

[6] A revocation hearing is not a criminal trial, *Johnson v. Stucker*, 453 P.2d 35 (Kan.), nor is a hearing on a motion to suppress from which the information was obtained upon which determination to revoke the suspended sentence was made. Accordingly, it is

Ordered, that the suspended sentence of imprisonment granted in the above-captioned case be and the same hereby is revoked for a period of five (5) years from this date and shall again be suspended thereafter upon the same conditions of good behavior imposed in the original sentence.

It is Further Ordered, that because of the operation of 11 T.T.C. 7, the offenses charged in Criminal Case No. 435 be and the same are hereby dismissed.

ROBINSON HENRY, and RONNY ICHIRO, Appellants

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Case No. 378

(District Court Criminal Cases Nos. 7397 and 7398)

Trial Division of the High Court

Palau District

September 29, 1972

Appeal from denial of motions to suppress written confessions. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that confessions made, without counsel, after statement that arrested persons wished police to send for counsel, were admissible as presence of counsel had been validly waived.

1. Arrest—Request for Counsel—Subsequent Statements

An answer of "yes" by an arrested person to question whether he wishes police to send for counsel to come and see him at that time, without more, makes any subsequent statement or confession without presence of counsel inadmissible.

2. Arrest—Request for Counsel—Subsequent Statements

Where arrested persons wrote "yes" to form question whether they wished police to send word at that time for counsel to come and see

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them, and, in answer to question: "if so, whom do you want us to send for?", wrote a public defender's name, and then wrote that they would see counsel later in court and proceeded to write confessions on a sheet of paper headed ". . . having been advised of my rights . . . (I) make the following statement to the police freely and voluntary . . .", their confessions were voluntary and there was a valid waiver of counsel.

3. Arrest—Illegal Arrest—Subsequent Statements

An illegal arrest does not, by itself, render a confession subsequently obtained during illegal detention inadmissible at trial.

4. Arrest—Illegal Arrest—Subsequent Statements

Where police, without warrant or having seen the offense, illegally arrested persons for drinking while under age, but had detected liquor on their breath and arrested them at a "drinking bout", confessions made during the illegal detention were admissible.

5. Arrest—Illegal Arrest—Harmless Error

There was no reversible error where illegal arrest did not prejudice arrested persons. (12 T.T.C. § 69)

Counsel for Appellants:

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Counsel for Appellee:

BENJAMIN N. OITERONG, *Dis-
trict Prosecutor*

TURNER, *Associate Justice*

The two appellants were convicted in District Court for illegal consumption of alcoholic liquor while under 21 years of age. Both appeal the denial of their motions to suppress their written confessions made to the police after arrest on the grounds (1) they were denied counsel when they were interrogated after requesting counsel, and (2) their arrests were illegal in that it was without warrant and no offense was committed in the presence of the arresting officers.

A transcript was not included in the appeal record but the facts necessary to permit a determination of the questions raised were agreed to by counsel for appellants and appellee at the time of hearing.

The first ground for appeal concerns the ever-recurring problem as to the effectiveness of the so-called Miranda Notice to Accused of his rights. *Trust Territory v. Sokau*, 4 T.T.R. 434, discusses the development of the Notice within the Trust Territory plus interpretation of *Miranda* in the United States by *United States v. Priest*, 409 F.2d 491, from which is quoted the admonition to police everywhere:

“Where there is a request for an attorney prior to any questioning, as in this case, a finding of knowing and intelligent waiver of the right to an attorney is impossible.”

The question in this appeal is similar to the disputes which all too frequently arise, both in the Trust Territory and in the United States, as to whether an attorney was in fact requested by the suspect or the accused at the time he is interrogated by the police.

It would seem that the clear and definite language in the mimeographed sheet the Palau District Police give to suspects before questioning could not be the basis of controversy. Unfortunately, the slightest deviation from the form causes dispute as to what the suspect intended, as in the present case.

[1] The two appellants each wrote the word “Yes” in answer to the following question:

“Do you want us to send word now to counsel to come see you here?”

If that had been all of the answer, there could have been no argument that any statement made before the accused had talked to counsel would not be admissible under the statute, 12 T.T.C. 68, for the reasons set forth in *Trust Territory v. Poll*, 3 T.T.R. 387, from which the Code provision was derived.

The question which follows on the form emphasizes the

certainty of the request for counsel. It states in both English and Palauan, as do all the questions on the form:

“If so, whom do you want us to send for?” Each appellant wrote in the name of one of two Public Defender’s Representatives.

Without more, the subsequent written confession made without counsel being present was inadmissible under 12 T.T.C. 68. But there was more. Each appellant wrote at the bottom of the form and signed his name that he would “see” the named Public Defender’s Representative “later” in court. Each of the statements written by appellants were on a sheet of paper headed by a mimeographed statement that “. . . having been advised of my rights . . . (I) make the following statement to the police freely and voluntary . . .”

[2] Under this state of the record, was the confession voluntary and was there a valid waiver of the presence of counsel? We hold there was such a waiver because after being told of his right to have counsel present, each appellant proceeded to write their confessions without waiting to talk to counsel. We admonish the police that they can avoid the controversy which has arisen in this case by paying closer attention to the method an accused uses in filling out the form. If the accused does not want counsel “now” but wants to talk to the Public Defender later, the first question quoted above should be answered “No” rather than “Yes.”

A somewhat similar argument as made by appellants in the present case was employed in *Hughes v. Swenson*, 452 F.2d 866, where the appellant insisted that he had not expressly declared a waiver of the presence of counsel and without an express declaration, the waiver was not effective. In the present appeal, appellants argued the waiver expressly made was not effective because it was contradicted by an earlier express request for counsel. The

answer given by the Federal court in *Hughes* is applicable. The court said:

“. . . if the defendant is effectively advised of his rights and intelligently and understandingly declines to exercise them, the waiver is valid.”

In spite of the ambiguity and conflicting declarations of appellants in the “Notice to Accused”, these appellants wrote their confessions without counsel being present. They were not coerced by the police. When they wrote their confessions, they waived the presence of counsel regardless of the conflicting prior express statements given in connection with the statement of their rights.

There having been a waiver of the presence of counsel after they had been informed of their rights, the written confessions were admissible.

[3] Appellants argued also the confessions were erroneously admitted because they were made following an illegal arrest in that they were not by warrant and the offense—illegal consumption of liquor—did not occur in their presence. There are several answers to this argument, one being that an illegal arrest does not, by itself, render a confession inadmissible. *Mulligan v. State*, 271 A.2d 385 (Md.), noted in Nedrud, Criminal Law, 1971, page B-2; and as explained in *People v. Briggs*, 319 N.Y.S.2d 374, quoted in Nedrud, Criminal Law, 1971, page B-21:

“The fact admissions or confessions are obtained from a defendant during a period of illegal detention following an unlawful arrest does not, as a matter of law, render them inadmissible, the manner of the arrest and the subsequent detention being merely circumstances to be considered on the issue of voluntariness”

[4] The police detected liquor on the breath of both appellants. The circumstances of the arrest at a “drinking bout”, even though the police didn’t actually see the appellants take a drink, was sufficient within the scope of *Briggs*

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to admit the voluntary confessions and to provide the essential corroboration.

[5] Finally, we hold the arrest without a warrant did not prejudice the appellants and as a consequence under the statute, 12 T.T.C. 69, there was not reversible error.

The Judgment of the Palau District Court is affirmed.

MASAYOSHI SIKSEI, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Case No. 385

(District Court Criminal Case No. 7400)

Trial Division of the High Court

Palau District

September 29, 1972

Appeal from petit larceny conviction. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that where appellant thought municipal councilman could authorize him to cut, remove and sell a mahogany tree on government forest preserve, and councilman had no authority to do so, and District Administrator directive placed authority in himself and municipal magistrate, intent and all other elements of larceny were present.

1. Larceny—Intent—Proceeding at One's Own Peril

Appellant found guilty of petit larceny cut, removed and sold a mahogany tree from a government forest preserve at his own peril where directive of District Administrator put removal of trees under control of himself and magistrates and appellant gained permission from neither, relying instead on permission from municipal councilman who appellant claimed had apparent authority to give permission.

2. Municipalities—Councilmen—Status

A municipal councilman is neither an employee nor agent of the District Government or of the magistrate of a Municipal Government.

3. Agency—Apparent Authority

Where municipal councilman was not the agent of either District Administrator or municipal magistrate, there could be no "apparent authority", as an agent of one of the two, to give permission to cut, remove and sell a mahogany tree on government forest preserve.