apparent that the jury, burdened with the exhaustion of six days of trial, burdened with the concern of their family affairs at home, and burdened with the lateness of the hour, could not be a proper jury. Certainly exhaustion and the limitation of the physical body functions as well as the mental limitation brought about because of the physical weakening of the body as a result of long and late hours, should be considered as an outside or external influence on the jury. In the case of *Remmer vs. United States, 350 U. S. 377, 76 S. Ct. 425, 100 L. Ed. 435,* the Court held "It is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside or external influence."

It is easy to see from the record in these proceedings that the jury was not able to freely operate because of the pressures of exhaustion brought on by the lateness of the hour.

In *Xenakis vs. Garrett Freight Lines, 265 P. 2d* 1007, 1 Ut. 2d 299, the Court held:

> "It would seem unwise, in view of all of the effort that goes into a law suit, the time and energy extended upon the pleadings, the investigation of facts, the procurement of witnesses and other evidence, and the use of several days of trial, to then submit a cause to a jury at such a late hour that they may feel under compulsion of the pressure of time, or other considerations, which would prevent them from making a full, fair and

dispassionate analysis and determination of the matters entrusted to their judgment."

With the seriousness attending a case wherein the charge is first degree murder, it seems that the above set forth rule of the Utah Court would apply even more in the instant case than in the case cited.

The Utah Court reviewed this point in other proceedings, including the case of *Hanks vs. Christiansen, 354 P. 2d 564, 11 Ut. 2d 8.* The *Hanks* case recognizes the authority of the trial judge to use a wide latitude of discretion. However, where his determinations are purely arbitrary, unreasonable and prejudicial to the objecting party there are grounds for reversal. In the instant case, the trial judge was in fact arbitrary and unreasonable about the requirement that the jury stay and consider the issues involved in the complicated matter at such a late hour. This requirement was clearly prejudicial to the defendant, who objected to the same.

POINT V

The Cumulative Effect of the Foregoing Errors Deprived the Appellant of a Fair Trial.

It is the position of the defendant that each of the issues heretofore presented is sufficient ground upon which this Court should reverse the trial court judgment and grant the appellant a new trial. However, should the Court hold against the appellant on each of these issues, it should keep in mind the responsibility that

the Court has to "scrutinize with care the propriety o all aspects of the proceedings." *State vs. St. Clair, 3 U 2d 230, 282 P. 2d 323 (1955).*

In *State vs. Vasquez, 101 Utah 444, 121 Pac. 9* *(1942)* the Court recognized that there may be several errors in a trial and each error standing alone will no be sufficiently prejudicial to merit a reversal, but when each error is reviewed in conjunction with the other errors the cumulative effect may amount to the denial of a fair trial.

If the Court will but review the record and circumstances surrounding the trial of Roy Lee Poe it will be apparent that the overall effect of the proceedings prevented the appellant from receiving a fair and just trial. The evidence before the jury was purely circumstantial evidence. The State failed to prove that the weapons introduced as Exhibits were in fact the weapons which contributed in any way to the death of the defendant. The State failed to prove that the defendant Roy Lee Poe had any motive whatsoever for the killing of Mr. Kenneth Hall, a person who had befriended him and taken him into his home.

The defendant was in an area where he had no friends whatsoever to come to his aid and rescue by testifying on his behalf or by assisting him in any way. The defendant had spent the previous several years incarcerated as a result of a conviction in the first trial.

the incarceration pending the second trial and his incarceration during the trial.

The fact that the murder in 1965 had been a sensational murder in the small town of St. George, Utah, with the victim of the crime a life-time resident in the community apparently left the entire Southern Utah area with an impression that the "outsider" Mr. Roy Lee Poe, the defendant herein, was the only obvious suspect. The record is absolutely clear that no efforts whatever were made to investigate the crime to determine the actual facts and circumstances except such facts, evidence and circumstances that could be uncovered and directed toward Mr. Roy Lee Poe.

From the absence of proof on the part of the State to show a motive for the brutal killing, from the absence on the part of the State to associate the defendant in any direct manner with the crime by fingerprints or other direct evidence, and from the fact that the entire Southern Utah area had a general attitude that the defendant was guilty prior to even his first trial and certainly more so after his second trial and after the many court hearings held between the first trial and second trial in an effort to insure the defendant proper representation, and from the errors of the court as heretofore set forth, it is submitted that under the rule of *State vs. St. Clair* and the other cases with similar holdings, this

Court should remand this case back to the District Cour
for a new trial.

Respectfully submitted,

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