KORO PAUL, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Appeal No. 14

Appellate Division of the High Court

January 28, 1959

See, also, 2 T.T.R. 238

Appeal from conviction of assault and battery with a dangerous weapon in violation of T.T.C., Sec. 377-A, in the Trial Division of the High Court, Truk District. Appellant contends that evidence was insufficient to show deadly weapon was used and that prosecution constituted double jeopardy. The Appellate Division of the High Court, Judge Jose C. Manibusan, held that evidence was insufficient to prove use of dangerous weapon, and that prosecution constituted double jeopardy since accused had been convicted of assault and battery in Truk District Court for offense arising out of same act. Reversed.

1. **Assault and Battery with a Dangerous Weapon—"Dangerous Weapon"**
Dangerous weapon as used in crime of assault and battery with a dangerous weapon means weapon which is likely, in natural course of things, to produce death or great bodily harm when used in manner in which it was used in particular case in question. (T.T.C., Sec. 377-A)

2. **Assault and Battery with a Dangerous Weapon—"Dangerous Weapon"**
Weapon which, in manner used, creates danger of only slight or superficial probable injury, and in fact only causes such injury, does not constitute dangerous weapon as used in connection with crime of assault and battery with a dangerous weapon. (T.T.C., Sec. 377-A)

3. **Assault and Battery with a Dangerous Weapon—"Dangerous Weapon"**
Where, in criminal prosecution for assault and battery with a dangerous weapon, alleged dangerous weapon was not identified and must be inferred from injuries inflicted, which were superficial, court may deem evidence insufficient to find beyond reasonable doubt that dangerous weapon was used. (T.T.C., Sec. 377-A)

4. **Criminal Law—Double Jeopardy**
In many jurisdictions accused in criminal proceeding is held to have waived defense of former jeopardy by failure to raise issue before going to trial on merits.

5. **Criminal Law—Pre-Trial Procedure**
In Trust Territory, any defense or objection capable of determination without trial of merits of case must be raised before trial by motion. (Rules of Crim. Proc., Rule 9)

6. **Criminal Law—Double Jeopardy**
Under United States Federal Rules, defense of former jeopardy should be raised by motion to dismiss before trial, and Trust Territory rules should be construed with regard to Federal Rules. (Fed. Rules of Crim. Proc., Rule 12)

7. **Criminal Law—Double Jeopardy**
In Trust Territory, proper way to raise defense of double jeopardy is by motion to dismiss before taking of testimony and preferably before plea is taken. (Rules of Crim. Proc., Rules 9, 10)

8. **Criminal Law—Double Jeopardy**
Where issue of double jeopardy is not raised in criminal prosecution before taking of testimony, defense is waived, except that court may permit defense to be raised later and grant relief where it appears waiver has been due to honest inadvertance, ignorance of facts, or failure to understand them.

9. **Criminal Law—Double Jeopardy**
No special form is required to raise issue of double jeopardy in criminal prosecution, since courts consider substance rather than form.

10. **Constitutional Law—Double Jeopardy**
Trust Territory Bill of Rights gives protection against second prosecution for any offense carrying criminal penalty. (T.T.C., Sec. 4)

11. **Constitutional Law—Double Jeopardy**
Words of Trust Territory Bill of Rights prohibiting double jeopardy must be construed in accordance with judicial interpretation of these words in Fifth Amendment of United States Constitution. (T.T.C., Sec. 4)

12. **Criminal Law—Double Jeopardy**
Where appellant in criminal prosecution has been previously convicted in District Court of assault and battery based on same act as alleged in High Court information for assault and battery with a dangerous weapon, and evidence supporting information would clearly have been admissible to support first complaint, appellant is in double jeopardy of punishment for assault alleged in information when he has already been convicted under prior complaint.

13. **Criminal Law—Lesser Included Offense**
Test of whether same act constitutes violation of two distinct statutory provisions is whether each provision requires proof of additional facts which other does not, but test is not applicable to repeated offenses under same provision of written law or greater offense including lesser one.

14. **Criminal Law—Double Jeopardy**
Where greater criminal offense includes lesser offense, test of double jeopardy is whether facts alleged in second prosecution, or any part of them constituting lesser included offense could, if given in evidence,

have warranted conviction in first prosecution, unless first prosecution was procured by fraud, connivance or collusion of defendant, or some new fact, such as death of victim, has intervened after first prosecution. (T.T.C., Sec. 4)

15. **Criminal Law—Double Jeopardy**
Prosecution for assault and battery with dangerous weapon may be barred by prior conviction for assault and battery arising out of same act. (T.T.C., Sec. 377-A)

16. **Criminal Law—Burden of Proof—Prima Facie Case**
Time or place of crime need not be proved precisely as stated unless they are necessary ingredients of crime.

17. **Criminal Law—Lesser Included Offense**
Single continuing crime cannot be split up by time into two parts for separate prosecutions. (T.T.C., Sec. 4)

18. **Assault and Battery—Generally**
In crime of assault and battery, each blow in one continuous beating does not constitute separate crime, nor does temporary lull in infliction of blows necessarily mean that next blow is separate offense. (T.T.C., Sec. 379)

19. **Criminal Law—Lesser Included Offense**
Wherever there is reasonable doubt as to whether certain causes of action constitute more than one crime, all charges should be presented to same court at same time.

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Counsel for Appellee: ALFRED J. GERGELY, ESQ.

Before FURBER, *Chief Justice*, GILMARTIN and MANIBUSAN, *Temporary Judges*

MANIBUSAN, *Temporary Judge*

OPINION OF THE COURT

This is an appeal from the Truk District. The appellant, Koro Paul, was convicted in the Trial Division of the High Court of the crime of Assault and Battery with a Dangerous Weapon in violation of Section 377-A of the Trust Territory Code, and sentenced to sixty days' imprisonment for it.

The appellant raises two major objections to conviction: First, that the evidence was insufficient to support a finding of guilty of anything more than the lesser included offense of Assault and Battery, and second, that the prosecution for this offense constituted double jeopardy.

The first of these issues turns in this particular case upon what constitutes "a dangerous weapon" within the meaning of Section 377-A of the Trust Territory Code, and whether there was sufficient evidence to warrant a finding that such a weapon was used, beyond a reasonable doubt. The incident involved occurred shortly after midnight. The defendant, testifying on his own behalf at the trial, admitted the assault and battery, but denied using any weapon. The information alleged the crime was committed "by wilfully and unlawfully striking one Topin in the head with a blunt object in such a manner as to constitute a dangerous weapon". The alleged "blunt object" was never identified specifically, nor was it introduced in evidence. The only injuries attributed to it were two ragged edged cuts on the top left scalp of the victim—approximately 2 cm. and 1/2 cm. long, respectively. The medical report introduced in evidence by the prosecution (Exhibit 1) stated they were "superficial and no scalp fracture proved by X-ray". The Government witness who attempted the most detailed description of the "object" alleged to have been used, said it was about 6 inches long and "the sort of metal they use to build—for quonsets" (transcript, p. 9), although he later stated in cross-examination that he did not see the object that night, but that the next morning he saw a piece of metal which he thought was the piece of metal used by the defendant "because that is where the fighting occurred." (Transcript, p. 10).

[1, 2] Considering the purpose of Section 377-A of the Code, the penalties which it authorizes, and decisions

as to similar legislation in other jurisdictions, we hold that "a dangerous weapon" within the meaning of that section is a weapon which is likely, in the natural course of things, to produce death or great bodily harm, when used in the manner in which it was in the particular case in question. While we recognize that a weapon might be "dangerous" without necessarily being "deadly", the words "dangerous weapon" and "deadly weapon" are so often used loosely as interchangeable in this connection that we believe the difference between them is slight, and that in order to constitute a "dangerous weapon" for this purpose, one must so nearly meet the test of being a "deadly weapon" that decisions defining deadly weapons in this general context are at least analagous. We are clear that a weapon which, in the manner used, creates danger of only slight or superficial probable injury, and in fact only causes such injury, does not constitute a dangerous weapon within the meaning of Section 377-A. That it might, by some unexpected freak of nature, conceivably have caused serious injury is not enough. Thus it has been held that an unloaded gun or pistol used to strike with is not necessarily a dangerous weapon, but is such, or not, according to its size, weight, and the manner of using it. 4 Am. Jur., Assault and Battery, §§ 34–36. Judicial and Statutory Definitions of Words and Phrases, Vol. 2, p. 1828–1829, "Dangerous Weapon". Bouvier's Law Dictionary, 3rd Revision, Vol. 1, p. 754, "Dangerous Weapon". Note following *Hudson v. State* (1910), in Ann. Cas. 912 A, 1324, at p. 1328. *MacIllrath v. U.S.* (1951), 188 F.2d 1009.

[3] There was no direct evidence as to the violence with which the object in question was used. That had to be inferred largely from the superficial injuries inflicted and the fact that one witness testified the appellant threw it from about 6 feet away. According to the victim, what-

ever hit him came from behind him. After careful study of the entire transcript of evidence, and considering the evidence in the light most favorable to the prosecution, we feel constrained to hold that the evidence was not sufficient to warrant a finding that the assault and battery was, beyond a reasonable doubt, committed with a dangerous weapon as we have defined that above. The sentence of sixty days' imprisonment imposed by the trial judge would seem to indicate that he, himself, did not consider the crime actually committed in this instance to be of the seriousness which the definition we believe correct imports.

The appellant's claim of double or former jeopardy presents several interesting questions. The claim was first advanced after the prosecutor had commenced his closing argument and in it disclosed the prior conviction on which the claim was based. Nevertheless, the trial court considered the merits of the claim, without objection as to its timeliness, invited argument on it, received the District Court file in the former case as an exhibit, and then denied the motion for acquittal based on this ground.

[4] According to decisions in a number of jurisdictions, an accused would be held to have waived the defense of former jeopardy by failure to raise the issue before going to trial on the merits. 14 Am. Jur., Criminal Law, §§ 277 and 280. *State v. Barnes* (1915), 29 N.Dak. 164. 150 N.W. 557. Ann. Cas. 1917 C 762 and note following it in Ann. Cas. 1917 C 765.

The Barnes case involves facts surprisingly analogous to those in the present one. There an accused had been convicted of Assault and Battery in a justice court and was then prosecuted for Assault and Battery with Intent to Kill on the basis of the same acts committed upon the same person as in the justice court case. The jury, in the second prosecution, found him guilty of the included of-

fense of Assault and Battery. He moved in arrest of judgment, asserting for the first time that he had been once before convicted and punished for the same offense. The motion was denied and sentence of fine and imprisonment imposed. The North Dakota Supreme Court held that if defendant had raised this defense by a plea at the proper time, and the jury had found for him on it, together with its general verdict of guilty of Assault and Battery, an acquittal of all crime would result, but that the failure to enter such a plea was a waiver of all benefits which might have been thus gained thereunder.

[5] Rule 9 of the Trust Territory Rules of Criminal Procedure provides in part as follows:—

> "Any defense or objection which is capable of determination without trial of the merits of the case may be raised before trial by motion . . . . Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver . . . ."

[6–8] This rule, although briefer than Rule 12 of the Federal Rules of Criminal Procedure, is based largely on it, and should be construed with regard to it. The note of Advisory Committee to subdivision (b) (1) and (2) of Federal Rule 12 enumerates "former jeopardy, former conviction, former acquittal", as among the defenses which it is contemplated may be raised under that rule by motion to dismiss before trial. Federal Court Rules 1947 Annotated, p. 11. See also Form 19 in the Appendix to the Federal Rules of Criminal Procedure. Rule 10 of the Trust Territory Rules of Criminal Procedure limits pleas to those of "guilty" and "not guilty". Construing our Rules 9 and 10 together in the light of the Federal practice, which provides much of the background for them, we hold that the proper way to raise the defense of double jeopardy in any form (that is, former jeopardy, former conviction, or former acquittal) in Trust Territory courts is

by motion to dismiss, which should be made before the taking of testimony begins, and preferably before the plea is taken. If the issue is not raised by the time taking of testimony begins, the defense is waived and cannot be raised later as a matter of right, but the court may, in its discretion, grant relief from the waiver and allow the motion to be made later. Decisions in other jurisdictions to the effect that the waiver is absolute, therefore are not applicable under our rules. In the present case, we believe the court was fully justified in permitting the issue to be raised and considered when it did, and that relief from a waiver of such an important defense should be granted freely whenever it appears the waiver has been due to honest inadvertence, ignorance of the facts, or failure to understand them.

[9] No special form of words is necessary. Any words which clearly give the court to understand that the issue of double jeopardy is being raised are legally sufficient. Thus in this case it is not fatal that the defendant moved that he be acquitted on the ground of double jeopardy rather than that the information be dismissed on that ground. Our courts should, as the trial court did in this case, consider the substance rather than the form. See *Clawans v. Rives* (1939), 104 F.2d 240.

[10, 11] While it is often stated that one of the main purposes of prohibitions against double jeopardy is to prevent a person's being twice punished for the same offense, it should be noted that the Trust Territory Bill of Rights, like the 5th Amendment to the United States Constitution, goes beyond the question of double punishment and declares, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb". This provision refers expressly only to "jeopardy of life or limb", but it has long been established that these words

in the 5th Amendment to the United States Constitution give protection against a second prosecution for any offense carrying a criminal penalty. *Ex parte Lange* (1874), 85 U.S. 163, 18 Wall. 163, 21 L.Ed. 872. *Clawans v. Rives*, supra. We hold that the words must be similarly construed in the Trust Territory Bill of Rights.

[12] The Government in this case does not dispute but what the appellant had been previously convicted in the District Court of Assault and Battery on the same victim, on the same day, and in the same village as alleged in this case, but claims there were two separate offenses committed by the appellant within a short time and a short distance of each other, and it is the second of these for which he was prosecuted in this case, while the conviction in the District Court was for the first one. Be that as it may, we feel the appellant was clearly in jeopardy of punishment for the assault and battery involved in this case when he pleaded guilty to and was convicted on the complaint in the District Court, sworn to December 26, 1957, charging him with Assault and Battery on the victim in this case on or about December 21, 1957 (the date alleged in this case) at Muan Village (the alleged place of the crime in this case). Under the terms of that complaint, evidence of the assault and battery involved in this case would clearly have been admissible to support the complaint.

[13] We fully recognize that in a number of cases involving the question of whether the same act constituted a violation of two distinct statutory provisions, it has been announced that the test is "whether each provision requires proof of an additional fact which the other does not". See *Blockburger v. United States* (1932), 284 U.S. 299, at p. 304, 52 S.Ct. 180, at p. 182. That test has been applied particularly to statutes making crimes of vari-

ous elements of a prohibited business. As to the difficulty of applying it even in such situations, see *Gore v. United States* (1958), 78 S.Ct. 1280. That test, however, appears to us to have no application to situations involving either repeated offenses against the same provision of the written law or to a greater offense including a lesser one.

[14, 15] We believe that in such a situation as that involved in this case, the correct test as to identity of offenses is whether the facts alleged in the second prosecution, or any part of them constituting a lesser included offense, would, if given in evidence, have warranted conviction in the first prosecution, unless the first prosecution was procured by the fraud, connivance, or collusion of the defendant, or some new fact, such as the death of the victim, has intervened after the first prosecution. No claim of any fraud, connivance, or collusion in connection with the earlier prosecution is made in this case, nor is any intervening fact claimed. We therefore hold that the prosecution for Assault and Battery with a Dangerous Weapon in this case was barred by the prior conviction for the lesser included offense of Assault and Battery. 15 Am. Jur., Criminal Law, §§ 380, 386, and 391. *U.S. v. Nickerson* (1855), 58 U.S. 204, 17 How. 204, 15 L.Ed. 219. *Grafton v. U.S.* (1907), 206 U.S. 333, 27 S.Ct. 749. *Miller v. U.S.* (1945), 147 F.2d 372. *Ekberg v. U.S.* (1948), 167 F.2d 380, 385.

[16, 17] In applying the test which we adopt, it should be noted that the former jeopardy will not normally be limited to the date or dates of the offense alleged in the first complaint or information, since the time or place of the crime need not be proved precisely as stated, unless they are necessary ingredients in the crime; and that a single continuing crime cannot legally be split up by time into parts for separate prosecutions. Though time and place

should be stated in the charge, it is generally sufficient, so far as these matters are concerned, if it is proved that the crime was committed prior to the bringing of the charge, within the period of limitations, and within the jurisdiction of the court; provided the accused has not been misled to his prejudice.

Thus it has been held a conviction on a charge of illegal transportation of liquor on or about February 12 created jeopardy as to and barred later prosecution for such transporation on February 13 of the same year, even though there was illegal transportation on both dates. *U.S. v. One Buick Coach Automobile* (1929), 34 F.2d 318. Similarly the Supreme Court of the United States has held that conviction for bigamy on an indictment charging that it continued from Oct. 15, 1885 till May 13, 1888, barred a prosecution for adultery on May 14, 1888, where the latter offense was in fact part of a continuous cohabitation with one of the women named in the first indictment. *Ex parte Nielsen* (1889), 131 U.S. 176, 9 S.Ct. 672. It has also held that where there were convictions on three indictments for bigamy extending over three consecutive years, alike in all respects except that each indictment covered a different calendar year, there was one entire offense and the court had no jurisdiction to inflict punishment on more than one of the convictions. *Ex parte Snow* (1887), 120 U.S. 274, 7 S.Ct. 556. There are a number of similar decisions as to attempts to split up conspiracies. See *Short v. U.S.* (1937), 91 F.2d 614, 112 A.L.R. 969; and *U.S. v. Cohen* (1952), 197 F.2d 26.

The general principle of criminal procedure that, except where time enters into the nature of the offense, it is not necessary to prove the exact time alleged in the charge, is well recognized by American decisions and should apply equally in the Trust Territory. 27 Am. Jur., Indictments and Informations, §§ 70 and 181. Underhill's

Criminal Evidence, 4th Ed., Sec. 86, p. 107 and 108. In *Ledbetter v. U.S.* (1898), 170 U.S. 606, at p. 612, 18 S.Ct. 774, at p. 776, the U.S. Supreme Court stated:—

> "Neither is it necessary to prove that the offense was committed upon the day alleged, unless a particular day be made material by the statute creating the offense. Ordinarily, proof of any day before the finding of the indictment and within the statute of limitations, will be sufficient."

In *Berg v. U.S.* (1949), 176 F.2d 122, at p. 126, the U.S. Court of Appeals for the Ninth Circuit states:—

> "The charge of a date in an indictment is not a material allegation which must be proved as laid. A stock charge to the jury in a misdemeanor case is in substance as follows:
>
> 'The Government need not prove the crime, if any, was committed on the exact day laid in the indictment. It is sufficient if it be proved beyond a reasonable doubt that the crime charged was committed at any time within two years before the finding of the indictment.' "

See also *Lelles v. U.S.* (1957), 241 F.2d 21, at p. 25, where conviction was affirmed although the evidence tended to show the unlawful shipment involved had been made 19 days before the date alleged in the indictment.

Thus in a prosecution for assault with intent to have carnal knowledge on a particular date, admission of evidence tending to prove a later date was held not reversible error. *Miller v. U.S.* (1927), 19 F.2d 702.

This principle is recognized even in murder cases. In *Hardy v. U.S.* (1902), 186 U.S. 224, at p. 225, 226, 22 S.Ct. 889, the U.S. Supreme Court stated:—

> "But the date named in an indictment for the commission of the crime of murder is not an essential averment. Proof that the crime was committed days before or days after the date named is no variance."

See also 26 Am. Jur., Homicide, § 281.

[18] The general rule against splitting up a single crime is well established. See 15 Am. Jur., Criminal Law, §§ 382 and 383. While assault and battery may be committed by one blow, what might be called a thorough assault and battery often continues for a considerable number of minutes. The word "beat", contained in our Code's definition of assault and battery (Section 379), connotes repeated action. The first definition given for the verb "beat" in Webster's New International Dictionary, Second Edition, unabridged, 1946, begins as follows:— "To strike repeatedly; to lay repeated blows upon, often with the effect of impelling, pulverizing, working, threshing, mixing, etc., implied; . . .". Bouvier's Law Dictionary, 3rd Revision, gives as its first definition of "beat or beating":—"To strike or hit repeatedly as with blows." It is clear that each blow in one continuous beating does not constitute a separate crime, nor does a temporary lull in the infliction of the blows necessarily mean that the next blow is a separate offense. Since the issue of double jeopardy was not raised until the closing arguments, and witnesses as to the incident were not then recalled, the question of just how definite a break there was between the two alleged assaults and batteries, was, quite naturally, not thoroughly explored, but from the evidence in the transcript we are very doubtful whether there was more than one assault and battery.

[19] While we commend the District Attorney for his candor in calling attention to the former conviction, we feel that the attempt, in which his subordinates appear to have participated, to split this incident into two parts and present one part to one court and the other to another court, was not consistent with the fair dealing and interest in substantial justice which should be expected of the representatives of the Government. It is strongly recommended that in the future whenever there is reasonable doubt as to whether a certain course of action constitutes

more than one crime, all the charges believed warranted be presented to the same court at the same time, so that the whole incident may be fairly evaluated and proper punishment imposed—without running such great risk of double punishment on the one hand, or of inadequate punishment on the other hand, where an accused may escape with a penalty based on only part of the crime he actually committed. If one of the offenses to be charged falls within the jurisdiction of a lower court and another does not, that should be sufficient reason for the Trial Division of the High Court to exercise its concurrent jurisdiction and hear all the charges involved.

The finding and sentence of the Trial Division are set aside and the information dismissed on the ground of former jeopardy.