ESTHER CRUZ RASA, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Case No. 38

Appellate Division of the High Court

June 23, 1973

Appeal from involuntary manslaughter conviction. The Appellate Division of the High Court, Brown, Associate Justice, held that in trial in which defendant was found guilty of involuntary manslaughter, motion, at close of prosecution's case, to dismiss, was properly denied where evidence allowed inference that defendant had committed four acts not amounting to a felony, namely: speeding, unsafe passing, negligent driving and reckless driving, and that these acts proximately caused or contributed to auto accident in which defendant's passenger was killed.

1. **Criminal Law—Evidence—Opinion**

   In trial of defendant whose passenger was killed in accident occurring when defendant attempted to pass another vehicle, court erred in allowing witness' statement that he believed the two drivers were racing to stand, but it was not reversible error where there was similar testimony not objected to and the inadmissible statement was not contradicted.

2. **Criminal Law—Appeals—Findings**

   Trial court's findings were not clearly erroneous, and thus would not be set aside, where there was substantial evidence to support them. (6 TTC § 355(2))

3. **Homicide—Involuntary Manslaughter—Evidence**

   In trial in which defendant was found guilty of involuntary manslaughter, motion, at close of prosecution's case, to dismiss, was properly denied where evidence allowed inference that defendant had committed four acts not amounting to a felony, namely: speeding, unsafe passing, negligent driving and reckless driving, and that these acts proximately caused or contributed to auto accident in which defendant's passenger was killed.

4. **Criminal Law—Rights of Accused—Presumption of Innocence**

   Since the presumption of innocence remained throughout the trial, and since only the burden of going forward with the evidence, not the burden of proof, shifted at end of prosecution's case, lower court properly denied motion for mistrial made on grounds presumption of innocence was not overcome at close of prosecution's case, and denial of mistrial did not place burden of proof on defendant.

5. **Criminal Law—Witnesses—Manner of Testifying**

Judge's statement that defendant's narrative style of giving testimony indicated he was giving a preconceived story, and that the testimony should follow a question and answer pattern, not objected to at trial, was not prejudicial or an abuse of discretion.

6. **Criminal Law—Prejudicial Statements—Judges**

Judge's statement, before formally announcing judgment, that he would prepare a written judgment so as to give defense counsel "an opportunity to sink his teeth into an appeal", was not prejudicial.

7. **Homicide—Involuntary Manslaughter—Elements**

Government, in involuntary manslaughter prosecution, was not required to prove that defendant's acts were the sole proximate cause of death; it was sufficient if they were one of the proximate causes and there was no efficient intervening cause.

8. **Homicide—Involuntary Manslaughter—Elements**

Involuntary manslaughter is the taking of the life of another, without malice, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due care and circumspection.

9. **Torts—Negligence—Proximate Cause**

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred; it is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury.

10. **Torts—Negligence—Proximate Cause**

The acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause.

11. **Homicide—Involuntary Manslaughter—Sentence**

Two hundred and fifty dollar fine and suspended two-year sentence for involuntary manslaughter, well below the maximum allowable sentence, were within court's discretion, and the fine was not excessive, or the sentence cruel and unusual punishment. (1 TTC § 6; 11 TTC § 754)

12. **Homicide—Involuntary Manslaughter—Sentence**

Judge's statement, in reciting conditions of suspension of two-year sentence for involuntary manslaughter by automobile, that a traffic violation would automatically revoke the suspension, was surplusage and without legal effect, simply an admonition.

Counsel for Appellant: ROGER ST. PIERRE, ESQUIRE, *Public Defender*

Counsel for Appellee: LYLE L. RICHMOND, ESQUIRE, *District Attorney,* Truk

Before BURNETT, *Chief Justice,* BROWN, *Associate Justice,* and BENSON, *Temporary Judge* (Judge, Island Court of Guam, sitting by designation)

BROWN, *Associate Justice*

Appellant was found guilty of involuntary manslaughter in the death of Margarita P. Pinaula, resulting from a two vehicle collision which occurred at approximately 2:00 p.m., September 27, 1969 on highway 2-W, Saipan, Marianas District. The deceased was an occupant of a certain blue Toyota sedan which was being driven, controlled and operated by appellant in a southerly direction along and upon highway 2-W. The second vehicle was also a Toyota sedan, red in color, which, too, was traveling in a southerly direction along and upon highway 2-W, and which was being driven by Vicente C. Barcinas.

Highway 2-W, a paved thoroughfare marked with a center line, was 40 feet 8 inches wide. At the time of the collision, the weather was clear, and the surface of the highway was dry.

At the scene of the accident, which was described as being between the "oil pump house" and a structure known as "The Fountain", the posted speed limit was 45 miles per hour.

The evidence reveals that as Mr. Barcinas was driving South at a speed he testified to be 45 miles per hour, appellant overtook him from the rear and attempted to pass him. At that time, both vehicles greatly increased their speed; and as the two automobiles traveled south at an excessive

speed, appellant lost control of the blue Toyota. It swerved over the center line to the right and struck the left side of the Barcinas' automobile with its own right-front fender. Undoubtedly, this contact between the two vehicles was made, for a subsequent investigation revealed the transfer of paint. At that juncture, Mr. Barcinas was able to bring his automobile under control, and he managed to bring it to a stop without injury to himself or to the person who accompanied him in his automobile. As for appellant, she lost control of the blue Toyota. Skid marks laid down by her vehicle measured 328 feet, scrape marks extending from the end of the skid were found to measure an additional 141 feet, and indentations in the grassy area between the end of the scrape marks and the place where the blue Toyota finally came to rest indicated an additional uncontrolled travel of 53 feet. From the end of the scrape marks up to the point where the blue Toyota came to rest, it appears that appellant's automobile rolled over three times. As it rolled, Margarita P. Pinaula was thrown from it, and her body came to rest on the ground, a distance from where the blue Toyota finally came to a stop. As a result of the accident, she sustained fatal injuries, and death was determined to be the result of asphyxia following extensive injuries to the upper left chest. Two independent eyewitnesses, Albert S. Camacho, called by the defense, and Absalon Waki, called by the prosecution in rebuttal, testified that during the time appellant was attempting to pass the Barcinas automobile, both vehicles greatly increased their speed. During his testimony, Albert Camacho, stated, in part: in response to a question propounded by defense counsel: "I believe they were racing." At that juncture, defense counsel promptly moved the Court to strike that portion of the testimony as non-responsive. Clearly, it was non-responsive and also constituted both an opinion and a

conclusion on the part of the witness, and the trial court should have ordered it stricken. Instead, the trial court failed to rule at all, stating, merely, "He is your witness."

During appellant's testimony, the prosecution interposed an objection upon the ground of hearsay, and the trial court, in ruling, stated:—

"Well, we will let it go. I will listen to the motion to strike after she has recited her tale."

On its own motion, the trial court directed that the appellant's testimony be elicited by way of questions and answers and admonished that she, . . .

"not give us a recitation of a preconceived story, which obviously this witness is doing. I know it is easier, but it sounds much more believable to ask and answer questions."

Because of this remark, appellant moved the Court for a mistrial. In denying that motion, the trial court observed:—

"Just because it is obvious that a witness has a preconceived story, that doesn't mean it is not true; it is a mere recitation of something figured out in advance."

At another point in the testimony of the appellant, the trial court again requested that it be in question and answer form, stating:—

"We are more apt to get at the real testimony. . . ."

So far as witnesses called by the government were concerned, there was no direction by the Trial Court that the prosecution frame questions which called for answers and permitted the witnesses to testify in narrative form. We note that the defense failed to object as to this matter.

Upon the conclusion of the trial, appellant was, as noted above, found guilty of involuntary manslaughter. A second count charging her with negligent driving was merged into

the count charging involuntary manslaughter, and no finding was made except as to the count charging manslaughter.

Appellant was sentenced to a term of imprisonment for a period of two years, the entire period of imprisonment was then suspended on the following conditions:—

1. "You are to conduct yourself in all respects as a law abiding citizen, and particularly you are to observe and comply with the traffic laws of the Trust Territory. Any violation, determined upon hearing, will automatically mean the revocation of this suspended sentence.

2. You are not to leave Saipan without the consent of the Sheriff or this Court.

3. These conditions may be modified or changed at any time that the Court feels that a change is appropriate.

4. After you have completed the probationary period and paid the fine, you will be discharged from all liability under this sentence."

Immediately before the Trial Court found appellant guilty of involuntary manslaughter, the Court stated:—

"As is my practice in a criminal case when there has been a conviction, to give the Public Defender an opportunity to sink his teeth into an appeal, I will prepare a formal written judgment reciting in some respects the things I have just said, but in the meantime it is the finding and the judgment of the Court that the defendant is guilty of the crime of involuntary manslaughter. On the other count of indictment there will be no finding of itself because it is merged in the greater offense."

(There was, of course, no indictment at any time; and there could not have been, for there is no grand jury in the Trust Territory. No doubt, the Trial Court made reference to the other count in the information which was filed by the District Attorney.)

Upon motion of defense counsel, the trial judge stayed execution of the sentence pending appeal.

The appellant bases her appeal upon the following grounds:—

1. That the presumption of innocence as to the Appellant was not overcome at the close of the prosecution's case and the Court erred in denying Appellant's motion for dismissal at that time.

2. The presumption of innocence as to Appellant was not overcome at the close of the prosecution's case and the Court erred in "putting Appellant to her proof" at that time thus placing the burden of proof upon appellant.

3. The Court's order on its own motion directed solely at Appellant, prohibiting Appellant from testifying in the narrative form advancing the reason that such method of testifying was a device to make her testimony appear more believable constituted prejudicial error and that the Court erred in denying Appellant's motion for mistrial at that time.

4. That the evidence adduced by the prosecution did not establish beyond a reasonable doubt that Appellant's operation of a motor vehicle was the sole proximate cause of death.

5. Appellant appeals from the sentence imposed on the ground of undue harshness.

6. Appellant appeals from condition numbered one (1) in the conditions of suspension on the ground of undue harshness.

As to these specified grounds, the brief filed on behalf of appellant reveals that she relies upon two specifications of error, namely:—

1. Prejudice on the part of the trial court denying Appellant a fair and impartial trial; and

2. That the evidence adduced by the government did not establish beyond reasonable doubt that Appellant operation of the vehicle was the direct proximate cause of death.

[1] We will consider these two specifications of error hereinafter. However, we will first consider the effect of the trial court's failure to rule upon appellant's motion to strike a portion of the testimony of witness, Albert S. Camacho. There can be no question but that the trial court should have ordered stricken that portion of the testimony of Mr. Camacho when he stated that, "I believe they were

racing", as being non-responsive and as a conclusion and an opinion on the part of the witness. The Court's failure to do so was, indeed, error. Further, the record which is before us reveals that, in arriving at the judgment, the trial court did consider that improperly admitted testimony. Had this been the only testimony along those lines, then we would necessarily conclude that this constituted reversible error requiring us to reverse the decision of the lower court. However, there was other similar testimony received without objection, and there was no valid evidence to contradict that which had been improperly admitted. The law is clear that if evidence improperly admitted may have been a factor in the decision, it requires a reversal of the judgment unless the remaining evidence is without conflict and is sufficient to support the judgment. 5A C.J.S., Appeal and Error, Sec. 1677, p. 706.

[2] 6 TTC § 355(2) dealing with powers of courts on appeal or review provides, in part:—

"(2) The findings of fact of the Trial Division of the High Court in cases tried by it shall not be set aside by the Appellate Division of that court unless clearly erroneous, ..."

A finding is not "clearly erroneous" if there is substantial evidence to support it. *Oedekerk v. Muncie Gear Works*, 179 F.2d 821, 824 (C.A. Ind.). In the case before us, there was very substantial evidence to support the findings of the trial court.

[3] An examination of the record shows that the Court did not err in denying appellant's motion for dismissal at the close of the prosecution's case in chief. The prosecution had produced evidence from which the trier of fact could infer that appellant committed four unlawful acts not amounting to a felony, namely, speeding, unsafe passing, negligent driving, and reckless driving, and that these

proximately caused or contributed to the accident and to the fatal injuries resulting therefrom.

[4] We agree with appellant's contention that the presumption of innocence was not overcome at the close of the prosecution's case, for, the presumption of innocence remained with her throughout the trial. We disagree totally with appellant's contention that the denial of appellant's motion to dismiss upon the completion of the prosecution's case resulted in placing the burden of proof upon appellant. It did not, for such is not the law. Only the burden of going forward with the evidence shifted at that time. This burden is met by evidence which raises a reasonable doubt of defendant's guilt. *People v. Wells*, 76 P.2d 493 (Cal.), *People v. Albertson*, 145 P.2d 7 (Cal.), *People v. Deloney*, 246 P.2d 532 (Cal.), *People v. Carson*, 110 P.2d 98 (Cal. App.).

[5, 6] As has already been noted, appellant urges that her conviction be reversed by reason of prejudice on the part of the trial court which had the effect of denying her a fair and impartial trial. It is axiomatic that a judge has a duty to be impartial, courteous and patient, and it has been truthfully stated that there is never an instance which justifies a trial judge or counsel in being discourteous one to the other, to witnesses, or to parties litigant. *People v. Williams*, 131 P.2d 851 (Cal. App.). A review of the record reveals no such indication of prejudice on the part of the trial judge. He did request that defense counsel cause defendant to answer specific questions rather than to testify in narrative form. He did state that a narration indicated that defendant was relating a preconceived story, but he then carefully pointed out that the mere fact defendant's narration was preconceived, that, in and of itself, did not mean that it was untrue; and the trial judge so expressed himself at the time he requested that the form of defend-

ant's testimony be changed from narration to question and answer. This falls far short of constituting prejudicial misconduct on the part of the trial judge. Likewise, appellant's claim that prejudicial misconduct occurred when the trial judge indicated, before formally announcing his judgment that he would prepare a formal written decision so as to give defense counsel,

"... an opportunity to sink his teeth into an appeal. ..."

Appellant's contention that this indicated that the trial judge had improperly prejudged the case cannot be accepted by us, particularly when it is noted that in the very same sentence, the trial judge formally found defendant guilty of involuntary manslaughter.

Under certain circumstances, of course, a judgment of a trial court must be reversed because of prejudicial misconduct. With this broad rule, we have no quarrel; on the contrary, we support it wholeheartedly. We also recognize, and we hold that, under certain circumstances, a reversal may be required upon such grounds whether the case be before a jury or before a court sitting without a jury. The true test is whether or not the conduct of the trial judge deprived a party of a fair trial. We hold to the modern rule that, in the area of alleged prejudice, each case must be considered in the light of its own particular set of facts. *Geary v. Avery*, 178 Cal. App. 2d 572; *Beasley v. Superior Court*, 5 Cal. App. 3d 617. After having examined the facts as they are revealed in the case before us, we find that appellant's contention that the trial judge misconducted himself so as to deprive her of a fair trial is without merit.

Returning to the Court's request that appellant's testimony be in question and answer form while permitting one or more other witnesses to testify by way of narration, we note, first, that at the time of trial there was no objection to that permitted procedure, and, second, discretion lies

with the trial court to allow, restrict, or prevent narrative testimony. *Silva v. Dias*, 116 P.2d 496 (Cal. App.). Here, we find no abuse of discretion.

We also note that the record shows that the appellant had already narrated the entire matter. Thus, the Court's request for testimony by way of question and answer came after she had had an opportunity to describe the whole occurrence in narrative form.

[7] Appellant next urges that the government failed to establish that appellant's operation of the blue Toyota sedan was the sole proximate cause of the death of Margarita P. Pinaula. The government was not required to do so; such is not the law.

[8] Involuntary manslaughter is the taking of the life of another without malice, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due care and circumspection.

The trial court was justified in finding that the prosecution had proved beyond a reasonable doubt that appellant committed four acts not amounting to a felony. These, as we have already noted, were speeding, unsafe passing, negligent driving, and reckless driving.

To constitute the crime of involuntary manslaughter, or, for that matter, any felonious homicide, there must be, in addition to the death of a human being, at least one unlawful act which proximately caused that death.

[9] The proximate cause of an injury, fatal or non-fatal, is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury.

[10] This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor, one act, one element of circumstances, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause.

The evidence fully justified the trial court's finding that Mr. Barcinas, too, was driving at a "tremendous speed." While he may have been culpable in this regard, we make no finding as to him; for he was not a party to the present action. We do hold, however, that his conduct was not such as to have constituted an efficient intervening cause. The fact, if it is, indeed, a fact, that one or more unlawful or negligent acts on the part of Mr. Barcinas proximately contributed to the accident and to the fatal injuries cannot be used by appellant as a means to escape liability on her own part. Her own wrongful conduct clearly was a proximate cause of the death of Margarita P. Pinaula, and no efficient intervening cause operated to break that chain of causation.

[11] In considering appellant's appeal from the sentence and from the conditions of suspension, we need only note that the sentence imposed was well below the maximum provided by 11 TTC § 754 (formerly TTC Sec. 383) and was imposed by the trial court in the exercise of its sound discretion. As we have already stated in this opinion, after finding appellant guilty of involuntary manslaughter, a violation of 11 TTC § 754 (formerly TTC Sec. 383), wherein it is provided that imprisonment for a term of not more than three years or a fine not exceeding one thousand dollars, or both, may be imposed, the trial judge sentenced appellant to a term of imprisonment for a period of two

years, all suspended upon conditions we have enumerated earlier, and a fine of two hundred fifty dollars.

Appellant urges that the sentence or the conditions of suspension should be modified, one of appellant's arguments being that, at least by implication, they conflict with the provisions of 1 TTC § 6. We find no merit in this contention.

1 TTC § 6 provides:—

"Excessive bail, excessive fines, cruel and unusual punishment. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

First, can it seriously be argued that in this case, involving the loss of a human being's life, a fine of two hundred fifty dollars is excessive? We do not agree that it is.

Second, can it seriously be argued that in this case a sentence to a term of imprisonment for a period of two years, with all of the imprisonment suspended, be regarded as cruel and unusual punishment? We do not regard it as such.

We recognize that large discretion is vested in the legislative branch of the government in the fixing of penalties; this is a legislative function and one not to be exercised by the judicial branch, and this Court will not substitute its judgment unless the penalty prescribed is so excessive as to shock the sense of mankind. No such condition presents itself in this case.

Likewise, sentencing is a matter which lies within the discretion of the trial court. Absent a showing of an abuse of that discretion, an appellate court is not justified in modifying a sentence imposed by the trial court. As was said by the Court in *Aimeliik People v. Remengesau*, 2 T.T.R. 320, 325:—

"Determination of the relative amount of punishment to be given each appellant, within the limits of the law, was a matter resting

within the sound discretion of the trial court, and this court sees no indication that this was any abuse of that discretion."

Nor does this court find any abuse of discretion on the part of the trial court in the case now before us. We recognize and adopt the widely and properly held view that, as a general rule, a sentence is neither illegal nor excessive if it is within the limits authorized by law. The sentence imposed here was well within the maximum limits permitted under the applicable provisions of the Trust Territory Code; it was neither illegal, nor was it excessive upon its face.

[12] Appellant argues strenuously that in reciting the conditions of suspension, the trial judge's requirement that she conduct herself as a law abiding citizen, particularly as to traffic violations, followed by the statement, ". . . because any violations, *determined upon hearing*, would automatically mean revocation of this suspended sentence, . . ." (emphasis added). These quoted words were, of course, no part of the conditions of suspension. They were mere surplusage and without legal effect. Should appellant at some later date be charged with a traffic violation, and should a revocation of the suspended sentence be sought, she would be entitled under the law to a hearing. This was recognized by the trial judge. At any such hearing, the trial judge retains his discretion. To postulate that it would result in an "automatic revocation" of the conditions of suspension would be to engage in pure speculation, and this we decline to do. We regard these remarks merely as part of an admonition to appellant. We do not consider the words as operative, nor do we interpret them as anything more than surplusage with no effect upon appellant's substantial rights. In no event can it be successfully contended that the words complained of limit the discretion of the judge at any hearing pertaining to the revocation of probation,

should there ever be, in fact, such a hearing. We, of course, cannot assume that such hearing will ever take place; were we to do so, we would be indulging in pure speculation. Likewise, should we make such an assumption, we would usurp the discretionary powers of the trial judge, and this we are unwilling to do. In the event a hearing on revocation of probation possibly should be held, appellant's right to seek relief from any conceivable abuse of discretion by the Court at such hearing is preserved. Her rights in this regard remain inviolate.

Since no reversible error is to be found, the judgment of the trial court is affirmed.