1971

The State of Utah v. Weldon Bassett And Judy Bassett : Brief of Respondents

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

WELDON BASSETT and [illegible] BASSETT,

Defendants-Appellants.

BRIEF OF [illegible]

APPEAL FROM THE SECOND JUDICIAL [illegible] FOR WEBER COUNTY, HONORABLE JOHN F. [illegible] SIDING.

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Defendants-Appellants.

Case No. 12727

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This is a criminal action charging the defendants and each of them with Involuntary Manslaughter for the death of their minor child.

DISPOSITION IN LOWER COURT

The Jury found both defendants guilty of Involuntary Manslaughter.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have this Court affirm the judgment of the lower court.

STATEMENT OF FACTS

Weldon and Judy were the parents of Erica Jean Bassett, who was approximately two and one-half months old at the time of her death (T. 133-34).

On September 11, 1970, Judy Bassett gave birth to a daughter, Erica Jean Bassett, at St. Benedict's Hospital in Ogden, Utah. The baby was a breech birth, buttocks first, but this was only a moderate problem (T. 120). Dr. Rogers delivered the baby and testified it was not injured and was a normal healthy baby (T. 121). Dr. Rogers further testified the child was healthy, normal and was growing at its third week and sixth week checkups.

On November 8, 1970, the child was brought into the pediatrics ward at McKay Hospital with a fever and convulsions (T. 123). There were bruises around the ear of the child (T. 124). The child had lost weight since its sixth week checkup (T. 128) and was kept in the hospital four days (T. 131). Dr. Rogers testified the problem of a battered child presented itself and under the law the doctors filled out forms to report the matter to the police (T. 131). They even tried to have the Juvenile Court intervene and relieve the family of responsibility of the child but were unsuccessful in doing so (T. 131). The child was released to the parents but on November

24, 1970, the child was admitted to St. Benedict's Hospital (T. 136). The child was dead.

An autopsy was performed on the child. The autopsy showed five fractures involving four ribs (T. 171), three brain injuries, perhaps six bruises, (T. 175-185) on the chest and both arms (T. 170).

The Appellants, Weldon and Judy Bassett were accused and convicted of the crime of Involuntary Manslaughter. It is from this conviction the Appellants are appealing.

ARGUMENT

POINT I.

THE TRIAL COURT CORRECTLY DETERMINED THAT THERE WAS SUFFICIENT EVIDENCE TO GO TO THE JURY AND TO SUSTAIN THE JURY'S VERDICT.

Involuntary Manslaughter as defined by Utah Code Ann. § 76-30-5(2) (1953) is as follows:

> "(2) Involuntary in the commission of an unlawful act not amounting to a felony or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection."

Utah case law defining the meaning is sparse. However, in *State* v. *Lingman*, 97 Utah 180, 91 P. 2d 457 (1939), an automobile homicide case, this Court outlined the statute and its meaning. The first part of the statute

"an unlawful act not amounting to a felony" was defined by the Court when it stated:

> "We think the 'unlawful act' that is, the infraction must be done in such a manner as to more than constitute a mere thoughtless omission or slight deviation from the norm of prudent conduct." 91 P. 2d at 466.

In *State* v. *Peterson*, 116 Utah 362, 210 P. 2d 299 (1949), this Court added:

> "We also stated therein that the 'unlawful act' must be 'reckless or in marked disregard for the safety of others.' The implication is that the nature of the unlawful act must be such that it has the potentialities of injury to others." 210 P. 2d at 230-1.

An analysis of the meaning of these cases and the law derived therefrom show that an "unlawful act" may be a significant omission or a deviation from the norm of prudent conduct and it must be such that it has the potentialities of injury to others.

The second part of the statute which states, the commission of a lawful act which might produce death (1) done in an unlawful manner, or (2) done without due caution and circumspection was explained in *Lingman*, supra, when it stated:

> "The distinct characteristic . . . is that the act must be one which has knowable and apparent potentialities for resulting in death. If such an act is done in an unlawful manner or without due care and circumspection, the criminal negligence is present." 91 P. 2d at 466.

Criminal negligence was defined by the court in *Howard* v. *State*, 88 Okl. Cr. 4, 199 P. 2d 240 (1948), as "the omission to do something which a reasonable or prudent person would do, or the doing of something which such person would not do under the circumstances surrounding the particular case." 199 P. 2d at 244.

In the case at bar, the trial court judge looked at the evidence presented by the prosecution. This evidence consisted of at least three brain injuries, perhaps as many as six, but at least four broken ribs, bruises on the chest, bruises on both arms, the child was in convulsions as a result of injury on the 8th of November and new injuries resulted in the death of the child by November 25th (T. 242).

The judge stated the parents had to exercise reasonable ordinary care to protect their children and the failure to do this if it reached gross proportions would be enough to convict the parents (T. 242-3). The case was then submitted to the jury. No positive act is required, only the omission to positively protect their children as is their responsibility.

The defendants testified they had almost exclusive control of the child from the time of its birth with some minor exceptions (T. 304). Even on the minor occasions, there was testimony they didn't notice anything unusual about the child (T. 304). Any injury that occurred to the infant would have to have occurred while the parents were responsible according to their own testimony.

Whether or not an omission or deviation from the norm of prudent conduct existed to convict the defendants of Involuntary Manslaughter rested with the jury.

Appellant claims there was no act nor intent offered into evidence as required by Utah Code Ann. § 76-1-20 (1953). The respondent has shown that no positive act need occur but an omission may constitute the unlawful act in Involuntary Manslaughter cases. Also Involuntary Manslaughter involves an unintentional killing, therefore, Utah Code Ann. § 76-1-20 (1953) is not applicable. This Court in *State* v. *Cobo*, 90 Utah 89, 60 P. 2d 952 (1936), in a Voluntary Manslaughter case held the killing must be intentional or wilful whereas an unintentional killing results in Involuntary Manslaughter. 60 P. 2d at 956.

Appellants further allege the evidence does not support the jury verdict of guilty. Appellants point out many things that remotely could have caused the injuries.

Appellants ignored the expert testimony of Dr. Rogers to the effect the child suffered from high temperatures, loss of weight, bruises and convulsions (T. 123-126). Dr. Rogers further testified that he and two other doctors (Dr. Grant Way and Dr. James Hansen) tried to get the Juvenile Court to intervene and relieve the family of the responsibility of caring for the child until the injuries were clarified (T. 131).

Dr. Weston testified as to the bruises, fractures and hematomas on the child (T. 165-185). Dr. Weston fur-

ther testified he believed these injuries were caused by a person or persons (T. 188) and he found no other cause of death (T. 188-189).

Dr. Grunnet testified as to the severity of the subdural hematomas (T. 215-225).

There was other evidence presented that the child was normal, healthy and happy while in the hospital on its third and six week checkups and during the period following November 8th.

This is not an intentional crime but one of negligence. One where the parents have failed to provide the due caution and circumsection necessary to insure the life of a small infant.

The evidence was more than mere speculation and it was properly submitted to the jury for its determination. According to well settled rules of law it is within the province of the jury to determine from all the facts and circumstances surrounding the death of the infant whether there was sufficient negligence as to render the appellants guilty.

This Court has upheld this theory in *State* v. *Read*, 121 Utah 453, 243 P. 2d 439 (1952), in deciding a case wherein defendant was convicted of Involuntary Manslaughter, held:

> "The evidence, admittedly conflicting, and therefore a jury question unless reasonable minds could arrive at no conclusion other than that there was no criminal negligence, was obviously such that a

jury reasonably could have concluded that a defendant's conduct was of that type required to justify conviction on grounds of criminal negligence." 243 P. 2d at 440.

Reasonable minds could not arrive at only a conclusion there was no criminal negligence, therefore, this case was properly submitted to the jury for its verdict and ample evidence existed for the conviction returned by the jury.

POINT II.

THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 8, SETTING FORTH THE ELEMENTS TO BE FOUND BY THE JURY IN ORDER TO CONVICT THE DEFENDANTS OF INVOLUNTARY MANSLAUGHTER.

Instruction No. 8 as given to the jury is as follows:

"No. 8

Before you can convict the defendant of the crime of Involuntary Manslaughter you must find from the evidence, beyond a reasonable doubt, all of the following elements of that crime.

1. That Erica Bassett was the lawful child of the defendant under consideration and as such the defendant was under an obligation to provide ordinary protection. The protection that a parent must provide need not be of exceptional or extra careful or unusually wise type of protection, but need only be in accordance with community minimal acceptable standards.

2. That Erica Bassett died as a result of head injuries caused by trauma and that the trauma was administered while there existed a child-parent relationship with the defendant under consideration on or about the date alleged.

3. That the parent under consideration failed to provide minimal protection for the child and because of such failure the child received the trauma that resulted in its death. A parent is not a guarantor of the safety of a child but is required to use ordinary reasonable care. The criminal law does not punish a parent for negligent care of a child unless that negligence is so gross as to amount to wilful disregard for the consequences and it must be under circumstances containing no satisfactory excuse. While a parent may under many circumstances reasonably trust the other parent to provide protection, neither parent may totally shift the duty to the other unless the circumstances appear to warrant such confidence.

If you believe that the evidence establishes each and all of the essential elements of the offenses beyond a reasonable doubt, it is your duty to convict the defendant. On the other hand, if the evidence has failed to so establish one or more of said elements then you should find the defendant not guilty."

Appellants' contention is that there was no mention of a requirement given that defendants committed an unlawful act. The major fact appellants overlook is that the whole instruction goes to an omission that in and of itself is an unlawful act. That is, the appellants failed to provide the requisite care to protect the life of their child and are therefore grossly negligent. This is in com-

plete agreement with the wording of the statute as is shown in Point I. Appellants had complete control of their child at all times, thus any injury had to occur while there existed a child-parent relationship. Whether there occurred a lawful act by appellants which might have produced death in an unlawful manner or without due circumspection was properly submitted to a jury for its determination.

The instruction was properly given by the court and was in harmony with the intent and meaning of Utah Code Ann. § 76-30-5(2) (1953).

CONCLUSION

The evidence was sufficient to submit the case to a jury and allow them to find that the appellants were responsible for the death of their child while committing an unlawful act not amounting to a felony or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection.

The trial court correctly denied appellants' motion for a directed verdict.

Instruction No. 8 concerning the elements necessary to find the appellants guilty of Involuntary Manslaughter was properly given by the trial court and is consistent

with the meaning and intent of the law.

It is respectfully submitted that the verdict of the jury and the judgment of the trial court should be affirmed.

Respectfully submitted,

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