2001

State of Utah v. Robert Maxson Vickers : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondant, vs. ROBERT MAXSON VICKERS, Defendant-Appellant.	CASE NO. 14300

BRIEF OF APPELLANT

Appeal from a conviction for Placing an Infernal Machine in the Fifth District Court for Washington County
The Honorable J. Harlan Burns, Judge

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STATEMENT OF THE NATURE OF THE CASE

This is a case of first impression involving a comparison as to the meaning and possible overlap of two statutes in the new criminal code. This appeal is from a conviction, judgement and sentence for the crime of Placing of an Infernal Machine in violation of section 76-10-307 U.C.A. 1953 (as amended). The issue raised by Appellant is that he should have been convicted and sentenced for the crime of Arson by means of explosives in violation of section 76-6-102.

DISPOSTION IN LOWER COURT

Appellant was tried by jury before the Honorable J. Harlan Burns, Judge of the Fifth Judicial Court, and convicted and sentenced for Placing of an Infernal Machine in violation of section 76-10-307 U.C.A. 1953 (as amended).

Appellant argued throughout his trial that he could only properly be convicted of and sentenced for the crime of Arson by means of explosives. This argument was raised in the form of motions for a dismissal and directed verdict; requested jury instructions on the offense of Arson and the definition of Infernal Machine; objections to the jury instruction used by the trial court in defining Infernal Machine; and a motion at the time of judgement and sentencing wherein Appellant requested that he be sentenced in accordance with the penalty provisions for the crime of Arson.

This appeal is from the rulings of the trial court in denying all of Appellant's motions and requests concerning the argument that Appellant was guilty of the crime of Arson by means of explosives rather than the crime of Placing of an Infernal Machine.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his conviction and sentence and respectfully requests that this court remand this case for resentencing as a class A misdemeanor. In the alternative, Appellant seeks a new trial wherein the jury would be instructed on the crime of Arson by means of explosives.

STATEMENT OF FACTS

Shortly after 2:00 a.m. on March 13, 1975, in Washington, Utah, the back end of a car belonging to Phillip Hartley was blown up (T. 21). Shortly thereafter Appellant was found in the back yard of the Hartley residence.

Appellant had taken some dynamite and placed it at the back bumper of the Hartley car (T.108). After lighting it, he left the scene, but realized what he had done and returned to undo what he had started (T.108,9). The time between lighting the charge and returning to the car was established by Appellant at four to ten minutes (T. 118), and as he grabbed the dynamite it exploded (T. 108,9). As is common practice in detonating dynamite, Appellant had used a blasting cap and fuse (T. 113).

The car was damaged in the amount of $975.00 (T. 28). Appellant testified he just wanted to cause damage to the car (T. 108. 118), but some circumstantial damage did occur. Some plaster boards and nails in the house had been jarred about a quarter inch by the concussion and the front porch roof was loosened (T. 22,23). There was also damage to grass and bushes and doors on a shed (T. 23). This other damage amounted to $415.00 (T. 28,29). The damage to the shed doors appears to have occured by Appellant running into the shed after the explosion (T. 24).

POINT I

THE TRIAL COURT ERRED IN REFUSING TO GRANT APPELLANT'S MOTIONS FOR DISMISSAL AND DIRECTED VERDICT BASED ON THE FACT THE EVIDENCE SHOWED A VIOLATION OF THE CRIME OF ARSON RATHER THAN THE CRIME OF PLACING OF AN INFERNAL MACHINE.

This is a case of first impression. Appellant admits that he is guilty of damaging property of another by means of explosives. The central issue on appeal is which of two statutes Appellant should have been convicted and sentenced under.

Appellant claims he should have been convicted and sentenced under Section 76-6-102 Utah Code Annotated (1953 as amended), which provides;

> A person is guilty of arson if, under circumstances not amounting to aggravated arson, by means of fire or explosives, he unlawfully and intentionally damages:
>
> (a) Any property with intention of defrauding an insurer; or
>
> (b) The property of another.
>
> (2) A violation of subsection (a) is a felony of the third degree. A violation of subsection (b) is a felony of the third degree if the damage caused exceeds $5,000 value; and Class A misdemeanor if the damage exceeds $1,000 but is not more than $5,000 value; a Class B misdemeanor if the damage caused exceeds $250 but is not more than $1,000; any other violation is a Class C misdemeanor. (Emphasis Added)

The section under which Appellant was charged, convicted, and sentenced, 76-10-307, provides:

> Every person who delivers or causes to be delivered to any express or railway company or other common carrier, or to any person, any infernal machine, knowing it to be such, without informing the common carrier or person of the nature thereof, or sends it through the mail, or throws or places it on or about the premises or property of another, or in any place where another may be injured thereby in his person or property, is guilty of a felony of the second degree.

Section 76-10-306 defines infernal machine as follows:

> An infernarl machine is any box, package, contrivance, bomb, or apparatus containing or arranged with an explosive or acid or poisonous or inflamable substance, chemical, or compound, or knife, loaded pistol, or gun, or other dangerous or harmful weapon or thing, constructed, contrived, or arranged so as to explode, ignite, or throw forth its contents, or to strike with any of its parts, unexpectedly when moved, handled, or operned, or after the lapse of time or under conditions or in a manner calculated to endanger health, life, limb, or property.

At the close of the State's case Appellant moved for a dismissal of the charge of Placing of an Infernal Machine as alleged in the Information (T.105). A similar motion was made for a directed verdict after both parties had rested (T.120,1). These motion were again presented after the jury had retired and were again denied (T. 133,4). Both motions were based upon a showing from the evidence that the State had failed to prove the existance of an Infernal Machine and the case could only properly be submitted to the jury on a theory of Arson by means of explosives. For the reasons stated below, the trial court erred in not granting Appellant's motions.

The evidence produced by the State showed that Appellant had damaged the property of another by means of dynamite and the Appellant had some blasting caps and fuse stored where he lived. During Appellant's own testimony it was established that he had in fact used a blasting cap and fuse to detonate the dynamite. This evidence places the actions of Appellant squarely within the statute governing Arson.

The Infernal Machine violation is obviously contemplated to involve something other than the simple use of the type of explosives exemplified in the instant case. The conduct of Appellant clearly constitute damage to proerpty" . . . by means of fire or explosives . . ." under the Arson statute, but can hardly be said to involve a " . . . box, package, contrivance, bomb, or apparatus containing or arranged with an explosive . . ." as required by the section 76-10-306 definition of Infernal Machine.

Any explosive material requires that something be done to it or added to it to make it explode. If dynamite with a blasting cap and fuse is construed as a matter of law as meeting the definition of Infernal Machine, it is difficult for one to imagine what the legislature had in mind when it included the use of explosives in the Arson statute.

In overruling Appellant's motion for a dismissal and directed verdict, the trial court necessarily ruled that the simple use of dynamite with a blasting cap and fuse constitutes an Infernal Machine. If this is so, then by enacting the new criminal code the legislature passed overlaping statutes with incongruous penalty provisions.

Arson requires actual damage and provides for a range of punishments between a Class C misdemeanor and a third degree

felony depending on the actual loss of value. The crime of placing of an Infernal Machine does not require any actual loss and is punished as a second degree felony. Under the statutory construction used by the trial court in denying Appellant's motions, a person who only attempted to commit a Class C misdemeanor Arson would necessarily have also committed a second degree felony Placing of an Infernal Machine. Such a result could not logically have been intended by the legislature.

To reconcile the crime of Arson by means of explosives with the crime of Placing of an Infernal Machine, it is logical to interpret the definition of Infernal Machine as encompassing a concept such as that of a time bomb or booby trap which is more intricate than the simple use of explosives. This interpretation embodies the notion of moving mechanical parts and is more consistant with the ordinary meaning of the word machine. Under such an interpretation there would be no conflict between the statutes governing Arson and Infernal Machine. The definition of Arson would be met where, as in the instant case, a defendant's conduct was limited to destruction of property by use of a simple explosive means; and the definition of Infernal Machine would be met if, for example, a defendant rigged dynamite to a car in such an arrangement that starting the car would cause an explosion. Such a statutory construction would also be consistant with the existance of a " . . . box, package,

contrivance, bomb, or apparatus containing or arranged with an explosive. . . "

POINT II

THE TRIAL COURT ERRED BY REFUSING TO ALLOW APPELLANT'S JURY INSTRUCTION REGARDING THE OFFENSE OF ARSON, DENYING APPELLANT'S REQUESTED INSTRUCTION ON DEFINITION OF INFERNAL MACHINE, AND IN OVERRULING APPELLANT'S OBJECTION TO THE INCOMPLETE DEFINITION OF INFERNAL MACHINE USED BY THE COURT IN INSTRUCTING THE JURY.

Appellant's requested jury instruction number 3 (R.48) is a definition of Infernal Machine taken directly from the statutory definition found in Section 76-10-306 and reads as follows:

> An infernal machine is defined as follows:
>
> Any box, package, contrivance, bomb, or apparatus containing or arranged with an explosive or acid or poisonous or inflamable substance, chemical or compound, or knife, loaded pistol, or gun, or other dangerous or harmful weapon or thing, constructed, contrived, or arranged so as to explode, ignite, or throw forth its contents, or to strike with any of its parts, unexpectedly when moved, handled, or opened, or after the lapse of time or under conditions or in a manner calculated to endanger health, life, limb, or property.

Appellant's requested jury instruction number 4 (R. 49) reads as follows:

> If you have a reasonable doubt as to whether the State has established each and every element necessary to convict the defendant of the crime of Delivery of an Infernal Machine, you should next consider whether the defendant is guilty of the crime of arson.

Appellant's requested jury instruction number 5 (R.50) provides the statutory elements necessary to find the defendant guilty of arson and reads as follows:

> To warrant you in finding the defendant guilty of the Crime of Arson, you must find beyond a reasonable doubt that the defendant:
> (1) Intentionally damaged the property of another;
> (2) That said damage was done by use of fire or explosives; and
> (3) That said acts occured in Washington County, State of Utah.

Appellant objected to the Trial Court's refusal to give these instructions (T.128), and the definition of infernal machine in Instruction Number 15 (R. 62) as given by the court was also objected to by Appellant (T. 123, 124). Instruction Number 15 as given reads as follows:

> You are instructed that an infernal machine is any package, contrivance, bomb or apparatus containing or arranged with an explosive constructed, contrived or arranged so as to explode after the lapse of time or in a manner calculated to endanger property.

As noted in Appellant's exception to Instruction Number 15, Appellant's "entire defense is based on the definition of infernal machine" (T. 123), and Appellant was denied the opportunity to have the jury determine the meaning of that term since it did not have the entire definition.

The impact of the Trial Court's refusal to give the complete statutory definition of infernal machine was substantially aggravated by the Court's refusal to grant Appellant's requested instruction on Arson. The effect of this procedure by

the Trial Court was to rule that Appellant's actions constituted delivery of an Infernal Machine and did not, as a matter of law constitute arson. In refusing to give Appellant's requested instructions 4 and 5 (R. 49,50) regarding the crime of arson, Appellant was denied the right to have the jury consider Arson as a possible alternative to finding Appellant guilty of placing in Infernal Machine.

Under the rulings of the trial court on the above noted jury instructions, it appears to be impossible for one to commit the crime of Arson by use of explosives. The intent of legislature is passing section 76-6-102 on Arson contemplates no such premis. The offense which the legislature contemplated when providing for Arson by means of explosives has been eliminated by judicial fiat under the rulings by the trial court. Such a result is in direct disregard for the manifest intent of the legislature to create two separate and distinct crimes.

POINT III

APPELLANT WAS DENIED EQUAL PROTECTION OF LAWS AND DUE PROCESS BECAUSE HE WAS NOT GIVEN THE BENEFIT OF RECEIVING THE LESSER OF TWO POSSIBLE STATUTORY PUNISHMENTS FOR THE SAME ACT.

It cannot be questioned that Appellant's act constituted the crime of Arson as provided in Section 76-6-102. If such an act is also construed as Placing an Infernal Machine as provided in Section 76-10-307 then the legislature has made the same act subject to two different sanctions and Appellant

should have been sentenced under the lesser penalty.

At the time of sentencing, Appellant argued as a cause against judgement that under the Utah Supreme Court cases of State v. Fair, 23 Utah 2d 34, 456 P.2d, 168 (1969) and State v. Shondel, 22 Utah 2d 343, 453 P.2d 146 (1969), Appellant should be sentenced to the punishment provided for a Class A misdemeanor under the arson statute since the value of the property damage was less than $5,000. This motion was denied. (Sentencing Transcript p. 3,4)

In the cases of Fair, and Shondel, this court held that an accused should be accountable for only the lesser of two conflicting penalties where the same act has been made the subject of two legislative fiats. In reaching the decision in Shondel, the opinion of this court relied upon principles of equal protection of law in agreeing ". . . with the proposition . . . that the equal protection of the laws requires that they affect alike all persons similarly situated." 22 Utah 2d at 345, 453 P. 2d at 147. Reliance was also placed on the principle that " . . . a penal statute should be . . . clear, specific and understandable as to the penalty imposed for its violation." 22 Utah 2d at 346, 453 P.2d at 148.

Both of these principles of Shondel were violated by the compound effect in denying Appellant the opportunity to have the jury consider Arson and then denying Appellant's motion

to be setenced under the Arson statute as the lesser of two possible penalties.

If one were to decide to commit the crime of Arson by means of explosives and be willing to suffer the consequences established by the legislature, it would be impossible to do so under the rulings made by the trial court. Such a result is clearly inconsistant with the words of Chief Justice Crockett that " . . . a penal statute should be . . . clear, specific and understandable as to the penalty imposed for its violation." 22 Utah 2d at 346, 453 P.2d at 148.

CONCLUSION

This case should be reversed and remanded for the reason that the evidence adduced at trial proved only the crime of Arson by means of explosives and does not support a finding of guilty of Placing of an Infernal Machine. The definition of Infernal Machine requires a more intricate or mechanical means than the simple use of dynamite employed by Appellant and the trial court erred in not granting Appellant's motions for dismissal and directed verdict.

The refusal of the trial court to instruct the jury with respect to the crime of Arson by means of explosives denied Appellant due process of law. This error was compounded by the refusal of the trial court to sentence Appellant in compliance

with the principle stated in Shondel that " . . . where there is doubt or uncertainty as to which of two punishments is applicable to an offense an accused is entitled to the benefit of the lesser." 22 Utah 2d at 346, 453 P.2d at 148.

Respectfully submitted,

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