TRUST TERRITORY OF THE PACIFIC ISLANDS

v.

CORNELIO BRUNO

Crim. No. 5-73

Trial Division of the High Court

Palau District

May 15, 1974

Prosecution for voluntary manslaughter and unlawful possession of a firearm. The Trial Division of the High Court, Robert A. Hefner, Associate Justice, held that where police officer shot and killed person at disturbance police were attempting to quell, rocks had been thrown at police, one officer testified he was threatened with a machete, police officer had left, gone home and returned with a gun, and he testified he fired at a tree to scare the troublemakers after a rock passed over his head, but that he could not see the end of his rifle, homicide was not justifiable as one in which necessary force was used to compel submission of an arrested person, nor excusable as one not strictly willful or intentional and done by accident or misfortune, or while doing a lawful act by lawful means, and that defendant was guilty of involuntary manslaughter.

1. **Constitutional Law—Miranda Warning**

   Where, following homicide at which defendant, one of the police officers attempting to quell a disturbance, was present, another officer was sent to find defendant and obtain his gun, and officer found defendant, asked for and was given the gun, and did not take defendant into custody, arrest him or interrogate him, defendant was not entitled to a Miranda warning and evidence connected to the gun would not be stricken for failure to give one. (12 TTC § 68)

2. **Search and Seizure—Consent—Voluntariness**

   Where an accused actively assisted a police officer, consent will ordinarily be regarded as having been voluntary.

3. **Search and Seizure—Consent—Voluntariness**

   Voluntariness of consent to a police search is a question of fact to be determined from all the circumstances.

4. **Search and Seizure—Consent—Voluntariness**

   Whether one who consented to a police search knew of his right to refuse is a factor to be considered in determining whether the consent was voluntary.

5. **Search and Seizure—Consent—Voluntariness**

   Prosecution need not show that accused knew he had a right to refuse to consent to a police search as a prerequisite to establishing that accused voluntarily consented to a search.

6. Search and Seizure—Consent—Voluntariness

A voluntary consent to a search is not rendered invalid solely on the basis that a suspect was not given the Miranda warning.

7. Homicide—Involuntary Manslaughter—Particular Cases

Where police officer shot and killed person at disturbance police were attempting to quell, rocks had been thrown at police, one officer testified he was threatened with a machete, police officer had left, gone home and returned with a gun, and he testified he fired at a tree to scare the troublemakers after a rock passed over his head, but that he could not see the end of his rifle, homicide was not justifiable as one in which necessary force was used to compel submission of an arrested person, nor excusable as one not strictly willful or intentional and done by accident or misfortune, or while doing a lawful act by lawful means, and that defendant was guilty of involuntary manslaughter. (11 TTC § 754)

8. Homicide—Involuntary Manslaughter—Burden of Proof

Where a trier of fact has a reasonable doubt that a homicide was justifiable or excusable, the trier of fact must give the defendant the benefit of the doubt and acquit him.

Special Judges:	FRANCISCO MOREI, *Presiding Judge,* and SINGICHI IKESAKES, *Associate Judge, District Court*
Interpreter:	AMADOR D. NGIRKELAU
Reporter:	SAM K. SASLAW
Prosecutors:	JOHN F. VOTRUBA, *District Attorney,* and GILLIAN T. TELLAMES, *Assistant District Prosecutor*
Counsel for Accused:	J. LEO MCSHANE, *Acting Chief Public Defender,* and FRANCISCO ARMALUUK, *Public Defender's Representative*

HEFNER, *Associate Justice*

Defendant, a police officer at the time of this incident, was tried on two counts, in an Information, the unlawful possession of a firearm and murder in the second degree, both arising out of a homicide occurring on November 29, 1972.

At the time the prosecution rested, the defense moved for an acquittal, or in the alternative, to reduce the charge

of second degree murder to a lesser included offense since malice was not proven by the prosecution. The Court, pursuant to Rule 13(h) of the Rules of Criminal Procedure granted the motion reducing the second count to voluntary manslaughter.

Several significant legal issues arose in this matter which have no precedent in the Trust Territory Courts.

During the presentation of the case for the prosecution, it developed that on the night of November 29, 1972 a group of police officers converged on the village of Ngerbeched, Koror Municipality, to quell a disturbance and incident where certain youths threatened the police officers with a machete and by throwing stones and prevented the officers from making arrests. During this time witnesses saw the defendant with a gun and heard one shot. The next morning, November 30, 1972, the body of one Mathias Boisek was found not far from the place where he was seen last and an autopsy was performed. The medical officer concluded that the cause of death was a .22 caliber bullet which entered the right side of the victim, passing almost all the way through the body.

On December 1, 1972, a police officer was instructed by his superiors to find the defendant and get his gun. The police officer found the defendant and testified "I came for the gun, the very gun he used during the night when there was some problem at the village of Ngerbeched so he got into the car—got into the jeep and took the gun and gave it to me."

The officer took the gun back to the police station. The defendant was not placed in custody and was left where he was found. No arrest or charges were filed against the defendant until April 19, 1973.

Defense counsel moved to strike any evidence connected to or arising from the weapon, arguing that since the

defendant was not given the "Miranda warning," his rights concerning protection of self-incrimination were violated.

Defense counsel did not specify the grounds of his motion, other than that of the "Miranda warning" and cases "based on the Supreme Court." As indicated in *Trust Territory v. Poll*, 3 T.T.R. 387, the case of *Miranda v. State of Arizona*, 384 U.S. 436, held that statements obtained from defendants during incommunicado interrogation in a police dominated atmosphere, without full warning of the defendant's Constitutional rights, were inadmissible as having been obtained in violation of the Fifth Amendment privilege against self-incrimination. There is no doubt that the *Miranda* case dealt with "custodial interrogation" which simply means that the questioning is initiated by law enforcement officers after the person has been taken into custody or otherwise deprived of his freedom of action in any significant way. The *Poll* case and 12 TTC § 68 recognize that arrest and custody is the key to when the warning to the defendant became necessary.

[1] It is clear that from the facts in this case, there was no "custodial interrogation." The defendant was not under arrest, not taken to the police station, not interrogated, nor even charged for some months later. After being asked to produce the weapon, he went and obtained it for the officer. No search was instituted or carried out. At most, it can be inferred, though certainly not clear from the testimony, that this was a very preliminary investigation of the shooting on November 29, 1972.

Any violation of the defendant's rights cannot be based on the *Miranda* case and the Court would have to consider cases, not cited by counsel, to determine if more recent Supreme Court cases are applicable in the Trust Territory and to the particular defendant.

According to some courts, after an accused *has been taken into custody* (emphasis added), his consent to a warrantless search is not valid unless he was first warned of his right to refuse the search—analogous to the "Miranda warning." *United States v. Blalock*, 255 F.Supp. 268. Other courts have rejected the theory. (See cases cited at 4 *Wharton's Criminal Evidence*, 80.)

No U.S. Supreme Court case is found which requires a "Miranda warning" under facts similar to those in this case.

1 TTC § 3 provides that one should not be subject to unreasonable searches and seizure. This section is based on the Fourth Amendment to the United States Constitution.

[2] The gun in this instance was either in the defendant's jeep, as the police officer testified, or in the defendant's outboard motorboat at a public dock. It was not in what would be considered a private or secluded place such as his home or office. There is no evidence that the police officer searched the defendant, the jeep or boat. There is no evidence that the police officer seized the gun. The vehicle or boat were not ransacked or even touched by the police officer and the gun was obtained by the defendant and given to the police officer voluntarily. Where the accused actively assists the officer, consent will ordinarily be regarded as voluntary. *Seay v. United States*, 380 F.2d 258 and cases cited at 68 Am. Jur. 2d 701.

[3–5] The United States Supreme Court has recently held that when the subject of a search is not in custody and the prosecution attempts to justify a search on the basis of his consent, the prosecution must demonstrate that the consent was in fact voluntarily given. Voluntariness is a question of fact to be determined from all the circumstances. The subject's knowledge of his right to refuse is a factor to be taken into account but the prosecu-

tion is not required to demonstrate such knowledge as a prerequisite to establish a voluntary consent. *Schneckloth v. Bustamonte*, 83 S.Ct. 2041.

The Supreme Court expressly rejected the proposition that the subject of a search be advised that he had a right to refuse consent before eliciting his consent. In the case at Bar the subject was a police officer and certainly would be expected to be more sophisticated and knowledgeable about his rights and this fact along with the other circumstances leads the Court to the conclusion that the consent was voluntary.

[6] Therefore, it is well recognized that a voluntary consent to a search (even if a search occurred here) is not rendered invalid solely on the basis that a suspect has not been given the "Miranda warning" as to his Fourth Amendment rights. This same rule should be applied in the Trust Territory.

Therefore, the gun obtained from the defendant is admissible into evidence and the resulting evidence from that gun is likewise admissible. This includes the testimony of the medical personnel, the ballistic expert and the other witnesses which proved beyond a reasonable doubt that the gun of the defendant shot the bullet found in the body of the victim and that bullet caused the death of the victim.

[7] The main thrust of the defense was that the homicide was justifiable or excusable. It is true that the defendant was a police officer on duty at the time of the shooting. In essence, the defendant argues that he used the force allowed by 12 TTC § 65, which states:—

> "Use of force in making arrest. In all cases where the person arrested refuses to submit or attempts to escape, such degree of force may be used as is necessary to compel submission."

This Court finds that the defendant exceeded the degree

of force allowed by the law under the circumstances existing at the time of the shooting.

The Trust Territory Code section succinctly states the law generally followed in the many cases dealing with a killing of a policeman. See generally 1 Warren on Homicide, 662.

In this case, the disturbance or incident had been going on for some time on the night of November 29, 1972. Rocks had been thrown at the police officers, including the defendant, and one officer testified he was threatened by a machete. The defendant left the scene, went to his home, obtained his rifle and one bullet and returned to the scene. As he walked toward the dissidents, he fell down an embankment, cocked the gun, climbed up to the edge of a road and hung onto a tree with his left hand. He testified he heard a stone pass over his head so he crouched down and using only his right arm and leg to steady the gun, waited about a minute and fired the gun at a Guava tree in order to scare the troublemakers. The tree described by the defendant is behind a store and intersection where the victim stood at the time of the shooting. It was dark and the defendant admits he could not even see the end of the barrel or stock of his rifle at the time of the shooting.

By the defendant's own testimony this homicide cannot be called justifiable as a justified homicide is one committed with full intent, but under such circumstances as to render the act one proper to be performed. 1 Wharton, 257 and 1 Warren on Homicide, 616.

Excusable homicide is one that takes place under circumstances that the party cannot strictly be said to have committed the act willfully and intentionally. 1 Warren on Homicide, 616. The circumstances referred to are that the killing is done by accident or misfortune, or in doing any lawful act by lawful means, *with usual and ordinary*

caution, (emphasis added), and without any unlawful intent. *People v. Slater*, 60 Cal.App.2d 358. 1 Wharton 463, 553.

[8] This Court adopts the rule that where the trier of fact has a reasonable doubt whether the homicide was justifiable or excusable, the trier of fact must give the defendant the benefit of the doubt and acquit him. *People v. Sanchez*, 30 Cal.2d 560, 184 P.2d 673.

This seems to be the more accepted rule than requiring proof of justification or excuse beyond a reasonable doubt. See 1 Warren on Homicide, 322.

In any event, there are no facts in this case which substantiate a finding of justification or excuse. The evidence of shooting by the defendant under the circumstances as they existed at that time, show, beyond a reasonable doubt that the defendant unlawfully took the life of another without malice, without due caution and circumspection, and this is the very case defined in 11 TTC § 754 as involuntary manslaughter.

The defendant was also charged with the unlawful possession of an unregistered firearm during the incident. Whether by design or inadvertence the legislature exempted possession of an unregistered firearm by a policeman, while on official duty, from the provisions of the act. 63 TTC § 553(1). The section, when read in conjunction with Section 559 of Title 63, clearly indicates that even though the defendant would have been guilty of possessing an unregistered firearm if he had not been on official duty, the fact that he was on duty at the time means he is exempted and therefore not guilty. The Weapons Control Act does not distinguish between officially issued weapons and those which are not registered pursuant to the act.

It is the judgment of the Court that the defendant, Cornelio Bruno, is guilty of involuntary manslaughter and

not guilty of the unlawful possession of a firearm. Sentencing shall be in conformance with the law.