

TRUST TERRITORY v. POLL

TRUST TERRITORY OF THE PACIFIC ISLANDS

v.

BENSON POLL

Criminal Case No. 92

Trial Division of the High Court

Ponape District

January 31, 1968

Hearing to determine admissibility of two alleged statements made by accused. The Trial Division of the High Court, Chief Justice E. P. Furber, held that as to cases to a certain date court would apply traditional standards regarding right to counsel in the case of confessions obtained by police from persons in custody, however, after that date *Miranda* type standards would be applied.

Motion to suppress denied.

1. Criminal Law-Rights of Accused-Generally

Decision of the United States Supreme Court concerning protection against self-incrimination and the right to counsel are entitled to great

weight as precedents from another jurisdiction and should be recognized as goals to be reached so far as they are applicable to conditions existing in the Trust Territory. (T.T.C., Sec. 4)

2. Criminal Law-Arrest for Examination

Section 464 of the Trust Territory Code relating to rights of persons arrested for examination imposed no express obligation on anyone to inform the arrested person of his rights under the section. (T.T.C., Sec. 464)

3. Criminal Law-Generally

Treatment accorded accused in police station appeared directly contrary to section 13b of the Trust Territory Constabulary Manual which provided that prisoners were to be treated fairly and impartially, properly clothed and fed and provided with clean, properly equipped living quarters.

4. Criminal Law-Arrest for Examination

Section 13c of the Trust Territory Constabulary Manual made clear that those persons held undergoing investigation came within the term "prisoner" as used in section 13b of that Manual.

5. Criminal Law-Rights of Accused-Counsel

The *Escobedo* decision established that as far as state courts in the United States are concerned the right to counsel extends to those in custody on suspicion and not yet charged with a specific crime and that statements obtained from them after their request to consult counsel had been disregarded or denied by the police cannot be admitted in evidence against them.

6. Criminal Law-Rights of Accused-Waiver

The *Miranda* decision concerning "custodial interrogation" requires that prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has right to the presence of an attorney, either retained or appointed, however, the person may waive those rights provided the waiver is made voluntarily, knowingly and intelligently.

7. Criminal Law-Rights of Accused-Generally

Under the *Miranda* decision the mere fact that an accused person may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

8. Criminal Law-Rights of Accused-Counsel

Under the *Miranda* decision it is necessary to warn an accused person not only that he has a right to consult with an attorney but also that if he is indigent a lawyer will be appointed to represent him.

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9. Criminal Law-Rights of Accused-Counsel

The Criminal Justice Act of 1964 aims to make competent counsel immediately and readily available to even the most indigent in criminal cases, other than for petty offenses, in the United States federal courts right from their first appearance before a commissioner or court, which under the federal system must follow the arrest "without unnecessary delay". (Public Law 88-455, 78 Stat. 552, 18 U.S.C. § 300 6A)

10. Criminal Law-Arrest for Examination

There is no equivalent in the federal system of the arrest for examination for 48 hours permitted by the Trust Territory Code. (T.T.C. Sec. 464)

11. Criminal Law-Rights of Accused-Counsel

Court would apply traditional standards regarding right to counsel in the case of all confessions or admissions obtained by the police from persons in the Trust Territory until prosecuting authorities had reasonable notice of opinion changing standards.

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FURBER, *Chief Justice*

The accused in this case is charged with murder in the second degree. He pleaded "Not Guilty" and trial started before Associate Justice Joseph W. Goss and Special Judges Carl Kohler and Raidong Antonio, with the District Attorney John D. McComish, Esquire, and Ioanes Kanichy representing the Government and the Public Defender, Roger L. St. Pierre, Esquire, and Yoster Carl representing the accused. The District Attorney waived opening statement and before calling any witness stated that "subject to laying a foundation by evidence of the corpus delicti", he would like to introduce at that time an incriminatory statement by the accused.

After conference with the court, it was stipulated by the District Attorney and counsel for the accused that "the Prosecution will introduce evidence of the corpus delicti, independent of the statement of the Defendant before referred to, after a ruling on the admissibility of the statement is made and before its contents are made known to the Court."

The court thereupon proceeded to take testimony on the preliminary question of the admissibility of the statement -or, as it later developed two alleged statements by the accused and a "notice to accused" signed by him. At the close of the testimony on this matter, the notice to the accused was marked P #1, the first statement by the accused P #2 and the second alleged statement P #3, in each case with an agreed written translation in English. The Prosecution offered these as exhibits and counsel for the accused moved to suppress them. After discussion, however, P #1 was admitted as P Exhibit #1 without objection and a stipulation was entered into that each side would submit a memorandum of points and authorities on the question of admissibility of the other two documents within thirty (30) days of receipt of the transcript of testimony of the witnesses who had testified on this point.

Associate Justice Goss was suddenly transferred to American Samoa and by memorandum dated the day of his transfer, he forwarded a copy of the transcript of testimony in question to the District Attorney and another to the Public Defender, notifying them of his transfer and suggesting that they confer on the matter and file an appropriate stipulation to permit some other judge to rule on the question of admissibility on these documents. Pursuant to that suggestion a written stipulation was filed, that the trial and all matters relating thereto might be heard by any justice of the High Court, and further that the matter of the applicability in the Trust Territory of the United States Supreme Court decision in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), and particularly its applicability to the facts shown in this case might be orally argued before any such justice. It is considered that this written stipulation has relieved counsel from their previous undertaking to submit written memoranda.

Accordingly, after study of the transcript of evidence, I heard oral arguments from the District Attorney and the Public Defender at Susupe, Saipan, on the question of the admissibility of the documents marked P #2 and P #3. At this hearing both counsel requested as much guidance as possible as to the rules or standards to be applied in the Trust Territory as to alleged confessions obtained by the police from persons in their custody.

## OPINION

From the transcript of evidence, the court considers it clear:-

(1) That the documents in question are admissible by any standards or tests previously applied in the Trust Territory or applied by the United States Supreme Court to confessions used in trials in state courts prior to 1963, including those applied in *Crooker v. California*, 357 U.S. 433, 78 S.Ct. 1287 and *Cicenia v. LaGay*, 357 U.S. 504, 78 S.Ct.1297, both decided in 1958;

(2) That the documents are not admissible by the requirements laid down in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, decided in 1966, in which it is specifically stated in footnote 48 to the majority opinion that the *Crooker* and *Cicenia* cases are not to be followed; and

(3) That it is a close question whether these documents are admissible by the test laid down in *Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1336, decided in 1963.

This case therefore poses directly the question of the extent to which the more recent decisions of the United States Supreme Court as to in-custody interrogation of prisoners should apply in the Trust Territory. Counsel for the accused has called attention particularly to the cases of *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608 (1943); *Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356 (1957); and *Escobedo v. Illinois*, 378 U.S. 478, 84

S.Ct. 1758 (1964), in addition to the cases mentioned above. The court considers it abundantly clear that these decisions are not of themselves binding on Trust Territory courts, and that the specific constitutional provisions which they interpret do not apply in the Trust Territory. *14 Diamond Rings v. U.S.*, 183 U.S. 176, 22 S.Ct. 59 (1901). *DeLima v. Bidwell*, 182 U.S. 1, 21 S.Ct. 743 (1901). *Trust Territoy v. Yifith*, Yap District Criminal Case No.9 (1955) extracts from which appear on pages 34 to 35 of the mimeographed "Rulings and Remarks of (what is now) the Trial Division of the High Court, which may be of general interest to those concerned with criminal cases." *Meyer v. Trust Territory*, 3 T.T.R. 586.

**[1]** Since, however, the Trust Territory Code contains in section 4 of the same words as those used in the fifth and sixth amendments to the United States Constitution concerning protection against self-incrimination and the right to counsel, and the Trust Territory is being administered by the United States, decisions of the United States Supreme Court on these matters are entitled to great weight as precedents from another jurisdiction, and it is believed that they should be recognized as goals to be reached so far as they are applicable to conditions existing in the Trust Territory.

**[2]** In the present case, the accused was arrested and informed the cause of the arrest was because he was under suspicion of murder in connection with the death of Kalwin. The court construes this to mean that he was arrested for examination in accordance with Trust Territory Code Section 457(d). Section 464 requires that a person so arrested shall either be released or charged with a criminal offense within 48 hours after his arrest, makes it unlawful to deny him the right to see at the place of his detention, counsel, or member of the arrested person's family, or his employer, or a representative of

his employer, and also makes it unlawful to refuse or fail to make a reasonable effort to send a message to any of these persons provided the arrested person so requests and such message can be sent without expense to the government or the arrested person prepays any expense there may be to the government. The section, however, imposes no express obligation on anyone to inform the arrested person of these things.

Upon the accused's arrest he was taken to the police station, his shirt and pants were taken away from him leaving him with nothing on but his undershorts, and he was put in a room, which he describes as "good-it was dry inside". After a time, it appears a policeman, Ruben Tom, took him out, read him in Ponapean the form of "notice to accused" widely used in the Trust Territory, asked him if he needed counsel, and, after the answer to that question had been filled in, asked him to sign the notice, which he did. According to the accused's testimony, he initially stated that he did desire counsel. It appears that the Ponapean word for "yes" in response to the question translated "Do you desire counsel?" was originally written on the form, but that this was struck out and the Ponapean word for "no" substituted before he signed the form. The testimony regrettably leaves it entirely to conjecture as to why he changed his mind, or how he was induced to do so. There is no intimation that he made any specific request to consult counsel at that time or have any message sent to counsel. A copy of the English version of the form of "Notice to Accused" used is attached.

After that Ruben Tom questioned the accused, but the latter refused to talk. So, according to Ruben Tom, he was "put back in custody". The accused's testimony is, "I and Ruben talked and I did not tell him anything." So Ruben returned me to another room, in which a drunk man was. They took out the drunk and put me in that room.

The room was wet and there was vomit all over the floor". It would seem that this description must be at least substantially correct since the prosecution presented no evidence to rebut it. Evidence elicited from the police established that the room had either a stone or a concrete floor and that the accused was given no form of bed, mat, or bedding to sleep on. In two more interviews the accused refused to give Ruben Tom any information, but when questioned by the Sheriff, the accused apparently willingly made the statements contained in the six page document marked P #2 and signed each page of it. According to the Sheriff the accused later signed P #3, which is typewritten. The accused says the statements in that are the ones he made, but says he does not recall signing any typewritten statement. The testimony leaves entirely to conjecture why the accused was ready to talk to the Sheriff when he would not talk to Ruben Tom. According to the Sheriff, P #2 was signed before Ruben Tom's third unsuccessful attempt to question the accused.

The Sheriff also testified that after the accused had signed P #2, "I returned him to a cell because I felt that he did not give me everything that I thought he was going to give me"; and in cross-examination, the Sheriff at one point said, that it was his intention to hold the accused in the cell until he admitted the blows and the number of blows or until the accused told the Sheriff what the latter wanted to hear. There is no evidence that either the reason for returning the accused to the cell or the above-mentioned intent to hold him were told to the accused. While the Sheriff in stating his intention to hold the accused put no time limit on it, his other testimony indicates he was thoroughly conscious of his obligation to either release the accused or charge him with a crime within 48 hours after the anest for examination or as he puts it "on suspicion". The court therefore considers that

his statement of intention must be construed to mean that he intended only to hold the accused until he made a satisfactory statement or the 48 hours expired.

After the Sheriff had obtained what he considered a satisfactory statement, the accused's clothes were returned to him, he was charged with murder in the second degree and brought before the Presiding Judge of the District Court within the 48 hours allowed by Trust Territory Code, section 464, after two nights and a day and a fraction in custody.

[3,4] As indicated in the dissenting opinion of Mr. Justice Harlan in the *Miranda* case, concurred in by Mr. Justice Stewart and Mr. Justice White, traditionally reasonable pressure has been regularly allowed in the past in endeavoring to obtain confessions from persons in custody and the word "voluntary" as to such confessions has been used in a very special and perhaps inaccurate sense. See 384 U.S. 515, 86 S.Ct. 1649. The treatment accorded the accused in the police station in the present case appears directly contrary to Section 13b of the Trust Territory Constabulary Manual, which provided in part as follows:

"Prisoners are to be treated fairly and impartially. They must be properly clothed and fed. They must be provided clean, properly equipped living quarters, . . . ."

Section 13c makes clear that those held undergoing investigation come within the term "prisoner" as used in 13b. The pressures shown to have been used here, however, appear no greater, worse, or more illegal than those generally permitted in state court cases under United States Supreme Court decisions as to the normal run of adults prior to 1963. The accused here is a 48 year old male with years of experience as a copra buyer.

[5-8] The *Escobedo* decision established that as far as state courts in the United States are concerned the right

to counsel extends to those in custody on suspicion and not yet charged with a specific crime and that statements obtained from them after their request to consult counsel had been disregarded or denied by the police cannot be admitted in evidence against them. The majority opinion in the *Miranda* case goes further and lays down the following requirements concerning what it calls "custodial interrogation" : -

"As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." 384 U.S. 444-445, 86 S.Ct. 1612.

In another part of the majority opinion it is made clear that it is necessary to warn the person not only that he has a right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him.

**[9,10]** Clearly the intent of the court in the *Miranda* case is to stop the type of interrogation which was conducted here unless the suspect much more clearly waives his rights "voluntarily, knowingly and intelligently" than has previously been required and to rely much less than

formerly on a suspect's having to take the initiative in asserting his rights. This change of position or emphasis in recent years is not limited to the courts. The Criminal Justice Act of 1964 (Public Law 88-455; 78 Stat. 552) approved August 20, 1964, and its legislative history set forth in U.S. Code Congressional and Administrative News, 88th Congress, Second Session, p. 2990-3003, show this clearly. This act aims to make competent counsel immediately and readily available to even the most indigent in criminal cases (other than for petty offenses) in the United States federal courts right from their first appearance before a commissioner or court, which under the federal system must follow the arrest "without unnecessary delay". There is no equivalent in the federal system of the arrest for examination for 48 hours permitted by the Trust Territory Code.

The United States Supreme Court itself has recognized that the safeguards which it has established in the *Escobedo* and *Miranda* cases are so new that in the public interest they should not be applied retroactively and has specifically determined that the holding in the *Escobedo* case is available only to persons whose trials began after June 22, 1964, the date on which *Escobedo* was decided, and that the guidelines set out in the *Miranda* case are only available to persons whose trials had not begun by June 13, 1966, the date of the *Miranda* decision. *Johnson v. New Jersey*, 384 U.S. 719, 734, 86S.Ct. 1772, 1781 (1966).

**[11]** Similarly this court believes that prosecuting authorities in the Trust Territory should have reasonable notice before any such new standards are to be applied here-particularly in view of the Appellate Division's indication in *Meyer v. Trust Territory*, 3 T.T.R. 586, that it would not apply *Escobedo* literally, but would "recognize Trust Territory realities". (Final page of mimeographed

opinion.) The court will therefore apply in this case what the Supreme Court refers to as "traditional standards" and believes that this should be done in the case of all confessions or admissions obtained by the police from persons in custody in the Trust Territory until the prosecuting authorities have had reasonable notice of this opinion.

*This opinion is, however, intended specifically as a warning that the standards heretofore accepted in the Trust Territory, and tolerated as to the documents in issue in this case because of lack of notice of change, are not to be followed or applied to confessions or admissions obtained from persons in custody after reasonable notice of this opinion. Ninety days after the distribution of this opinion is considered reasonable notice for this purpose.*

It is believed that the whole matter of permissible police methods in endeavoring to obtain confessions in the Trust Territory should now be reviewed in the light of present day thinking in the United States as represented by Supreme Court decisions, the Criminal Justice Act of 1964, and state legislation and regulations as to permissible police interrogation, and that the more modern views should be followed so far as these are fairly applicable to conditions in the Trust Territory. The United States as the administering authority can hardly take the position that words it has sanctioned in the Trust Territory Bill of Rights, taken from the amendments to the United States Constitution, have a basically different meaning in the Trust Territory from what they have in the United States. I hope that we may have the aid of both the executive and legislative branches in determining how far conditions here require that variations be made in the interest of practical administration of justice. The legislative branch has already by Trust Territory Code, Section 498,

made the *McNabb* ruling applicable to evidence obtained in violation of Chapter 6 of the Code; and the District Attorney has assured the court that he has already taken steps to prevent a reoccurrence of the more disgusting part of the treatment accorded the accused at the police station.

In response to the request of counsel for guidance as to the rules and standards to be applied in the future, I submit the following views.

One great difference from conditions in the States which must be frankly recognized is the extremely small number of actual lawyers readily available in the Trust Territory to represent suspects or accuseds. It is therefore my belief, and it seems to have been generally accepted in the past, that a duly listed trial assistant must be accepted in the Trust Territory as sufficient counsel wherever a lawyer would be called for in the States in connection with interrogations.

Another important difference is the much lower degree of general understanding as to the functions of counsel, the responsibilities of the police and limitations on their powers, and the much greater general apprehension of danger of police requests are not complied with or unnecessary requests are made of them. Sub-paragraphs (a) and (b) of Trust Territory Code, Section 464, have proved largely ineffective because apparently most Micronesians under arrest for examination either never think of asking to see anyone or do not dare to ask. Another aspect of this lack of understanding is the limited number of policemen who have sufficient education and training so that they can reasonably be expected to enlighten a suspect accurately about these matters even if the police have the best of intentions and honestly try to give such enlightenment. In the present case, the accused's principal complaint voiced against the constabulary is not that

they failed to notify him of his right to counsel, but that they failed to explain to him why he needed counsel, and in a surprising number of cases, we have found instances of an accused stating that he desired counsel, but then apparently quite freely going on to talk about the merits of the case without any effort to obtain counselor have counsel obtained for him, on the theory that counsel would only be important at the time of trial, even though the "notice to accused" used has expressly advised him that he has the right to advice of counsel *before making* any statement which may involve him as an accused in any criminal action.

This lack of general understanding would make the requirement of an affirmative waiver "voluntarily, knowingly and intelligently" made, extremely difficult to apply. In my opinion the Trust Territory has not yet reached the stage of development where it is practical or fair to the general public to absolutely require such a waiver. On the other hand this lack of understanding, in my opinion, makes the use of the warnings stipulated in the majority opinion in the *Miranda* case most appropriate.

The dissenting opinions in the *Miranda* case show that four justices of the Supreme Court considered that the requirement of the type of waiver specified by the majority was undesirable even in the United States in 1966. Three of them argue for the use of traditional standards, but, Mr. Justice Clark, who has had much experience in law enforcement, takes a middle ground (384 U.S. 499-504, 86 S.Ct. 1640-1642), which I believe should be the one followed in Trust Territory courts, with the qualification that a duly listed trial assistant be considered sufficient as counsel in place of a lawyer for some years to come.

To be very specific, I recommend the following:-

1. The form of "Notice to Accused" be revised substantially as follows :-

A. To expressly state : -

i. That the individual warned has a right to remain silent;

ii. That the police will, if the individual so requests, endeavor to call counsel to the jail or other place of detention and allow the individual to confer with counsel there before he is questioned further, and allow him to have counsel present while he is questioned by the police, if he so desires; and

iii. That the services of the Public Defender, when in the vicinity, and of his local representative are available for these purposes without charge.

E. By changing the question "Do you desire counsel?" to read "Do you want us to send word now to counsel to come to see you here?" and add, "If so, whom do you want us to send for?"

2. The police be instructed that once a person in custody has expressed a desire for counsel, they shall not argue that he does not need counsel, but shall offer to make a reasonable effort to put counsel in touch with him as soon as practicable if he so desires.

3. The police be instructed that before questioning a suspect arrested under Trust Territory Code; Section 457(d), they shall inform him of his rights under Section 464.

4. The translations of the revised "Notice to Accused" in the local languages be carefully checked to make sure that they convey the warnings as nearly as possible with the same emphasis as the English. [The court is not happy about either the Ponapean or the Trukese translations of the form now in use.]

5. The Congress of Micronesia considers amending Trust Territory Code, Section 464, by adding a provision that when anyone is arrested for examination it shall be the

duty of those having custody of him to promptly, and before questioning him about his participation in any crime, inform him of his rights and their obligations under sub-paragraphs (a), (b) and (c) of that section.

The court therefore holds that the admissibility of any confession obtained by the police from a person in custody, in the absence of counsel, more than 90 days after the distribution of this opinion should be judged by the following standards, indicated by Mr. Justice Clark's dissenting opinion in the *Miranda* case : -

1. The warnings specified by the majority in the *Miranda* case are to be expected.

2. **If** the warnings have been given and the court finds "by an examination of all of the attendant circumstances" (as required in *Haynes v. Washington*) that the confession was voluntary and not obtained by coercion or improper inducement, the confession may be admitted in evidence even though no affirmative waiver of counsel is shown. The standards indicated in the *Crooker* and *Cicenia* cases are no longer to be relied on.

3. **If** through ignorance or inadvertance, these warnings are not all given, the burden is on the government to prove *either*

a. That counsel was voluntarily, knowingly and intelligently waived and the confession was voluntarily given; *or*

b. That under all the attendant circumstances, including the failure to give the warnings, the confession was clearly voluntary, even though no affirmative waiver of counsel is shown.

**If** the government sustains this burden, the confession may be admitted.

#### RULING

The documents marked P #2 and P #3 are admissible in evidence and shall be admitted as exhibits if and when

the prosecution has presented adequate evidence of the corpus delicti in accordance with the stipulation of counsel. The motion of counsel for the accused to suppress these documents is denied.