TAKEO YAMASHIRO, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Appeal No. 18

Appellate Division of the High Court

February 18, 1963

Appeal from conviction of murder in the first degree in violation of T.T.C., Sec. 385, by the Trial Division of the High Court, Palau District. Appellant contends that trial court erred in rejecting prosecutor's offer of witness for cross-examination whom he had not called to testify, that court erred in admitting confession into evidence which had been procured by coercion, and that confession was not corroborated. The Appellate Division of the High Court, Chief Justice E. P. Furber, held that decision as to whether or not to permit cross-examination of prosecution's witness who had not been called to testify was in discretion of trial judge, that confession was voluntary exculpatory statement, and that confession was amply corroborated by circumstantial evidence.

Affirmed.

1. Criminal Law—Rights of Accused—Confrontation of Witnesses

Matter of whether to permit witnesses of prosecution, whose testimony would be merely cumulative, to be offered for cross-examination without taking time for direct examination, rests in discretion of trial court.

2. Criminal Law—Witnesses

Common law rule, that it is duty of prosecution in felony cases to call and examine all persons who have knowledge of material facts, arose under system where accused had no right of compulsory process for obtaining witnesses in his favor, and rule has no application in Trust Territory where accused is granted this right under Bill of Rights. (T.T.C., Sec. 4)

3. Appeal and Error—Scope of Review

Appellate court will not interfere with decision of trial court on matter within its discretion unless abuse of discretion is shown.

4. Criminal Law—Rights of Accused—Confrontation of Witnesses

Accused cannot demand as matter of right to be allowed to cross-examine witness who has not been called to testify by either side.

5. Appeal and Error—Scope of Review—Facts

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

6. **Appeal and Error—Scope of Review—Facts**

Finding of fact by Trial Division of the High Court will not be set aside by Appellate Division unless clearly erroneous. (T.T.C., Sec. 200)

7. **Appeal and Error—Scope of Review—Facts**

Principle that appellate court will not set aside fact findings of trial court unless clearly erroneous applies to findings incidental to rulings in course of trial.

8. **Confessions—Admissibility**

Fact that confession was obtained after long questioning by police is not enough to make it inadmissible.

9. **Confessions—Admissibility**

Appellate court will not upset finding of trial court that confession was voluntary and not obtained by promise or coercion where there is ample evidence to support such finding.

10. **Criminal Law—Evidence—Exculpatory Statements**

Exculpatory statements, including admissions contained in them, have long been recognized as admissible.

11. **Criminal Law—Evidence—Exculpatory Statements**

In considering exculpatory statements, trial court is entitled to use judgment as to what parts of statement should be believed and what parts are untrue.

12. **Criminal Law—Corpus Delicti**

In criminal proceedings, corpus delicti may be proved by circumstantial evidence as well as by direct evidence.

13. **Criminal Law—Corpus Delicti**

It is not necessary to prove corpus delicti by evidence entirely independent and exclusive of confession in criminal proceedings, and sufficient proof to convict exists when corpus delicti is established by other evidence and confession taken together.

14. **Criminal Law—New Trial**

In criminal proceedings, motion for new trial on grounds of newly discovered evidence, filed by appellant after oral argument on appeal, should be remanded to trial court for hearing.

Counsel for Appellant: GEORGE W. GROVER, *Public Defender and Counselor*
Counsel for Appellee: ALFRED J. GERGELY, ESQ., *District Attorney*

Before FURBER, *Chief Justice* and PEREZ, *Temporary Judge*

FURBER, *Chief Justice*

OPINION OF THE COURT

This is an appeal from a conviction of murder in the first degree, rendered by the Trial Division of the High Court sitting in the Palau District consisting of the Associate Justice and two Special Judges in accordance with Trust Territory Code Section 125. The murder was alleged to have been committed by setting fire to a house while the victim was in it, as a result of which the victim was burned to death.

Counsel for the appellant in his brief raises three issues, namely,

"1. The court erred in rejecting the Prosecutor's offer of a witness for cross questioning which he had not used to testify.

2. The court erred in admitting an alleged confession into evidence which had been procured by promise and coercion.

3. The judgment is contrary to the law and evidence for if the alleged confession had been true it would not have constituted first degree murder, also the alleged confession was not corroborated and therefore in denying appellants motion for acquittal the court was in error."

In his oral argument, however, counsel for the appellant limited himself to the argument that the alleged confession was improperly admitted and that without this there was doubt whether the defendant was even in the house in question when the fire started and as to who started the fire, which might have been started by the victim himself, so that the trial might have ended differently. He also argued that no motive for the crime had been ade-

quately shown and that the identity of the victim had not been satisfactorily established.

Counsel for the appellee admitted that the alleged confession was in the nature of an exculpatory statement, indicating that the defendant was trying to convince the police that he had set the fire accidentally. Counsel for the appellee argued, however, that the statement was properly admitted and that the evidence in the record supported the conviction.

[1, 2] We recognize that such an offer as the appellant refers to in the first issue raised in his brief has been accepted in several instances in Trust Territory courts. When it appears from the evidence that four or five people were present at a particular happening and several of them have testified in a substantially consistent manner and the prosecution offers for cross-examination one or more others shown to have been present, indicating that their testimony is expected to be merely cumulative and that the prosecution does not wish to make any direct examination of them, it often expedites the trial, with justice to all concerned, to accept the offer and allow these additional witnesses to be sworn and cross-examined without taking the time for any direct examination. This, however, is a matter resting in the sound discretion of the trial court. 53 Am. Jur., Trial, §§ 34, 75, 116, and 128. In the present instance three witnesses had already been cross-examined as to the circumstances surrounding the taking of the so-called confession—one of these at great length—without casting doubt on the prosecution's theory as to the taking of the statement. It appears that the court felt under these circumstances that it would be in the interests of expeditious justice to leave this fourth witness involved in the obtaining of the statement to be called by the defense if it so desired. The ancient common law ruling that it was the duty of the prosecution in felony

cases to call and examine all persons who had knowledge of the material facts, arose under a system in which the accused had no right of compulsory process for obtaining witnesses in his favor. It has no application in the Trust Territory where, under Section 4 of the Bill of Rights, an accused is specifically guaranteed the right to have compulsory process for obtaining witnesses in his favor, as is the usual rule in the United States. 58 Am. Jur., Witnesses, § 3.

[3] 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. 5 Am. Jur. 2d, Appeal and Error, § 772.

We see no abuse of discretion in the court's rejection of the prosecutor's offer in this instance. The defense did call the witness in question and had the benefit of his testimony, if it can be called benefit, although the testimony proved adverse to the defendant's claim. An accused cannot properly demand as a matter of right to be allowed to cross-examine a witness who has not been called to testify by anyone. We feel the counsel for the appellant was sound in disregarding this issue in his oral argument. 58 Am. Jur., Witnesses, § 614.

[5, 6] The appellant's second point, namely, that the court erred in admitting the alleged confession because it was procured by promise and coercion, depends almost entirely on the testimony of the accused which was flatly contradicted by other testimony. 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. 5 Am. Jur. 2d, Appeal and Error, §§ 839 and 840. *Symons*

v. United States (9th Cir., 1949), 178 F.2d 615. *United States v. Bazzell* (7th Cir., 1951), 187 F.2d 878. *Kirispin and Takauo v. Trust Territory*, 2 T.T.R. 628.

The Trust Territory Code, Section 200, specifically provides in part as follows:—

"The findings of fact of the Trial Division of the High Court in cases tried by it shall not be set aside by the Appellate Division of that court unless clearly erroneous, ..."

[7, 8] This principle applies not merely to the findings of fact essential to the final decision but also to findings of fact incidental to rulings in the course of the trial. 5 Am. Jur. 2d, Appeal and Error, § 843. In this instance the trial court held an extended preliminary examination, extending over the whole of one day and parts of two other days of the trial, on the question of the admissibility of the alleged confession, and in holding that it was admissible, the trial court clearly found that the statement was voluntary and not obtained by promise or coercion as the defendant claimed. We consider that evidence which the trial court had the right to believe on this point, was amply sufficient to support the finding implied in its ruling that the statement in question was admissible. The mere fact that it was obtained after long questioning by the police, while in their custody, is not alone enough to make it necessarily inadmissible. 20 Am. Jur., Evidence, §§ 498, 500, and 501.

The appellant's third point that the judgment is contrary to the law and evidence is based on two subsidiary claims, namely:—

1) That, if the facts had been as recited in the alleged confession, the defendant could not properly have been convicted of murder in the first degree; and

2) That the statement, or alleged confession, was not sufficiently corroborated.

[9–11] We fully agree with the first of these subsidiary claims, but that does not mean that the judgment is contrary to the law and evidence. As was conceded by counsel for the appellee at the oral argument, the statement in question was clearly not in any true or accurate sense a confession, but was an attempted explanation of the defendant's alleged innocence. That is, it was what is known technically among judges and lawyers as "exculpatory". It did, however, contain various admissions from which, in connection with other evidence, an inference of guilt could properly be drawn. Such exculpatory statements, including admissions contained in them, have long been recognized as admissible. 20 Am. Jur., Evidence, § 559, note 12. *Commonwealth v. Dascalakis* (1923), 243 Mass. 519, 137 N.E. 879, 38 A.L.R. 113. *O'Loughlin v. People* (1932), 90 Colo. 368, 10 P.2d 543, 82 A.L.R. 622. The trial court in considering this, as well as other evidence, was entitled to use its best judgment on the basis of all the evidence as to what part or parts of the statement should be believed and what part or parts not believed. There was no obligation on the court to necessarily either believe the whole of the statement or reject the whole of it. The court obviously did believe that certain parts were true and certain parts untrue. 53 Am. Jur., Trial, §§ 784 and 785. 58 Am. Jur., Witnesses, § 872. The exculpatory nature of the statement is so apparent on its face that we feel confident the court could not have been misled in any way simply by the inaccurate use of the word "confession" in referring to it.

[12, 13] The appellant's claim that the alleged confession was not sufficiently corroborated appears based on some misconception of the law. There was a mass of circumstantial evidence that tended to corroborate. The appellant has failed to indicate what element of the corpus delicti he feels was not corroborated, but it is well estab-

lished that the corpus delicti may be proved by circumstantial evidence as well as by direct evidence, and that the connection of the accused with the crime does not have to be shown by evidence entirely independent and exclusive of the accused's confessions or admissions. 20 Am. Jur., Evidence, §§ 1230, 1231, and 1234.

"The general rule now is that while the corpus delicti cannot be established by the extrajudicial confession of the defendant unsupported by any other evidence, it may be established by such a confession corroborated by other facts and circumstances. It is not necessary to prove the corpus delicti by evidence entirely independent and exclusive of the confession, but sufficient proof to convict exists when the corpus delicti is established by other evidence and the confession taken together. ****" 20 Am. Jur., Evidence, § 1233.

While it is recognized there was no true confession here, the same principle applies to an accused's admissions out of court, such as those involved here. See discussion of cases in 20 Am. Jur., Evidence, § 1233, note 8.

From an examination of the entire record we find no proper basis for interfering with the decision of the trial court.

[14] The motion for new trial on the ground of newly discovered evidence which was filed by the appellant after the oral argument on this appeal, we believe should be considered in the first instance by the Trial Division as a separate matter from this appeal. We therefore remand that motion, without any intimation as to its merits, to the Trial Division for hearing and such action as it determines is warranted.

The finding and sentence of the Trial Division are affirmed.