

**COMMONWEALTH OF THE
NORTHERN MARIANA
ISLANDS**

vs.

Fernando T. RIVERA

**Appellate No. 83-9012
District Court NMI
Appellate Division**

Decided July 16, 1985

1. Weapons - Dangerous

A dangerous weapon is an instrument which is likely to cause death or great bodily harm when used in the manner in which it was used in the particular case.

2. Appeal and Error - Criminal Conviction - Standard of Review

On appeal of a conviction, the court must review the evidence, taking into account reasonable inferences which may be drawn from it, in a light most favorable to the government; findings will not be reversed unless clearly erroneous.

3. Appeal and Error - Criminal Conviction - Standard of Review

The test on appeal of a criminal conviction is whether any rational trier of fact, viewing the evidence in a light most favorable to the government, could have found the essential elements beyond a reasonable doubt.

4. Weapons - Dangerous

The determination whether an object constitutes a "dangerous weapon" turns not on the object's latent capability alone, but also on the manner in which the object was used.

5. Weapons - Dangerous

Where evidence showed that the defendant poked "samurai knife" or "military knife" at victim and made death threats, trial court's finding that defendant used "dangerous weapon" was not clearly erroneous.

6. Evidence - Criminal Proceeding - Victim Testimony

The testimony of a victim, even though impeached, will support a conviction unless it is inherently improbable or physically impossible.

7. Appeal and Error - Criminal Conviction - Sufficiency of Evidence

Defendant who challenges a conviction solely on sufficiency of the evidence bears a heavy burden of proof.

8. Appeal and Error - Criminal Conviction - Sufficiency of Evidence

Where the victim testified consistently to the events leading to the assault and to the defendant's threats and use of the weapon, and where his testimony reveals no physical impossibility and is not inherently incredible, and where his account is corroborated by two other witnesses, there is sufficient evidence to sustain the conviction.

9. Judges - Bias

Absent plain error, challenge to partiality of trial judge will not be considered by the appellate court where no challenge was made in the trial court.

FILED
Clerk
District Court

JUL 16 1985

IN THE DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

For The Northern Mariana Islands
By [Signature]
(OF COUNSEL)

APPELLATE DIVISION

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COMMONWEALTH OF THE NORTHERN)
MARIANA ISLANDS,)
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Plaintiff/Appellee,)
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vs.)
)
FERNANDO T. RIVERA,)
)
Defendant/Appellant.)

DCA NO. 83-9012
CTC NO. 83-78

OPINION

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BEFORE: LAURETA, WEIGEL and DUENAS, District Judges
LAURETA, District Judge:

The defendant Fernando Rivera was convicted of assault and battery with a dangerous weapon under 11 Trust Territory Code (TTC) § 204. Rivera now appeals this conviction raising the following issues:

1. Whether the evidence supports the trial court's finding that a dangerous weapon was used.

1 2. Whether the evidence supports the
2 conviction.

3 3. Whether the conviction was the result of
4 the bias and prejudice of the trial
5 judge.

6 1. Dangerous Weapon

7 [1] A dangerous weapon has been defined by the High Court
8 of the Trust Territory of the Pacific Islands as an instrument
9 which is likely to cause death or great bodily harm when used in
10 the manner in which it was used in the particular case.
11 Ngiraibai v. Trust Territory, 2 Trust Territory Reports (T.T.R.)
12 522 (1964); Paul v. Trust Territory, 2 T.T.R. 603 (App.Div.
13 1969). Rivera contends that the evidence does not support the
14 trial court's finding that the weapon used was sufficiently
15 dangerous to sustain a conviction under § 254.

16 [2-5] Of course, the appellate division must review the
17 evidence, taking into account reasonable inferences which may be
18 drawn from it, in a light most favorable to the government;
19 findings will not be reversed unless clearly erroneous. United
20 States v. Hudson, 609 F.2d 1326 (9th Cir. 1979). The test on
21 appeal is whether any rational trier of fact, viewing the evi-
22 dence as noted above, could have found the essential elements
23 beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307,
24 318-319, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979). Rivera's
25 main contention is that there was some conflict in the evidence
26 as to the nature of the weapon. There is testimony by the
victim, Juan Diaz, that the weapon was a "samurai knife" or

1 "military knife" about 2 feet in length with a sharp blade
2 (Reporter's Transcript at 14). Diaz testified that Rivera
3 "poked" the weapon at him saying he was going to kill him. Id.
4 The determination whether an object constitutes a 'dangerous
5 weapon' turns not on the object's latent capability alone, but
6 also on the manner in which the object was used, United States v.
7 Guilbert, 692 F.2d 1340, 1343 (11th Cir. 1982), cert. denied, 460
8 U.S. 1016 (1983)(pool cue is dangerous weapon when defendant
9 assaulted victim with it while shouting death threats). Here,
10 Diaz' recollection of the weapon is supported by the testimony of
11 other witnesses and by evidence of cuts he received. There is
12 sufficient evidence to support the judge's conclusion.

13 2. Sufficiency of the Evidence

14 Rivera contends that the evidence of the assault is
15 based solely on the testimony of Diaz and lacks credibility.
16 Initially, it should be noted that the prosecution called three
17 eyewitnesses. However, even assuming Rivera's version of the
18 evidence, the conviction will be sustained.

19 [6-8] The testimony of a victim, even though impeached will
20 support a conviction unless inherently improbable or physically
21 impossible. In Re Terry S., 121 Cal.App.3d 87, 174 Cal.Rptr. 54
22 (1981). The defendant who challenges the conviction solely on
23 sufficiency of the evidence bears a heavy burden of proof.
24 United States v. De Fiore, 720 F.2d 757 (2nd Cir. 1983), cert.
25 denied, ___ U.S. ___, 104 S.Ct. 1684 (1984). Diaz testified
26 consistently to the events leading to the assault and to Rivera's

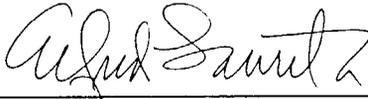
1 threats and use of the weapon. The testimony contains no phys-
2 ical impossibility of truth nor is it inherently incredible;
3 moreover, the account is corroborated by two other witnesses.
4 There is sufficient evidence to sustain the conviction.

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6 3. Bias and Prejudice

7 [9] Rivera makes general allegations of bias and prejudice
8 on the part of the trial judge. Where there is no challenge
9 below to the impartiality of the trial judge, the allegation will
10 not be considered on appeal absent plain error. United States v.
11 Latimer, 548 F.2d 311 (9th Cir. 1977). Rivera's assertions are
12 meritless.

13 4. Conclusion

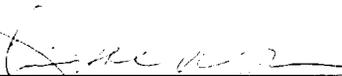
14 Rivera's conviction is affirmed.

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18 JUDGE ALFRED LAURETA

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22 JUDGE STANLEY A. WEIGEL

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26 JUDGE CRISTOBAL C. DUENAS