

FIGIR, Appellant
v.
TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee
Criminal Case No. 105
Trial Division of the High Court
Yap District Court
February 24, 1966

Defendant was convicted in Yap District Court of trespass and malicious mischief in violation of T.T.C., Sees. 401 and 398 (as amended). On appeal, defendant contended that evidence was insufficient to prove guilt beyond a reasonable doubt, that trial court erred in finding defendant guilty on both counts for same acts, and that defendant was denied his right to speedy trial. The Trial Division of the High Court, Chief Justice E. P. Furber, held that trial court's findings will not be set aside if supported by substantial evidence and that defendant cannot complain of postponement to which he agreed, but that evidence as to crime of malicious mischief falls short of proof beyond reasonable doubt of separate offense.

Affirmed in part and reversed in part.

1. Criminal Law-Appeals-Scope of Review

Where trial court in criminal proceedings is faced with conflicting testimony, and evidence favorable to government, if believed, clearly and expressly covers every element of crime, trial court's findings will not be upset on appeal.

2. Appeal and Error-Scope of Review-Witness Credibility

Trial judge who has opportunity to hear witnesses is in much better position to judge their credibility than appellate court can be merely from written record.

3. Appeal and Error-Scope of Review

In considering case on appeal, appellate court in Trust Territory must test sufficiency of proof on basis of what trial court had right to believe, even though there is evidence to contrary.

4. Appeal and Error-Scope of Review-Witness Credibility

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

5. Criminal Law-Appeals-Scope of Review

On appeal in criminal case in Trust Territory, evidence must be considered in light as favorable to government as is reasonable.

6. Criminal Law-Trial Procedure-Motion to Dismiss

Motion to dismiss one of counts in criminal case made before evidence is taken is without merit in that form, since alternative counts or charges may be based on same facts. (Rules of Crim. Proc., Rule 6e)

7. Malicious Mischief-Malice

Element of malice is entirely eliminated from offense of malicious mischief in Trust Territory. (Executive Order No. 84, amending T.T.C., Sec. 398)

8. Trespass-Generally

In order for acts set forth in Trust Territory Code to constitute trespass, they must be done without committing or attempting to commit any of certain other crimes mentioned therein. (T.T.C., Sec. 401)

9. Trespass-Generally

Phrase "beforementioned crimes" referred to in Trust Territory statute on trespass refers to all crimes previously listed in Section C (Crimes Against Property) of Chapter Six, among which is amended crime of malicious mischief. (T.T.C., Sec. 401)

10. Malicious Mischief-Generally

It is possible under Trust Territory law for person to commit act of malicious mischief immediately after committing crime of trespass. (T.T.C., Sees. 398, 401)

11. Malicious Mischief-Generally

In criminal prosecution for trespass and malicious mischief, where evidence of accused having caused any damage in leaving premises after trespass is not at all clear, there is no proof beyond reasonable doubt of separate offense of malicious mischief. (T.T.C., Sec. 398)

12. Criminal Law-Rights of Accused-Speedy Trial

In criminal proceedings, accused cannot consent either personally or through counsel to postponement of trial and then use postponement as ground for avoiding trial.

13. Criminal Law-Rights of Accused-Speedy Trial

By consenting to postponement of criminal trial, accused waives any objection he might otherwise have to delay as an interference with his right to speedy trial. (T.T.C., Sec. 4)

14. Courts-Continuance

Trial court is entitled to use its sound discretion in granting postponements when there is good reason for them.

15. Courts-Continuance

Trial court's discretion in granting postponement will not be interfered with on appeal unless it appears there has been definite abuse of that discretion.

16. Criminal Law-Rights of Accused-Speedy Trial

Where criminal trial is completed within eighteen days after incident involved, and accused consents to postponement, there is no basis for any claim of abuse of discretion by trial court.

<i>Assessor:</i>	JUDGE NIKOLAS LIJON (sometimes spelled LEON)
<i>Interpreter:</i>	THOMAS A. FAIMAU
<i>Counsel for Appellant:</i>	LINUS RUUAMAU
<i>Counsel for Appellee:</i>	LAWRENCE J. KEN

FURBER, *Chief Justice*

This is an appeal from convictions of trespass and malicious mischief in violation of Sections 401 and 398 (as amended by Executive Order No. 84 of December 23, 1960).

Although the appellant's Notice of Appeal lists six grounds, these as actually argued amount essentially to only three, namely, (1) that the evidence was insufficient to prove the accused guilty beyond a reasonable doubt, (2) that the trial court erred as a matter of law in finding the accused guilty on both counts for the same acts (although the Notice of Appeal states this as an error in denying the motion of defense counsel to dismiss one of the counts, which motion was made before any evidence had been received), and (3) that the court erred in granting, in violation of the accused's right to a speedy trial, the prosecution's motion for a postponement for six days after the case had already been postponed for one day from the date for which it was originally scheduled.

Counsel for the appellee argued that the evidence was sufficient to support the convictions, stressing the fact that he had presented an eye-witness to the incident who was in a good position to clearly identify the accused, that both postponements granted were reasonable and due to the fact that the complainant, whom the prosecutor

wished to have present at the trial, was busy at the time in connection with his duties in the Yap Islands Congress, and that the fact that the accused, after he was discovered, left the premises through a torn screen constituted malicious mischief separate from the trespass.

OPINION

[1, 2] The accused's principal defense at the trial was an alleged alibi. In support of this, he presented several witnesses whose testimony tended to show that he could not have been at the scene at the time of the alleged incident. The testimony of these witnesses was sharply in conflict with that of government witnesses. Obviously, some of the witnesses must have been wrong about the date concerning which they were testifying, or else other witnesses were wrong in their identification of the accused as the man involved in the incident. The trial court was faced with a question of fact resting squarely upon conflicting testimony, but the evidence favorable to the government, if believed, clearly and expressly covered every element of the crime of trespass. The trial judge had the opportunity to hear the witnesses and was in a much better position to judge their credibility than an appellate court can by merely from reading the record.

[3-5] This court has repeatedly held, and the Appellate Division of the High Court has taken the same view, in accordance with generally accepted precedents in the United States, that in considering a case on appeal, the appellate court must test the sufficiency of proof on the basis of what the trial court had a right to believe, even though there is evidence to the contrary. In other words, 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. Or putting it in still another way,

on appeal in a criminal case, the evidence must be considered in a light as favorable to the government as is reasonable. *Krispin Oingerang v. Trust Territory*, 2 T.T.R. 385. *Bemoch Recheungel and Another v. Trust Territory*, 2 T.T.R. 517. *Soilo and Others v. Trust Territory*, 2 T.T.R. 368. *Kirispin and Another v. Trust Territory*, 2 T.T.R. 628. 5 Am. Jur. 2d, Appeal and Error, §§ 839-841 inclusive.

[6] The appellant's objection, as stated in his Notice of Appeal, to the court's denial of his motion to dismiss one of the counts before any evidence had been taken, is clearly without merit in that form. Rule 6e of the Rules of Criminal Procedure expressly provides that alternative counts or charges may be based on the same facts. His oral argument, however, to the effect that the same act or acts cannot under the terms of the Trust Territory Code constitute both trespass and malicious mischief is better taken. In this, he has relied heavily on the decision of this court in the case of *Bisente v. Trust Territory*, IT.T.R. 327.

[7] It should be noted that the *Bisente* case arose and was decided before Section 398 was amended by Executive Order No. 84. The amendment made by that Executive Order has entirely eliminated the element of malice from the offense set forth in that section although still entitled "Malicious Mischief". Consequently, what was said in the *Bisente* case concerning the element of malice does not apply under present Code provisions. The part of that decision, however, concerning acts constituting at one and the same time trespass and one of the other crimes against property set forth in the same section of the Code applies just as much to malicious mischief as defined in Executive Order No. 84 as it did to malicious mischief as originally defined in the Code.

[8, 9] Section 401 concerning trespass has not been changed and requires that for the acts therein set forth

to constitute trespass, they must be done "without committing or attempting to commit any of the beforementioned crimes", which the court considers to refer to all of the crimes previously listed in that section, namely, Section C entitled "CRIMES AGAINST PROPERTY" of Chapter 6 of the Code, among which is the amended crime of malicious mischief.

[10, 11] It would, of course, be possible for a person to commit an act of malicious mischief immediately after one of trespass as counsel for the appellee has argued here, but the evidence of the accused having caused any damage in leaving the premises through an already torn screen is not at all clear, and in the opinion of this court, falls far short of proof beyond a reasonable doubt of a separate offense.

[12-16] The appellant's third ground of appeal was raised for the first time after the postponement in question had been granted with his counsel's consent. In the first place, it is not fair for an accused to consent, either personally or through counsel, to such a postponement and then use that as a ground for avoiding trial. By such consent, he waives any objection he might otherwise have to the delay as an interference with his right to a speedy trial. 21 Am. Jur. 2d, Criminal Law, § 253, notes 18 and 19. In the next place, the trial court is entitled to use its sound discretion in granting postponements when there is good reason for them, and the trial court's discretion will not be interfered with on appeal unless it appears there has been definite abuse of that discretion. 21 Am. Jur. 2d, Criminal Law, §§ 243 and 251. In this instance, where the trial was completed within eighteen days after the incident involved, and where the accused consented to the postponement, this court can see no basis for any claim of abuse of discretion.

JUDGMENT

The finding and sentence of the Yap District Court on .Count 1., for trespass, in its Criminal Case No. 702, are hereby affirmed. The finding and sentence on Count 2, for malicious mischief, in the same case, are set aside and the accused acquitted on that count.