FATTUN, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Appeal No. 21

Appellate Division of the High Court

January 21, 1965

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, Yap District. Appellant contends that judgment was contrary to weight of evidence. In a Per Curiam opinion, the Appellate Division of the High Court held that it is function of trial court to weigh sufficiency of evidence.

Affirmed with modification of sentence.

1. Criminal Law—Appeals—Scope of Review

   In criminal appeal, court is under obligation under Trust Territory Code and general principles of law to consider evidence in light most favorable to government.

2. Appeal and Error-Scope of Review-Facts

   It is function of trial court, not appellate court, to make determinations of fact which are dependent upon conflicting evidence.

3. Criminal Law-Appeals-Scope of Review

   Where substantial evidence of every essential element of crime charged is offered by prosecution in criminal proceedings,court will not upset determination of trial court even though there was evidence to contrary.

4. Criminal Law-Sentence-Modificatio:n

   Appellate court may reduce sentence on criminal appeal from conviction for assault and battery where there was extreme provocation and accused had some justification for actions. (T.T.C., Sec. 379)

Counsel for Appellant: ROGER L. ST. PIERRE, *Public Defender*
Counsei for Appellee: RICHARD V. BACKLEY, *District Attorney*

Before FURBER, *ChiejJustice*, SHRIVER and PEREZ, *Temporary Judges*

PER CURIAM

OPINION OF THE COURT

This is an appeal from a conviction of assault and battery with a dangerous weapon by the Trial Division of

the High Court sitting in the Yap District. The accused was sentenced to serve one year's imprisonment with the last nine months suspended on conditions, and commenced serving his sentence immediately following the trial. Motion for a new trial was filed, heard, and denied. Thereafter, notice of appeal was filed. The further execution of the sentence was then stayed pending determination of the appeal, and the defendant ordered released from confinement until disposition of the appeal.

The appellant advanced the following grounds in his notice of appeal:-

1. The Court erred in denying the Defendant's motion to dismiss the information on the grounds that the prosecution's evidence was insufficient to support the charge.

2. The Court's judgment was contrary to the great weight of the evidence.

3. The Court erred in denying the Defendant's motion for a new trial.

The appellant is in effect asking to have the evidence re-weighed by this court.

[1] The accused testified on his own behalf, and if his testimony and that of other witnesses offered by him had all been believed by the Trial Court, the accused would, no doubt, have been acquitted, but there was other testimony which must be considered. This court has repeatedly recognized its obligation, under Section 200 of the Trust Territory Code and under general principles of law, on a criminal appeal, to consider the eVidence in the light most favorable to the government. *Kirispin and Takauo v. Trust Territory*, 2 T.T.R. 628. *Takeo Yamashiro v. Trust Territory*, 2 T.T.R. 636. *U.S. v. Nelson*, 273 F.2d 495 (7th Cir. 1960). 5 Am. Jur. 2d, Appeal and Error, §§ 834, 839,840.

[2] As stated in *Takeo Yamashiro v. Trust Territory* cited above, "It is the function of the trial court, and not

the appellate court, to make determinations of fact which are dependent upon conflicting evidence. The appellate court must test the sufficiency of proof on the basis of what the trial court had the right to believe, not on what the defendant wishes it believed."

In this case, there is no dispute but what the victim was the one who started the physical conflict between him and the accused. The incident happened about nine o'clock at night on a road. The victim, a 24-year-old Yapese, while very drunk, was carrying his baby daughter along the road and either singing, shouting or scolding, or doing all three, while his wife and a relative and another friend were beseeching him to hand the baby over to his wife for fear he would injure the baby. The accused, a 49-year-old Yapese of good reputation in his community, tried to quiet the victim and started pleading with him to turn the baby over to his wife. Whereupon, the victim told the accused in a very peremptory and insulting manner to get out of the way. According to the statement of the victim himself, who admitted he had studied English at the University of Hawaii, (Tr. p. 5), "I used the ugliest word which means to get away or leave that place that he is in." The victim then handed the baby to one *01* those nearby and made a statement in Yapese to the accused, which was originally translated, (Tr. p. 2, 3), "I am going to beat you or hit you or kill you", but of which the victim says the correct translation is only, "I am going tobeat you." Then the victim pushed the accused so that, according to the victim's statement, (Tr. p. 9), "He .was going to fall down-a sort of going backward and getting his balance.'

From this point on there is conflict in the testimony as to the details indicating which contestant was to blame for prolonging the incident. The victim admitted (Tr. p. 8), "I was drunk and·I was mad ...." There was

testimony, however, that the accused, instead of trying to depart, came back toward the victim, was pushed off again by the victim and came back a second time, that about this time the accused took a knife, with a blade about three inches long, out of his basket, and when the victim pushed or attempted to push the accused a third time, the victim was stabbed. The accused's story is different and some of it was corroborated.

There is no doubt, however, but what the victim received a wound, on the underside of his right biceps, which went down to the bone of that arm and was made by the accused's knife while held by him.

[3] Clearly the trial court believed the prosecution's basic story of the incident and did not believe all that of the accused. On the basis of the evidence most favorable to the government, we feel that the accused was not justified in taking the knife from his basket and using it, even if his intent was just to defend himself. There was substantial evidence of every essential element of the crime charged. We can see no proper basis for saying that the trial court, which saw and heard the witnesses, was not warranted in believing this, even though there was evidence to the contrary. We find no error on any of the points raised as grounds of appeal.

[4] Even considering the evidence most favorable to the government, however, the accused acted under extreme provocation. The victim admitted (Tr. p. 6) that it was not usual on Yap for a young man to speak to an older one in the manner in which the victim did in this case. To actually push a much older man around when he was acting reasonably to keep the peace and protect the safety of a baby, was clearly most disrespectful and likely to be infuriating.

The finding of guilty is affirmed, but the sentence is reduced to the time already served.