

(\$1,325.00) under paragraph 5c of the April 8, 1970 agreement, together with interest at the rate of six per cent per annum from date hereof until paid.

3. That payment of the judgment amount herein shall be in full satisfaction of defendant's obligations upon that certain promissory note in the face amount of \$25,000.00 due July 25, 1970, from defendant to plaintiff and that certain agreement entered into between the parties dated April 8, 1970.

4. Costs are not allowed.

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**TRUST TERRITORY OF THE PACIFIC ISLANDS**

v.

**TRUMAN NGIRMANG AND ABRAHAM OBAK**

Criminal Case No. 390

Trial Division of the High Court

Palau District

November 7, 1972

Prosecution for kidnapping and rape. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, found alibi offered as only defense to be insufficient to adequately challenge evidence of guilt beyond a reasonable doubt where defendants did not offer corroborating testimony regarding their presence, for a crucial period of at least an hour, at club they claimed to have been at.

**1. Criminal Law—Evidence—Hearsay Exceptions**

In prosecution for kidnapping and rape, conversations between perpetrators of the crimes, overheard by raped girl and overheard the morning after the offense occurred by girl who lived at house where perpetrators assembled and discussed what had happened, admonished each other not to talk about the events and voiced their concern over being discovered together by police a few hours after the offense, at which time one of them had been arrested, were properly admitted in evidence under exceptions to the hearsay rule relating to conspirators. (Rules of Evidence, Rule 63)

**2. Criminal Law—Evidence—Acts and Statements of Conspirators**

When several persons conspire to commit a crime, the acts and declarations of any of them during and in furtherance of the conspiracy are admissible as substantive evidence against any conspirator.

**3. Criminal Law—Evidence—Acts and Statements of Conspirators**

Conspirator's statements are admissible even though the charge and trial are not for conspiracy.

**4. Criminal Law—Evidence—Decedents' Acts and Statements**

That some of the statements of conspirators testified to in prosecution for kidnapping and rape were made by an accused who took his life before trial did not preclude admissibility of the statements.

**5. Criminal Law—Principal and Accessory**

In prosecution for kidnapping and rape of girl by four men, defense argument that victim's testimony did not conclusively show she was raped by all four men was precluded by statute removing distinction between principals and accessories before the fact. (11 T.T.C. § 2)

**6. Criminal Law—Burden of Proof—Alibi**

The burden of proving an alibi is on the one asserting it.

**7. Criminal Law—Alibi—Proof**

An alibi need not be proven by either a preponderance of the evidence or beyond a reasonable doubt.

**8. Criminal Law—Alibi—Weight and Sufficiency**

In prosecution for kidnapping and rape, alibi offered as only defense raised no doubt as to guilt and was inadequate where girl was abducted in the early evening, dropped off near her home between 11 p.m. and midnight, and there was a minimum period of 9:30 p.m. to 10:30 p.m. for which there was no corroborating testimony that defendants were at club they claimed to have been at from 9:00 p.m. to midnight.

TRUST TERRITORY v. NGIRMANG

*Assessor:* PABLO RINGANG, *Presiding Judge of the Palau District Court*

*Interpreters:* SINGICHI IKESAKES and PETER NGIRAIBICHOL

*Reporter:* NANCY K. HATTORI

*Prosecutors:* PHILLIP W. JOHNSON, *District Attorney, PALAU;* and GILLIAN TOLLAMES, *Assistant District Prosecutor*

*Counsel for Defendants:* J. LEO MCSHANE, *Public Defender, Palau;* and BENJAMIN SANTOS, *Assistant Public Defender's Representative*

TURNER, *Associate Justice*

This case arose with four young men being charged with kidnapping and raping a 17-year-old girl on Koror and Malakal Islands. Preliminary hearings were held in the District Court and one of the four was discharged when he established an alibi to the satisfaction of the Court. Of the three bound over for trial, one took his own life a few months before trial. Trial therefore was had upon the charges against two of the original four.

The State proved the kidnap-rape without challenge. The sole question of fact was the identity of the accused. They both resisted prosecution evidence as to their participation with an alibi defense.

There was conflicting testimony at trial from both prosecution and defense witnesses as well as contradictory statements to police and others within a relatively short time after the offense had been committed. The admissibility of these out-of-court declarations raises the question of law involved in this case.

The prosecution proved beyond the necessary reasonable doubt that the victim had been seized outside her home,

adjacent to the Peleliu Club during the early night of June 9, 1971; that she was carried to a waiting automobile, in which the engine was running; that she was put in the back seat with three of her captors; that her dress was torn into strips which were used to blindfold her, gag her, and bind her feet; that she and the four attackers were driven by a fifth person, a woman, to the former Japanese reefer dock (known locally as the "Icebox") where she was dragged from the car and raped by four persons. The victim, still bound, gagged and blindfolded, was returned to an area near her home and near the intersection of the main road and the access road to the Peleliu Club, where she was dumped out of the car. Some time later, estimated to be between 11:00 p.m. and midnight, the victim was found lying near her home, in a helpless condition, by her uncle with whose family she lived.

The victim was taken to the hospital and to the police station where she told about her experience. Approximately 2:15 a.m., the police arrived at the home of one of the accused where they found the subsequently accused four young men drinking together. Truman Ngirmang was arrested and taken to the police station for interrogation. He was not given the Miranda warnings required by the Trust Territory Code and his statement was admitted in evidence only to impeach his testimony.

The following morning, three of the accused assembled at a home where they were joined by the woman driver of the kidnap car and another girl who lived at that house. The fourth accused, Truman, was being held in jail. Testimony by the two girls as to the discussions by the accused of the previous night's happenings, their admonitions to each other not to talk about the event, and their very obvious concern over being discovered together by the police corroborated the testimony of the car driver in which she identified the four accused.

The admissibility of the testimony relating to the conversations of the following morning was challenged by the defense under the exclusionary rule of hearsay and also because one of the participants had died before trial.

[1] The conversations overheard by the two girls, called as prosecution witnesses, are admissible under exceptions to the hearsay rule relating to conspirators. Also, Rule 63, Trust Territory Rules of Evidence, lists a number of exceptions to the hearsay rule applicable here. See Rule 63(1) relating to previous statements by a person subject to cross-examination; (4) relating to *res gestae*; (6) relating to confessions; and (9) (b) relating to statements made in the course of a conspiracy by conspirators.

[2, 3] When several persons conspire to commit a crime, the acts and declarations of any conspirator, during such conspiracy and in furtherance thereof, are admissible as substantive evidence against any co-conspirator on trial. See Wharton's Criminal Evidence, 12th Ed., Volume 2, pages 178-190. Conspirator's statements are admissible even though the information does not charge conspiracy as set forth in 11 T.T.C. 401. In *United States v. Olweiss*, 138 F.2d 798, 800. Judge Learned Hand stated the rule:

"The notion that the competency of the declarations of a confederate is confined to prosecutions for conspiracy has not the slightest basis; their admission does not depend upon the indictment . . ."

The testimony as to the conspirators' statements made the morning after the crimes had been committed were admissible in that they corroborated direct testimony by a prosecution witness (the driver of the kidnap automobile) and also they come within the rule set forth by Wharton, Volume 2, page 204, that conspirators' statements after the crime are admissible when made for "the purpose of escape, the concealment of evidence, or the defeat or prevention of the prosecution."

[4] The fact that some of the statements testified to were made by Hosei Mikel, who died before trial, does not preclude their admissibility. The rule is set forth in *United States v. Weber*, 437 F.2d 327, 336:

“When the co-conspirator declarant is available as a witness, there is no doubt that hearsay principles do not prevent the introduction into evidence of extra-judicial statements made by the co-conspirator in furtherance of the conspiracy. (Citing) The fact that Burgess had died before trial strengthened, rather than weakened, the Government’s argument for admitting the extra-judicial statements. One of the rationales for permitting exceptions to the hearsay rule is necessity. . . . When the co-conspirator had died before trial, there is greater justification to lay aside the hearsay rule, because there is greater necessity.”

[5] Another defense argument challenging prosecution evidence related to the conclusiveness of the virgin victim’s testimony she was raped by the four accused. Even if there was any direct evidence that all four did not participate in the rape—and there was none except their denials of the offenses charged—the Trust Territory statute, 11 T.T.C. 2, removing the distinction between principals and accessories before the fact precludes a defense on this ground.

[6, 7] Both accused testified at the trial to establish their alibi defenses. The burden of proving an alibi is on the one claiming it. See Wharton, Volume 1, pages 38–42, but it need not be proven by either the preponderance of the evidence nor beyond a reasonable doubt. Wharton, Volume 1, pages 65–77. However, it is noted that in conspiracy cases, Wharton says:

“When the prosecution establishes a conspiracy on the part of two or more persons to do any unlawful act, an alibi cannot be shown in defense, since, in a conspiracy, the presence or absence of one of the conspirators at the exact time or time covered by the offense, is immaterial . . . .”

[8] The evidence offered by the defendants sought to establish that they were both at the Peleliu Club from approximately 9:00 p.m. until the midnight closing of the club. It was during this period the victim was kidnapped and raped. Although several witnesses were called, including an off-duty policeman who was present at the club, none of these were able to corroborate in its entirety the claim of the accused they were present the entire evening. There was a minimum period from 9:30 p.m. to 10:30 p.m. for which the accused were unable to offer corroborating testimony. This period was sufficient time for the commission of the crime and without a valid showing of an alibi for the crucial period, there was nothing to raise a doubt as to the guilt of the accused as established by the prosecution evidence. All that was offered by the accused were their own self-serving declarations denying the crime and claiming their continued presence at the club. Without more, such self-serving testimony is an inadequate defense.

Because the prosecution evidence was sufficient to establish guilt beyond a reasonable doubt and because the defendants failed to adequately challenge this evidence by their attempted establishment of an alibi, it follows both accused must be and are found guilty of both offenses as charged.