**OLBER, Appellant**

**v.**

**TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee**

Criminal Case No. 1

Appellate Division of the High Court

June 5, 1951

Defendant was charged with burglary and convicted in Ponape District Court, Nichols, District Judge, of lesser offense of trespass. On appeal, the Court of Appeals, in a Per Curiam opinion, held that where there is reasonable doubt as to whether defendant had permission to enter dwelling house, finding of trespass in entering house is not warranted, but that defendant was properly convicted of trespass as to piece of clothing taken from house even though technically trespass as to clothing was not included in burglary charge.

Modified and affirmed.

1. **Criminal Law—Custom**

   Indigenous customs prevailing in area where alleged crime has occurred must be given careful consideration both in determining accused's motives and effect his acts should be expected to have on others.

2. **Ponape Custom—Generally**

   Under Ponapean custom, wearing of woman's underclothing by a man is accepted method of showing love for woman.

3. **Trespass—Generally**

   In criminal prosecution for trespass, where there is reasonable doubt on question of whether owner gave accused permission to enter house, finding of trespass in entering house is not warranted. (T.T.C., Sec. 401)

4. **Trespass—Intent**

   Where individual takes woman's underclothing from clothesline without any firm basis for knowing whose it is and knowing he has no actual permission from anyone to take it, he is interfering with peaceful use and possession of another, even though he hopes owner will approve.

5. **Burglary—Generally**

   Act of accused in taking woman's underclothing from line after he enters house cannot technically constitute part of burglary, which is completed upon his unlawful entry with necessary force and intent. (T.T.C., Sec. 391)

6. **Burglary—Felonious Intent**

   Proof of larceny or other felony is often necessary part of proof of intent involved in burglary. (T.T.C., Sec. 391)

7. **Criminal Law—Surprise**
Where taking of woman's underclothing was definitely an issue in prosecution for burglary, accused cannot properly claim any element of undue surprise or lack of opportunity to meet issue fully.

8. **Burglary—Lesser Included Offense**
In criminal prosecution for burglary, although element of trespass as to underclothing taken from house is not technically included in burglary charge, finding of guilty of trespass so far as taking of piece of underclothing is concerned does not result in any injustice to accused. (T.T.C., Sec. 401)

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Before FURBER, *Chief Justice,* and DRUKER and SPIVEY, *Associate Justices*

SUMMARY OF CASE

1. Olber was charged with burglary. He pleaded not guilty, was tried by the District Court, found guilty only of the lesser offense of trespass and sentenced to one month's imprisonment. From this finding and sentence he has appealed, primarily on the ground that his conduct was justified by local custom.

2. The evidence showed the following facts. Olber entered the dwelling house and the restaurant of one Erwin in Kolonia, Ponape Island, in the night time in search of a girl he had been courting. The restaurant and house were near together and constituted essentially one establishment. Both were referred to by some of the witnesses as "Erwin's house". The girl Olber was searching for was Erwin's cousin and often stayed at this place when in Kolonia. Olber had stayed there with her previously. She had also previously given him a piece of her underclothing. Olber entered the house by untying a string which held the screen door and it appeared he entered the restaurant by simply opening a door which was not locked, although there was some conflict in the testimony on this point. There were three people sleeping in the restaurant and he woke and talked with one of them, inquiring for

the girl. This person made no objection to Olber's being there and no outcry or disturbance was caused. The girl Olber was looking for was not there. Olber saw a piece of woman's underclothing hanging on a line in the house and, thinking this belonged to her, he took it with him as an indication of his continued love and proof that he had been looking for her. Unfortunately, however, the piece of underclothing which Olber took turned out to be the property of Erwin's wife and not of the girl Olber was interested in. Although the piece of underclothing was just like one which the girl owned, Olber did not at the time know she owned one like it. A few days later, the next time he saw the girl he had been looking for, Olber let her see the piece of underclothing. The following night he talked with her about it and upon her indicating distinct displeasure and Olber's learning the underclothing was not hers, he asked her to return it.

3. Although the charge sheet in this case contained only the one count for burglary, the prosecutor said in his opening statement that he was going to attempt to prove that the accused had entered the dwelling house of Erwin with the intent to steal and did take therefrom a piece of lady's underclothing belonging to Erwin's wife. The issue of the taking of the piece of underclothing was covered at length in the trial.

OPINION

[1–3] 1. The court is in complete accord with the claim advanced by the accused, both in his argument during the trial and in his notice of appeal, to the effect that the indigenous customs prevailing in the area where the alleged crime has occurred, must be given careful consideration both in determining the accused's motives and the effect his acts should be expected to have on others. It is recognized also that the wearing of a woman's under-

clothing by a man is an accepted method of showing love for a woman under Ponapean custom. No specific evidence was introduced by either side at the trial as to whether or not Olber had had express permission from Erwin for his previous visits to the house or as to whether any express or implied permission he had had for these visits had been revoked. There was a strong inference that Erwin did not like the attention which Olber was paying to the former's cousin, but it is possible this dislike arose from or after the taking of the underclothing. Erwin did not testify at all. It is felt that the evidence left a reasonable doubt on this question of Olber's permission, so that the finding that Olber trespassed in entering the house was not warranted.

[4] 2. In taking the woman's underclothing from the line, however, without any firm basis for knowing whose it was and knowing he had no actual permission from anyone to take it, Olber was interfering with the peaceful use and possession of the property of another. It is not an act he can be considered to have done as of right. He was taking a chance. To be sure, he hoped the owner would approve, but in this hope he turned out to be entirely disappointed. It is not considered that there is any indigenous custom which would authorize or justify as a method of courting one woman, to seize the property of another. No such custom was shown. It is accordingly felt that the evidence introduced warranted the finding of trespass for interfering with the peaceful use and possession of this piece of underclothing.

[5–8] 3. As noted above, the charge sheet in this case contained no count for larceny or trespass and it is recognized that, technically speaking, the acts of the accused after he entered the house could not constitute part of the burglary charged, which would have been completed upon

his unlawful entry with the requisite force and intent. In the popular mind, however, the larceny or other felony intended by a person committing a burglary, is pretty generally included in the idea of burglary. The proof of the larceny or other felony is often a necessary part of the proof of the intent involved in the burglary. In this case, the taking of the underclothing was made definitely an issue in the trial, being included in the prosecutor's opening statement of what he intended to prove. It is accordingly felt the accused cannot properly claim any element of undue surprise or of lack of opportunity to meet the issue fully. It is not believed that either the public interest or that of the accused would be served by a new trial on the issue of trespass on the ground that technically the trespass as to the underclothing was not included in the burglary charge. The accused in his notice of appeal expressly states that the appeal has been prepared on the assumption that the Court of Appeals has no power to increase sentences, which appears to negative the desire on his part for a new trial in which the sentence might or might not exceed that awarded in the original trial. In the opinion of the majority of the court, after examination of the entire record, the finding of guilty of trespass so far as the taking of the piece of underclothing is concerned, has not resulted in any injustice to the accused. The length of the sentence is of no practical importance now since it has already been served, and is a matter resting largely in the discretion of the trial court. It is well within the legal limit for trespass.

4. For the guidance of those involved in future criminal cases of a similar nature, attention is invited to the following considerations:—

a. Any case in the District Court is prosecuted by a charge sheet on the responsibility of either the District

Attorney or the Attorney General or someone authorized to act on behalf of one or the other of these officials. The accused in his appeal has laid great stress upon the alleged bias or enmity of Erwin whom the accused seemed to blame for the entire prosecution. It should be noted, however, that the official charge was made by the District Attorney who signed and filed the charge sheet. The evidence brought out at the trial when considered in the light of indigenous custom prevailing where the alleged crime occurred so completely failed to support the charge of burglary that it is felt that the accused should not, in fairness, have been required to stand trial for this charge and that the facts disclosed warranted only the charge of a misdemeanor which could better have been handled in the community court. It is recognized that the District Attorney in this case was without legal training and it is possible that he may have been under some misapprehension as to his responsibilities in connection with bringing the prosecution.

b. It is felt that a careful investigation should be made before a charge sheet is filed by or on behalf of the District Attorney in any case and that, if that had been done in the present case, it would have been apparent as a practical as well as a legal matter that no prosecution for a felony was justified.

c. In any burglary case in which the accused is believed to have carried out the intent with which he entered, the larceny or other felony intended should be charged as a separate count in the charge sheet.

DECISION

So much of the trial court's special finding as relates to the accused having been guilty of trespass because he interfered with the peaceful conduct of Erwin's household, is set aside. The general finding of guilty of tres-

pass in violation of Article III, Section 12 of Interim Regulation 5-48, and the remainder of the special finding, and the sentence, are confirmed.

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