

MICHEL ITELBONG, Appellant
v.
TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee
Criminal Case No. 42
Trial Division of the High Court
Marshall Islands District
November 16, 1964

Defendant was convicted in Marshall Islands District Court of failing to yield right of way, driving while intoxicated, and injuring vehicle, in violation of T.T.C., Secs. 814(c), 815(a) and 815(f). The Trial Division of the High Court, Chief Justice E. P. Furber, affirmed conviction of first count; remanded for new trial on second count since there was no evidence in record to support conviction thereon; and set aside finding on third count as appellee failed to prove necessary element of willfulness.

Affirmed in part, reversed and remanded in part.

1. Criminal Law—Evidence

Where inconsistencies in testimony of prosecution's witnesses are not contradicted by defendant in criminal proceedings, trial court is fully justified in finding, on basis of all the evidence, that accused failed to yield right of way. (T.T.C., Sec. 814(c))

2. Criminal Law—Admissions

Accused's admissions to investigating officers outside of court are not proper matters for consideration by court, on charge to which accused has pleaded not guilty, unless and until such admission is properly introduced at trial.

3. Confessions—Admissibility—Trial Procedure

If accused at criminal trial objects to admission of alleged damaging admission or confession on grounds it was not voluntary or was improperly obtained, court should give both sides opportunity to present evidence on how admission or confession was obtained before it admits such evidence.

4. Confessions—Admissibility

Court should refuse to admit evidence of allegedly damaging admission or confession at criminal trial unless court is satisfied that admission or confession was voluntary.

5. Criminal Law—Prosecutor's Error or Omission

Trust Territory courts, in promoting substantial justice, are not expected to let accused go free simply because of some error of prosecution in failing to present evidence on essential element of crime.

6. Criminal Law—Prosecutor's Error or Omission

Where it appears probable that there is evidence available on point not covered by prosecution in criminal trial, court will remand case with such directions as may be just, instead of merely reversing judgment and acquitting accused. (T.T.C., Sec. 200)

7. Criminal Law—Complaint—Defect

Where there is error in criminal complaint as to violation charged, error will be disregarded if accused is not misled to his prejudice on account of error. (T.T.C., Sec. 445(a))

8. Motor Vehicles—Injuring Vehicle

Crime of injuring vehicle is limited to situation in which person willfully breaks, injures, tampers with, or removes any part or parts of vehicle. (T.T.C., Sec. 815(f))

9. Motor Vehicles—Injuring Vehicle

Where accused is charged with crime of injuring vehicle, and implication is he caused injury carelessly and without any conscious purpose to inflict it, court will set aside verdict and new trial on charge will not be required. (T.T.C., Sec. 815(f))

Counsel for Appellant: OSCAR DE BRUM and ANIBAR TIMOTHY
Counsel for Appellee: ARON LEJER

FURBER, *Chief Justice*

This is an appeal from decision of Marshall Islands District Court in its Criminal Case No. 517, involving convictions, after pleas of "Not Guilty" for:—

(1) failure to yield the right of way in violation of Trust Territory Code, Section 814(c);

(2) driving while intoxicated in violation of Trust Territory Code, Section 815(a); and

(3) injuring vehicle in violation of Trust Territory Code, Section 815(f).

There was one other count in the complaint, but the accused pled guilty to that count and no appeal has been taken from the action on that count. All four charges arose from a collision of a vehicle driven by the accused with another vehicle.

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Both counsel waived oral argument and submitted the appeal for consideration of the court on the basis of the record and their written arguments. There was no assessor.

Original notice of appeal is attached hereto.

The appellant's basic ground for appeal as to each of the convictions appealed from is in substance that the evidence was insufficient to show guilt beyond a reasonable doubt.

OPINION

[1] While there are some inconsistencies in the testimony of the two witnesses who testified for the prosecution, no evidence was offered by the accused to contradict the testimony of these witnesses, and this court is satisfied that the trial court was fully justified in finding on the basis of all the evidence that the accused was guilty of failure to yield the right of way. The sentence on that count is well within the limits provided by the Code and this court sees no reason to disturb it.

The situation with regard to the other two counts appealed from, however, is entirely different.

As to the count for driving while intoxicated, this appeal is governed by the principles set forth in the opinion of this court in *Firetamag v. Trust Territory*, 2 T.T.R. 413. There is no testimony in the record of the District Court to show that the accused had been drinking or was under the influence of intoxicating liquor or narcotic drugs, which is one of the essential elements of the crime charged. Counsel for the appellee, in his written argument, states that when the accused was taken to the Police Station for questioning, he admitted to the investigating officers that he had been drinking eleven (11) cans of beer and that when he'd finished that number of beers, he took the vehicle which he was driving at the time of the accident. Counsel for the appellee claims that this, together with the testi-

mony of the two prosecution witnesses, was sufficient to prove the charge of driving while intoxicated.

[2-4] This last contention of counsel for the appellee might well be sound if the admission which he alleges had been proved or stipulated to at the trial, but the mere fact that an accused has admitted damaging facts outside of court, or even made a full confession, is not a proper matter for consideration by a court on a charge to which the accused has pled "Not Guilty", unless and until such admission is duly shown at the trial, either by legal evidence or by a stipulation or admission in court which a judge is authorized to accept in place of evidence. Furthermore, if the accused at the trial objects to the admission of evidence of an alleged damaging admission or confession on the ground that it was not voluntary or was improperly obtained, the court should give both sides an opportunity to present evidence on how the admission or confession was obtained before it admits evidence of the admission or confession itself, and should refuse to admit this evidence unless the court is satisfied that the admission or confession was really voluntary. The evidence in the record is clearly insufficient to support the charge of driving while intoxicated.

[5, 6] This court has already held, however, that Trust Territory courts, in promoting substantial justice, are not expected to let an accused go free simply because of some error of the prosecution in failing to present evidence on an essential element of the crime. Where it appears that it is probable there is evidence available on the point not covered, this court has adopted the practice of remanding the case with such directions for a new trial as may be just in accordance with the powers granted it by Section 200 of the Trust Territory Code, instead of merely reversing the judgment and acquitting the accused. *Ngirmidol*,

Simer, and Moses v. Trust Territory, 1 T.T.R. 273. *Fire-tamag v. Trust Territory*, cited above.

[7-9] The conviction for injuring a vehicle in violation of Section 815(f) of the Trust Territory Code is apparently based upon a misapprehension on the part of both the prosecution and the trial court as to the essential nature of that crime. The complaint referred to this charge as being in violation of the Trust Territory Code, Section 815 (j), but there is no indication that this misled the accused to his prejudice. In accordance with the provisions of the Trust Territory Code, Section 445(a), this error is disregarded. Section 815(f), however, in defining this crime limits it to a person who shall "*wilfully* break, injure, tamper with or remove any part or parts of a vehicle" (emphasis supplied). "Wilfully" means intentionally and not by accident. See Bouvier's Law Dictionary Vol. 2, p. 3454, Wilfully. It is clear that the accused injured a vehicle, but not only is there no evidence that he intended to do so but the strong implication of both the evidence and the written argument for the appellee is that the accused caused the injury carelessly without any conscious purpose or desire to inflict it. There is no intimation that there is additional evidence available as to this count to show the necessary wilfulness. Counsel for the appellee in his written argument has disregarded that element of the crime entirely. In quoting Section 815(f), he even omitted the crucial word "wilfully". This court therefore considers that substantial justice does not require a new trial on this count.

JUDGMENT

The findings and sentences of the Marshall Islands District Court appealed from in its Criminal Case No. 517 are acted upon as follows:—

1. The finding and sentence on Count 1, for failure to yield the right of way, are affirmed.

2. The finding and sentence on Count 4, for injuring vehicle, are set aside, a finding of not guilty entered, and the accused acquitted of that charge. The fine imposed on that count, if already paid, is to be refunded to the accused.

3. The finding and sentence on Count 3, for driving while intoxicated, are set aside and the case remanded to the Marshall Islands District Court for a new trial on that count, subject to the following directions:—

a. The judge who originally heard the case is to reopen it and take any additional, proper testimony either side wishes to offer on Count 3, but the judge is also to consider the evidence already in the record without its being re-introduced.

b. After taking such additional testimony, the judge shall finish the trial on Count 3 as if there had been no previous finding and sentence on that count; shall allow the usual opportunity for argument; make a new finding based on all the evidence; and, if the finding is guilty, allow the usual opportunity for hearing on the question of sentence on that count, and then impose such new lawful sentence on Count 3 as he deems just.

c. The fine imposed on Count 3, if already paid, is to be retained pending the outcome of the new trial, and then applied against any fine that may be imposed on this count as a result of the new trial or returned in whole or in part if the accused is acquitted of this charge or fined less than the amount already paid.