ONGALIBANG UCHEL, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Appeal No. 23

Appellate Division of the High Court

September 3, 1965

Appeal from conviction of maiming, in violation of T.T.C., Sec. 382, in the Trial Division of the High Court, Palau District. Appellant contends that judge's calling of witness after prosecution and defense had rested demonstrated reasonable doubt as to sufficiency of evidence, and since witness contributed nothing to alleviate doubt, court should have found accused not guilty. In a Per Curiam opinion, the Appellate Division of the High Court held that calling of witness after both sides have rested case does not necessarily indicate doubt of judge but is merely exercise of caution. The Court further held that written notice of appeal is required and that record on appeal should contain statement that notice of right of allocution has been given.

Affirmed.

1. Criminal Law-Burden of Proof-Reasonable Doubt

   To warrant conviction in criminal case, government must prove accused guilty beyond reasonable doubt.

2. Criminal Law-Witnesses

   Where court calls witness in criminal trial which neither prosecutor nor defense has called, appellate court will construe action as exercise of caution endeavoring to make situation as clear as possible, and not as admission of doubt of sufficiency of evidence of prosecution.

3. Criminal Law—Appeals—Scope of Review
   Under Trust Territory Code and general principles of law, appellate court on criminal appeal is obligated to consider evidence in light most favorable to government. (T.T.C., Sec. 200)

4. Criminal Law—Appeals—Notice of Appeal
   Oral notice of appeal in criminal proceedings is not in compliance with Trust Territory Rules of Criminal Procedure which require concise statement of grounds of appeal. (Rules of Crim. Proc., Rule 31(a))

5. Criminal Law—Appeals—Notice of Appeal
   Written notice of appeal in criminal proceedings is required in Trust Territory. (Rules of Crim. Proc., Rules 31(a), 32(b); T.T.C., Sec. 198)

6. Criminal Law—Appeals—Notice of Appeal
   Under Federal Rules of Criminal Procedure, oral notice of appeal is insufficient. (Fed. Rules of Crim. Proc., Rule 37(a))

7. Criminal Law—Appeals—Notice of Appeal
   Timely filing of required notice of appeal in United States District Courts is essential to exercise of jurisdiction over appeal.

8. Criminal Law—Appeals—Notice of Appeal
   Trial court may accept oral notice of appeal in criminal proceedings only as basis for temporary stay of execution of sentence.

9. Criminal Law—Rights of Accused—Allocution
   In United States District Courts, accused has right to be heard before sentence is imposed (right of allocution). (18 U.S.C. Sec. 4208(b); Fed. Rules of Crim. Proc., Rule 32(a))

10. Criminal Law—Rights of Accused—Allocution
   Records on appeal in criminal proceedings should affirmatively show that right of allocution has been accorded accused.

Counsel for Appellant: ROGER L. ST. PIERRE, *Public Defender*
Counsel for Appellee: RICHARD V. BACKLEY, *District Attorney*

Before FURBER, *Chief Justice,* SHRIVER and DUENAS, *Temporary Judges*

PER CURIAM

OPINION OF THE COURT

This is an appeal from a conviction of Maiming by the Trial Division of the High Court sitting in the Palau Dis-

trict. No written notice of appeal setting forth a statement of the grounds of appeal was filed, but the trial court accepted an oral motion for appeal and issued an order staying execution of the sentence pending disposition of the appeal and continuing pending appeal, the bail already deposited. The appellant in his brief, however, sets forth the question presented by the appeal as follows:-

"Whether, in a criminal proceeding, where ,the Court is also the trier of fact and after both the prosecution and the defense have rested, the Court on its own motion summons witnesses it deems indispensible to resolve a STATED DOUBT as to an indispensible fact, and the testimony of the Court's witnesses shed not one iota of light on the doubt, whether this doubt was not per se a reasonable doubt, and it was not as a matter of law error to convict on that very doubt even to the finding of the necessary intent."

In the portion of his brief devoted to argument, the appellant refers to this "stated doubt" at one point as an "admitted doubt" (p. 5) and at another as an "admitted reasonable doubt" (p. 8).

The alleged maiming in question occurred in the course of or shortly after a fight between the complaining witness and the accused in which the complaining witness assaulted the accused with a pipe or some similar object, following extensive drinking and exchange of insults by both of them in the presence of a number of people. There is no question but what the complainant did lose part of his ear and part of his nose in the process. The trial court indicated that it accepted the accused's theory that the biting of the ear was in self-defense as part of the fight in which he had been assulted with a dangerous weapon, and that its finding of guilty was based on the biting off of part of the defendant's nose, which the court found took place after the parties were separated and while two people were attempting to shield the victim from the accused.

The appellant's claim that the court had stated or had admitted a doubt about the circumstances surrounding this biting off of a part of the nose is based upon the following coloquy (Tr. p. 46, 47), which occurred right after both sides stated they had completed presentation of witnesses : –

"Court: Just about everyone has testified except Armaluuk, the husband of Ereang. Mr. Prosecutor, do you know whether or not he is available.

"Mr. Backley: I assume he is but I hadn't planned on calling him.

"Mr. St. Pierre: I had listed both Armaluuk and Omchelang as possible witnesses. I did not call them in view of the fact that they completely blanked out and could tell me nothing-not fact No. 1.

"Mr. Backley: I will attest to that also. That is what our investigation disclosed.

"Mr. St. Pierre: If the cour,t wishes I would be more than happy to .get them here and have them testify.

"Court: The court would like to have them here. There is one question of fact I am interested in: did the defendant get up from the floor while the complaining witness was being held by two men, push them aside and bite his nose off. If you think it more proper for the court to call them as court's witnesses, I will.

"Mr. St. Pierre: I would be happy to have the court call them to satisfy itself. Perhaps they have had a recurrence of memory."

[1] The two witnesses referred to appeared and testified the next morning and it is true, as alleged by the appella-nt, that their testimony failed to shed any light on the biting off of part of the complainant's nose. We also fully agree with the appellant's contention that to warrant aconyiction in a criminal case, the government must prove the accused guilty beyond a reasonable doubt.

[2] We cannot, however, agree with the appellant's interpretation of the trial judge's remarks and request for the attendance of these two witnesses. It appears to us' that rather than indicating any doubt as to the sufficiency of the testimony up to that point, the court was

merely stating what it considered the crucial issue before it and expressing a desire, in fairness to both sides, to have before it any available evidence which might tend either to justify the actions of the accused and rebut in whole or in part some of the testimony against him, or to confirm or supplement testimony already presented. All others who had been shown to be present had testified, and it was certainly logical for the court in the interests of fairness to want to satisfy itself as to what these two men might to able to contribute. Such exercise of caution in endeavoring to make the situation as clear as possible should not, in our opinion, be construed as any sort of admission or finding or to preclude the court from later making its finding in regular course on the basis of all the evidence.

[3] As stated in *Fattun v. Trust Territory*, 3 T.T.R. 571.

"This court has repeatedly recognized that it has an obligation, under Section 200 of the Trust Territory Code and under general principles of law, on a criminal appeal, to consider the evidence in the light most favorable to the government."

On all the evidence we hold that the trial court was fully justified in making the finding it did.

The record before us, however, presents two points as to practice and procedure in Trust Territory Courts on which we believe we should comment in the hope of avoiding difficulties in the future, even though neither point was raised by either party.

[4, **5]** In the present case as indicated above, no written notice of appeal was filed but instead after the finding and sentence were announced in open court, counsel for the accused moved orally for appeal, the court accepted the oral motion for appeal, and notation was made in the docket immediately after the sentence and under the same date, "Oral notice of appeal was stated and accepted." An

oral notice of appeal is certainly not an exact compliance with Rule 31a of the Trust Territory Rules of Criminal Procedure, which provides in part as follows : –

"A notice of appeal from the Trial Division of the High Court to the Appellate Division of that court shall be filed in duplicate and shall also set forth a concise statement of the grounds on which the appeal is taken."

When this is construed in connection with Rule 32b of the Rules of Criminal Procedure, it becomes abundantly clear that a written notice is contemplated. Rule 32b reads as follows : –

, *"Forwarding of notice of appeal.* Immediately upon the filing of a notice of appeal to the Appellate Division, one of the original copies thereof (with a notation ,endorsed thereon of the date of filing) shall be forwarded by the Clerk of Courts with whom it is filed to the Clerk of Courts for the Truk District, who has been designated to keep the records and dockets of the Appellate Division."

We are also inclined to believe that an oral notice does not comply with the. fair meaning and intent of Section 198 of the Trust Territory Code concerning appeals.

[6] Attention is invited to the fact that under the corresponding, but more detailed, provisions of Rule 37(a) of the Federal Rules of Criminal Procedure, it has been expressly held that an oral notice of appeal, even though accepted by the trial court and noted in the record, is not sufficient. *U.S. v. Isabella* (2nd Cir.) 251F.2d 223 (1958). *O'Neal v. U.S.* (5th Cir.) 264 F.2d 809 (1959). *Durel v. U.S.* (5th Cir.) 299 F.2d 583 (1962).

[7] It has also been generally held that the timely filing of the required notice in United States District Courts is an essential to the giving of jurisdiction over an appeal. *U.S. v. Robinson,* 361 U.S. 220, 80 S.Ct. 282 (1960). *Berman v. U.S.,* 378 U.S. 530, 84 S.Ct. 1895 (1964). 4 Am. Jur. 2d, Appeal and Error, §§ 292, 293.

[8] We see no objection to a trial court accepting an oral notice of intention to appeal as a basis for a temporary stay of execution of sentence, but we feel strongly that such an oral notice should not be accepted as anything more than an expression of intention to file the written notice, which we believe is contemplated both by the Code and the Rules of Criminal Procedure. We therefore believe that the practice of using and accepting oral notices of appeal in Trust Territory Courts, for anything other than the limited purpose indicated above, should be discontinued.

[9] The decision of the Supreme Court of the United States in *U.S. v. Behrens,* 375 U.S. 162, 84 S.Ct. 295 (1963), which requires that the accused be given an opportunity to be heard before modification of sentence under Title 18 U.S.C., Section 4208 (b), contrary to the previous practice in a number of United States District Courts, has attracted renewed attention to the importance, even at the present time, of the ancient right of an accused to be heard before sentence is imposed-known as the right of "allocution". While at common law this right was generally held to apply only in capital cases, it has been extended to all criminal cases in U.S. District Courts by Rule 32(a) of the Federal Rules of Criminal Procedure, and in a slightly different form to all criminal cases in Trust Territory Courts, other than Community Courts, by Rule 14c(1) of the Trust Territory Rules of Criminal Procedure. We realize that it has been the regular practice of the Trial Division of the High Court to accord an accused the right to be heard on the question of sentence, either personally or by counsel, as a routine matter as required by the above-mentioned Rule 14c(1), but not to make any mention of this in the record except when testimony has been submitted by one side or the other on the question of sentence. It is, therefore, not surprising that the

present record is entirely silent as to whether this right was accorded the accused.

[10] In view of the emphasis now being given this matter in U.S. Courts, however, 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. Where this right of allocution is necessary in the United States, it is generally held that it must be shown by the record. 15 Am. Jur.,Criminal Law, § 457, note 20. To eliminate any doubt as to whether this right had been accorded in the case now under appeal, this court has questioned counsel for the appellant on the matter and been assured that the accused was given an opportunity to be heard and was heard by counsel on the question of sentence. This we believe, cures any defect there may be thought to be in the record on this point.

. The finding and sentence appealed from are affirmed.