1970

State of Utah v. Judy Carol Leggroan : Brief of Respondent

In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff-Respondent,

vs.

JUDY CAROL LEGGROAN,

Defendant-Appellant,

Case No. 12048

BRIEF OF RESPONDENT

APPEAL FROM THE JURY VERDICT OF GUILTY IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE D. FRANK WILKINS, JUDGE, PRESIDING.

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BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

This is an appeal from a jury verdict of guilty to the crime of murder in the second degree.

DISPOSITION IN LOWER COURT

The jury found the defendant guilty of second degree murder in the Third Judicial District Court, in and for Salt Lake County, State of Utah. The defendant was sentenced to the Utah State Prison for an indeterminate term for the crime of murder in the second degree.

RELIEF SOUGHT ON APPEAL

The respondent submits that the judgment of the Third Judicial District Court should be affirmed.

STATEMENT OF FACTS

The respondent stipulates to the appellant's facts except for the following observation.

It should be noted that there is conflicting evidence concerning the sequence of events immediately prior to the shooting. A police officer testified that the appellant said to him on the evening of the shooting that her husband called the appellant's mother a whore which made the appellant very angry. She reached under the bed and picked up a gun." . . . I had to put guts in it," she stated. The appellant then stood up and shot him (T. 290-91). Later at trial, the appellant testified that the argumen had erupted into a fight when her husband threatened her with a gun and called her mother a whore, and in the struggle she took the gun away from him and shot him (T. 548-49).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DISTINGUISHING VOLUNTARY MANSLAUGHTER FROM MURDER NOR IN ITS DEFINITION OF "IN THE HEAT OF PASSION."

Manslaughter is explicitly distinguished from

murder in Wharton's Criminal Law and Procedure § 271 at 574 (Anderson ed. 1957):

> "Manslaughter is unlawful homicide without malice aforethought, either express or implied. The element of malice aforethought must be absent or the homicide will by definition be murder. The absence of malice distinguishes it from any degree of murder. Manslaughter is a distinct offense, not a degree of murder, although both manslaughter and murder are kinds or categories of homicide." See Utah Code Ann. §§ 76-30-1, 76-30-5 (1953).

The element of malice is also defined in the Utah Code Ann. § 70-30-2 (1953):

> "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

In the instant case, the appellant was charged in the information with the commission of murder in the first degree, and the appellant entered a plea of not guilty. Consequently, the State carried the burden of proving the essential elements of the offense beyond a reasonable doubt. In arriving at a verdict, the Utah Code Ann. § 77-33-5 (1953) requires the jury to find the degree of homicide:

> **"Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."**

Under this Section, the degree of homicide should be determined so the court must instruct the jury on the lesser grades of the offense where the evidence warrants such instruction. *State v. Ferguson,* 74 Utah 263, 279 P. 55, 56 (1929) and *State v. Campbell,* 24 Utah 103, 66 P. 771 (1901). Sufficient evidence was present in this case to warrant such instructions, and the court instructed the jury that the State had to prove any offense—murder in first degree, murder in the second degree, voluntary manslaughter, and involuntary manslaughter — beyond a reasonable doubt. The jury considered each offense in the order given in the jury instructions and determined whether they were convinced beyond a reasonable doubt that one of the offenses was committed (R. 24, 26, 28, 29). When the court instructed the jury concerning the elements of voluntary manslaughter, the appellant alleges that the court erred in defining "in the heat of passion' as such "emotional or mental state as to irresistably compel an ordinary reasonable person to commit the act charged."

In view of the definitions of murder and manslaughter, a charge of murder in the first or second degree can be reduced to voluntary manslaughter only if it can be shown that malice, either express or implied, was not present in the alleged act.

Conceptually, the crime of manslaughter was devised to treat leniently those who were transgressors by reason of provoked wrath rather than by a deliberate intent and forethought. Burdick, The Law of Crime §§ 458, 460 (1946). The reason for the lenient treatment of such transgressors is that they committed the alleged homicide by being provoked to such a degree of passion that no malice or a premeditated intent to take a life was present, and the homicide occurred because passion displaced any deliberate or premeditated intent. Consequently, the homicide is voluntary manslaughter not murder.

The respondent submits that the jury instruction that the heat of passion must "irresistably compel an ordinary reasonable person to commit the act charged. . . ." ih not too strict a standard to express what degree the heat of passion must be. If the homicide occurs from any degree of malice or deliberate intent, it is then an element of murder and not manslaughter. The standard for manslaughter must be high enough to ascertain whether or not the act charged was the result of passion which completely displaced any element of malice.

Wharton's Criminal Law and Procedure § 275 at 583 (supra):

> **"The passion aroused by the provocation must be so violent as to dethrone the reason of the accused for the time being; it must prevent thought and reflection, and the formation of a deliberate purpose. The theory of the law**

> **is that malice cannot exist at the same time as passion of this degree, and that the act of the defendant therefore cannot be considered the product of malice aforethought. Mere anger, in and of itself, is not sufficient, but must be of such a character as to prevent the individual from cool reflection and a control of his actions."**

Case law holds that manslaughter requires a passion of an uncontrollable nature which suspends momentarily the exercise of cool reason. By definition, the "heat of passion" is the degree of passion which suspends cool reason, is uncontrollable, and "irresistably compels" an individual to cause the act committed. If the degree of passion were any lower than the suspension of cool reason, it would be the element of malice or intent in murder and no longer an element of passion in voluntary manslaughter. *Zenou v. State*, 4 Wis.2d 655, 91 N.W.2d 208, 214 (1958); *People v. Harris*, 8 Ill. 2d 431, 134 N.E.2d 315, 317 (1956); *State v. McAllister*, 41 N.J. 342, 196 A.2d 786, 792 (1964); *State v. Smart*, 328 S.W.2d 569, 574 (Mo. 1959); *State v. Cobo*, 90 Utah 89, 6 P.2d 952 (1936); *People v. Calton*, 5 Utah 451, 16 P. 902, rev'd on other grounds, 130 U.S. 83 (1888). Therefore, the standard for determining the sufficient degree of passion should be so strict that the jury has to be persuaded beyond a reasonable doubt that no malice or premeditated intent was present before a verdict of voluntary manslaughter can be formed. The appellant submits that the trial court did not set too strict a standard in its definition of "in the heat of passion" which required an in-

dividual to be "irresistably compelled to commit the act charged."

POINT II

THE DEFENDANT WAS NOT REQUIRED TO PROVE ANY ELEMENT OF DEFENSE BEYOND A REASONABLE DOUBT AND ASSUMED ONLY THE BURDEN OF THE RISK OF NON-PERSUASION.

The appellant disagrees with jury instruction 28 because the instruction allegedly requires that two elements of voluntary manslaughter, "without malice" and "in the heat of passion," be proven by the appellant beyond a reasonable doubt in order for the appellant to reduce the charge from second degree murder to voluntary manslaughter. Such a requirement, it is argued, would therefore shift the burden of proof to the appellant and would only confuse the jury as to what is reqquired to be believed beyond a reasonable doubt to justify a valid verdict. An analysis of this argument is best understood when the purpose and meaning of "beyond a reasonable doubt" and "burden of proof" are clearly understood.

"Beyond a reasonable doubt" is a phrase which measures the degree of the jury's persuasion in criminal cases. This standard indicates the positiveness of persuasion that must exist in the form of a verdict for conviction. 9 J. Wigmore, Burden of Proof § 2497 at 317 (3d ed. 1940). In the case of *State v. McCune*, 16 Utah 170, 51 P. 818 (1898), which involved an appeal of a jury verdict of guilty of assault with an

intent to commit rape on the basis of insufficient evidence, the Utah Supreme Court specifically held that this was the standard for the sufficiency of evidence for criminal cases.

> **"When the intent is the gist of the offense, that intent should be shown by such evidence as, uncontradicted, will authorize it to be presumed beyond a reasonable doubt. In order to convict, it is incumbent upon the prosecution to prove its case, and establish the defendant guilty, beyond a reasonable doubt. A reasonable doubt is not a mere imaginary, captious, or possible doubt, but a fair doubt, based upon reason and common sense, and growing out of the testimony in the case. It is such a doubt as will leave the juror's mind, after a careful examination of all the evidence, in such a condition that he cannot say that he has an abiding conviction, to a moral certainty of the defendant's guilt."** *Id.* **at 819.**

Other Utah cases which hold this standard applicable for criminal convictions include *State v. Adamson*, 101 Utah 534, 125 P.2d 429, 430 (1942); *State v. Hillstrom*, 46 Utah 341, 150 P. 935, 942 (1915); *State v. Green*, 77 Utah 580, 6 P.2d 177, 181 (1931); *State v. Gutheil*, 98 Utah 205, 98 P.2d 943, 944 (1940).

If this standard of persuasion is not obtained—"guilt beyond a reasonable doubt,"—the defendant is then entitled to an acquittal. This proposition is set forth in Utah Code Ann. § 77-31-4 (1953):

> **"A defendant in a criminal action is presumed to be innocent until the contrary is**

> **proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal."**

In cases where the degree of persuasion is less than "guilt beyond a reasonable doubt," the prosecution has failed to carry its "burden of proof" and the defendant is acquitted of the criminal charge. *State v. Coyle*, 41 Utah 320, 126 P. 305, 308 (1912); *State v. Sullivan*, 6 Utah 2d 110, 307 P.2d 212 (1957). Consequently, the prosecution may prevail in a criminal case if he can establish "guilt beyond a reasonable doubt," but the defendant may be acquitted if he can raise a reasonable doubt in the jurors' minds as to the persuasiveness of the prosecutor's argument.

"Burden of proof" has two definitions that can be applied in a criminal trial. Abbot, *Two Burdens of Proof*, 6 Harv. L. Rev. 125 (1892). One definition is that the party who has invited the issue carries the burden of persuasion for his cause of action to establish by evidence the requisite degree of belief in the mind of the trier of fact, i.e., in criminal cases the prosecution must establish "guilt beyond a reasonable doubt." 9 J. Wigmore, Burden of Proof § 2487 at 278, *supra*. Obviously, this burden does not shift because the prosecution's cause of action would be defeated if the prosecution shifted or abandoned this burden of persuasion, and the jury

would then be left with a reasonable doubt as to why the prosecution would leave this burden.

The second definition given to "burden of proof" is that the burden of going forward with evidence may shift from one party to another during the course of the trial. When the prosecution has invited the issue and has produced sufficient evidence from which the jury could infer the fact alleged from the circumstance proved, the burden then shifts to the defendant to introduce rebutting evidence or evidence establishing some defense to avoid the risk of a ruling against the defendant. 9 J. Wigmore, Burden of Proof § 2485 at 270, *supra.* Unlike the first definition of burden of proof, this burden does shift depending on the quantity of evidence produced by the moving party, and is often referred to as the risk of non-persuasion. It is this burden that shifts in a murder case as described by Utah Code Ann. § 77-31-12 (1953):

> **"Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation or that justify or excuse it, shall devolve upon him, unless the proof on the part of the prosecution tends to show that the crime committed amounts only to manslaughter, or that the defendant was justified or excusable."**

In view of these definitions, the appellee submits that there was no shifting of the burden of persuasion—the burden of establishing guilt beyond a reasonable doubt, but that there may have been a

duty on the part of the appellant to bring forth evidence to mitigate or rebut the evidence that the appellant had brought forth to avoid an adverse rul-produced mitigating circumstances which included two elements of voluntary manslaughter, "heat of passion" and "without malice." But as already argued ,the appellant had to only raise a reasonable doubt in the minds of the jurors concerning the element of malice in order to obtain an acquittal of the murder charge and did not have to prove the elements of voluntary manslaughter beyond a reasonable doubt in order to defeat the prosecution's argument (Utah Code Ann. § 77-31-4 (1953). This was clearly understood by the jurors because the court in instruction 28 specifically stated:

> **"You are further instructed that the burden is upon the State to prove to your satisfaction and beyond a reasonable doubt that all of the foregoing elements of the crime of Voluntary Manslaughter are present in this case; and if the State shall have failed to satisfy your minds beyond a reasonable doubt upon one or more of said elements, then you must acquit the defendant of voluntary manslaughter, and you should consider whether or not she is guilty of Involuntary Manslaughter."**

In view of the jury verdict in favor of the prosetion, it follows that the appellant's theory of mitigating circumstances failed to raise a reasonable doubt in the jury's mind concerning the prosecution's theory of murder. Consequently, the appellant suf-

fered an adverse ruling and must accept the degree of persuasion of the trier of fact as to the verdict of second degree murder. The jury instructions clearly stated that the burden was upon the State to prove the elements of voluntary manslaughter "beyond a reasonable doubt," and the appellant needed only to raise a reasonable doubt in the mind of the jury to be entitled to an acquittal.

POINT III

THE APPELLANT'S ARGUMENT DOES NOT SHOW THAT THE MANNER OF JURY SELECTION WAS INTENTIONAL, PURPOSEFUL DISCRIMINATION.

The appellant's authority for the proposition that a "substantial portion of the community" was excluded from the jury rests partly upon several civil rights cases. These cases rely upon the constitutional principle of the Fourteenth Amendment that a purposeful or deliberate exclusion of Negroes from jury service is a violation of the Equal Protection Clause. *Strauder v. West Virginia,* 100 U.S. 303, 308 (1880); *Ex Parte Virginia,* 100 U.S. 339 (1880); *Carter v. Texas,* 177 U.S. 442, 447 (1900). Such discrimination on account of race was present in the civil rights cases cited by the appellant. In *Sims v. State of Georgia,* 389 U.S. 404 (1967), Negroes constituted 24 per cent of the taxpayers but only 2.4 per cent of the grand jury lists and 9.8 per cent of the petit jury lists. In *Arnold v. State of North Carolina,* 376 U.S. 773 (1964), Negroes and whites were listed separately on the

tax records and in twenty-four years, only one Negro had been on the grand jury. In *Whitus v. State of Georgia*, 385 U.S. 545 (1967), Negroes constituted 27 per cent of the taxpayers and less than 8 per cent of the names appeared on the jury lists. These cases do not stand for the proposition that if it is shown that a group is excluded from jury service, discrimination is present, but they stand for the proposition that if the number of Negroes chosen is an improbable result of random selection, that fact is prima facie evidence of discrimination because a large and unexplained disparity between the population of Negroes on the venires and in the population is unlikely to result from random selection. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L. Rev. 338 (1966). This proposition is further supported by the Supreme Court holding in *Swain v. State of Alabama*, 380 U.S. 202 (1965), that the evidence based upon a statistical analysis was not sufficient to constitute a prima facie case of discrimination even though it seemed to indicate that a portion of the Negro community had been excluded from jury service. In other words, the evidence did not indicate such a disparity between Negroes participating in jury service and the total Negro community to render the process an improbable result of random selection.

The respondent asserts that the appellant has failed to carry his burden of proof to prove that discrimination was present in the instant case. In support of his argument, the appellant has only cited the relevant Utah statute as prima facie evidence of

exclusion, and this is not sufficient to prove purposeful discrimination. The Supreme Court has clearly held that purposeful discrimination cannot be merely asserted or assumed. *Terrance v. Florida,* 188 U.S. 519 (1903); *Brownfield v. South Carolina,* 189 U.S. 426 (1903); *Smith v. Mississippi,* 162 U.S. 592 (1896). Proof must be of the nature as that found in the civil rights cases which demonstrate that the selection process creates such a disparity that the result is not possible under a random selection process. Otherwise, the system is free from any arbitrary and systematic exclusion unless such proof is present. The respondent submits that the citing of Utah Code Ann. § 78-46-17 (1953) is insufficient to establish discriminatory methods of jury selection. The statute does not indicate that different standards of qualifications were applied to different groups within the community in an attempt to exclude a specific group of otherwise qualified jurors. The appellant's argument may point out that the system of jury selection is not perfect but this is not equivalent to purposeful discrimination. *Swain v. Alabama, supra; Hoyt v. State of Florida,* 368 U.S. 57 (1961).

When the civil rights cases do not apply to a group that the appellant alleges is discriminated against, the appellant relies upon *Hernandes v. State of Texas,* 347 U.S. 475 (1954):

> **"The constitutional command forbidding intentional exclusion is not limited to Negroes. It applies to any identifiable group in the community which may be the subject of prejudice."** *Id.* **at 478.**

The appellee submits that this statement is dictum as the facts involved a group of Mexican descent and does not stand for the broad proposition that the appellant alleges. Within its context, this statement is limited to racial groups in our community which may be the subject of prejudice and does not pertain to the young, poor, non-property holders, or female groups. These groups do not come within the constitutional principle of Equal Protection of the Fourteenth Amendment in this case because there are not sufficient facts or evidence which indicate that arbitrary or discriminatory methods were applied during the jury selection process. Consequently, the appellant's argument fails to establish any discrimination or purposeful exclusion in the instant case.

CONCLUSION

The appellee submits that the jury was properly instructed on the distinctions between murder and voluntary manslaughter, and that the selection of the jury was free from arbitrary and discriminatory methods. The appellant respectfully submits that the judgment of the Third Judicial District Court should be affirmed.

Respectfully submitted,

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