

pass in violation of Article III, Section 12 of Interim Regulation 5-48, and the remainder of the special finding, and the sentence, are confirmed.

BELEWAI HARUO, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Case No. 4

Appellate Division of the High Court

July 29, 1952

Appeal from conviction of grand larceny in the Trial Division of the High Court, Palau District. Defendant was convicted solely on basis of oral admissions made by him to constabulary and an alleged written confession given by him to constabulary. The Appellate Division of the High Court, Chief Justice E. P. Furber, held that where evidence does not affirmatively show that alleged confession was voluntary in fact, leaving confession in evidence after objection is raised to it is prejudicial to defendant.

Reversed and remanded.

1. Confessions—Admissibility

In criminal prosecution, confession is presumed to be voluntary unless it is objected to, or there is something in confession which indicates it is inadmissible.

2. Criminal Law—Trial Procedure—Untrained Counsel

When accused in criminal prosecution is represented by counsel known to trial court not to be trained lawyer, court has same duty to protect accused against inadvertently waiving or losing benefit of essential rights that it would have if accused were without counsel.

3. Criminal Law—Trial Procedure—Untrained Counsel

Where accused in criminal prosecution is represented by counsel known to trial court not to be trained lawyer, and if objection which will affect determination of case is brought to attention of court in good faith at any time before finding and whether in proper form or not, court has duty to make every reasonable effort to put accused in same position he would have been had objection been raised at proper time and in proper manner.

4. Confessions—Admissibility—Trial Procedure

In criminal prosecution, once it becomes clear to court that accused's basic defense is that alleged confession is involuntary and untrue, it is

duty of court to reopen question of whether confession is in fact voluntary, make careful investigation into circumstances surrounding its giving, including consideration of experience and intelligence of accused, just as if objection to admission of confession had been made when it was originally offered or express motion had been made to strike it out.

5. Criminal Law—Pre-Trial Procedure

Person arrested for examination may lawfully be held only forty-eight hours without being charged with criminal offense. (Interim Regulation No. 2-51, Sec. 21)

6. Criminal Law—Evidence—Obtained in Violation of Rights of Accused

Any evidence obtained in violation of Interim Regulation limiting time person may be held without being charged with criminal offense is inadmissible. (Interim Regulation No. 2-51, Sec. 55)

7. Confessions—Admissibility—Illegal Custody

If person is deliberately held in custody for four days and thereby induced to make confession of crime on fourth day and is not charged with any criminal offense until fifth day, confession is clearly involuntary and inadmissible. (Interim Regulation No. 2-51, Secs. 21, 55)

8. Confessions—Admissibility

Where evidence falls far short of showing affirmatively that alleged confession is voluntary in fact, and confession is left in evidence after objection is raised to it in criminal prosecution, accused is prejudiced thereby and finding of guilt and sentence will be set aside.

Counsel for Appellant: JOSEPH C. PUTNAM, ESQ., Truk, Caroline Islands

Counsel for Appellee: DEAN K. EMERY, ESQ., Saipan, Marianas Islands

Before FURBER, *Chief Justice*, and SHRIVER and MANIBUSAN

FURBER, *Chief Justice*

OPINION

This is an appeal from the former District Court (now known as the Trial Division of the High Court), which at a sitting in the Palau District, found the appellant guilty of grand larceny, and sentenced him to eighteen (18) months' imprisonment. The sole evidence connecting the appellant with the alleged theft was certain oral admis-

sions alleged to have been made by him to the constabulary, and an alleged written confession given by him to the constabulary. The items alleged to have been stolen were not produced at the trial, nor was it shown what had become of them. The alleged oral admissions were admittedly made before the appellant was advised of his right to consult counsel and to refrain from making any statement incriminating him, or warned that any statement he did make might be used against him. The alleged written confession was made after he had been so advised and warned and had signed a form of notice to the accused, written in Palauan, acknowledging he had been so advised and warned, and stating that he desired counsel. He was admittedly represented by lay counsel throughout the trial.

The appellant, represented on the appeal by a trained lawyer, alleges, among other things, that the trial court erred in admitting these admissions and confession in evidence and in making a finding of guilty based upon them. Counsel for the appellee does not argue that the oral admissions were properly admissible, but claims these admissions did not prejudice the appellant, because they were all confirmed in the written confession which the appellee claims was properly obtained and admitted in evidence.

[1] Both the testimony as to the oral admissions and the written confession, were admitted without any objection by the appellant's lay counsel. This Court takes the view adopted in a majority of American jurisdictions, that a confession is presumed to be voluntary unless it is objected to, or there is something in the confession which indicates it is inadmissible. 20 American Jurisprudence, Evidence, Section 536. Therefore it was within the discretion of the trial judge to admit the confession in this case at the time he did.

[2, 3] We hold, however, that when an accused is represented by counsel known to the trial court not to be a trained lawyer, the court has the same duty to protect the accused against inadvertently waiving or losing the benefit of essential rights, that it would have if the accused were without counsel. Under such circumstances, if an objection which will affect the determination of the case, is brought to the attention of the court in good faith at any time before finding and whether in proper form or not, we believe the court, in the interests of substantial justice, has a duty to make every reasonable effort to put the accused in the same position he would have been had the objection been raised at the proper time and in the proper manner.

[4] It is apparent from the record that the appellant's lay counsel was unfamiliar with the proper way and time to object to the admission of a confession as involuntary, but it must have been clear to all concerned from the testimony presented by and on behalf of the appellant that his basic defense was that the alleged confession was involuntary and untrue. Once this became apparent, it was the duty of the court to reopen the question of whether the confession was in fact voluntary, make careful investigation into the circumstances surrounding its giving, including consideration of the experience and intelligence of the appellant, just as if objection to the admission of the confession had been made when it was originally offered or an express motion had been made to strike it out. 20 American Jurisprudence, Evidence, Section 534.

[5-7] The evidence in this case does not even show with any certainty when the alleged confession was made, or whether the appellant was then in custody and if so, how long he had been in custody, or how long he was questioned, or whether he was allowed any freedom dur-

ing the questioning. It appears that he was in custody on January 3, 1952; Palauan and English translations of the alleged confession were admitted in evidence, without objection, as true translations of the original, which was in Japanese; each of these translations bears the date 7 January 1952; there is no indication whether the appellant was released from custody between the 3rd and the 7th; the complaint against him was sworn to on January 8, 1952. Interim Regulation No. 2-51, Section 21, expressly limits to 48 hours the time a person arrested for examination may lawfully be held without being charged with a criminal offense. Section 55 of the same Regulation makes any evidence obtained in violation of that Regulation, inadmissible. If the appellant was deliberately held in custody from January 3 to January 7 and thereby induced to make a confession on the seventh and was not charged with any criminal offense until January 8th, all of which is consistent with the record, the confession would clearly be involuntary and inadmissible. *McNabb, et al. v. United States*, 318 U.S. 332, 63 S.Ct. 808 (1943).

[8] Furthermore, it is significant that the confession itself does not disclose what became of the items allegedly stolen—a fact which would seem peculiarly within the knowledge of the appellant and which he would be ready to explain if he desired voluntarily to clear his conscience of the matter. Certainly the evidence falls far short of showing affirmatively that the alleged confession was voluntary in fact. To leave the confession in evidence under these circumstances after objection had been raised to it, was prejudicial to the appellant and requires that the finding and sentence be set aside.

It is therefore not necessary to consider any of the appellant's other specifications of error. Whether the appellant was prejudiced thereby or not, however, this Court considers the prosecutor's remarks made during and at the

close of the cross-examination of the appellant, first implying and then expressing an intention to press charges of perjury, were unwarranted by the evidence and improper. For guidance in the future, attention is directed to the following quotations:—

“Credibility of Witnesses. Counsel in arguing a case to a jury may comment on the credibility of a witness where his remarks are based on facts appearing in the evidence. In this connection counsel properly may comment on a witness’ appearance and conduct while giving testimony. Likewise, a prosecuting attorney may, in the course of his argument, comment on the appearance of the accused while testifying. No right exists, however, to attack the credibility of witnesses because of facts within counsel’s own knowledge and which do not appear in the evidence. Thus the use of unwarranted language in the abuse of a witness not justified by the record, is improper. Similarly, unwarranted accusations by counsel attributing perjury to a witness where there is no foundation in the evidence for such an imputation, are improper, particularly when injected into the argument in such a way as to have the appearance of positive evidence, as distinguished from mere opinion, forcibly expressed, and may furnish a basis for the granting of a new trial

53 American Jurisprudence, Trial, Section 464.

“In Reference to Defendant in Criminal Case. Since a prosecuting attorney, in a criminal case, represents the people of the state, including the defendant, it is his duty not to lay aside the impartiality that should characterize his official actions in order to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seek to procure a conviction at all hazards. It is therefore improper for a prosecuting attorney to denounce and vilify a defendant on account of the nature and character of his defense, to comment on the personal appearance of the defendant, not as a witness or on account of his manner and bearing as such, but as indicating a probability of guilt, to charge the defendant with previous crimes or immorality, or to assert that his character was bad, or otherwise denounce an accused in an unwarranted and improper way.....”

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53 American Jurisprudence, Trial, Section 504.

“Statement or Comment Regarding Perjury of Witnesses. Unwarranted accusations and unbridled statements by an attorney for a party in a civil action or the prosecuting attorney in a criminal prosecution attributing perjury to a witness, when there is no foundation in the evidence or the circumstances of the trial for such imputation, may constitute grounds for a new trial at the instance of the party injured thereby, particularly when these matters are injected in such a way as to have the appearance of positive evidence, as distinguished from mere opinions of the attorneys, forcibly expressed. The prejudicial effect of particular remarks or conduct depends upon the attending circumstances, including the degree of temperateness, their justification in view of the evidence, the timeliness and sufficiency with which objection to the alleged error is made, and the efforts put forth by the court to cure the effect of the error. Denunciation, in counsel’s argument to the jury, of a witness as a perjurer or his testimony as perjured, particularly if unfounded or a misstatement of the evidence, is ground for new trial.....”

39 American Jurisprudence, New Trial, Section 64.

By the unanimous per curiam decision and order entered July 24, 1952, in this case, the finding and sentence have been set aside, a new trial granted, bail fixed at \$10.00 for release of the accused pending new trial or other disposition of the charge, and the case returned to the Trial Division of the High Court for further action in accordance therewith.