

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

v.

**HERMAN T. PALACIOS, Appellant**

Criminal Appeal No. 54

Appellate Division of the High Court

May 28, 1976

Appeal by co-defense counsel from trial court ruling of contempt of court for failing to appear on original date set for criminal trial. The Appellate Division of the High Court, per curiam, reversed and remanded, holding that where trial court, on September 9, entered written order of contempt of court which stated that court found defense attorneys in contempt and ordered each to pay a fine of \$100 and sentenced each to six months in jail, but suspended sentence on condition that fine be paid within three days, and stated that in event that fine was not paid, attorney not paying fine would be committed to jail until fine was paid, there was insufficient support for finding of contempt; and that where notice of appeal was filed on September 12, trial court's filing on September 19, of an amendment to its original contempt order, which amendment stated that trial court certified that it saw the conduct constituting contempt and that it was committed in actual presence of the court, and set forth precise facts upon which contempt was found, was without legal effect since it was not a correction of a clerical error and trial court had no jurisdiction, to enter amended order, because its power to act ended upon filing of notice of appeal.

**1. Courts—Jurisdiction—Correction of Clerical Errors**

Where trial court, on September 9, entered written order of contempt of court which stated that court found defense attorneys in contempt and ordered each to pay a fine of \$100 and sentenced each to six months in jail, but suspended jail sentence on condition that fine be paid within three days, and stated that in event that fine was not paid, attorney not paying fine would be committed to jail until fine was paid, there was insufficient support for finding of contempt; and where notice of appeal was filed on September 12, trial court's filing, on September 19, of an amendment of its contempt order, which amendment stated that court certified that it saw the conduct constituting contempt and that it was committed in actual presence of court, and set forth precise facts upon which contempt was found, was not correction of a clerical error and trial court had no jurisdiction to enter amended order, because court

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lost its power to act when notice of appeal was filed. (Rules Crim. Procedure, Rules 15e, 22(2))

**2. Courts—Jurisdiction—Filing Notice of Appeal**

Trial court generally loses its power to act with regard to a matter when notice of appeal is filed.

**3. Courts—Jurisdiction—Correction of Clerical Errors**

A generally recognized exception to rule that trial court loses its jurisdiction upon filing of notice of appeal is that the court may correct clerical errors.

**4. Courts—Jurisdiction—Correction of Clerical Errors**

Test in determining whether error is clerical or judicial is whether error was made in rendering judgment or recording judgment; court possess inherent power to correct errors in record evidencing judgment pronounced by court so as to make it speak the truth and actually reflect that which was in fact done, but court does not have power to correct error by court in rendering judgment it did not intend to render and by such order change judgment actually but erroneously pronounced by court, to one court intended to record.

*Counsel for Appellant:* EDWARD C. ARRIOLA  
*Counsel for Appellee:* NONE

Before BURNETT, *Chief Justice*, BROWN, *Associate Justice*, and WILLIAMS, *Associate Justice*

PER CURIAM

Appellants Douglas F. Cushnie and Joaquin C. Arriola were found to be in Contempt of Court for their failure to appear at the time set for trial in High Court Criminal Case 5-75, and sentenced to a term of six months imprisonment, suspended on the condition they not be found in contempt of any Court in the Trust Territory for a period of six months, plus a \$100.00 fine.

On September 9, 1975, while the jury was deliberating in the case of *Trust Territory of the Pacific Islands v. Herman T. Palacios*, Criminal Case No. 5-75, the Trial Court summarily found appellants in Contempt of Court for their failure to appear on August 19, 1975, the original date set

for trial. Only appellant Cushnie was in Court during the Summary Contempt Proceeding. Neither counsel was given notice of the contempt allegations or given an opportunity to present any evidence on their own behalf.

The Trial Judge concurrently issued a written Order of Contempt, which reads as follows:

The Court finds that Douglas Cushnie and Joaquin Arriola are in contempt of court.

It is Ordered, that Douglas Cushnie and Joaquin Arriola are each hereby sentenced to six (6) months in jail and a \$100.00 (one hundred dollars) fine. The six (6) months imprisonment for each is suspended on conditions that the \$100.00 (one hundred dollars) fine is paid no later than 5:00 P.M., September 12, 1975 and that he not be found guilty of contempt in any Trust Territory Court during said six (6) months term.

In the event the \$100.00 (one hundred dollars) fine is not paid by either person or both, the person not paying the fine will be committed to jail until the fine is paid.

Dated this 9th day of September, 1975.

Robert A. Hefner

On September 12, 1975, the appellants filed a notice of involuntary payment as well as a notice of appeal. The appeal was docketed on the same day.

On September 19, 1975, the Trial Judge filed a second written order to be entered nunc pro tunc September 9, 1975. Said order amended the original order of contempt entered on that date. The amended order reads as follows:

Pursuant to Rules 15e and 20a, Rules of Criminal Procedure, the Order of Contempt entered September 9, 1975 holding Douglas Cushnie and Joaquin Arriola in contempt is hereby amended and there is added thereto the following:

1. The court hereby certifies that it saw the conduct constituting the contempt of court of Douglas Cushnie and Joaquin Arriola and that it was committed in the actual presence of the court.

2. The facts found by the court constituting contempt of court are as follows:

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(a) Douglas Cushnie and Joaquin Arriola were informed, knew and understood that the above entitled case was set for a jury trial at 9:00 A.M., August 19, 1975.

(b) That written notice of said trial was given to Douglas Cushnie on August 8, 1975. That Joaquin Arriola received written notice no later than August 11, 1975. That both Douglas Cushnie and Joaquin Arriola represented to the court in writing that they were Co-counsel for the defendant.

(c) That on August 13, 1975, a motion for continuance was heard by the court and denied. Douglas Cushnie was in court at the time the court denied the motion and he was personally informed of the court's decision.

(d) That at 9:00 A.M., August 19, 1975, the court called the above entitled case and the Prosecution was ready. The Court personally observed that Douglas Cushnie and Joaquin Arriola were not present in court to represent the defendant or proceed with the case. The defendant was present.

(e) The court, by necessity, continued the trial until September 2, 1975 and the jury panel was excused.

(f) That said Douglas Cushnie and Joaquin Arriola had the ability to appear at the time and place of said trial.

(g) The said Douglas Cushnie and Joaquin Arriola did wilfully neglect and fail to so appear without sufficient reason or excuse for such failure.

Except as amended herein the Order of Contempt entered September 9, 1975 shall remain in full force and effect.

This Amended Order is to be entered nunc pro tunc September 9, 1975.

Robert A. Hefner

The Trust Territory Rules concerning summary contempt specifically Rule 20a, Trust Territory Rules of Criminal Procedure provides as follows:

Contempt may be punished summarily without hearing evidence or according the offender assistance of counsel if the court certifies that it saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the Court. The order of contempt shall recite the facts and shall be entered in the record.

It is readily apparent that the original "Order of Contempt" dated September 9, 1975, contained no certifica-

tion or recitation of the necessary facts as required by the foregoing rule, nor does the record reflect the necessary certification and recitation of facts. Since Rule 20 of the Trust Territory Rules of Criminal Procedure is very similar to Rule 42(a) of the Federal Rules of Criminal Procedure, the interpretation of the Federal Courts are persuasive.

The Court in *Widger v. United States*, 244 F.2d 103, (5th Cir. 1957) held a summary contempt conviction could not be sustained if the record was not certified by the judge that he witnessed the alleged contemptuous conduct, and that it was committed in his actual presence, and the Order must recite any relevant facts not merely the conclusions of the Court. Also in *Pietsch v. President of the United States*, 434 F.2d 861, (2nd Cir. 1970), the Court held where the Order of Contempt did not recite facts which led to the finding and sentencing of summary contempt, the order could not be upheld.

[1] In view of the requirements of Rule 20 of the Trust Territory Rules of Criminal Procedure and the foregoing authorities, the Order of the Court dated September 9, 1975 was not sufficient to support a finding of contempt.

[2] The Trial Court generally loses its power to act with regard to a matter when the Notice of Appeal is filed. *Kaneshina v. Trust Territory*, 5 T.T.R. 99 (App. Div. 1970); *Miller v. United States*, 114 F.2d 267, (7th Cir. 1940), *Janousek v. Doyle*, 313 F.2d 916, (8th Cir. 1963). As a result the amended order of September 19, 1975, is also without any legal effect since the Notice of Appeal was filed and docketed on September 12, 1975, prior to the filing of the amended order since the Court had no jurisdiction to act.

[3, 4] A generally recognized exception to the rule that the Court loses its jurisdiction is that the Court may correct clerical errors. *In Re Candelario*, 477 P.2d 729,

(Cal. 1970). This principle is embodied in Rule 15e of the Trust Territory Rules of Criminal Procedure and is similar to Rule 36 of the Federal Rules of Criminal Procedure and Rule 60 of the Federal Rules of Civil Procedure, and the inherent power of the Court under the common law. The power of the court under such procedure is limited to correction of clerical mistakes and error arising from oversight or omission. *Dow v. Baird*, 389 F.2d 882, (10th Cir. 1968). Such clerical errors as may be corrected under this procedure are to be distinguished from judicial errors which may not be corrected by such amendments. The test in determining whether the error is clerical or judicial is whether the error was made in rendering judgment or recording judgment. *In Re Candelario*, 477 P.2d 729, (Cal. 1970). This principle is well stated in *Blankenship v. Royalty Holding Co.*, 202 F.2d 77, 79 (10th Cir. 1953) as follows:

Courts possess the inherent power to correct errors in the records evidencing the judgment pronounced by the court so as to make them speak the truth actually reflecting that which was in fact done. They do not, however, possess the power to correct an error by the court in rendering a judgment it did not intend to render and by such an order change a judgment actually but erroneously pronounced by the court to the one the court intended to record. With these principles all courts are in accord.

After consideration of the record in this case, it appears the error sought to be corrected by the Trial Court in its amended order was not a clerical error as contemplated under Rule 15e, Trust Territory Rules of Criminal Procedure. As a result, the Court was without jurisdiction to enter the amended order.

Although appellants have raised other issues in their appeal, discussion of these issues is not necessary in view of our ruling on the original and amended orders finding appellants in contempt.

Therefore, since the original order finding appellants in contempt of court does not comply with Rule 20, Trust Territory Rules of Criminal Procedure, and the Court had no jurisdiction to enter the amended order, the matter is hereby reversed and remanded to the Trial Court for further proceedings in accordance with Rule 20b, Trust Territory Rules of Criminal Procedure.