JOAQUIN R. LIZAMA, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Appeal No. 46

Appellate Division of the High Court

Mariana Islands District

September 15, 1975

Appeal from burglary conviction. The Appellate Division of the High Court, Hefner, Associate Justice, held that evidence of prior offenses was admissible to show intent.

1. **Criminal Law—Appeals—Findings**

   When, on appeal from conviction of a criminal offense, it is claimed that the evidence was insufficient to support a finding of guilt, the appellate court must determine whether or not there is any reasonable evidence to support the verdict.

2. **Criminal Law—Evidence—Prior Commission of Crime**

   Generally, evidence that accused is guilty of other crimes is inadmissible for the purpose of showing the commission of the crime charged, but it may be admitted to show intent in the crime charged, or to establish a common plan, design or scheme embracing a series of crimes, including the crime charged, so related to each other that proof of one tends to prove the others.

3. **Criminal Law—Evidence—Prior Commission of Crime**

   In deciding whether to admit evidence of crimes other than that charged to show intent or a common design, plan or scheme, the court must consider the character, the surrounding circumstances and the remoteness in time of the alleged prior offenses.

4. **Larceny—Intent**

   Intent to commit theft was shown by possession of the fruits of the theft.

Counsel for Appellant: BENJAMIN M. ABRAMS
Counsel for Appellee: WILLIAM S. AMSBARY

Before BROWN, *Associate Justice*, HEFNER, *Associate Justice*, and WILLIAMS, *Associate Justice*

HEFNER, *Associate Justice*

This is an appeal from a conviction of burglary. The appellant was charged with burglary in two counts, arising

from the same occurrence. The only difference between the two counts was in the intent alleged. In the first count, the appellant was charged with entry by stealth into a house not his own with the intent to commit rape; in the second count he was charged with the same entry with the intent to commit theft, all in violation of 11 TTC § 351. He was convicted and sentenced to five years' imprisonment, but execution of judgment was stayed on August 8, 1973, and the appellant was admitted to bail.

The appellant's notice of appeal was filed on May 29, 1973, and his written brief was due on November 26, 1973. On November 13, 1973, the appellant moved to augment the record by the inclusion of the transcript of certain pretrial proceedings, and on November 15, 1973, he moved for an extension of time in which to file his written brief. No order has been entered by the Court as to either of these motions, and no brief has been filed by either party.

Although the appellant's motion for extension of time in which to file his written brief is still pending, the record clearly indicates that he has had more than sufficient time in which to file his brief. The appellant's reason for requesting an extension of time in which to file his brief was to allow him time to review and analyze the transcript he requested in the above-mentioned motion to augment the record. That motion is also still pending, but the record shows that that motion is now moot: the requested transcript was forwarded to the appellant about May 28, 1974, more than 15 months ago.

Rule 32(i) of the Trust Territory Rules of Criminal Procedure provides that "If no written argument is filed by the appellant . . . the Appellate Division may proceed to decide the appeal without written argument and without further notice . . . ." Since all assignments of error not briefed or argued are deemed waived, *Debesol v. T.T.*, 4 T.T.R. 559 (1969), it is clear that this Court could dismiss

the appeal on the basis of the appellant's failure to prosecute it; indeed, in a civil action the appeal would probably be dismissed out of hand. But in a criminal action other considerations enter in; this Court must always keep in mind its responsibility to safeguard the rights of the accused in a criminal action. Therefore this Court will consider the appeal on the basis of the points raised in the notice of appeal and on the basis of its own independent review of the record.

[1] Appellant's first ground for appeal is that the evidence at trial was insufficient to support a finding of guilt. This Court has held on numerous occasions that where a criminal appeal is based on the ground that the evidence does not support the finding, the essential question is whether there was sufficient evidence to justify the trial court's making the finding which it made, considering primarily evidence most favorable to the decision of the lower court. "All the appellate court is obliged to do when an appeal is taken on this ground is to determine whether or not there is any reasonable evidence to support the verdict of guilty." *Markungael v. T.T.*, 4 T.T.R. 432, 433 (1969). See also *Amis v. T.T.*, 2 T.T.R. 364; *Aïichi v. T.T.*, 3 T.T.R. 290. This Court has made an extensive review of the record, and is of the opinion that the evidence here was more than sufficient and reasonable; the evidence supporting the finding of guilt here was overwhelming. This Court therefore concludes that the appellant's first ground for appeal is not well taken.

[2] Appellant's second ground for appeal is that the trial court committed prejudicial error in admitting evidence of appellant's prior criminal conduct. This evidence seems to have been admitted for the purpose of proving the appellant's intent, an essential element of the crime of burglary. While it is true that the general rule is that evidence

which shows that the accused is guilty of other crimes is inadmissible for the purpose of showing the commission of the crime charged, this general rule is subject to numerous exceptions. One of these exceptions is that such evidence may be admitted for the purpose of showing intent in the crime charged. See, e.g., *People v. Von Hecht,* 283 P.2d 764 (Calif.); *Tedesco v. United States,* (CA 9 Or.), 118 F.2d 737.

[3] To be admissible, such evidence cannot be used to show merely that the accused was a criminal; rather, it may be admitted to establish a common plan, design or scheme embracing a series of crimes, including the crime charged, so related to each other that proof of one tends to prove the other. See, e.g., *Robinson v. United States* (CA10 Okla.), 366 F.2d 575 (1966); *People v. Cavanaugh,* 282 P.2d 53 (Calif. 1955), *cert. den.* 76 S.Ct. 325. Several factors must be weighed by the trial court in deciding whether to admit such evidence: its character, the surrounding circumstances, and the remoteness in time of the alleged prior offense or offenses are all to be considered by the trial court in exercising its discretion in admitting such evidence. In reviewing the record in this case, we find that the trial court did not abuse its discretion and the prior acts of the appellant were properly admitted into evidence.

[4] It is further noted that this evidence was not the only evidence of the appellant's intent. The appellant was convicted of two counts of burglary, one of which charged the intent to commit theft. Evidence of prior criminal acts was not necessary to prove appellant's intent as to this count; his intent to commit theft was shown by his possession of the fruits of the theft itself, and is evident from the record.

For the foregoing reasons, the conviction of Joaquin R. Lizama of burglary must be, and is hereby, affirmed.