

BENEMANG, Appellant
v.
TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee
Criminal Appeal No. 123
Trial Division of the High Court
Yap District
February 10, 1970
See, also, 5 T.T.R. 32, 42

Appeal from conviction upon a plea of guilty to offenses charged wherein appellant claims he had not been informed adequately of his rights and that court failed to hold a proper hearing on his plea. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that a hearing on a plea of guilty was mandatory and should have been held and that under proper circumstances such a plea may be withdrawn and also that an accused has a right of allocution and the record must show that such right was suggested by the court and was declined or accepted and that the accused addressed the court.

Reversed.

1. Criminal Law—Attempt

If there was a single criminal act involved in the charge, then a second count charging an attempt should be dismissed when a plea of guilty is entered to the commission of the crime.

2. Criminal Law—Attempt

A single criminal act cannot be both committed and attempted.

3. Criminal Law—Attempt

If there are two separate and distinct acts, one involving the commission of the crime and the other amounting only to an attempt to commit

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the same crime as was consummated by the separate act, then a plea should be taken to both charges.

4. Criminal Law—Pre-Trial Procedure—Plea of Guilty

A hearing or interrogation of an accused who has pleaded guilty is mandatory under Trust Territory Rules of Criminal Procedure, Rule 10b(2)(b).

5. Criminal Law—Pre-Trial Procedure—Plea of Guilty

Where a plea of guilty is offered in a criminal case, the court should, before making its determination that such a plea is voluntarily made with an understanding of the nature of the charge, interrogate the accused personally so that there can be no possible question that the accused has authorized the plea and understands its effect. (Rules of Crim. Proc., Rule 10b(2)(b))

6. Criminal Law—Trial Procedure—Change of Plea

When a defendant has pleaded guilty in a criminal case, it is within the discretion of the trial court to permit the plea to be withdrawn. (Rules of Crim. Proc., Rule 10b(2)(b))

7. Criminal Law—Trial Procedure—Change of Plea

The issue of the defendant's guilt or innocence is not involved in an application for leave to withdraw a plea of guilty, rather the issue for determination is whether the plea of guilty was voluntary, advisedly, intentionally and understandingly entered or whether it was at the time of entry, attributable to force, fraud, fear, ignorance, inadvertence or mistake such as would justify the court in concluding that it ought not to be permitted to stand. (Rules of Crim. Proc., Rule 10b(2)(b))

8. Criminal Law—Trial Procedure—Change of Plea

Where it clearly appears that a guilty plea was entered by a defendant in justifiable ignorance of his rights, or that he did not understand the consequences of his action, or acted as a result of fear, coercion, or mistake, such circumstances are usually held to justify the granting of a motion to withdraw the plea; however, to constitute a sufficient reason for withdrawal of the plea the circumstances must amount to a fraud or imposition upon the defendant, or a misapprehension of his legal rights.

9. Criminal Law—Rights of Accused—Allocution

The Rules of Criminal Procedure grant the right of allocution and absent a showing the accused suffered no prejudice by loss of this right, its loss is sufficient to warrant vacating a judgment of guilt and the sentence imposed thereon. (Rules of Crim. Proc., Rule 14c(1))

Interpreters: BARBARA J. LEEGUROY and
EDWARD FITLOG
Reporter: SAM K. SASLAW
Counsel for Appellant: WILLIAM E. NORRIS
Ass't. Public Defender, and
FRANK FLOUNNUG,
Public Defender Representative
Counsel for Appellee: DOUGLAS CUSHNIE, District Attorney,
and LAWRENCE MANGARFIR,
District Prosecutor

TURNER, *Associate Justice*

The appellant was charged by complaint in the Yap District Court with assault and battery with a dangerous weapon in violation of Section 377-A, Trust Territory Code, and with *attempted* assault and battery with a dangerous weapon in accordance with Section 431, of the Code, which relates to attempt, and Section 377-A setting forth the offense.

Appellant appeared before Judge Gargot (Presiding Judge Fanechoor having disqualified himself) and was represented by a trial assistant who was not the public defender's representative. He entered a plea of guilty, presumably to both counts although the record is not clear, and was sentenced to five years imprisonment with the last three years suspended. The single sentence was made applicable to both counts by notation on the commitment order. Proper procedure required separate sentences on each count if a guilty plea was in fact entered to both counts.

[1,2] We note in passing, for future guidance, that if there was a single criminal act involved in the charge, then the second count charging an attempt should have been dismissed when the plea of guilty was entered to the commission of the crime. A single criminal act cannot be both committed and attempted. 21 Am. Jur. 2d, Criminal Law, § 110.

[3] If, however, there were two separate and distinct acts, one involving the commission of the crime and the other amounting only to an attempt to commit the same crime as was consummated by the separate act, then a plea should have been taken to both charges.

After Benemang began serving his sentence, a timely notice of appeal was filed in this court by a Peace Corps Volunteer as applicant's counsel. A supplemental notice of appeal setting forth additional grounds of appeal was subsequently filed by the Assistant Public Defender who thereafter represented the appellant in these proceedings.

Grounds for appeal primarily rested upon the claim the appellant had not been informed adequately of his rights and that the court failed to hold a hearing to ascertain if the plea of guilty was made voluntarily and with an understanding of the nature of the charge in accordance with Rule 10b(2)(b), Trust Territory Rules of Criminal Procedure. The rule itself is significant:—

“The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge.”

[4] The hearing, or in its simplest form, the interrogation of the accused is mandatory under our rules. On the hearing on the appeal it was evident that no District Court hearing was held and that the Judge did not make any inquiry of the accused.

It also is reasonably clear from what has previously been said concerning the necessity of either dismissing the charge of attempt or to impose a separate sentence if the facts warranted, that the District Court made no inquiry into the facts. It follows that if the Court was not informed as to the facts charged and the consequences of those facts, then the accused also would be unlikely to know or understand the nature and consequences of the two charges brought against him.

The Trust Territory Reports do not indicate any situation similar to the present one, but there are comparable cases wherein the rule as to acceptance of an admission of guilt during trial, rather than entry of a formal plea of guilt prior to trial, is set forth. In *Lornis v. Trust Territory*, 2 T.T.R. 114 at 115:—

“In Criminal cases in which an accused pleads ‘not guilty’, admissions of the accused in open court should not be accepted in place of evidence unless they are clear and voluntarily made with a good understanding of their effect.”

[5] The quotation is a paraphrase of the procedural rule governing acceptance of a plea of guilt. In a somewhat similar case, *Rodriguez v. Trust Territory*, 3 T.T.R. 179 at 181, the court said:—

“ . . . a trial court, before making its determination that such a plea is voluntarily made with an understanding of the nature of the charge as is required by Rule of Crim. Proc. 10b(1)(b), should, in the exercise of reasonable caution, interrogate the accused personally so that there can be no possible question such as that raised in this instance as to whether the accused has authorized the plea and understands its effect.”

If this were no more than an appeal from the judgment and sentence in the district court, the record warrants a remand for further proceedings in accordance with the governing law. However, in addition to and as a corollary to the appeal is the oral motion of the Public Defender to permit the appellant to withdraw his plea of guilt and to go to trial in this court on a plea of not guilty to both charges.

Rule 10b(2)(b), Rules of Criminal Procedure provides:—

“To correct manifest injustice the court, after sentence, may set aside the judgment of conviction and permit the accused to change his plea.”

The Trust Territory procedural rule is almost identical to Rule 32(d), Federal Rules of Criminal Procedure.

[6] It is a familiar general rule that when a defendant has pled guilty in a criminal case, it is within the discretion of the trial court to permit the plea to be withdrawn. Application of the rule to a given situation depends upon the time the motion to withdraw is made and the circumstances pertaining to the reason for the withdrawal. 20 A.L.R. 1445. 66 A.L.R. 628.

It is an exception to the general rule, but some courts permit the withdrawal of the guilty plea after the accused has begun serving his sentence. *People v. Crooks* (Ill.), 157 N.E. 218. *Silver v. State* (Ariz.), 295 P. 311.

Most courts hold that on an appeal from a justice court to a superior court which may try the case *de novo*, the plea may be withdrawn in the Appellate Court. This rule in the United States relates to courts comparable to the Trust Territory relationship between District Court and High Court. 146 A.L.R. 1430, 1438.

[7] Under our procedural rule permitting withdrawal after sentence to correct manifest injustice it is clear that after sentence must include after the accused has commenced serving his sentence. Since the Federal and Trust Territory rules are substantially the same, this Court will be guided by the Federal decisions.

It is said in *Friedman v. U.S.*, 200 F.2d 690 at 696:—

“The issue of the defendant’s guilt or innocence is not involved in an application for leave to withdraw a plea of guilty. [Citing.] Upon such an application a trial court is not required to try the issue of guilt or innocence. The issue for determination is whether the plea of guilty was voluntary, advisedly, intentionally and understandingly entered or whether it was at the time of entry, attributable to force, fraud, fear, ignorance, inadvertence or mistake such as would justify the court in concluding that it ought not to be permitted to stand. [Citing.]”

[8] Again it is said in *Williams v. U.S.*, 192 F.2d 39 at 40:—

“Where it clearly appears that the guilty plea was entered by the defendant in justifiable ignorance of his rights, or that he did not understand the consequences of his action, or acted as a result of fear, coercion, or mistake, such circumstances are usually held to justify the granting of such a motion. To constitute a sufficient reason for withdrawal of the plea, however, the circumstances must amount to a fraud or imposition upon the defendant, or a misapprehension of his legal rights. Such a motion should never be denied where the ends of justice would be best served by granting it.”

We note one other area in this appeal requiring an admonition. The defendant was not given the right of allocution—that is the right to speak in his own behalf to persuade the court to lighten the sentence. The record was silent as to whether the right was granted. At the hearing the District Prosecutor was asked and admitted the accused did not speak in his own behalf. We call attention to the instruction given in *Uchel v. Trust Territory*, 3 T.T.R. 578 at 584–585:—

“... we believe that the practice in the Trial Division of the High Court and in the District Courts should now be changed, and that as a matter of precaution records on appeal should affirmatively show that this right has been accorded the accused.”

[9] Rule 14c(1), Trust Territory Rules of Criminal Procedure, grants the right of allocution. Absent a showing the accused suffered no prejudice by loss of this right, its loss is sufficient to warrant vacating the judgment of guilt and the sentence imposed thereon.

All Clerks of Courts, their assistants, and court reporters are directed to include in their record of trial under “Remarks,” that the right of allocution was suggested by the Court but declined or was accepted and that the defendant addressed the Court. In the event the Court overlooks compliance with the rule, the interpreter, reporter, prosecutor or public defender should remind the Court before sentence is imposed.

JUDGMENT

It is ordered, adjudged, and decreed:—

1. That the judgment and sentence imposed upon the accused Benemang in the District Court of Yap District in its Criminal Case No. 2040 be and the same is hereby vacated and set aside.

2. That the motion of Benemang to withdraw his plea of guilty heretofore made in the District Court be granted and that the plea of guilty be and the same hereby is withdrawn and vacated to the complaint filed against him.

3. That in lieu of remanding the case for further proceedings to the District Court, it is ordered retained in this Court and that the District Attorney file an information in lieu of the complaint heretofore filed and that the defendant Benemang be arraigned upon such information and be given the opportunity to plead thereto.

4. That Benemang be released from imprisonment upon posting bail in the sum of \$50.00.