

Criminal Procedure. *State v. Saluter*, 715 A.2d 1250 (R.I. 1998). An indictment or information is not fatally duplicitous where it describes the period of the alleged acts in terms of "day and dates," but becomes fatally duplicitous when the bill of particulars does not adequately clear the ambiguity of the counts.

In *State v. Saluter*,¹ the Rhode Island Supreme Court addressed the problem concerning duplicitous indictments and informations. In *Saluter*, the court determined that even if an indictment or information is duplicitous, it is not fatal unless the state's bill of particulars does not clear the ambiguity.² Additionally, the court rejected the state's contention that the crime of sexual assault consists of a continuous course of conduct, thus making it impossible for the information or indictment to include specific dates.³

FACTS AND TRAVEL

On March 8, 1994, Glenn A. Saluter (Saluter) was charged by indictment with two counts of first-degree sexual assault, four counts of first-degree child molestation, and three counts of second degree child molestation.⁴ These offenses allegedly occurred between April 1, 1984 and April 30, 1987, while defendant was living with the complaining witness' mother.⁵ The complaining witness, Amy, was under the age of thirteen during the period of the alleged incidents.⁶

Saluter moved, pursuant to Rule 7(f) of the Superior Court Rules of Criminal Procedure, for a bill of particulars.⁷ The bill of particulars provided by the state alleged that Saluter committed the acts charged in seven of the nine counts on multiple occasions.⁸ Only in Counts Five and Eight did the state allege a single incident of conduct charged in that count.⁹

1. 715 A.2d 1250 (R.I. 1998).

2. *Id.* at 1256.

3. *See id.* at 1255.

4. *See id.* at 1251.

5. *See id.*

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.*

Thereafter, the defendant filed a motion to dismiss, asserting that the bill of particulars was inadequate and the charges duplicitous, violating Rule 8(a) of the Superior Court Rules of Criminal Procedure.¹⁰ Saluter also argued that the manner of the charges, as they stand, deprived him of the minimum notice requirement under both the Federal Constitution and Rhode Island law.¹¹ The motion to dismiss was denied by the trial justice, who concluded that the indictment charged "nine specific acts" and afforded Saluter sufficient notice.¹²

After trial, a jury convicted Saluter on all nine counts.¹³ Defendant filed a timely appeal to the supreme court, raising two issues.¹⁴ First, whether the nature of the bill of particulars, together with the evidence presented at trial and the justices failure to adequately instruct the jury, resulted in uncertainty over whether the jury's decision was based upon the same conduct for which the indictment had been returned.¹⁵ Second, whether the trial justice committed reversible error in his instructions to the jury.¹⁶

ANALYSIS AND HOLDING

The gravamen of defendant's argument rests upon the issue of duplicity. According to the court, "'duplicity' refers to the joining of two or more offenses, however numerous, in a single count of an indictment."¹⁷ The problem with duplicity stems from a defendant's fundamental right to due process.¹⁸ At a minimum, due process requires that "a defendant be afforded 'adequate notice of the offense with which he is charged.'"¹⁹

All nine counts of the indictment used the same "formulaic language" when describing the charges. In each of the counts the defendant was charged as acting "on a day and dates" when referring to the period of his conduct.²⁰ The court found that it was not

10. *See id.*

11. *See id.*

12. *Id.* at 1252.

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *Id.* at 1253.

18. *See id.*

19. *Id.* at 1252 (quoting *State v. Hendershot*, 415 A.2d 1047, 1048 (R.I. 1980)).

20. *See id.* at 1253.

clear whether the defendant was charged with a single act or multiple acts in each of the nine counts.²¹ However, the court decided, this language alone "did not render the indictment defective *per se*."²²

Such language is not *per se* duplicitous because a general charge such as this can be reduced to specific facts in a bill of particulars.²³ A bill of particulars "provide[s] the defendant with the factual detail omitted from an indictment or information. Its primary purpose is to supply the defendant with such particulars as are necessary in order that judicial surprise is avoided at trial."²⁴ Here, however, it was the Attorney General's failure to clarify the ambiguity in the bill of particulars, that led the court to conclude that the indictment was fatally duplicitous.²⁵

To exemplify the problem with duplicity in the present case, the court discussed one count brought against the defendant in detail. In response to Count Two of the indictment, the bill of particulars read as follows:

Count 2. The State's answer with respect to dates, times, and places is the same as Count 1. The allegations are that defendant inserted his finger or fingers into the vagina of the complainant more than once, and with a frequency of "quite a few times per week" during the period alleged in the indictment.²⁶

At trial, Amy had testified regarding numerous incidents where the defendant digitally penetrated her vagina.²⁷ Two such incidents were recounted in detail: once when she was wearing a striped nightgown, and another time where she endured the same abuse "in exchange for being excused from having to eat her vegetables at dinner."²⁸ Both incidents took place within the time frame charged in Count Two, and both incidents were offered at trial as evidence of the charged crime.²⁹

21. *See id.*

22. *Id.*

23. *See id.*

24. *Id.* (citing *State v. Rios*, 702 A.2d 889, 890 (R.I. 1997)).

25. *See id.* at 1256.

26. *Id.* at 1254.

27. *See id.*

28. *Id.*

29. *See id.*

The problem was further amplified because the "trial justice appeared to suggest [to the jury] that the dinner incident was the act charged by Count Two, whereas the state contended in its closing argument that the nightgown incident satisfied its burden of proof for that count."³⁰ According to the court, the jury could have convicted the defendant under Count Two based upon either of the two incidents.³¹ The court theorized that,

If some members of the jury were convinced beyond a reasonable doubt that the nightgown incident did take place while the remaining members were not adequately convinced of that allegation but instead were convinced beyond a reasonable doubt that the dinner quid pro quo had occurred, the jury could have returned a verdict on count 2 without the actual jury unanimity required for conviction under our laws.³²

The state claimed that the crime of sexual assault, as opposed to other crimes, constitutes a continuing course of conduct, thus eliminating the duplicity problem when charging these offenses.³³ The court, while recognizing that some other states permit charging sex crimes as continuing offenses, refused to step into what it perceives to be "the domain of the Legislature," by judicially creating a crime of continuing sexual assault.³⁴

The court differentiated this case from two earlier cases in which the duplicitous issue was raised: *State v. LaPlante*³⁵ and *State v. Roberts*.³⁶ In both *LaPlante* and *Roberts*, the defendants waived their objections to the complaints by failing to comply with the rules of criminal procedure.³⁷ The court noted that the proper method by which to attack a duplicitous complaint, indictment, or information, is by filing a timely motion to dismiss pursuant to Superior Court Rules of Criminal Procedure 12(b)(2) and (3).³⁸ In the case at bar, *Saluter* preserved that claim by raising the issue in a timely manner.

30. *Id.* at 1254-55.

31. *See id.* at 1255.

32. *Id.*

33. *See id.* at 1255.

34. *Id.*

35. 409 A.2d 130 (R.I. 1979).

36. 420 A.2d 837 (R.I. 1980).

37. *See Saluter*, 715 A.2d at 1254.

38. *See id.* at 1254 (citing *State v. Roberts*, 420 A.2d 837, 840 (R.I. 1980)).

CONCLUSION

In *State v. Saluter*, the Rhode Island Supreme Court addressed the problem of duplicitous charging in criminal complaints, indictments and informations. The court held the use of the phrase "on a day or dates" when charging various sexual assault crimes was not per se duplicitous. However, the failure to clarify such, through a bill of particulars, so that the defendant is charged with one offense in each count, warrants a vacation of the convictions of those counts. Additionally, the court noted that the issue of duplicity is properly raised through a pretrial motion to dismiss pursuant to Rhode Island Superior Court Rule of Criminal Procedure 12(b)(2) and (3).

Christopher E. Friel