

SUPREME COURT

Continued from Page 1

jection to the same as the indictment means as to the defendants Johnny...

That the said defendants, an Indian, and Joe Iapah, an Indian, and Joe Iapah, an Indian, and Joe Iapah, an Indian...

The indictment follows substantially the form suggested by our statute. (Comp. Laws, Sec. 4200.) The act charged as the offense is, we think, clearly and distinctly set forth in ordinary and concise language...

After the state had rested its case, counsel for the defendant Johnny, announced that his client, who rested, and on his behalf moved that the case be given to the jury at this time before any defendant Iapah...

The court, after taking time to consider the motion, denied it, and this ruling is assigned as error. Sections 260 to 262, inclusive, of our Criminal Practice Act (Comp. Laws, Secs. 4242-427) provides as follows:

4227. Sec. 362. When two or more persons are included in the same indictment and the court is of opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defense, it shall order him to be discharged from the indictment, before the evidence shall be deemed closed, that he may be a witness for his codefendant.

the other defendant will not be deprived of the right of a codefendant, who is indicted by the state's evidence in this case we gave a simple charge of accomplices, to same result. Comp. Laws, Sec. 4327, sub 1, in any event, but under one procedure and that of this state must not be sufficient evidence of the defendant's confession to put him on his defense before his codefendant can, in the manner required, avail himself of his testimony...

4. Confessions of the defendant Iapah were admitted in evidence, over the objection of the counsel that it did not appear that such confessions were given voluntarily, but, upon the contrary, were obtained by reasons of fear, inducements and threats. One of these confessions was made to two officers upon the evening of the defendant's arrest, and before he was placed in jail.

The other confession was made the following morning, in the presence of the sheriff, to representatives of the local newspapers. The latter confession was reduced to writing, read over to the defendant, and signed by him by annexing his name thereto. The first confession was made while the defendant was in the custody of Guy Harbin, the deputy sheriff, a Mr. Brown and a Mr. Stanley, during the temporary absence of the sheriff.

It would appear from the evidence that the defendant was told by Mr. Stanley that the defendant Johnny had told of the crime, and that he further said to him, "You might as well tell the truth." Beyond this nothing is said to the defendant to induce him to make a confession.

Counsel placed the defendant Iapah upon the stand to recite the circumstances of the confession, but he did not vary in any particular degree in his testimony from that recited by the witness for the state. He did, however, say that it was Mr. Harbin who told him that "Johnny had already told about it." He testified: "When he told me that it scared me more. Everything I told then was true. I was scared very much that night."

All that can be made of the defendant's testimony is, that he was scared when he made his confession to Harbin, but he iterates upon the stand that what he told that night was the truth. The only object in excluding testimony given under threats, duress, or upon promise of reward, is, that such testimony might not be the truth. A defendant cannot be prejudiced by the admission of a confession which he voluntarily acknowledges, under oath, is the truth. But the fact that he was imbued with fear occasioned by his arrest and a knowledge of guilt would not alone make his confession inadmissible.

All that has been said about the confession made by the defendant Iapah to deputy sheriff Harbin and the others, upon the evening of his arrest, will apply to his confession made the following morning to the newspaper men.

Thereafter they had thrown the body upon the fire. He was not seeking to establish innocence or crime, but his effort was directed to avoiding a conviction of murder in the first degree; by showing that he was in a drunken condition at the time he fired the shot, and was therefore incapable of that premeditation which is an essential element of murder in the first degree. Evidence which tended to show that intoxicating liquor had the effect of transforming him from a good boy to a dangerous character, we think, could not have prejudiced the defense, but would rather tend to strengthen it.

6. Counsel for Johnny assigns error in the refusal of the court to strike out, upon the ground that it was hearsay, the testimony of an Indian witness called Captain Jim, who testified upon the part of the State, to the effect that upon the night of the killing the two defendants were at his camp, and that Iapah said in the presence of Johnny, that "Johnny held the man's hands while Iapah cut his throat." We doubt if the record of this testimony will warrant a conclusion that it was hearsay. But, conceding that it was the error in admitting it was harmless, for other witnesses testified to the same conversation, and Johnny, as a witness in his own behalf, also testified to the same effect.

(People v. Marseller, 70 Cal. 53.) 7. Upon the law of drunkenness as a defense to crime, the court gave instructions Number 26 and 27 of its own motion and defendants' Requested Instruction number 5, which instructions read as follows: 26. "It is a well settled rule of law that drunkenness is no excuse for the commission of a crime. Temporary insanity, produced by intoxication does not destroy responsibility, when a party, who in sane and responsible made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, for when a crime is committed by a party while in a fit of intoxication, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of the crime, and for this purpose it must be received with great caution."

27. "In this case if you find that the defendants unlawfully and with malice aforethought, as already designated as Fred Foreman, it is murder, and if such killing was willful, deliberate and premeditated, or was done in the perpetration or attempt to perpetrate robbery, it was murder of the first degree, otherwise it is murder of the second degree; and in determining the degree, any evidence tending to show the mental status of the defendants is proper for the consideration of the jury. The fact, if it be a fact, that the defendants were drunk, does not render the act less criminal, and in that sense it is not available as an excuse, but there is nothing in this to excuse, as evidence upon the question as to whether the act was deliberate and premeditated or was committed in the carrying out of an intent to rob. Presumptively, every killing is murder, but so far as the degree is concerned, no presumption arises from the mere fact of killing, considered separately and apart from the circumstances under which the killing occurred. The question is one of fact to be determined by the jury from the evidence in the case, and it is not a mere legal conclusion and drunkenness, as evidence of a want of premeditation or an intent to rob, is not within the rule which excludes it as an excuse. Drunkenness neither excuses the offense nor avoids the punishment which the law inflicts, when the character of the offense is ascertained and determined, but evidence of drunkenness is admissible solely with reference to the question of premeditation or where there is evidence tending to show that a murder has been committed in the perpetration or attempt to perpetrate a robbery, as to the question of the existence of the felonious intent to steal which is an essential element of robbery."

In cases of premeditated murder, the fact of drunkenness is immaterial. A man who is drunk may act with premeditation as well as a sober one, and is equally responsible for the consequences of his act. In murder of the first degree, it is necessary to prove the killing was premeditated or was committed in the perpetration or attempt to perpetrate robbery or one of the other felonies already enumerated, which involves, of course, an inquiry into the state of mind under which the party committed it, and in prosecution of such an inquiry, his condition as drunk or sober is proper to be considered. The weight to be given it is a matter for the jury to determine, and it should be received with great caution and carefully examined in connection with all the circumstances and evidence in the case. You should determine between the condition of mind merely excited by intoxicating drink and yet capable of performing a specific and deliberate intent to take life, and such a prostration of the faculties as renders a man incapable of forming the intent, or of deliberation of premeditation. If an intoxicated person has the capacity to form the intent to take life, and conceives and executes such intent, it is no ground for reducing the degree of his crime that he was induced to conceive it, or to conceive it more suddenly by reason of his intoxication."

Defendants' requested instruction, No. 5. You are instructed that in order to find the defendants or either of them guilty of murder in the first degree you must find, from evidence beyond all reasonable doubt that the murder was perpetrated by means of poison, or lying in wait, or torture, or by any other willful, deliberate and premeditated killing, or in the perpetration or attempt to perpetrate robbery. This ingredient of deliberate and premeditated killing must be clearly shown and proven beyond all reasonable doubt. It is not sufficient that you think the killing was deliberate and premeditated, the evidence must convince you of that fact to a strong certainty and beyond all reasonable doubt. The evidence of deliberation and premeditation must be such as to convince you that the deliberate premeditated design and purpose to murder was known and intentionally formed and conceived in the mind of each defendant and meditated upon before the fatal blow was struck; and in considering such evidence, or such a design was formed in the minds of each of the defendants, you should consider the evidence, if any, of drunkenness. If the defendants were drunk at the time and were too much intoxicated to form a deliberate and premeditated purpose, they cannot be found guilty of murder in the first degree. It is true that drunkenness is no excuse for the commission of an offense, but nevertheless the jury must consider the evidence of drunkenness and determine whether it was sufficient to so cloud the minds of the defendants as to interfere with the formation of deliberate and premeditated purpose to kill. If the drunkenness was sufficient to create a reasonable doubt in your minds as to the existence of such a deliberate premeditated purpose, you cannot find the defendants guilty of murder in the first degree."

Counsel for defendants attacked the court's instruction No. 27 as being an erroneous statement of the law, ambiguous and misleading consequently, highly prejudicial to the defendants. The instruction complained of was not, as contended in the main from an instruction that has a number of times met with the approval of the Supreme Court of an arena. (People v. Williams, 43 Cal. 245; People v. Johnson, 21 Id. 545; People v. Lewis, 36 Id. 531; People v. O'Ferris, 55 Id. 599; People v. Jones, 63 Id. 168; People v. Vincent, 95 Id. 425; People v. Pugh, 100 Id. 581.) The instructions upon the law of drunkenness, as applicable to this case should be considered together. The jury, we think, were fairly and correctly instructed upon this point of law. (People v. Leonard, 143 N. Y. 364; State v. Hawkins, 53 Wash. 289; 63 Pac. 258; Wilson v. State, 60 N. J. L. 171; Hopt v. People, 104 U. S. 632; Booher v. State, 106 Ind. 447; 34 N. E. R. A. 391; State v. Thompson, 12 Nev. 151. See also: 21 Cyc. 679; McClain on Cr. Law, Sec. 162.) The refusal of the court to give certain requested instructions upon the law of manslaughter was not error, as there was no evidence tending to reduce the offense to the grade of manslaughter. (State v. Donovan, 10 Nev. 36; State v. Minnin, 3 Nev. 409; Pirkle v. State, 9 Hump (Tenn) 663; State v. Weaver 35 Or. 415.) A number of instructions requested by defendants were refused by the court, either upon the ground that they were inapplicable to the case, or that they were covered by instructions already given. A careful examination of these requested instructions convinces us that the court did not err in their refusal. (State v. Burall, 27 Nev. 54; State v. Maher, 25 Nev. 465.) It is contended that the instruction given at the request of the prosecution relative to the consideration which the jury should give to the defendants' testimony, was erroneous and prejudicial. This instruction, substantially as given by the court in this case, has heretofore in a number of cases, been approved by this court. (State v. Hartley, 22 Nev. 350; State v. Streeter, 20 Id. 403; State v. Hing, 16 Id. 97; State v. Hymer, 15 Id. 49.) The following language of the instruction is particularly taken: "In convincing and carrying with it a belief in its truth, you have a right to act upon it, if not, you have a right to reject it, etc." As this instruction has been given in other cases in this State, the words we have italicized have been omitted. It is urged by counsel here that the use of these words was, in effect, a direction to the jury that it was entirely optional with them whether they should act upon the testimony of the defendants, even though they believed in the truth of the same. While we think it would have been clearer to have omitted from the instruction the words in question, we do not think that all probable that the jury placed any such construction as contended upon them. In another instruction the jury was told that the "must consider all the evidence," etc. That a jury would fail to give full consideration to the testimony of a defendant, which was convincing and carried with it a belief in its truth, is not unreasonable for consideration. We have no hesitancy in saying that the defendants were not prejudiced by this instruction. There are some other alleged errors in the record, but we have examined them and think they are not of sufficient merit to require a new trial. Counsel for defendants have dwelt in their briefs upon the point that the defendants were Indians, and

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The Nye and Ormsby County Bank CARSON CITY, NEVADA CAPITAL \$250,000 Frank Golden, President— D. M. Ryan, Vice President A. G. Raycraft, Cashier and Secretary Directors:— FRANK GOLDEN, D. M. RYAN, JAS. G. SWEENEY, JOHN MCKANE, ALONZO TRIPP, L. L. PATRICK, W. H. WHEB, LINE, T. W. KENDAL, M. L. MACDONALD, J. W. McQUILLAN INTEREST PAID ON TIME DEPOSITS AT 3 1/2 PER CENT. Gen. W. Cowing, Asst. Cashier Carson City Nevada A. F. Titus, Asst. Cashier, Tonopah Jas. Deegan, Asst. Cashier, Goldfield M. J. Hill, Asst. Cashier, Manhattan

The State Bank & Trust Co Carson City, Nevada Capital Fully Paid Up Branches at Tonopah, Goldfield and Manhattan, Nevada. DIRECTORS:— T. B. RICKEY, GEO. H. MEYERS, P. H. PETERSEN, A. LIVINGSTON, S. L. LEE, J. P. OODBURY, G. W. MAPES, C. T. BENDER, W. BROUGHER. Cashier: E. D. Vanderlieth, Asst. Cashier: E. B. Cushman, Asst. Cashier, Tonopah: J. L. Lindsay, Asst. Cashier, Goldfield: C. H. Wise, Asst. Cashier, Manhattan. The Bank will receive deposits, buy and sell Foreign and Domestic Exchange, give prompt attention to Collections; buy and sell Mining Stocks and do a GENERAL BANKING BUSINESS. A SAFE DEPOSIT DEPARTMENT— With over one hundred safe deposit boxes has been placed in the Bank. These boxes are rented at from \$2.50 to \$6.00 per year according to size. Bank Money Orders sold on all principal places in the United States at the greatest cost than Postal Money Orders.

OFFICIAL ADVERTISING OFFICIAL COUNTY OF STATE FUNDS STATE OF NEVADA County of Ormsby, ss. John Sparks and James G. Sweeney, being duly sworn, severally say they are members of the Board of Examiners of the State of Nevada; that on the 13th day of Sept. 1906, they (after having ascertained from the books of the State Controller the amount of money which should be in the Treasury) made an official examination and count of the money and vouchers for money in the State Treasury of Nevada and found same correct as follows: Coin \$551,926 75 Paid Coin Vouchers not returned to controller 166,422 53 Total 358,249 27 State School Fund Securities Irredeemable Nevada State School Bonds \$380,000 00 Massachusetts State 3 per cent bonds 632,000 00 Nevada State bonds 233,000 00 Massachusetts State 3 1/2 per cent bonds 313,000 00 United States bonds 215,000 00 Total \$2,121,249 17 John Sparks James G. Sweeney. Subscribed and sworn to me this 13th day of September, A. D. 1906. J. Doane, Notary Public, Ormsby County Nevada. Ladies shampooing and massage, electric apparatus, private rooms, Arlington Barber Shop. PROPOSALS FOR CONCRETE. Proposals will be received by the State Board of Military Auditors to construct concrete walks, approaches to two drive gates, floors and steps for two porches, and a conduit under one drive way, in and about Block 2 of Sears, Thomson and Sears division of Carson City, Nevada, up to 12 o'clock M., on the 29th day of September, 1906. No proposal will be considered unless accompanied by a bond or certified check in the sum of one hundred dollars as a guarantee of good faith. Plans and specification will be shown by the Clerk of this Board. Proposals should be addressed to S. H. Day, Clerk Board of Military Auditors and endorsed, Proposals for concrete work. By order of the State Board of Military Auditors. S. H. DAY, Clerk. Dated Sept. 18, 1906. DRY PASTURAGE—100 acres of dry pasture. Stock \$1 a head a month. Apply at this office.

IN THE SUPREME COURT OF THE STATE OF NEVADA, Abraham Chapman, Petitioner vs. The Justice Court of Tonopah Township, County of Nye, State of Nevada, and Hon. J. J. Brissell, presiding in said Court. W. R. Needles and E. P. Moran, Attorneys for Petitioner. W. B. Pittman and Attorney General James G. Sweeney, Attorneys for Respondent. Original Proceeding Writ of Certiorari ON PETITION FOR REHEARING. There are no points set up in the petition not presented in the briefs heretofore filed in this cause and covered by the decision rendered. A further examination of the questions involved has not occasioned any doubt as to the correctness of the conclusion heretofore reached. The petition is denied. Norcross, J. I concur: Talbot, J. I dissent: Fitzgerald, C. J. DINING ROOM CLOSED. The dining room at Shaw's Springs has been closed to the public until further notice as it is impossible to accommodate outside guests until the new building is completed. Baths may be secured as before. Talbot, J. Norcross, J. Fitzgerald, C. J.