

RAMON T. LIZAMA, Appellant
v.
TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee
Criminal Case No. 212
PEDRO A. TAITINGFONG, ATANCIO A. TAITINGFONG,
AND WILLIAM ADA, Appellants
v.
TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee
Criminal Case No. 213
LORENZO A. MANALO, Appellant
v.
TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee
Criminal Case No. 214
Trial Division of the High Court
Mariana Islands District
March 21, 1968

Appeal from convictions for assault and battery. The Trial Division of the High Court, E. P. Furber, Temporary Judge, held exclusion of defense witnesses, when those of prosecution had not been excluded, was improper.

Judgment set aside and case remanded for new trial.

1. Criminal Law-Trial Procedure-Exclusion of Witnesses

Rule 19h of the Rules of Criminal Procedure relating to the exclusion of witnesses, like all other parts of those Rules, must be construed in the light of the purpose of the Rules and the overall obligations of a judge to act fairly and justly within the limits imposed on him by law.

2. Courts—Judicial Discretion

Many different expressions have been used to describe the exact meaning of "judicial discretion" sometimes referred to as a "legal discretion" to make clear that it does not imply a completely free choice, but one limited by general principles of law.

3. Courts—Judicial Discretion

A legal discretion is one that is regulated by well known and established principles of law.

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4. Criminal Law-Trial Procedure--Generally

Under the Trust Territory Bill of Rights every person charged with crime has an absolute right to a fair and impartial trial, and the duty rests upon the courts, and also upon the prosecuting authorities to see that this right is upheld and sustained.

5. Criminal Law-Trial Procedure-Exclusion of Witnesses

As to the exclusion of witnesses, it is generally considered that where exclusion is ordered all witnesses should be included, unless some good reason is shown for exempting certain ones.

6. Criminal Law-Trial Procedure-Exclusion of Witnesses

That there is good reason for exempting certain persons from the exclusion of witnesses is well recognized, thus an accused has an absolute right to be present even though he plans to testify, similarly one directly interested in the result of the trial, such as the complainant, may be exempted, and parties in civil action should be exempted on the same basis; so too expert witnesses and one who has actively assisted in the preparation of the case and is assisting counsel at the trial should be exempted.

7. Criminal Law-Trial Procedure-Exclusion of Witnesses

The order excluding witnesses should not prevent calling as a rebuttal witness one who has been in the courtroom if the side calling him had not planned to use him and could not reasonably have foreseen that he would be needed.

8. Criminal Law-Trial Procedure-Exclusion of Witnesses

Exemptions from an order excluding witnesses should be applied equally to witnesses of both sides as far as circumstances permit.

9. Criminal Law-Trial Procedure-Exclusion of Witnesses

Ordinarily, a motion for exclusion of witness and any order on the subject should be made before the prosecution's or plaintiff's opening statement.

FURBER, *Temporary Judge*

MEMORANDUM OF DECISION

These three appeals are from convictions for Assault and Battery in three cases tried together in the District Court all arising out of the same incident and involving the same victim. "The appeals were heard together and the grounds in all three are identical.

They raise a point which is very important to the proper administration of justice and which it seems difficult for many Micronesians to understand, namely, the restraints or limitations there are on a judge's freedom of choice in deciding matters left to his discretion. This in turn depends on a principle of much broader application which also seems to cause many Micronesians special difficulty, namely, that words must always be construed with careful regard to the setting or context in which they are used and that it is never safe or proper to rely on the literal dictionary meaning of particular words lifted out of the setting or context in which they are used.

In these cases, when the prosecution rested after its evidence-in-chief, during which no witnesses had been excluded from the courtroom, the trial judge on his own initiative asked the prosecutor whether or not he intended to ask that defense witnesses be excluded from the courtroom, until called to testify. The prosecutor then moved to so exclude the defense witnesses, stating he had been thinking of doing so. Counsel for the accused objected, but the motion was granted and the defense witnesses were excluded until each was called to testify.

Counsel for the appellants argued that the exclusion of the defense witnesses, when those of the prosecution had not been excluded, in itself showed unfairness.

[1] Counsel for the appellee argued that Rule 19h of the Rules of Criminal Procedure gave the court discretion to exclude any witness without excluding all.

Rule 19h of the Rules of Criminal Procedure reads as follows:-

"h. *Exclusion.* The court in its discretion, with or without the request of the prosecution or the accused or his counsel, may direct that any or all witnesses be excluded from the court until they have given evidence, and may direct that they shall remain in court thereafter during the proceeding unless released."

These words taken alone might seem to authorize a trial judge to so exclude any witness at any point in the trial before the witness is called to testify without regard to what the judge does as to any other witnesses, but they, like all other parts of these Rules, must be construed in the light of the purpose of the Rules and the overall obligations of a judge to act fairly and justly within the limits imposed on him by law. Rule 1 of the Rules of Criminal Procedure must be considered. It provides in part as follows:-

"Purpose and Construction. These rules are intended to provide for the just determination of every criminal proceeding. . . . They shall be construed to secure simplicity in procedure, *fairness in administration*, and elimination of unjustifiable expense and delay. . . ." (Emphasis added.)

We have tried to make clear a judge's overall obligations in Chapter I of the "Handbook for District and Community Court Judges, Clerks of Courts, and Trial Assistants". The paragraph entitled "Fairness" in that chapter on page 2 of the handbook is particularly in point "In all matters which a judge must decide, he is expected to think carefully before he acts, to be fair to all concerned, to consider the interests and convenience of both parties and public, and to try to act consistently, that is, to treat all those in the same situation equally and distinguish between people only when there is good reason for doing so."

[2,3] Many different expressions have been used to describe the exact meaning of "judicial discretion" sometimes referred to as a "legal discretion" to make clear that it does not imply a completely free choice, but one limited by general principles of law. See Bouvier's Law Dictionary, Third Revision, Discretion, Vol. I, p. 884, 885. Perhaps one of the clearest definitions is that quoted there from *Detroit Tug and Wrecking Co. v. Circuit Judge*, 75 Mich. 360, 42 N.W. 968, as follows:-

"A legal discretion is one that is regulated by well known and established principles of law."

[4] One of the most fundamental principles of law in the United States is that every person charged with crime has an absolute right to a fair and impartial trial, and that the duty rests upon the courts, and also on the prosecuting authorities to see that this right is upheld and sustained. 21 Am. Jur. 2d, Criminal Law, §§ 234, 235. Under our Bill of Rights, this principle applies equally in the Trust Territory.

[5-7] Applying this principle to the exclusion of witnesses, it is generally considered that where exclusion is ordered all witnesses should be included, unless some good reason is shown for exempting certain ones. That there is good reason for some exemptions is well recognized. An accused has an absolute right to be present even though he plans to testify. Similarly one directly interested in the result of the trial, such as the complainant, may be exempted, and parties in civil actions should be exempted on the same basis. Expert witnesses, whose testimony is expected to be based on the facts disclosed by other witnesses are usually exempted. So may someone who has actively assisted in the preparation of the case and is assisting counsel at the trial. The order excluding witnesses should not prevent calling as a rebuttal witness one who has been in the courtroom if the side calling him had not planned to use him and could not reasonably have foreseen that he would be needed. 53 Am. Jur., Trial, §§ 32,33.

[8,9] Such exemptions from an exclusion order, however, should be applied equally to witnesses of both sides as far as circumstances permit. Ordinarily, a motion for exclusion of witness and any order on the subject should be made before the prosecution's or plaintiff's opening statement.

In the present cases, it is impossible to tell how much the accuseds were prejudiced by having their witnesses excluded when the prosecution's were not, but the fact that the trial judge stressed in his report that the testimony of the witnesses for the accused was conflicting shows the great danger of unfairness, where the prosecution witnesses had the benefit of refreshing their recollection from the testimony of those called ahead of them and the accuseds' witnesses did not.

There cannot fairly be any presumption that the witnesses of one side need to be excluded more than those of the other. While the court has great confidence in the good faith of the trial judge, it is satisfied that there was a serious misunderstanding on the part of both the prosecutor and the trial court as to the requirements of a fair trial and that these convictions cannot stand.

The findings and sentences in these cases are accordingly being set aside by judgment entered this day and the cases remanded to the District Court for new trial.