

NGIRKEBAI TIMULCH, Appellant  
v.  
TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee  
Criminal Case No. 282  
Trial Division of the High Court  
Palau District  
November 22, 1966

Defendant was convicted in Palau District Court of assault and battery in violation of T.T.C., Sec. 379. On appeal, defendant contends that evidence was insufficient to support charge and that evidence showed crime of affray. The Trial Division of the High Court, Chief Justice E. P. Furber, held that even if complaining witness participated in affray, fact that accused's attack precipitated affray would not excuse his commission of assault and battery. Affirmed.

1. Criminal Law-Appeals-Scope of Review

On appeal by accused in criminal case, evidence must be considered in light most favorable to government.

2. Criminal Law-Appeals-Scope of Review

In criminal appeal, evidence must be considered on basis of what trial court had right to believe, not on what accused wishes it believed.

3. Appeal and Error-Scope of Review-Witness's Credibility

Although Trial Division of the High Court on appeals from District Courts may review facts as well as law, it is not in as good position as trial court to pass on credibility of witnesses who appeared and testified personally in trial court. (T.T.C., Sec. 200)

4. Appeal and Error-Scope of Review

Appellate court should make every reasonable presumption in favor of determinations of trial court.

5. Assault and Battery-Generally

In prosecution for assault and battery, even if evidence shows that complaining witness, in endeavoring to protect himself, participated in an affray, fact that accused's attack precipitated affray would not excuse the assault and battery. (T.T.C., Sec. 379)

TIMULCH v. TRUST TERRITORY

<i>Assessor:</i>	JUNGE FRANCISCO K. MOREI
<i>Interpreter:</i>	HARUO I. REMELIUK
<i>Counsel for Appellant:</i>	FRANCISCO ARMALUUK
<i>Counsel for Appellee:</i>	BENJAMIN N. OITERONG

FURBER, *Chief Justice*

Counsel for appellant argued that the Government had produced insufficient evidence to support the charge of Assault and Battery and that instead the evidence showed that there had been a crime of Affray, citing Miller on Criminal Law, Sec. 168, particularly p. 490 and 491.

Counsel for the appellee argued that the Government had proved the charge of Assault and Battery beyond a reasonable doubt, calling particular attention to the fact that the complaining witness was not so drunk that he did not know what he was doing while the appellant-accused was very drunk, and pointed out that the people around them were put in fear by the actions of the accused rather than anything done by the complaining witness who did not engage in any actual fighting that would constitute an Affray, citing Miller on Criminal Law, p. 489. Counsel for the appellee pointed out that the complaining witness would have been justified in using reasonable force to remove the accused from the restaurant where it appears the accused's trouble started, but that no force had been necessary, citing 6 Am. Jur. 2d, Assault and Battery, § 168. In closing, he called attention to the fact that on an appeal in a criminal case, the court must consider the evidence in the light most favorable to the Government, citing *Asakov. Trust Territory*, 3 T.T.R. 191, and *Rdechor Tkoel v. Trust Territory*, 2 T.T.R. 513.

OPINION

[1, 2] This appeal is governed primarily by the principles set out in the opinions of this court in *Asakov*.

*Trust Territory*, 3 T.T.R. 191, and in *Soilo and Others v. Trust Territory*, 2 T.T.R. 368. These principles have also been dealt with in *Rdechor Tkoel v. Trust Territory*, 2 T.T.R. 513, and *Basilus Mesechol v. Trust Territory*, 3 T.T.R. 136. As stated in the *Asako* case:-

"This court and the Appellate Division of the High Court have repeatedly held that in appeals by the accused in a criminal case, the evidence must be considered in the light most favorable to the Government and on the basis of what the trial court had a right to believe, not on what the appellant wishes it believed."

**[3,4]** In the present case, there was clear and positive testimony that the accused made an unprovoked attack upon the complaining witness, punched him in the face and gave him a black eye, and that the complaining witness took no part in any fighting other than to try to protect himself from the attack by the accused. This evidence, if believed, clearly warranted a finding of guilty. To be sure, this testimony was contradicted by the one witness offered on behalf of the accused. As stated in the *Soilo* case cited above : -

"While under section 200 of the Trust Territory Code the Trial Division of the High Court on appeals from the District Courts may review the facts as well as the law, it is clearly not in as good a position as the trial court to pass on the credibility of witnesses who appeared and testified personally in the trial court. Furthermore, the appellate court should make every reasonable presumption in favor of the determinations of the trial court."

See 5 Am. JUR. 2d, Appeal and Error, §§ 838-840 inclusive.

**[5]** Counsel for the appellant has laid great stress on his contention-apparently based entirely on the testimony of the one witness offered on behalf of the accused -that the accused was guilty of Affray and not of Assault and Battery, and that the complaining witness should have been charged jointly with the accused. There is indi-

cation that an affray may have occurred in the restaurant where the accused's trouble started, but it is clear the complaining witness was not involved in that and was in the process of leading the accused out of trouble when the incident involved in this case occurred. Even if the action of the complaining witness in endeavoring to protect himself could conceivably be considered as participating in an affray (which appears to the court from the entire testimony to be unlikely), the fact that the accused's attack on the complaining witness had precipitated an Affray would not excuse the Assault and Battery.

From a careful examination of the entire record, this court is of the opinion that the trial court had a right to believe the evidence tending to support the Government's theory of the case and that this evidence amply justified the finding that the accused was guilty of Assault and Battery.

#### JUDGMENT

The finding and sentence of the Palau District Court in its Criminal Case No. 4711 are affirmed.