

STATE V. SENA, 1923-NMSC-083, 29 N.M. 146, 219 P. 496 (S. Ct. 1923)

**STATE
vs.
SENA**

No. 2785

SUPREME COURT OF NEW MEXICO

1923-NMSC-083, 29 N.M. 146, 219 P. 496

October 13, 1923

Appeal from District Court, San Miguel County; Leahy, Judge.

Apolonio A. Sena was convicted of criminal libel, and he appeals.

SYLLABUS

SYLLABUS BY THE COURT

Where a statutory motion for change of venue is filed in a criminal case, and the question of the knowledge and interest of the supporting witnesses is opened up before the court by the state's examination of such witnesses, the defense, in the absence of some valid objection, should not be precluded, on cross-examination, from fully developing either the knowledge or the interest of the witnesses with respect to any of the material facts alleged in the motion or affidavits.

COUNSEL

E. R. Wright, of Santa Fe, for appellant.

Milton J. Helmick, Atty. Gen., John W. Armstrong, Asst. Atty. Gen., and O. O. Askren, of East Las Vegas, for the State.

JUDGES

Botts, J. Bratton, J., concurs. Parker, C. J., did not participate in this opinion.

AUTHOR: BOTTS

OPINION

{*146} {1} OPINION OF THE COURT Appellant was convicted of criminal libel. Before the jury was impaneled to try the case, appellant filed a motion for change of venue, in statutory form, supported by the affidavit of himself and that of two witnesses claiming to be disinterested. Based upon the previous decisions of this court (Territory v. Gonzales, 11 N.M. 301, 68 P. 925; Territory v. Emilio, 14 N.M. 147, 89 P. 239; Territory v. Cheney, 16 N.M. 476, 120 P. 335), sustaining the power and authority of the trial court to examine the supporting witnesses to a motion for a change of venue, counsel {*147} for the state moved the court to have such supporting witnesses called and examined under oath. This motion was granted, and the witnesses examined at some length by counsel for the state and turned over to counsel for the defense for cross-examination.

{2} One set of facts alleged in the supporting affidavits was not touched upon by counsel for the state in direct examination, and, when appellant's counsel undertook to examine the witnesses with reference to that portion of said affidavits, objection was interposed upon a ground which seems to us to be wholly without merit, and in fact no attempt is made by the state in its brief to justify the objection made to the admissibility of this evidence. The objection was sustained, however, and we agree with appellant that the court was thereby led into error.

{3} While it might be, from only the evidence before the court at the time the examination of these witnesses was closed, the trial judge was well satisfied that the exercise of discretion with reference to the motion should be against changing the venue, yet it would seem clear that, when the question of the witnesses' knowledge and interest is opened up before the court by the state's examination of such witnesses, the defense, in the absence of some valid objection, should not be precluded, on cross-examination, from fully developing either the knowledge or the interest of the witnesses with respect to any of the material facts alleged in the motion of affidavits.

{4} Objection is also made by appellant to the qualifications of the jury to try the case, but, inasmuch as the case must be sent back for retrial because of the error already pointed out, which retrial will be before a different jury, it would be of no benefit to the lower court for us to discuss the objections raised in this particular.

{5} For the reasons stated, the judgment of the lower court should be reversed and remanded, with directions to grant appellant a new trial; and it is so ordered.