

RDECHOR TKOEL, Appellant
v.
TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee
Criminal Case No. 249
Trial Division of the High Court
Palau District
January 10, 1964

Defendant was convicted in Palau District Court of affray, in violation of T.T.C., Sec. 424. On appeal, defendant contends there was no evidence of anyone besides participants being put in fear or danger. Appellee contends that such evidence was introduced in proceedings against other participant in affray and that same evidence should be considered in present proceedings. The Trial Division of the High Court, Chief Justice E. P. Furber, held that defendant was deprived of right to be confronted with witnesses against him and was entitled to new trial.

Reversed and remanded.

1. Affray—"Fear or Danger"

Placing of other persons in fear or danger is essential element of crime of affray. (T.T.C., Sec. 424)

2. Constitutional Law—Public Trial and Confrontation of Witnesses

Accused has right in all criminal prosecutions to be confronted with witnesses against him, including right to cross-examination and to know upon what evidence he is being tried. (T.T.C., Sec. 4)

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

While accused in criminal prosecution can waive right to be confronted with witnesses against him, it cannot properly be taken away from him without his consent. (T.T.C., Sec. 4)

4. Criminal Law—Prosecutor's Error or Omission

Where essential point in criminal prosecution has been omitted through inadvertence or misunderstanding, and it is probable there is evidence available on it, accused is not entitled to acquittal on appeal as matter of right, and case will be remanded with such directions for new trial as may be just. (T.T.C., Sec. 200)

5. Criminal Law—New Trial

Where essential point in criminal prosecution has been omitted and it is probable there is evidence on it, accused may choose to let original finding of guilt and sentence stand rather than proceed with new trial on remand.

<i>Assessor:</i>	JUDGE RUBASCH FRITZ
<i>Interpreter:</i>	HARUO I. REMELIUK
<i>Counsel for Appellant:</i>	WILLIAM O. WALLY
<i>Counsel for Appellee:</i>	E. TERMETEET

FURBER, *Chief Justice*

This is an appeal from a conviction of Affray in violation of Section 424 of the Trust Territory Code.

Counsel for the appellant argued orally that the government had failed to prove its case beyond a reasonable doubt because there was no evidence of anyone other than the participants in the alleged affray being disturbed. He pointed out that, under the terms of the section of the Code in question, it was essential to the crime to show that others beside the participants were put in fear or danger, and cited in support of his view 8 Am. Jur., Breach of the Peace, §§ 15 and 18.

Counsel for the appellee replied that it was abundantly clear that the appellant and a person who had been tried and adjudged a juvenile delinquent in connection with the same incident had been engaged in an altercation and fight in a public place which had terrorized many people. When questioned by the court as to what evidence he relied upon to show that many people were terrorized, he stated that this had been shown by several witnesses in the juvenile delinquency proceedings although he admitted he could not point to any evidence on this subject in the transcript in this case. He further admitted that the two cases were tried separately, that there was no stipulation that evidence in the juvenile delinquency proceedings

should be considered in this case, and that the appellant was not present at the hearing in the juvenile delinquency proceedings. He argued, however, that the evidence in those proceedings should be considered in this case because originally one complaint had been brought against this appellant and the alleged juvenile delinquent, and the cases had been separated for trial simply because of the age of the alleged juvenile delinquent.

OPINION

This case is governed by the principles discussed in the first, second, and fourth paragraphs of the Conclusions of Law by this court in the cases of *Ngirmidol, Simer and Moses v. Trust Territory*, 1 T.T.R. 273, in which an attempt was made by the government to have evidence that had been presented in another case considered without any stipulation or agreement by the accused that this be done. See also opinion of this court in *Firetamag v. Trust Territory*, 2 T.T.R. 413, in which the government attempted to rely upon an alleged admission or confession which has not been shown in evidence.

[1-3] It is very clear from the wording of Section 424 that the placing of other persons in fear or danger is an essential element of the crime of affray as set forth in that section. It is equally clear that under Section 4 of the Trust Territory Code an accused has the right in all criminal prosecutions "to be confronted with the witnesses against him". This includes the right of cross-examination and the right to know what the evidence is on which he is being tried. While he can waive the right, it cannot properly be taken away from him without his consent. There is no evidence of any such waiver in the record in this case.

[4] This court has repeatedly held, however, that where it appears an essential point has been omitted

through inadvertence or misunderstanding and it is probable there is evidence available on it, an accused is not entitled to acquittal on appeal as a matter of right. In such cases the 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. See cases cited above.

[5] The appellant is clearly entitled to a new trial, if he desires it, subject to certain directions. If, however, the terrorizing of many people can be as easily shown as counsel for the appellee indicates, the appellant may prefer to let the present finding and sentence stand, rather than proceed with a new trial.

JUDGMENT

1. If within seven (7) days after entry of this judgment the accused in Palau District Court's Criminal Case No. 2453 files in this court a written waiver of right to a new trial, the finding and sentence imposed by the District Court in that case shall stand, and, subject to the filing of such a waiver, that finding and sentence are affirmed.

2. If within seven (7) days after the entry of this judgment the accused in Palau District Court's Criminal Case No. 2453 has not filed in that court a waiver of right to a new trial, the finding and sentence in that case are set aside and the case referred back to that court for a new trial 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, but he is also to consider the testimony already in the record without its being reintroduced.

b. After taking such additional testimony, the judge shall finish the trial as if there had been no previous finding and sentence; shall allow the usual opportunity for

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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, and then impose such new, lawful sentence as he deems just.