

OPISBO v. TRUST TERRITORY

BERNARDO OPISPO, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Case No. 72

Trial Division of the High Court

Ponape District

May 8, 1964

Defendant was convicted in Ponape District Court of assault and battery with a dangerous weapon, in violation of T.T.C., Sec. 377-A. On appeal, the Trial Division of the High Court, Chief Justice E. P. Furber, held that trial judge is in better position to determine credibility of witness than appellate court and that appellate court will not weigh evidence anew or pass on credibility of witness where trial judge is supported in his decision by substantial evidence.

Affirmed.

1. Appeal and Error—Scope of Review

It is not function of appellate court to weigh evidence anew or pass on credibility of witnesses when trial court's findings are supported by substantial credible evidence, even though there is evidence to contrary.

2. Courts—Witnesses

Fact that witness in criminal case had been drinking *kava* before giving testimony does not necessitate disregard of his testimony.

3. Criminal Law—Appeals—Scope of Review

Trial judge who hears witness in criminal case is in better position to judge witness credibility on basis of whole testimony than appellate court can be by reading transcript of evidence.

<i>Assessor:</i>	JUDGE ELTES RINGLEN
<i>Interpreter:</i>	EDWEL H. SANTOS
<i>Counsel for Appellant:</i>	YOSTER CARL
<i>Counsel for Appellee:</i>	TOMISIANO MARTIN

FURBER, *Chief Justice*

This is an appeal from a conviction of assault and battery with a dangerous weapon in violation of Section 377-A of the Trust Territory Code. The appellant and another accused were charged in this case with trespass and assault and battery with a dangerous weapon and the case was tried with another one in which a third accused was charged with trespass and malicious mischief all arising out of the same general incident, but appeal has been taken only from the decision as to this appellant on the count for assault and battery with a dangerous weapon.

Counsel for the appellant argued that the prosecution had failed to prove beyond a reasonable doubt that the appellant had used a dangerous weapon. He pointed out that only one of the prosecution's four witnesses testified to seeing the appellant hit the victim on the head with a twelve inch bottle, and that this witness was under the influence of *kava* at the time so that his observation should not be relied on. He argued that when a person had been drinking *kava* he usually closed his eyes or half-closed them and would not observe accurately what was going on.

Counsel for the appellee argued that the effect of the *kava* on the witness in question had faded or worn off since it was apparent from his testimony that the witness had a good appreciation of what had gone on. The counsel also pointed out that this witness had been in the best position of any of the prosecution's witnesses to observe this particular part of the incident involved. While he acknowledged that it might be natural for a person drinking *kava* to half-close his eyes, counsel argued that any

such commotion or fight as was involved here would rouse the person and cause him to open his eyes. He therefore submitted that the prosecution had proved the charge beyond a reasonable doubt.

OPINION

[1] This case is governed primarily by the principle discussed in connection with the conviction of the appellant Bemoch in the case of *Bemoch Recheungel and Anemary Ngirailmau v. Trust Territory*, 2 T.T.R. 517. The conviction appealed from here, like that in the Bemoch case, rests squarely on conflicting testimony. The evidence favorable to the government, if believed, clearly and expressly covered every element of the crime. As stated in Bemoch case:—

“It is not the function of an appellate court to weigh evidence anew or to pass on the credibility of witnesses when the trial court’s findings are supported by substantial credible evidence, even though there is also evidence to the contrary.” 5 Am. Jur. 2d, Appeal and Error, §§ 834, 839–841 inclusive. *Kirispin and Takuo v. Trust Territory*, 2 T.T.R. 628.

[2, 3] There is no question but what the crucial witness, on whose testimony the government’s case depends, had been drinking *kava* and at one point in the cross-examination he volunteered the statement “I was drunk” in response to a question as to who were in the house at a particular time. He went on to answer the question, however, and neither counsel followed up the matter of either how much *kava* he had drunk or how much this had affected him. Unless the major part of his testimony was a fabrication, it would appear that he was well aware of what was happening. The trial judge who heard the witness was in a much better position to judge of the witness credibility on the basis of his whole testimony than this court can by merely reading the transcript of evidence.

From the entire transcript, this court is not prepared to say that the trial judge was not justified in believing this witness and it is obvious that the judge must have believed him.

JUDGMENT

The finding and sentence appealed from of the Ponape District Court in its Criminal Case No. 816 are affirmed.