NGIRBLEKUU DEBESOL, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Appeal No. 29

Appellate Division of the High Court

October 9, 1969

Appeal from conviction for voluntary manslaughter. The Appellate Division of the High Court, D. Kelly Turner, Associate Justice, reversed the conviction holding that appellant was convicted solely upon improperly admitted evidence, prior written statements not made under oath and without opportunity for cross-examination.

Reversed and remanded.

1. Homicide--Voluntary Manslaughter-Element of Offense

   A conviction of voluntary manslaughter may not be sustained without evidence that the killing was done upon a sudden quarrel or heat of passion.

2. Appeal and Error-Generally

   All assignments of error not briefed or argued are deemed waived.

3. Appeal and Error-Generally

   If appellant had a particular extrajudicial statement in mind which "clearly exhibited prejudice" toward him he was obliged to point it out to the appellate court and was duty bound to have made objection during the trial.

4. Criminal Law-Trial Procedure--Objections

   Objection made by the government does not inure to the benefit of the accused.

5. Appeal and Error-Generally

   A verdict of guilty may not be reversed for any prejudice shown toward the government.

6. Criminal Law-Trial Procedure-Objections

It is the duty of counsel to make objection at the time improper remarks or comments are made by the trial judge, the purpose of this being to promptly inform the trial judge of possible errors so that he may reconsider and make any changes deemed desirable.

7. Criminal Law-Trial Procedure-Objections

When objection is not made in the trial, the matter may not be raised upon appeal unless it is such prejudicial error as to result in failure to provide a fair trial amounting to a denial of due process.

8. Appeal and Error-Scope of -Review-Abuse of Discretion

Assigning as error "abuse of judicial discretion" without showing the particulars of the error complained of does not comply with the rule that the appellate court will not interfere with the decision of the trial court on a matter within its discretion unless abuse of that discretion is shown.

9. Criminal Law-Corpus Delicti

Corpus delicti is more than proof of cause of death.

10. Criminal Law-Corpus Delicti

The corpus delicti in a homicide consists of two elements, the first of which, the fact of death, is to be shown as a result of the second, that is, the criminal agency of another.

11. Criminal Law-Corpus Delicti

In proving the fact and manner of death, it is not necessary that a witness state with absolute certainty that death did result in the manner alleged by the Government, rather it is sufficient if the medical testimony establishes that a condition existed which could have resulted in death as alleged.

12. Criminal Law-Appeals-Scope of Review

In criminal appeal, court is under obligation of Trust Territory Code and general -principles of law to consider evidence in light most favorable to the government. (T.T.C., Sec. 200)

13. Appeal and Error-Scope of Review-Facts

It is the function of the trial court, and not the appellate court, to make determinations of fact which are dependent upon conflicting evidence, and appellate court must test the sufficiency of proof on the basis of what the trial court had the right to believe and not on what the appellant wishes it believed.

14. Criminal Law-Witnesses-Impeachment of Testimony

Out-of-court statements to the police by two defense witnesses, being contrary to the testimony given at trial by such witnesses, were admissible for impeachment only.

15. Criminal Law-Witnesses-Impeachment of Testimony

Out-of-court statements used to impeach testimony of witness could not be used as substantive evidence and it was error to give them probative effect.

16. Criminal Law-Witnesses--Impeachment of Testimony

Admission of ·prior out-of-court testimony of witness, which conflicted with that given at trial, at the request of counsel "as a statement made about the truth in the matter", for such purpose, was plain error.

17. Criminal Law-Pre-Trial Procedure-Discovery

Rule 7, Rules of Criminal Procedure, provides that the court may order inspection of papers, books and objects "obtained or belonging to the accused, or obtained from others by seizure or by process" and requires "a showing that the items sought may be material to the preparation of his defense", and where such items were neither obtained by seizure or process nor a showing of materiality made such inspection may not be had. (Rules of Crim. Proc., Rule 7)

18. Appeal and Error-Evidentiary Error

The fact that out-of-court statements were erroneously admitted as substantive evidence in the record on the request of the appellant without objection from the prosecutor would be "invited error" on appellant's .part and court would ordinarily decline to notice it; however, where it was so fundamentally wrong to admit them and then employ them as substantive evidence court was required to take notice of it.

19. Appeal and Error-Scope of Review-Witness Credibility

Whether witness' testimony was to be believed or not was for the trial judge and not appellate court.

20. Appeal and Error-Scope of Review-Witness Credibility

Even though trial judge was justified in disbelieving and rejecting all defense testimony he was not entitled to believe account of the affairs as set out in out-of-court statements.

21. Criminal Law-Witnesses--Impeachment of Testimony

A party may not impeach nor contradict his own witness.

22. Criminal Law-Evidence-Prior Written Statements

Prior written statements, not made under oath and without opportunity for cross-examination, are inadmissible hearsay.

23. Criminal Law-Witnesses-Impeachment of Testimony

Prior written statements may be introduced for impeaching purposes when the witness has denied making the inconsistent statement.

24. Criminal Law-Witnesses--Impeachment of Testimony

If the witness admits he has made prior statements, inconsistent to his testimony, the impeachment of the witness has been accomplished and it is unnecessary to put into the record the prior statement since its only purpose is for impeachment and it is without probative value.

Public Defender for the Appellant: ROGER ST. PIERRE
District Attorney for the Appellee: DOUGLAS F. CUSHNIE

Before SHOECRAFT, *Chief Justice,* BURNETT and TURNER, *Associate Justices*

TURNER, *Associate Justice*

This is an appeal from the conviction and sentence of the appellant for voluntary manslaughter. Testimony the court was entitled to believe showed the accused shot his son in the back of the head with a rifle.

[1] There was no acceptable evidence that the killing was done "upon a sudden quarrel or heat of passion". These are essential elements of the crime charged. Without them the conviction may not be sustained.

We first are drawn to the procedural aspects of the appeal. In the notice of appeal five grounds are set forth, but only one of them is worthy of consideration. Appellant ignored basic rules of appellate procedure by failing to specify with particularity the trial errors, or to expand on generalized assignments of error by written brief or oral argument, or both. Nor does the record show there was objection during the trial to the alleged errors listed as grounds for the appeal.

The decisions of the Appellate Division of the High Court show a marked tendency to ignore the obligations of an appellant to adequately present assignments of error. There is, perhaps, some justification for this indulgence when appellants represent themselves or are represented by Micronesian trial assistants who have not had formal legal training.

There is no justification for showing the same leniency when the appellant is represented by the Public Defender and the appellee Trust Territory by the District Attorney, both of whom are U.S. lawyers. **In** this appeal neither

lawyer bothered to submit written brief and at the hearing the oral argument was both limited and cursory.

[2] Even if the assignments of error had been sufficiently specific to apprise the court of their significance, they were effectively waived. All assignments of error not briefed or argued are deemed waived. *State v. Peters,* 269 S.W.2d 57, 46 A.L.R.2d 942.

Even though three of the five assignments are general, indefinite and insufficient and therefore present nothing for review, we have examined the record in search of some merit in them. We do not want to be charged with enforcing the rules of law applicable to appellate procedure without giving due notice of the court's intent to change the lenient attitudes of the past.

The first of these inadequate assignments which we had difficulty interpreting was:-

"3. That the Court through its comments on extrajudicial statements in evidence made by a witness clearly exhibited prejudice vs. appellant."

[3] There are 92 typewritten, legal size, pages of transcript and on almost everyone of them the court ruled, commented or made a statement. We read them all and none of them, in our opinion, "clearly exhibited prejudice" toward the defendant. If appellant had a particular comment in mind, he was obliged to point it out to the appellate court. He also was duty bound to have made objection during the trial.

We find the rule in *Turrietta v. Wyche,* 212 P.2d 1041, 15 A.L.R.2d 407:-

"No objection was made by counsel to these remarks of the court and the question cannot be considered here."

[4] Objection made by the government does not inure to the benefit of the accused and the only objection to

the court's comments we found was made by the District Attorney. The transcript shows:-

"Mr. Cushnie: What is the purpose of this inquiry, may I ask the court?

Court: You may ask, but I won't answer. I think it is rather obvious. Sit down.

Mr. Cushnie: Please note my objection to the cross examination of my witness.

Court: Your objection is overruled."

[5] Had the parties been reversed in the foregoing, we would have seriously considered the effect of such examination by the court of a defense witness in the face of an objection by the Public Defender. They were not and the verdict of guilt may not be reversed for any prejudice shown toward the government.

The next assignment of error, so general as to be impossible of ascertainment in the record and therefore valueless on appeal, was:-

"4. That various rulings of the Court on the admissibility of testimony constituted prejudicial error."

The transcript shows some error in rejection or admission of evidence, but it largely relates to the government's case and such error, therefore, was not prejudicial to the defendant.

The final assignment of error insufficient in itself and without merit upon examination of the transcript was:-

"5. That the Court protracted questioning of government witnessesconstituted both ,prejudice and abuse of judicial discretion."

[6] We first note the rule that it is the duty of counsel to make objection at the time improper remarks or comments are made by the trial judge. The purpose of the rule is to promptly inform the trial judge of possible errors so that he may reconsider and make any changes deemed desirable.

[7] When objection is not made in the trial, the matter may not be raised on appeal unless it is such prejudicial error as to result in failure to provide a fair trial amounting to a denial of due process. The transcript shows appellant's counsel made no objection to the court's "protracted questioning of government witnesses." The denial of the District Attorney's objection could scarcely be considered prejudicial to the accused.

[8] Assigning as error "abuse of judicial discretion" without showing the particulars of the error complained of is not sufficient to meet the rule of this court set forth in *Takeo Yamashiro v. Trust Territory,* 2 T.T.R. 638:-

> "This court on appeal will not and should not interfere with the decision of the trial court on a matter within its discretion unless abuse of that discretion is shown."

Appellant has neglected to show wherein the trial court abused its discretion so as to adversely affect the defendant.

This leaves the appeal with a single assignment of error: That the verdict was contrary to the law and to the evidence. Had law and argument been submitted in written briefs by both sides, we would be inclined to condone the casual indifference displayed in the oral argument.

The Public Defender's argument that the guilty verdict was contrary to the law rested upon the proposition there was no proof of the corpus delicti, and as to this, his theory was that the cause of death was not adequately demonstrated because the medical officer who examined the decedent admitted there could have been other causes of death, not ascertained, in addition to the obvious one of a rifle bullet hole through the head. The argument is rejected as unworthy of consideration.

[9-11] Corpus delicti is more than proof of cause of death. In *Fredriech Helgenberger v. Trust Territory,* 4 T.T.R. 530, it is pointed out:-

"The corpus delicti in a homicide consists of two elements, the first of which, the fact of death, is to be shown as a result of the second, that is the criminal agency of another . . . . It is not necessary, however, in proving the fact and manner of death, that a witness state with absolute certainty that death did result in the manner alleged by the Government. It is sufficient if the medical testimony establishes that a condition existed which could have resulted in death as alleged."

Finally, we come to the only valid issue in the appeal, i.e., was the verdict contrary to the evidence?

We are asked to weigh the evidence. How we do this is circumscribed by the rules heretofore laid down by this court.

[12,13] In *Fattun v. Trust Territory,* 3 T.T.R. 571, and quoted in *Ongalibang Uchel v. Trust Territory, 3* T.T.R. 578, it is said:-

"This court has repeatedly recognized that it has an obligation under Section 200 of the Trust Territory Code and under the general principles of law, on a criminal appeal, to eonsider the evidence in the light most favorable to the government."

It was said in *Takeo Yamashiro v. Trust Territory,* supra:-

"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 accordance with Rule 31(3) (a), we searched for "manifest error" which we would be justified in taking notice of on our own initiative.

Appropriate to this search was the statement of the United States Supreme Court in *U.S. v. National Association of Real Estate Boards,* 339 U.S. 485, 70 S.Ct. 711 at 717:-

"It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. (Citing) We are not given those choices, because our mandate is not to set aside findings of fact unless clearly erroneous."

We briefly examine the evidence adduced from both government and defense witnesses. The principal, nay, the only government witness bearing directly upon the homicide was Omisong, a member of the Constabulary who was related under the custom to the accused. His testimony included the following:-

"... and defendant asked me not to appear in court during the time of his case. The defendant said, 'Because 1 killed my son and only you, myself and my wife know about this.' These words that 1 have just mentioned were repeated to me three different times from the defendant."

Later the court asked:-

"Did he say how it happened; did he explain how it happened? A: No, the explanation of the killing was never done. He only told me, '1 am sorry such a thing happened.' "

The witness also quoted the defendant's wife, the only other person present, at the time of the defendant's admission:-

"The only thing that the wife of the defendant said was-at the time when we were together, the three of us, the wife of the defendant said, 'What you have talked about between you and the defendant is all true.' "

This was the government's case. We note a glaring weakness in it. We do not know whether the defendant accidentally shot his son, or killed him negligently and without malice (involuntary manslaughter); or killed him in the "heat of passion" (voluntary manslaughter) ; or with malice aforethought without premeditation (second degree murder); or finally, whether the killing was wilful, de-

liberate, malicious and premeditated (murder in the first degree).

[14-16] The answer to the question relating to the circumstances of the killing had to have been obtained from out-of-court statements to the police by two defense witnesses. These statements, being contrary to the testimony given at trial by these two, were admissible for impeachment only. They could not be used as substantive evidence and it was error to give them probative effect. The court admitted some of the prior contradictory statements at the request of the Public Defender "as a statement made about the truth in the matter." Admission for such purpose was plain error.

We note here, for future guidance, that the Public Defender obtained two statements given to the police by the witness Francis by demanding them from the prosecutor during the course of the trial. It was error for the court to require, as a matter of course without any special showing as to entitlement, the District Attorney to produce them. Also, the demand during trial was not timely.

The government vigorously objected to production of the witness' statements to the police in the face of the Public Defender's unwarranted charge the government was "suppressing evidence". Neither of the two counsel nor the court, which relied upon the non-applicable Rule 30, Rules of Criminal Procedure, considered the appropriate grounds for denying or requiring production of the statements.

[17] Rule 7, Rules of Criminal Procedure, provides that the court may order inspection of papers, books and objects "obtained or belonging to the accused, or obtained from others by seizure or by process . . . ." The witness' statements to the police were not obtained by either seizure or process. The rule also requires "a showing that the items sought may be material 'to the preparation of his

defense . . . ." No such showing was made. Our rule is not unlike, in part, Rule 16, Federal Rules of Criminal Procedures. As to timeliness of the demand, see: *Hellman v. U.S.,* 339 F.2d 36.

[18] The fact the out-of-court statements were erroneously admitted as substantive evidence in the record on the request of the appellant without objection from the prosecutor would be "invited error" on appellant's part and we ordinarily would decline to notice it. In this case, however, it was so fundamentally wrong to admit them and then employ them as substantive evidence we are required to take notice of it.

Particularly is this true when we observe from the record that the decision necessarily was founded on the out-of-court statements introduced by the prosecution for impeachment only. These statements necessarily were considered by the court as substantive evidence. They were the only part of the record shedding any light on the circumstances of the killing reflecting on the elements of "sudden quarrel or heat of passion" necessary for conviction.

The rule as to the reception or exclusion of evidence of this nature is set forth in precise detail in *Fredriech Helgenberger v. Trust Territory,* supra, in which the prosecutor read into the record a prior out-of-court statement for the avowed purpose of "refreshing the memory" of a government witness who unexpectedly refused to testify at the trial. Here, the Public Defender and the court contrived the same error.

It is possible, of course, for the defense to inadvertently supply essentials of a criminal charge omitted by the prosecution. The defense witnesses were the defendant, who blamed his ten-year-old son for the killing; the defendant's wife who denied her husband admitted the killing to Officer Omisong; the son Francis, who blamed his brother

Gabriel; and Gabriel, who almost, but not quite, admitted firing the fatal shot.

As to whether or not the evidence sustained the judgment of guilt, none of these defense witnesses supplied the testimony essential to the prosecution's case for voluntary manslaughter. There was no testimony as to the circumstances of the killing by the defendant upon which he could be found guilty of voluntary manslaughter. There was a great deal said about the circumstances of the killing outlined in the defense story that Gabriel shot his brother, accidentally or otherwise.

[19] The trial court obviously believed none of these witnesses. And with that we have no quarrel. Whether their testimony was to be believed or not was for the trial judge, not this court.

Where the trial judge went astray was to admit into evidence prior contradictory statements of two of these witnesses and give to them the force and effect of substantive evidence. These prior statements were admissible for impeachment only, not for their probative value.

[20] The only way the trial judge could have arrived at a verdict of guilt of voluntary manslaughter was to believe the out-of-court statements by the two sons of the defendant that their father killed the third son in the heat of a quarrel with his wife. But the court was not entitled to believe this account of the affair, even though the trial judge was justified in disbelieving and rejecting all defense testimony.

A quick review of the defense testimony will illustrate the point:-

Francis, the defendant's son, was called by the prosecution for the limited purpose of identifying the rifle belonging to his father which was "the rifle that killed Temdik". The court permitted, on cross-examination, wide-ranging interrogation on the theory our Rule 13 does not limit the

scope of cross-examination. Francis told the court in answer to the Public Defender:-

"Q: Francis, did you see who shot your brother, Temdik?
A: Yes.
Q: Who was it?
A: Gabriel."

On re-examination the District Attorney then put into evidence a statement made by Francis to the police, in' his handwriting and signed by him that:-

". . . Then my father got hold of a gun and shot Temdik, who stood under an apple tree . . . ." (Ex. 2.)

The Public Defender countered by demanding production by the government of the two additional statements to the police. The first of the two, Exhibit A, said the victim shot himself (in the back of the head with a rifle). The Public Defender offered it:-

"As a statement made about the truth in the matter."

[21] The court admitted it. The admission was invited error in that it was admissible-if at all-for impeachment and as the witness had been "taken over" by the defense, it was not admissible for impeachment. A party may not impeach nor contradict his own witness. Also, the order requiring compliance with the demand for the statements was erroneous under the circumstances shown in the transcript.

To compound the contrived and invited errors, the Public Defender next obtained admission of a third prior statement to the police by the witness Francis that repeated his testimony given from the witness stand that Gabriel shot Temdik. Neither defense counsel nor the court attempted' to explain the grounds for admitting this third out-of-court statement. It was error but not prejudicial to the appellant.

Nor did this procedure halt with the witness Francis. It continued when the ten-year-old son of the defendant, Gabriel, was called by the defense. Gabriel testified that he was "playing" with the rifle, "and the rifle exploded and I saw Temdik fall in the river." Gabriel also gave three statements to the police. One was offered and admitted in evidence as the Prosecution's Exhibit 3. The other two were marked for identification but not admitted. As impeachment of Gabriel's trial testimony that the rifle "exploded" while he held it, the statement to the police said:-

"My father increase in madness and ask mother what she said or if (she) like to receive a piece of a floor on her head. Whereas my mother also rose in anger then said, 'If you dislike us arguing concerning our children, take the life of Temdik right now.' My father instantly rose and took a gun to the door, squat, aim at Temdik, and shot him under an apple tree."

[22-24] Prior. written statements, not made under oath and without opportunity for cross-examination, are inadmissible hearsay. They may be introduced for impeaching purposes when the witness has denied making the inconsistent statement. If the witness admits he has made prior statements, inconsistent to his testimony, the impeachment of the witness has been accomplished and it is unnecessary to put into the record the prior statement since its only purpose is for impeachment and it is without probative value.

For the rule recently laid down by this court as to admissibility of prior statements and testimony, see: *Fredriech Helgenberger v. Trust Territory,* supra.

The conviction is not sustained by the evidence the court was entitled to believe. All the court had before it as believable substantive evidence was the admission of the defendant to his relative who was a police officer, that he killed his son. The medical evidence showed the victim

was shot through the head by defendant's rifle. But these facts were not sufficient to establish a criminal offense because they did not show the circumstances of the killing. The trial judge relied upon impeaching evidence for the necessary substantive evidence of the elements of the crime of voluntary manslaughter. This he was not entitled to do.

Nor must it be concluded from the foregoing that the defense established the innocence of the defendant. To the contrary, the defense established nothing to the satisfac,.. tion of the trial judge and we necessarily accept that conclusion.

The appellant is entitled to another trial in which the verdict is not influenced by erroneously admitted evidence.

For the foregoing reasons, the conviction of Ngirblekuu Debesol of voluntary manslaughter must be, and is hereby, reversed and the matter is referred to the Trial Division for further proceedings not inconsistent with this judgment.