

**KINTOL SKILANG, NGIRAKABOU MIDAR, KANSIANO
SASAO, PHILIPNERY LEMEI, Appellants**
v.
TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee
Criminal Case No. 342
Trial Division of the High Court
Palau District
May 1, 1970

Appeal from conviction of offense of consuming alcoholic beverages in a certain public area. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that accused's statements were admissible in evidence as they had effectively waived their right to counsel but that trial should be reopened to give prosecution an opportunity to produce "substantial" corroborative evidence and to give defense further opportunity to object to admission of statements on ground their right to counsel was not knowingly waived.

1. Liquor Control—Consumption

The authority to control liquor consumption and sale was delegated by the Congress of Micronesia to the Palau District Legislature by section 47(c)(1) of the Trust Territory Code. (T.T.C., Sec. 47(c)(1))

2. Appeal and Error—Scope of Review—Record

The content of the record, affirmed by the trial judge, is the responsibility of the party alleging prejudicial error in the record.

3. Criminal Law—Rights of Accused—Counsel

Uncontradicted statements of accused that each wanted counsel at time of trial and it was not necessary that counsel be present at time of interrogation constituted an effective waiver of the right to counsel.

4. Confessions—Admissibility—Waiver of Right

Where there was a waiver of right, evidenced by the signatures of the accused to their statements, the statements were admissible in evidence.

5. Confessions—Admissibility—Waiver of Right

A waiver of right establishes one of the essential elements necessary for admission of a confession in that it is evidence of a voluntary act.

6. Confessions—Admissibility

Reviewing court will not upset the trial court's determination of facts upon which admissibility of confessions depends unless there is plain error.

SKILANG v. TRUST TERRITORY

7. Confessions—Admissibility—Co-Defendant

Normally, a confession by one defendant against a co-defendant is not admissible because it deprives the implicated defendant of his right to be confronted with the witness against him and the right to cross-examine him; such inculcating statement is inadmissible hearsay.

8. Confessions—Admissibility—Co-Defendant

The rule that a confession by one defendant against a co-defendant is not admissible is not applicable where the co-defendant had an opportunity to cross-examine the defendant who made the confession.

9. Confessions—Corroborating Evidence

It is necessary in order to sustain a conviction based primarily upon a confession, to establish by reasonable evidence the *corpus delicti*, and such evidence may be circumstantial and need not establish the commission of the crime beyond a reasonable doubt but merely be substantial and either not contradicted or having greater weight than any contradiction.

10. Confessions—Corroborating Evidence

Before a conviction may be sustained the trial court must be convinced beyond a reasonable doubt of the accused's guilt and this may be based upon all the evidence, that is, both the confession and its corroboration.

Assessor:	ASSOCIATE JUDGE WM. O. WALLY
Interpreter:	PETER NGIRAIBIOCHEL
Counsel for Appellant:	FRANCISCO ARMALUUK
Counsel for Appellee:	BENJAMIN OITERONG

TURNER, *Associate Justice*

The four accused were convicted in a consolidated trial of the offense of consuming alcoholic beverages on the grounds of the District Hospital contrary to Palau District Code, Section 306(k) as amended by Public Law No. 4-4-2, Section 8(k).

[1] Some of the grounds given in the motion of appeal were not argued and were in effect waived by appellants. One of these challenged the power of the District Legislature to prohibit consumption of alcoholic liquor in enumerated public areas, including the hospital grounds. The authority to control liquor consumption and sale

is delegated by the Congress of Micronesia to the District Legislature by Section 47 (c) (1), Trust Territory Code.

Another appeal ground was that the charges were brought under the District Code section which had "been repealed by Public Law 4-4-2, Section 8(k)." The amending public law restated the former prohibition of the code.

[2] Of a more serious nature is the allegation that the trial judge demonstrated prejudicial bias by statements allegedly made at the close of the prosecution case. The record is absolutely devoid of any prejudicial remarks by the trial judge. This alleged ground of appeal is scandalous when not supported by the record and is not worthy of further consideration. The content of the record, affirmed by the trial judge, is the responsibility of the party alleging prejudicial error in the record. *Tasio v. Trust Territory*, 3 T.T.R. 262, 265.

There remain two grounds for appeal worthy of consideration. The first of these alleged errors was the admission in evidence of statements made to the police after the accused had, by writing the name of the Public Defender's representative, purportedly answered affirmatively the question in the "Notice to the Accused" that:—

"Do you want us to send word now to counsel to come see you here?" and,

"If so, whom do you want us to send for?"

The confessions were written and signed by the accused without the public defender being called nor being present. The prosecution explained this by eliciting statements from the police officers (who interrogated the accused) that each of the four stated they wanted counsel at time of trial and it was not necessary that the public defender's representative be present at the time of the interrogation. Although each of the four defendants took the stand none of them

were asked to contradict the testimony of the police. As to the failure to deny prosecution testimony see: *Trust Territory v. Benemang*, 5 T.T.R. 32.

[3] Under the circumstances, because of the failure to deny the police testimony, we must assume there was an effective waiver of the right to counsel, even though our inclination is to believe that the accused were not consciously aware they were waiving one of their protected rights and that the police did not sufficiently understand the question of waiver to adequately explain it to the accused. This is an area that calls for corrective training of the police and perhaps an enlarged explanatory notice to the accused.

[4] Because there was a waiver of right, evidenced by the signatures of the accused to their statements, the statements were admissible in evidence. Three of the statements were confessions in that the individuals admitted all elements of the offense. *Ridep v. Trust Territory*, 5 T.T.R. 61. *Firetamag v. Trust Territory*, 2 T.T.R. 413.

[5, 6] A waiver of right establishes one of the essential elements necessary for admission of a confession in that it is evidence of a voluntary act. The trial court found from the testimony that these statements were voluntary and admitted them. We will not upset the trial court's determination of facts upon which admissibility depends unless there is plain error, which in this case there was not. *Yamashiro v. Trust Territory*, 2 T.T.R. 638, 643.

[7] But only three of these statements were in fact confessions. The defendant Lemei did not admit he drank liquor on the hospital grounds. The confessions of the other three implicated him in the offense. Normally, a confession by one defendant against a co-defendant is not admissible because it deprives the implicated defend-

ant of his right to be confronted with the witness against him and the right to cross-examine him. Such inculpatory statement is inadmissible hearsay. *Bruton v. U.S.*, 88 S.Ct. 1620.

[8] But this general rule was not applicable in this case because Lemei did have an opportunity to cross-examine his three co-defendants since defense counsel called all defendants to the stand. The defense apparently was so concerned with excluding the written statements on the ground counsel had been requested and not provided that it made far more damaging tactical errors by calling the defendants to testify.

That is, the tactics would have been damaging had the prosecution taken advantage of the presence on the stand of the defendants by cross-examining them on the essential elements of the offense. Failure to do so presents a serious question as to whether the written confessions were sufficiently corroborated to sustain the convictions.

[9,10] It is necessary in order to sustain a conviction based primarily upon a confession, to establish by reasonable evidence the corpus delicti. The evidence may be circumstantial. It need not establish the commission of the crime "beyond a reasonable doubt," but merely that it be "substantial" and either not contradicted or having greater weight than any contradiction. Before the conviction may be sustained, however, the trial court must be convinced beyond a reasonable doubt of the accused's guilt and this may be based upon all the evidence, that is, both the confession and its corroboration. *Firetag v. Trust Territory*, 2 T.T.R. 413. *Yamashiro v. Trust Territory*, 2 T.T.R. 638, 644. *Marbou v. Trust Territory*, 1 T.T.R. 269, 272.

In this case the circumstantial corroborative evidence is most flimsy, but it was sufficient to convince the trial court and we would not upset it were it not

for the fact that the case must be remanded for further trial anyway. This appellate court is in very much the same situation as was the court in *Decena v. Trust Territory*, 3 T.T.R. 601, in which it was said:—

“Our difficulty is that from a totality of the evidence we cannot say that a more exhaustive presentation at a new trial is not indicated in the interest of justice.”

We believe the trial should be re-opened to give the prosecution an opportunity to produce “substantial” corroborative evidence and likewise to give the defense further opportunity to object to the admission of the statements of the accused on the ground their right to have counsel present during their interrogation was not knowingly waived. It is, therefore,

Ordered that the finding and sentence are set aside and the case is remanded to the District for further trial in accordance with the principles herein laid down.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Plaintiff

v.

MIKEL MAD, Defendant

Criminal Case No. 332

Trial Division of the High Court

Palau District

May 19, 1970

Criminal case involving charge of murder by torture. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that while there was no intent to kill there was an intent to inflict pain and suffering and malice aforethought necessary to convict could be inferred either from the wanton and wilful disregard of consequences to human life or from the intent to do great bodily harm.

1. Homicide—Generally

An unlawful killing is one without legal excuse or justification.

2. Homicide—Generally

Malice aforethought is manifested by the doing of an unlawful act intentionally, deliberately and without legal cause or excuse.