1971

The State of Utah v. Larry Jiron : Brief of Defendant-Appellant

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

THE STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

LARRY JIRON, :

Defendant-Appellant. :

Case No.
~~1517~~
12092

BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM THE JUDGMENT OF THE SECOND
DISTRICT COURT FOR DAVIS COUNTY
HONORABLE HENRY RUGGERI, JUDGE

MERRILL G. HANSEN
DAY & HANSEN
716 Newhouse Building
Salt Lake City, Utah 84111
Attorney for
Defendant-Appellant

HENRY E. HEATH
Deputy District Attorney
190 South Fort Lane
Layton, Utah
Attorney for Plaintiff-Respondent

TABLE OF CONTENTS

AUTHORITIES CITED

CASES:

Page

STATUTES:

TEXTS:

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No.
LARRY JIRON,	:	1517
Defendant-Appellant.	:	

BRIEF OF DEFENDANT-APPELLANT

NATURE OF THE CASE

Appellant, Larry Jiron, appeals from his conviction on the charge of Second Degree Burglary.

DISPOSITION IN THE LOWER COURT

Appellant was tried and convicted by a jury of the crime of Second Degree Burglary. The Honorable Henry Ruggeri of the Seventh Judicial District Court presided. From a verdict of Guilty, Appellant appeals.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the conviction reversed and the case remanded for a new trial.

STATEMENT OF FACTS

In the early morning of November 18, 1969, Duncan Electric, 290 South Main Street, Bountiful, Utah, was allegedly burglarized (T 6-10). The merchandise taken consisted mainly of several television sets. On November 19, 1969, Salt Lake City and Bountiful policemen recovered several television sets, matching the description and serial numbers of the stolen sets, from the home of Roy Jiron, the brother of the Defendant-Appellant (T 81). Subsequently the Appellant, Larry Jiron, was notified that he was being sought by the Bountiful City Police, at which

time he surrendered himself to them. Thereupon he was charged with the crime of Second Degree Burglary (T 134). The trial for that charge was held January 14, 1970 at Davis County.

The chief witness for the State was Frederick Leslie Palmer, an alleged accomplice in the burglary. He had been granted immunity from prosecution by the State in return for his testimony in the case (T 30). The testimony was extremely damaging to the Defendant-Appellant in that it tended to implicate the Appellant in the planning and perpetration of the crime.

In order to impune the credibility of Palmer, counsel for Appellant attempted to introduce evidence relating to the witness' use of drugs generally and his use of drugs on or about the time of the alleged burglary particularly.

The State's objection to admission of this evidence was sustained (T 65). The Court also refused to allow the testimony of another accused accomplice, Defense witness Michael Townsend. Appellant attempted to elicit evidence concerning Palmer's condition on the night of the burglary, i.e., whether or not he was under the influence of drugs. (T 105). Townsend further testified that Appellant had not been involved in the burglary.

The Appellant attempted once again to attack the credibility of the State's principal witness by cross examining him regarding his discharge from the United States Navy based upon emotional and mental problems. Once again this questioning was objected to and sustained by the Court (T 66).

At the trial, the only corroborating

witness for Palmer's damaging testimony was Christina Jiron, wife of Roy Jiron and sister-in-law of the Appellant. It was from her home that the television sets had been recovered. On direct examination she testified that she had received a telephone call from a man whom she thought was probably the Appellant on the day following the alleged burglary. The caller acknowledged the presence of the television sets and promised to remove them (T 21-23). On cross-examination her testimony revealed that the caller had not identified himself, and she admitted that she was not certain that the Appellant was the caller. In addition, Mrs. Jiron testified that she had not talked to the Appellant on the telephone for three or four months prior to that time, and admitted that the caller could have been

any one of Appellant's many brothers, each having similar voice qualities and accents (T 25-27).

At the end of the State's case Appellant moved for a directed verdict on the basis of lack of sufficient corroborating evidence of the alleged accomplice's testimony. The motion was denied (t 92). At the end of the trial the jury found the Appellant guilty as charged on the information and he was sentenced to the Utah State Prison for the statutory term.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN NOT GRANTING A DIRECTED VERDICT IN FAVOR OF APPELLANT AS THE STATE FAILED TO PRODUCE SUFFICIENT EVIDENCE TO CORROBORATE THE TESTIMONY OF AN ALLEGED ACCOMPLICE.

Section 77-31-18 Utah Code Annotated (1953) provides "A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without aid of the testimony of the accomplice tends to connect the Defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof." In State v. Erwin 101 U. 365, 120 P. 2d 285 (1941) the Court explained the test for sufficiency or corroborating

evidence. "...The corroborating evidence must implicate the defendant in the offense and be consistent with his guilt and inconsistent with his innocence, and must do more than cast a grave suspicion on him, and all of this must be without the aid of the testimony of the accomplice (Emphasis added)". Id at 393. The evidence in our case clearly does not meet the test.

Standing alone, the corroborating evidence in our case does not "implicate" the Defendant in the burglary. It does not "do more than cast a grave suspicion" on the accused. The State's entire case must rise or fall upon the testimony of Christina Jiron and specifically upon the telephone call that she received. (T 22). If the Court ignores the witnesses uncertainty regarding the identity of the caller and

considers her testimony in a light most favorable to the prosecution that testimony, at best, would tend to connect the Appellant with the crime of possession of stolen property but not with the crime of burglary. Had he been arrested for having possession of stolen goods he would have a chance to explain that possession. But that was not the crime charged on the information and was not the crime to be proved. It is important to note that no one ever saw Appellant with the television sets and no one testified to ever having seen the Defendant either immediately before or after the burglary with either of the admitted participants.

Mrs. Jiron's testimony does not sufficiently tie the Appellant to the crime to sustain the State's burden. She testified:

Q. And, did you recognize the voice on the phone?

A. Yes.

Q. Tell us whose voice it was.

A. Larry's.

Q. Are you referring to Larry Jiron?

A. Yes.

Q. Who is seated here with counsel; is that correct?

A. Yes (T 22).

...

Q. Tell us what, if anything, was said by Larry as he called you.

A. He just asked for Roy.

Q. And what did you tell him?

A. He wasn't home.

Q. And then what, if anything, was said.

A. He just said that he brought some T.V.s down and he was getting them out that night (T 23).

After this the Appellant, on cross-

examination of Mrs. Jiron, asked if she was really certain that it was Larry Jiron on the telephone. She answered "No". (T 25) And testified on re-cross:

Q. Mrs. Jiron, could it have been someone else in your mind?

A. Yes. It could have been one of his brothers. I don't know.

Q. How many brothers are there?

A. Four, I think.

Q. Similar quality to their voices?

A. Yes.

Q. Similar type accent?

A. Yes (T 26,27)

And later it was established that Mrs. Jiron had not talked to Larry on the telephone for three or four months prior to the telephone call about which she was testifying (T 67).

Clearly then, the State's only corroborating witness (T 94) did not

sufficiently implicate the Appellant with the crime charged. She admitted it could have been one of four other brothers. This is important especially since the accomplice also tried to implicate two of the brothers she mentioned, John (T 33), and Richard (T 42). Also she said it could have been "Junior or Dave". (T 27) Considering all of these alternative identifications of the voice on the telephone, there was not sufficient corroborating evidence, as required by statute, that the Appellant was implicated in the burglary.

This Court, in State v. Clark, 3 U. 2d 382, 284 P. 2d 700 (1955) held that a corroborating identification was insufficient to support the accomplices' testimony. That case involved a woman who was the recipient of an illegal abortion and who was the State witness-

accomplice. Her husband was to provide the corroborating evidence against the defendant who was the alleged procuress. The wife became very ill the evening of the abortion and her husband proceeded to take her to a hospital. He was met on his front porch by a woman who fit the description of the defendant; she warned him not to take his wife to the hospital. The woman again stopped him in front of the hospital and warned him against taking his wife in. The husband at trial said that he could not be absolutely positive about the lady's identification. It was held that the corroborating evidence was insufficient. In addition to the husband's tentative identification, the phone number of the defendant was in his wife's purse, he called the number for his wife the morning of the

abortion and the woman, when arrested, had abortion inducing drugs in her purse. The Statute involved in the Clark case was 77-31-14 Utah Code Annotated (1953) which has similar corroboration requirements. In our case there is certainly less evidence tying Appellant to the crime than was adduced in the Clark case where the corroboration was found to be insufficient.

In State v. Pratt, 25 U. 2d 76, 475 P. 2d 1013 (1970) this Court, in a three to two decision, found there was a lack of sufficient corroborating evidence for the testimony of an alleged accomplice on a contributing to juvenile delinquency charge. In that case a young girl posed for lewd pictures. The girl, the half sister of the Defendant could not, with any certainty, implicate the Defendant in the activities. She could not defi-

nitely place him at the scene of the crime. While the Defendant admitted being there temporarily, he presented an alibi for the bulk of the period involved. The Court in reversing the lower Court found vagueness and uncertainty in the testimony of the corroborating witnesses.

In our case there is certainly vagueness and uncertainty in the testimony of Mrs. Jiron. The fact that there are several brothers who could have made the call, coupled with the lack of sufficient conversation on the telephone to tie the caller with the burglary should clearly invalidate the value of the testimony. Her "testimony is no stronger than its weakest link on cross-examination" (State v. Pratt, supra) and the burden of corroboration is more weight than that testimony can bear.

It is also important to note that

both the Court and the prosecutor commented on Mrs. Jiron's apparent candor, frankness and honesty. She also stated that there was no other reason than the sound of the voice, for believing the caller was Appellant and that all Appellant's brothers sounded alike.

There is further reason to look with extra care at the testimony of the accomplice. Just prior to the burglary the witness and the Appellant had two disagreements. (T 66, 67, 135, 136). They may have been enough to have the Witness include another name in his story. The act of the Appellant in refusing to allow Palmer to stay at Appellant's apartment and the fact that Palmer felt Appellant was responsible for damage to a rented car makes it incumbent upon us to assess at the probable motivation behind his testimony.

The State has the burden of proving guilt of the accused beyond a reasonable doubt. In this case, where the only evidence directly connecting the Appellant with the crime is the testimony of an admitted accomplice, there is an additional burden of sufficient corroborating evidence. This burden was not met and the trial Court should have directed the verdict as moved by Appellant.

POINT II

THE TRIAL COURT ERRED IN NOT PERMITTING EVIDENCE CONCERNING THE USE OF DRUGS BY THE STATE'S CHIEF WITNESS AND PARTICULARLY HIS USE OF DRUGS ON OR ABOUT THE TIME OF THE CRIME.

Mr. Palmer, the State's admitted accomplice, was questioned concerning his use of drugs. The prosecution had its objections sustained by the Court

and was able to have this damaging evidence excluded (T 65). The purpose of Appellant was to show that the witness was under the influence of drugs on the night about which he was testifying and that his memory was therefore impaired. The State had questioned one of the Appellant's witnesses, Michael Townsend, another admitted accomplice, about his use of drugs on the night in question (T 104), and argued that he could not remember the events of that night as a result. Appellant asked that witness if Palmer was also on drugs that night but State's objection was sustained (T 105). Appellant contends that such questioning was probative and that the jury should have been allowed to consider this evidence as it would have related to the credibility of the testimony of the State's chief witness.

There are no Utah cases directly in point; however, several other States have dealt with the problem and generally hold that evidence of drug use should be admissable.

In State v. Fong Loon, 158 P. 233 (Idaho., 1916) the Defendant was accused of murder. The victim was Chinese and made a dying declaration in Chinese. The witness for the State took the dying declaration and translated it. An attempt to impeach his perceptive ability and credibility was made by the Defense in introducing evidence of the use of opium by the witness. The evidence was excluded. The Supreme Court found reversible error saying, "But we do mean to hold that the habitual use of morphine, cocaine and other like narcotics, which inevitably tend to impair the mind, destroy the memory and moral character of a witness

may be shown for the purpose of affecting his credibility or the weight that should be given to his testimony." Id at 237. In this case it was not asserted that the witness was using drugs at the time he took the dying declaration, rather that he was an habitual user.

Two Texas cases support this rule. In a murder case the trial court excluded testimony offered from the prosecuting witness herself and from others that she was a morphine addict. It was not alleged that she was under the influence at the time of the event about which she was testifying. The Court of Criminal Appeals reversed. They held the evidence was admissible for purposes of testing the credibility of the witness. Andersen v. State, 144 S.W. 281 (Tex., 1912).

In the other case, Beland v. State,

217 S.W. 147 (Tex., 1920) the crime charged was larceny. The only real witness for the State was allegedly a morphine addict. An attempt was made by the defense to question both the witness who used drugs and other witness about his use of drugs. The evidence was excluded. The Court of Criminal Appeals reversed saying in part, "It has been held in this State in a number of cases that it may be shown that a witness was drunk at the time of the occurrence about which he seeks to testify: (citations). We are of the opinion that if it can be successfully established that a material witness is an habitual user of cocaine, morphine, or opium, that fact should be admitted as a circumstance to be considered by the jury in determining his memory and mental condition." Id.

A Montana case, in spelling out that drug addiction is not generally admissible would still allow it in our case. In State v. Glein, 41 Pac 998 (Mont., 1895) at 1001 the court said, "We see no error in refusing to permit a Witness to be asked on cross-examination, for the purpose of affecting her credibility, whether or not she is addicted to the morphine habit (cite), unless it is proposed to show that the witness was under the influence of the drug at the time the events happened about which she testified, or unless she was under the influence of morphine at the time she is testifying, or unless it is made to appear that her powers of recollection are impaired by the habitual or excessive use of the drug." (Emphasis added)

And in McCormick, Evidence Section

45 (1954) at page 98, "one form of abnormality is that of being under the influence of drugs or drink. If the witness was under such influence at the time of the happenings which he reports in his testimony or is so at the time he testifies, this of course is provable, on cross or by extrinsic evidence, to impeach."

In our case the trial court should have permitted the evidence as to the use of the State's witness Palmer's use of drugs on the night of the burglary. This would have a great impact on the jury's acceptance of his powers of perception at that time, perhaps his memory ability and certainly the credibility of his testimony. Where the only real witness to the crime is high on drugs, justice demands that the jury know about it.

POINT III

THE TRIAL COURT SHOULD HAVE ADMITTED EVIDENCE THAT THE STATE'S CHIEF WITNESS HAD BEEN RECENTLY DISCHARGED FROM THE UNITED STATES NAVY FOR REASONS OF EMOTIONAL INSTABILITY AND THAT HE HAD ATTEMPTED SUICIDE ONLY EIGHT MONTHS PRIOR TO THE EVENTS ABOUT WHICH HE WAS TESTIFYING.

The Appellant was prepared to introduce evidence that the State's chief witness, Frederick Palmer, was discharged from the U.S. Navy for reasons of "a duly diagnosed emotionally unstable personality". Also, the Appellant was prepared to show that Palmer had, only eight months before the burglary, attempted to take his life by slashing his wrists. When Appellant asked the Witness, on cross-examination, about the state of his emotional and

mental health, the prosecution objected and was sustained (T 66). The aim of the questioning was to impeach the credibility of the testimony.

There have been no Utah cases dealing with the admissibility of evidence of a witness's mental health in order to impeach the credibility of the testimony. However, several other jurisdictions have confronted the problems we have here.

In Markowitz v. Milwaukee Electric Ry. and Light Co., 284 N.W. 31 (Wis., 1939) the witness, a woman, had received serious injuries in an accident some months before. The defense objected to her testifying but she was allowed. However, the evidence of her damaged spine and head and resulting hysteria were admitted for purposes of attacking her credibility and would go to the weight of the evidence.

In North Carolina, in the case of State v. Conrad, 168 S.E. 2d 39 (N.C., 1969), the problem was the attempted suicide. The Defendants in that trial were accused of conspiracy to commit murder. The witness, an ex-girlfriend of one of the defendants, gave some very damaging testimony about the conspiracy. The high court held reversible the fact that the defense could not question her as to her attempted suicide two years before. The Court said, "In light of the prejudicial testimony which the witness had given against both Ballimore and Davis, her attempt at suicide conceivably might have some relevancy as to her mental balance and her recollection sufficient to be impeaching." Id at p. 44.

And in Commonwealth v. Towber, 152 A 2d 917 (Pa., 1959) at p. 920 the Court said, "Psychiatric treatment in a hospital

within seven months of the date of trial was near enough to raise a question for the jury as to the effect of Fitzgerald's mental disorder on his credibility." In that case, as here, the crime was burglary, and there the witness was an accomplice who had been granted immunity from prosecution. The omission of psychiatric care evidence by the trial court was found to be reversible error.

In light of the decisions relative to this issue and the crucial role played by Palmer in this case, reversible error should be found. Whenever one man, by his sole testimony, can endanger a person's freedom, justice demands that every chance be given to impeach his credibility. Where, as in our case, the witness had within recent months been discharged from the military for reasons of emotional instability and

had only eight months before attempted suicide, it is vital that the jury have this information to provide them with the background necessary for a responsible analysis of his testimony.

It is ordinarily the rule that the Court allow wide latitude in the scope of the cross-examination so that the net testimony is reduced to its proper qualitative value. "The purpose of cross-examination is to give adversary counsel the opportunity not only to inquire into uncertainties relating to the testimony in chief, but to test its credibility. Whatever may tend to explain, modify or contradict that direct evidence should be allowed." Weber Basin Water Conservancy District vs. Ward, 10 U.2d 29, 347 P.2d 862 (1959).

CONCLUSION

It is submitted that on each of the issues presented herein, both the facts and the law are in accordance with the contentions of the Appellant.

For lack of sufficient evidence to corroborate the testimony of an accomplice, a directed verdict should have been rendered in favor of the Defendant-Appellant.

By not admitting testimony concerning the use of drugs by the State's chief witness, the Court did not permit the jury to fully weigh the witness's testimony nor allow the Defendant-Appellant an opportunity to test his credibility.

It is further submitted that the trial court also erred in not admitting evidence tending to question the credibility of the State's primary witness.

Justice demands a reversal of the conviction and that the case be remanded for a new trial.