1970

State of Utah v. Stephen Michael Van Dam : Appellant's Brief

In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff-Respondent,

vs.

STEPHEN MICHAEL VAN DAM,

Defendant-Appellant.

Case No. 12050

APPELLANT'S BRIEF

On Appeal from the District Court of
Salt Lake County, State of Utah
Honorable Aldon J. Anderson, District Judge

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NATURE OF THE CASE

Defendant-appellant was charged by the Salt Lake County Grand Jury with the crime of rape. The case was tried to a jury in the District Court, Salt Lake County, State of Utah, and appellant convicted. This is an appeal from the conviction.

DISPOSITION IN LOWER COURT

Appellant was convicted of the crime of rape by jury verdict. Appellant moved for a new trial on the grounds of newly discovered evidence. The court denied appellant's motion for new trial.

NATURE OF RELIEF SOUGHT ON APPEAL

Appellant seeks to have the verdict of guilty reversed and a new trial ordered.

FACTS OF CASE

On December 2, 1969, the complainant, Linda Sue Laws, was at her home at 4325 South 9th East, Salt Lake City, Utah. At about 1:00 p.m., she went to take out her garbage and observed a man walking up the street to the apartment behind her (R-10). About 5 or 10 minutes later, the same man appeared at her front door (R-11) and made some inquiries, also asking if she had a telephone book. Mrs. Laws went to her bedroom to obtain the telephone book and found the man coming into her bedroom with a knife (R-11), saying "Do what I tell you or I'll kill you" (R-11). She described the knife as:

> "A. It had a long, shiny blade. It was white. I couldn't see the handle of it too well. It looked like it had a bone handle on it something like a hunting knife. It had a bone handle" (R-12).

The intruder told Mrs. Laws to lie down on her bed, where he took off her boots and levis. He then told her to put a pillowcase over her head. Then he unbuttoned her blouse and ripped her bra open and took off her panties (R-13), and then she testified she "felt him inside her" (R-13). After, he told

her to lie there five minutes. When she heard him go out the door, she got up and ran to her neighbors, who called the police (R-14). The alleged rape took place at about 1:30 p.m.

The neighbor, Mrs. Rita Weber, testified that some time after noon, Mrs. Laws knocked on the door and said she had been raped (R-59); that she comforted Mrs. Laws for about ten minutes and then called the police, who arrived about 30 minutes later (R-59).

The police record indicates the telephone call was received at 1:48 p.m., and that it took about 30 minutes to locate the address (R-63). Upon arrival, the police officer took into evidence the bedclothes and clothing of Mrs. Laws, and obtained a description of the alleged assailant. Defendant was identified from pictures shown to Mrs. Laws. Mrs. Laws had described her assailant as being blond and wearing a green jacket, Levis and cowboy boots.

At approximately 3:00 to 3.45 p.m., Mrs. Laws was examined by a physician who determined that she had had sexual intercourse within 6 to 8 hours, but found no evidence of forceful entry (R-7).

Defendant was arrested after the Salt Lake County Grand Jury issued its indictment and, when arrested, a knife was taken from his car and a green jacket from him. These were placed into evidence, together with the items removed from Mrs. Laws' home. The bedsheet, pillowcase and coat were forwarded to the FBI lab for identification. The torn

bra was presented to the Salt Lake Grand Jury as evidence (R-78).

An FBI agent testified that he examined the bedsheet, pillowcase and coat, and found fibers removed from the sheet and pillowcase that matched the characteristics of the coat; he testified also that it was possible for some garment, other than defendant's coat, to have left the fibers (R-101).

Defendant testified that on the day in question, he had been home from work because of a back ailment, and that he lived in the basement apartment of his grandmother at 1247 Iris Lane, which is approximately 1.4 miles from the Laws residence (R-187). That at about 11:00 a.m. on that day, he purchased a voltage regulator from Hansen Auto Wrecking (R-111) to use in fixing one of his cars; that he was wearing patched Levi's, a white T-shirt and a long sleeved green army shirt. After making the purchase, defendant returned home where he worked on his car until about 12:00 noon. At about this time, defendant's grandmother, who was at home, came out and told defendant to come in and put some heat on his back, which defendant did. Defendant also fixed his lunch and ate it (R-114). Defendant's grandmother, Lucille Conyers, a nurse, was at home in her kitchen working near the window, and could observe defendant while he worked on his car (R-127). She saw him go into the basement apartment at about 12:00 noon, and heard him preparing his lunch and moving around in the apartment (R-128, 138), and never saw him leave the

house until about 1:30 p.m. (R-131). She was at a point in the home where she could observe all who would come and go from the house. She saw no one leave until defendant went out to resume working on his car at 1:30 p.m. Mrs. Conyers observed defendant on at least one occasion in the home between 12:00 noon and 1:30 p.m., when he came upstairs to use the bathroom (R-137), but she heard him in the apartment during the entire period. She also had full view of the cars in front of the house, and they were not moved during this time.

At exactly 1:34 p.m., Mrs. Conyers looked at her clock, since she had to leave for work at 2:00 p.m., and was checking her time. She then also observed the defendant in front of the house, talking to his mother, Elaine Van Dam, while he attached battery jump cables to her car in an attempt to start his.

Defendant was wearing a green army shirt with long sleeves and a white T-shirt when he was working on his car, as observed by Mrs. Conyers (R-140).

Between 1:30 and 2:00 p.m., defendant was working on his car in the presence of his mother, Elaine Van Dam, and his aunt, Rosanna Pitts (R-150).

Defendant further testified that he had been working on his car between 11:00 and 12:00 noon on the day in question; that at noon he went into his apartment, fixed lunch, rested and watched T.V. until about 1:30 p.m. (R-114). At about 1:30 p.m., he went outside to work on his car; he started towards

his mother's house (R-114), but traveled only about 40 feet, when he saw his mother driving towards him. He asked her to pull her car next to his so he could hook up a jump cable (R-115). He worked there trying to start the car for about 20 minutes (R-116). He further testified that he did not know the complainant, Mrs. Laws, had never seen her before, had never been in her home, and had never raped her.

ARGUMENT

POINT I

THE COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION FOR A NEW TRIAL, WHEN EVIDENCE MISSING AT THE TIME OF TRIAL WAS LOCATED IMMEDIATELY AFTER TRIAL.

During the course of the trial, the State's witness testified concerning the physical evidence surrounding the alleged rape. Reference was made to the knife used by the assailant and to the ripped bra of Linda Sue Laws. These items of evidence were in the possession of the Salt Lake County Sheriff's Deputy. The knife had been held for evidence, and the ripped bra had been presented to the Grand Jury. Defendant did not have possession of either item. When requested to produce the knife and the bra, after much testimony concerning them was before the jury, the State's witness, Deputy Sheriff Sidney Elliott, advised the court that they had been lost by the Sheriff's Office of Salt Lake County; thus, nothing was available for

inspection by the jury. Much was made of the fact that the victim was forced, at knife point, to submit to the carnal demands of her attacker, and of the fact that she had submitted only because of the use of the knife. Likewise, it was brought to the attention of the jury that a knife was found in defendant's car. The fact that the knife was not produced, even though defendant tried to explain and describe it, left only a vision in the minds of the jurors that could not be erased, except by the production of the knife for inspection. No amount of describing or explaining would alter that impression, and nothing short of presentation of the knife itself could change the impression of the jury. The victim described the knife as a "bone-handled hunting knife." Defendant described the knife as a "wooden-handled kitchen paring knife." Since a knife was used, and since a knife was found in the defendant's car, it seems only reasonable that the jury would make some comparative conclusions, unless the knife was actually presented so that they could see that the knife taken from defendant's car could in no way be described in the way the victim described the knife used by her attacker. Had the knife been produced at trial, it appears probable that it would have greatly supported defendant's defense and alibi, and that the jury would have reached a conclusion different from the verdict of guilty they returned. The alleged loss of the knife took from the defendant a very important element of his defense. Since the prosecution, through the sheriff's office, had determined to take

into custody this element of defendant's defense, it seems most appropriate that they should be held to the highest degree of protective custody to insure that the defendant is not denied any of his rights to that defense. The fact that the knife was conveniently found within two days after the trial, leaves his writer concerned as to whether or not it was in fact lost.

The torn brassiere of the victim was also described to the jury, and from its description it was indicated that a great force was used in connection with the alleged rape. This item of evidence likewise was not produced for inspection of the jury, since it was also lost at the time of trial. In view of the fact that this article of clothing would have unquestionably given grounds for substantial cross-examination, which, with an actual inspection of the garment by the jury, could have, and probably would have, sustained defendant's defense in the minds of the jurors, it seems that this element of establishing his innocence was likewise denied the defendant. This is particularly true, since the information of counsel is that the brassiere was the only item of evidence furnished to the grand jury at the time the indictment in this matter was returned.

It is recognized that this court has stated on many occasions that the granting or denying of a new trial is within the discretion of the trial court, and will not be interfered with, unless abusive of, or failure to exercise such discretion is clearly

shown—see *State vs. Cooper*, 114 U. 531; 201 P.2d 764. It is thus apparent from the evidence that the presence of the lost items was important to defendant's defense, and that the court's failure to grant a new trial after the items were located was an absolute abuse of its discretion.

In the case of *State of Utah vs. Ronald Gellatly*, 22 U.2d 149, 449 P.2d 993, the court established the ground rules under which newly discovered evidence could be the proper basis of a new trial. There, the court stated:

> **"Newly discovered evidence, to be the grounds for a new trial, must fulfill the following requirements: (1) it must be such as could not, with reasonable diligence, have been discovered and produced at the trial; (2) it must not be merely cumulative; (3) it must be such as to render a different result probable of the retrial of the case."**

See also *Jensen vs. Logan City*, 89 Utah 347; 57 P.2d 708.

Thus, the court supports the general rule as set forth in 39 Am. Jur., New Trials, Par. 158, Page 165, where it is stated:

> **"To warrant the granting of a new trial on the ground of newly discovered evidence, it must appear that the evidence is such as will probably change the result if a new trial is granted, that it has been discovered since the trial, that it could not have been discovered before the trial by the exercise of due diligence, that it**

> **is material to the issue, and that it is not merely cumulative or impeaching."**

From the circumstances and evidence here, it appears without question that the lost evidence is evidence that was discovered after trial since at the time of the trial it was represented to the court that it had been lost and was not available for use and presentation to the jury (R-115); that it could not have been discovered by defendant prior to trial, since it was in the safekeeping of the prosecution, and defendant had no knowledge or belief, or even a suspicion that the items would not be available at the time of trial; and that the evidence is of such a character that, had it been reviewed and considered by the jury, it appears probable that it would have left a strong reasonable doubt as to defendant's guilt, such doubt being of the nature that would have probably resulted in the acquittal of the defendant.

POINT II

THE EVIDENCE IS NOT SUFFICIENT, AS A MATTER OF LAW, TO SUSTAIN APPELLANT'S CONVICTION.

In this case, time, as shown by the evidence, becomes a highly important element, and an element which disproves Linda Sue Laws' claim that defendant raped her, and proves defendant's claim that he was over a mile away in his apartment and working on his car when the alleged rape occurred.

It is important to note that Linda Sue Laws appeared before the Salt Lake County Grand Jury on the 5th day of December, 1969, just three days after the alleged rape, and testified that she was raped at 1:30 p.m. on December 2, 1969. It is also important to note that the District Attorney, in his answer to defendant's application for a bill of particulars, stated that the exact time of the alleged rape was 1:45 p.m., December 2, 1969 (transcript of proceedings P-39). Also, it is highly significant that in her direct testimony, Linda Sue Laws placed the time of the alleged rape at about 1:30 p.m.—as she had testified to the grand jury. It has never been suggested that the incident took place prior to 1:30 p.m.

Mrs. Laws testified that at about 1:00 p.m. she saw a man walking on the street behind her house, as she was taking out her garbage (R-10). She went to the rear yard of the home and returned (R-10). She said she thought she was outside for about two minutes (R-22). About 10 minutes later, or between 1:12 and 1:15 p.m., the same man appeared at her front door. She identified the defendant as the same man. After a few minutes conversation, she went to the bedroom to get a phone book and found the man in the doorway of the bedroom with a knife in his hand. Some time had unquestionably passed so that a conservative estimate would put the assailant at the bedroom door at about 1:18 to 1:20 p.m. Mrs. Laws testified that she was then requested to lie on the bed and put a pillowcase over

her head. Then the assailant unbuttoned her blouse, took off her pants, ripped off her bra, and took off her panties, after which he did nothing for "awhile" (R-13). If this all took only three minutes, then the time would be about 1:23 p.m.

Linda Sue Laws testified that the actual intercourse act took place about 5 minutes, as found on page 41 of the record:

> **"Q. About how long would you guess, if you would give me a mean estimate of this time, that the actual act of intercourse took place?**
>
> **A. About five minutes."**

Thus, the actual intercourse representing the alleged rape would have been completed at approximately 1:28 p.m. Mrs. Laws stayed in the bed another two minutes, got dressed and went to the neighbors, which would have been about 1:30 p.m. The testimony was that the neighbors comforted her for about 10 minutes, then called her husband, and then the police. The police log indicated the call was received at 1:48 p.m. (R-179), or about 20 minutes after the assailant left the Laws house.

The evidence of defendant's grandmother was that she saw defendant in front of the home at exactly 1:45 p.m. within 4 to 6 minutes of the time Linda Sue Laws claimed defendant was raping her.

It is extremely important to observe that Rita Weber, the neighbor of Linda Sue Laws, testified

that Mrs. Laws came to the back door crying, was invited in, and that Mrs. Weber gave her two aspirins and a cup of coffee, and let her cry for about 10 to 15 minutes before calling the police (R-179). Since the police received the telephone call at 1:48 p.m., it would therefore sustain the testimony of Mrs. Laws that the claimed rape, in fact, occurred at about 1:30 p.m. However, for the defendant to have been involved at that time, and observed by Mrs. Conyers at 1:34 p.m., he would have had to possess more speed than an Olympic champion, since it took 4 minutes for Deputy Sheriff Elliott, to drive the distance from defendant's house to the Laws residence (R-187), and defendant would have been required to cover the same distance on foot, since no cars left the Conyers home between 11:00 a.m. and 2:00 p.m. (R-136, 143). In addition, the defendant would have had to change his clothing when he returned in order to appear as Mrs. Conyers observed him, all of which is humanly impossible.

This court has held that the issue of time, where the defense of alibi is injected, is important. See *State vs. Wade*, 92 U. 297, 67 P.2d 647; *State vs. Cooper, supra.* While it is realized that in those cases the court was only concerned with the date of the crime alleged, it appears no less important, where the time of the occurrence is a factor, as here, that the hour of the alleged incident be afforded equal import. Thus, as here, where a rape is alleged to

occur at one location at a specific time of the day, and the defendant can, without question, prove his being at another distant location at the same time, the matter of time is important and creates factually more than a reasonable doubt as to the guilt of the defendant.

Where defendant can account for his activities, not only on the day of the alleged crime, but also at the exact time that the rape was alleged to have happened, it seems without question that the guilt of defendant has not been established beyond a reasonable doubt. Thus, an objective analysis of the evidence indicates that reasonable minds could not believe beyond a reasonable doubt that defendant is guilty, and so the verdict of the jury cannot and must not stand. See *State vs. Mills*, 122 U. 306, 249 P.2d 211

POINT III

THE EVIDENCE DOES NOT SUPPORT THE ALLEGATION THAT THE CRIME OF RAPE HAD BEEN COMMITTED.

Notwithstanding the verdict of the jury that the appellant raped Linda Sue Laws, and without considering appellant's claim of innocence, the facts as presented by the trial evidence do not support the claim that the crime of rape was committed.

In order for the crime of rape to be committed, the act must be against the resistance of the complainant. The general rule is stated in 44 Am. Jur., Rape. p. 905, as follows:

> ". . . resistance must be by acts and must be reasonably proportionate to the strength and opportunities of the woman. She must resist the consummation of the act, and her resistance must not be a mere pretense, but must be in good faith, and must persist until the offense is consummated."

This court has more strictly evolved the general rule when it stated in *State vs. Horne*, 12 U. 2 162, 364 P.2d 109:

> "The old rule of 'resistance to the utmost' is obsolete. The law does not require that the woman shall do more than her age, strength, the surrounding facts and all attending circumstances make it reasonable for her to do in order to manifest her opposition." See also *State vs. Roberts*, 91 U. 117, 63 P.2d 584.

A review of the facts as presented here indicates that Linda Sue Laws did nothing to resist her claimed violation, nor did she do anything to manifest her opposition to the claimed offense.

Mrs. Laws testified that she saw her claimed assailant with a knife in his hand, at which time he said: "Do what I tell you or I'll kill you." (R-12). She further stated that the only things he told her to do were to "lie down on the bed" (R-12), and put a pillowcase over her head (R-13). She also testified that she did not see the knife after she first saw it in his hand at the bedroom door (R-33, 36).

Thereafter, Mrs. Laws claims, the assailant removed her clothing, ripped her bra, and raped her,

during the course of which she neither saw nor felt the knife. Mrs. Laws also testified that her assailant did not touch her with his hands, except when he ripped her bra (R-37, 39).

When questioned as to her resistance, she stated:

> "Q. You knew he was having intercourse with you at that time?"
>
> A. "Yes."
>
> Q. "Did you scream?"
>
> A. "No, I didn't scream."
>
> Q. "Did you make any effort to close your legs to prevent him from having intercourse with you?"
>
> A. "No, I didn't."
>
> Q. "Did you do anything at this time to resist him?"
>
> A. "No." (R-39).

Thus, it is clear that Mrs. Laws offered no resistance to the claimed rape. She did not vocally or physically offer any resistance, nor did she do anything to manifest her opposition to the claimed offense. It would certainly seem that at least some token resistance should have been made. For her to do nothing under the facts and circumstances could not be considered even as a mere pretense of resistance, let alone resistance of good faith, as required by the general rule of law stated earlier. 44 Am. Jur. 905, supra.

Without some effort to either avoid the rape or to let her opposition be known, it does not reasonably appear that the alleged crime was even committed.

CONCLUSION

The failure of the trial court to grant a new trial after the evidence missing during the trial was found, was an abuse of discretion that prohibited the innocence of the appellant from being properly brought to the view of the jury. This error must be corrected by the court.

This glaring error, coupled with the facts which establish not only that no rape was in fact committed, but that appellant could not have been at the home of the complainant, is so closely akin that a verdict of innocence is probable at a trial where all facts and all evidence are presented for consideration. To not afford the appellant a total trial is to deny him his entire future; a new trial should be granted.

Respectfully submitted,

DANSIE, ELLETT AND HAMMILL

By_____