1971

The State of Utah v. Larry Jiron : Brief of Respondent

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

LARRY JIRON,
Defendant-Appellant.

BRIEF OF RESPONDENT

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

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CASES CITED

RELIEF SOUGHT ON APPEAL

The Respondent submits that this Court should affirm the District Court's verdict.

STATEMENT OF FACTS

The respondent agrees with the statement of facts set out by appellant, subject to the following additions. Although Mrs. Roy Christine Jiron and Frederick Leslie Palmer's testimony may appear to have been rather insufficient for corroboration of an alleged accomplice's testimony (Palmer), the testimony of Jan Croxford (T. 158) and Maureen Iris Callahan (Tr. 163), when coupled with Christine Jiron's testimony, served to bolster the corroboration needed to make sufficient Palmer's eyewitness account as a principle to the crime charged.

ARGUMENT

POINT I.

ADEQUATE CORROBORATING TESTIMONY WAS RECEIVED AT TRIAL TO CONVICT JIRON OF THE CRIME OF SECOND DEGREE BURGLARY.

Even though Palmer was an alleged accomplice, appellant would have this Court place a much greater burden on the State to corroborate such testimony than is required by case law as this court has many times stated:

> "It is not essential that the corroborative evidence shall be sufficient of itself to support verdict of guilty, nor is it essential that testimony of the accomplice be corroborated *on every material point;* but it is sufficient if testimony of accomplice is corroborated as to *some* material fact, and without aid of testimony of accomplice, *tends to connect* defendant with the commission of the offense." (Emphasis ours) *State v. Vigil, 123 U.* 495, 260 P. 2d 539, 541 (1953); *State* v. *Cox,* 74 U. 149, 277 P. 972 (1929); *State* v. *Stewart,* 57 U. 224, 193 P. 855 (1926); *State* v. *Spencer,* 15 U. 149, 49 P. 302 (1899).

Likewise, Utah Code Ann. § 77-31-18 (1953) merely requires that the corroborative evidence "*tend*" to connect the defendant with the commission of the offense. (Emphasis ours.) Admittedly, questionable inferences of Christine Jiron's identification of Larry Jiron's voice raised valid factual issues for the jury to consider.

However, the testimony of Kenneth L. Duncan, the store owner, positively identifying Jan Croxford, appellant's girl friend, as having suspiciously entered the store just prior to the robbery, does more than merely tend to implicate Larry Jiron, especially when we consider the fact that after Miss Croxford quizzed the store owner as to the presence of television sets in his store, and without waiting for a reply, turned "suspiciously around, giggled, and walked out the door" (T. 158).

Mr. Duncan in being questioned as to the identity of Miss Jan Croxford, stated the following:

Q. But absolutely, this is the same girl?

A. Yes, Sir.

Q. No questions in your mind at all?

A. No questions in my mind (T. 158).

* * *

Q. You recognized her immediately as the girl?

A. I recognized her when we were standing in the hall; when she came down the hall.

Q. This morning (day of trial)?

A. Yes, sir (T. 159).

In further refuting Larry Jiron's alibi another witness, Maureen Iris Callahan, stated that in the early morning hours of the 18th of November, 1969, she attempted to visit Jan Croxford and Larry Jiron in the apartment at which they resided. Although she knocked "quite awhile," no one came to the door. The approximate time was between 1:30 and 3:00 a.m., the alleged time during which the robbery on the Duncan store was allegedly being committed. (Jiron had alleged in his alibi having remained all night in Jan Croxford's apartment.)

Therefore, the testimonies of Miss Callahan and Mr. Duncan, when coupled with that of Mrs. Roy Christine Jiron, adequately corroborated Frederick Leslie Palmer's testimony as to the details of the crime. The requirements of Utah Code Ann. § 77-31-18 (1953) were complied with by the prosecutor for the State.

POINT II.

PALMER'S TESTIMONY AT TRIAL ADEQUATELY DISPLAYED HIS COMPETENCY TO TESTIFY TO THE EVENTS WITNESSED THE NIGHT OF THE ROBBERY. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OMITTING TESTIMONY AS TO PALMER'S ALLEGED USE OF DRUGS OR MENTAL CONDITION.

In refuting the competency of the State's witness, Palmer, based upon his alleged mental imbalances and use of drugs, appellant, in contradistinction to prevailing case law, asserts that one's status as a user of drugs or certain mental defects, is per se, sufficient criteria for refuting the credibility and competency of the state's witness. Granted there may be times when a person's use of drugs causes mental defects so serious as to impair his ability to accurately testify and recall certain facts. Nowhere in the record is there any indication that Palmer's capacity to recall and reflect on his testimonial facts was any way impaired by physiological inadequacies.

Relying on the case of *State* v. *Fong Loon*, 158 P. 233 (Idaho 1916), appellant Jiron asserts that we should restrict the testimony of drug users. The state submits however, that this case can be adequately distinguished on its facts and is totally inappropos to the case at bar. In *Fong Loon* the witness, an alleged opium user, had been used as a translator to record and convey messages from

the victim in a shooting incident. The State tried to present the "dying declarations" from the deceased as substantive proof of defendant's guilt. Actually the case involved a "double hearsay" problem based upon the fact that the deceased had not spoken English. Since his dying declarations were hearsay, the compounded fact that he had to be translated by another, the impeached witness, who later testified as to what was said, caused the testimony to be inadmissible. So much of the case hinged on the translator's ability to remember, convey, recall and interpret that a serious question of competency was, of necessity, mandatorily imposed by the court:

> "And we think it was error for the court to restrict counsel for appellant's attempt to elicit by cross-examination this information from Yee Wee, or to lay the foundation for the purpose of establishing by independent proof that Yee Wee was an habitual user of opium or other like narcotics, the extent of that use, and what, if any, effect it had, or was more than likely to have, upon the mental balance of this witness, the truthfulness of his testimony, and his capacity to remember and correctly translate the questions of the representative of the state to Fong Chung into Chinese and Fong Chung's answers into English." *Id.* at 236.

The Court in *Fong Loon* was concerned primarily with what was said by a hearsay witness now deceased as conveyed through an addicted interpreter. The case at bar deals with the witness's first hand account of what he and defendant did, not as "double hearsay," but as actual criminal conduct. Regardless of Palmer's use of drugs or mental incompetencies, unless they affected his

ability at the time of trial or impaired his ability at the time of the crime to recollect what happened, none of his statements should have been excluded.

Appellant would have us apply a very limited series of cases on evidence to a much broader and less restrictive area of evidential proof on admission of testimony by state's witnesses. By combining appellant's Points II and III, the State submits that Palmer's testimony, having been properly corroborated by three different witnesses, was clearly admissible and probative of the issues at bar.

Although there is very little case law developed in Utah as to the competency of a witness determined by mental capacity or the use of drugs, it does seem fairly well settled that this State does permit and grant wide latitude to the trial judge, to, in his discretion, admit or restrict evidence as a matter of law based on the competency of the witnesses produced.

In ruling on the competency of a six year old child to testify, the court stated:

> "As we have previously observed, no particular age nor any specific standard of mental ability can be set as the qualification for giving testimony, but it is an important factor to be considered along with others, in determining whether a witness should be allowed to testify. What is essential is that it appears that the child has sufficient intelligence and maturity that she is able to understand the questions put to her; that she has some knowledge of the subject under inquiry and the facts involved therein; that she is able to remember what happened; and that she has a sense of moral duty

> to tell the truth. Whether she meets those tests and is therefore a competent witness is within the sound discretion of the trial court to determine. His ruling will not be disturbed by the absence of a *clear showing of abuse.*" (Emphasis ours.) *State* v. *Smith*, 16 U. 2d 374, 377, 401 P. 2d 445 (1965).

In the case of *State* v. *Scott*, 22 U. 2d 27, 447 P. 2d 908 (1968), the Court in deciding the competency of a former state mental patient went on to say:

> "A reading of the testimony of the witness clearly shows that he was competent. Whether or not he was truthful was for the jury to determine." *Id.* at 29.

As in the *Smith* case, the *Scott* case uses similar criteria such as the ability to communicate to the jury general intelligence and coherence of testimony, all of which Palmer displayed by his testimony now on record. The trial judge had adequate reason to find the witness competent:

> "After the trial court is satisfied with the competency of the witness, the final judgment as to the credibility and weight to be given the testimony is for the jury." *Scott, supra* at p. 27.

The law in Utah is that evidence which tends *to be highly material* to the issues in a dispute is admissible. Utah Code Ann. § 78-24-1 (1953). In stating who may be witnesses, the Code states:

> "All persons, without exception, otherwise than as specified in this chapter, who having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. Neither parties nor other persons who

> have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question, by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or by his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility."

The only qualification for witnesses in this Chapter of the Code is Section 78-24-2 which states that the following persons cannot be witnesses:

> "(1) Those who are of unsound mind *at the time of their production for examination.*" (Emphasis ours.)

A reading of Palmer's testimony obviously supports his fitness to testify based upon the criteria found in the Utah Code. Even though Palmer may have used drugs or been previously unfit emotionally, there was no indication, at least in the jury's mind, that Palmer was unfit to testify; the jury having been fully informed of the requirements for competency and credibility of witnesses, through the judge's extensive jury instructions on the competency issue (Jury Instructions 9-13).

Expansion of this admissibility of testimony to neighboring jurisdictions, as well as the federal courts, points up the general consensus that mental competency and use of drugs does not disqualify a witness per se. In *United States* v. *Kearney*, 420 F. 2d 170 (1969), the court said:

> "All rules as to admissibility of evidence are subject to supervening considerations that seek to avoid substantial danger of undue prejudice or jury confusion. The issue of narcotics use is one that may be properly handled with some sensitivity lest it result in undue and unnecessary prejudice. There is an interest in avoiding undue evidentiary assault on prosecution witnesses. *Davis* v. *United States*, 133 U. S. App. D. C. 167, 409 F. 2d 453 (1969). Prejudice may result if questions asked for the limited purpose of testing, say opportunity to observe, are permitted to generate a hostility based on the general odium of narcotics use." *Id* at 174.

In the case of *Herrera* v. *State*, (Ct. of Crim. App., Texas), 462 S. W. 2d 598 (1971), the appellant had sought to attack a witness's competency to testify based upon the foundation laid that witness had been a narcotics addict. "There was no showing, however, that at the time of the hearing or trial or at time of commission of the alleged offense the witness was under the influence of narcotics or that her mental capacity or recollection was impaired to any extent." *Id.* at 598. In overruling defendant's allegation of the state witness's incompetency by citing from 97 C. J. S. Witnesses § 59b, p. 454, the Court stated:

> "A witness is not rendered incompetent by the fact that he was under the influence of a drug at the time of the occurrence as to which he testifies, or at the time of giving testimony. So, a person who is so stupified by drugs that he does not realize until afterward what has happened is not rendered incompetent by a statute declaring persons

> incompetent as witnesses where they are insane at the time of the happening of the events to which they are called to testify. Further, *a drug addict* may be a competent witness." (Emphasis ours.) See also *U.S. v. Fannuzzo*, 174 F. 2d 177 (C.A. 2d N. Y. 1949). *Brown* v. *U. S.*, 222 F. 2d 293 (C. A. 9th, Cal. 1955).

In the case of *People* v. *Ortega*, 2 Cal. App. 2d 884, 83 Cal. Rptr. 269 (1969), "under the guise of impeachment, the prosecution asked questions, the purpose of which could only degrade the witness." The impeachment was based solely on the fact that the witness was a narcotics addict. In reversing the conviction on appeal, the court found prejudicial error in such line of questioning based upon the lack of a showing by the prosecution that the witness's use of drugs did in any way affect his present ability to recollect or competently testify.

It is quite obvious, then, from a reading of the case at bar, that Jiron's allegations as to Palmer's competency are unsupportable when one considers the detail, clarity and extent of Palmer's testimony, coupled with the corroborating testimony of Christine Jiron, Iris Callahan, and Mr. Duncan. It is plain to see that no prejudicial errors were committed in prosecution of evidence and production of witnesses before the jury. The discretion of the trial judge was validly exercised in admitting and excluding certain evidence. With the extensive jury instructions that were given as to credibility and competency of the witnesses, a reading of the record on appeal clearly substantiates the verdict of guilty rendered by the jury.

CONCLUSION

For the reasons enumerated herein, respondent submits that under the facts of the case no injustice was committed against Larry Jiron by admission of certain evidence as to various witnesses. Certainly Jiron's brief fails to raise incidents of reversible error which denied him due process of law as portrayed by the record. Therefore, respondent respectfully submits that the jury verdict and conviction in the district court should be affirmed.

Respectfully submitted,

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