

**TRUST TERRITORY OF THE PACIFIC ISLANDS,
Plaintiff-Appellee**

v.

SINGERU TECHUR, Defendant-Appellant

Criminal Appeal No. 36

Appellate Division of the High Court

Palau District

June 2, 1976

Appeal from conviction of second degree murder and sentence to fifteen years imprisonment with last ten years suspended upon good behavior. The Appellate Division of the High Court, Williams, Associate Justice, affirmed conviction but vacated sentence and remanded for reimposition of sentence, holding that where defendant threw a knife at his small son and knife struck his wife, and after being charged with assault with a deadly weapon was fully advised of his rights, and declined to make a statement and requested assistance of counsel, and about four hours later a police officer approached him, admonishing him that he had been previously advised of his right, showed him a knife taken from defendant's house on day of incident, and defendant stated that it was not the knife that he had at time he hurt his wife and that knife he used was stainless and much longer, and police went back to defendant's house, obtained two stainless steel knives, showed them to defendant with request that he identify one he used and defendant did so, trial court's finding that appellant's statements were voluntarily made after adequate notice of his rights, and therefore admissible, was clearly erroneous and statements should have been suppressed; but where defendant's guilt was more than adequately established by testimony of other witnesses, error in admitting evidence illegally obtained was harmless.

1. Criminal Law—Confessions or Statements—Admissibility

In criminal prosecution, mere fact that defendant has previously invoked his right to remain silent and consult with counsel does not necessarily

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render any subsequent statement or confession inadmissible, as long as he is aware of his rights and voluntarily proceeds to answer questions.

2. Appeal and Error—Findings and Conclusions—Supporting Evidence

Any determination concerning whether prosecution has met its heavy burden of demonstrating a knowing and intelligent waiver of defendant's rights must be made from totality of circumstances from whole record.

3. Constitutional Law—Miranda Warnings

Where defendant threw a knife at his small son and knife struck his wife, and after being charged with assault with a deadly weapon was fully advised of his rights and declined to make a statement and requested assistance of counsel, and about four hours later a police officer approached him, admonishing him that he had been previously advised of his rights, showed him a knife taken from defendant's house on day of incident, defendant stated that it was not the knife that he had at time he hurt his wife and that knife he used was stainless and much longer, police went back to defendant's house, obtained two stainless steel knives, showed them to defendant with request that he identify one he used and defendant did so, trial court's finding that appellant's statements were voluntarily made after adequate notice of his rights and therefore admissible was clearly erroneous and statements should have been suppressed.

4. Search and Seizure—Consent—Joint User

Joint occupant of premises can consent to search.

5. Search and Seizure—Evidence—Exclusionary Rule

Evidence obtained as result of an illegally obtained statement of defendant cannot be used against him unless it has become so attenuated as to dissipate taint; and where sole basis of police officer's acquisition of murder weapon is an illegally obtained statement, murder weapon is not admissible in evidence.

6. Search and Seizure—Evidence—Actual Prejudice

Improperly admitted evidence is not ground for reversal unless there is actual prejudice to defendant; and where defendant's guilt is more than adequately established by testimony of other witnesses, error in admitting evidence illegally obtained is harmless.

7. Evidence—Hearsay—"Res Gestae"

Statement comes within res gestae rule when made immediately before, during or following event to which it relates and under such circumstances that it is a product of event and not of declarant's deliberation; and amount of time lapsed between event and statement together with distance travelled by declarant are factors to be considered in determining if statement should be admitted as part of res gestae, though there is no specific combination of the two which is determinative.

8. Appeal and Error—Evidence—"Res Gestae"

Question whether given evidence comes within res gestae rule is left to discretion of trial judge and will not be disturbed unless a clear abuse of discretion is shown.

9. Appeal and Error—Evidence—“Res Gestae”

In prosecution for murder of defendant's wife, wife's statements that “I have been hurt with a cut in the back of my head” and “Singeru [defendant] did it”, made in response to her mother's inquiry as to what was wrong, when mother was sitting outside of house, heard someone shout “Singeru, you have hurted me” or “I am hurt”, immediately went inside, and defendant asked her to get a taxi to take her daughter to hospital and acknowledged that he was one who “hurt” her, were admissible under res gestae rule.

10. Appeal and Error—Evidence—“Res Gestae”

In prosecution for murder of defendant's wife, wife's statement that “My husband had thrown a knife and hurt my head”, made within approximately one hour after incident, at hospital to which she had been taken by her mother, and in response to nurse's question during examination for medical treatment, was admissible under res gestae rule.

11. Trial—Instructions—Special Judges

There is no requirement in statutes of Trust Territory or rules of High Court requiring presiding judge, in a trial without a jury, to instruct special judges concerning the law, as is required in a trial by jury; and procedure whereby presiding judge informs special judges of the law is discretionary. (5 TTC § 204(2))

12. Homicide—Malice

Malice aforethought, as applied to murder, is a question of fact and does not necessarily require ill will toward victim, but rather, signifies a general malignant recklessness toward others' lives and safety or a general disregard for ones' social duty; and where evidence was overwhelming that defendant threw a knife at his son and fatally wounded his wife as she attempted to protect child, the use of a deadly weapon to inflict a fatal wound was sufficient evidence for trial court to find requisite malice.

13. Criminal Law—Sentence—Modification

Imposition of sentence of 15 years imprisonment with suspension of last 10 years on conditions following conviction of second degree murder, where trial court made it clear that at time of sentencing, the five years imprisonment was imposed on defendant because trial court considered it to be a mandatory minimum under the penalty statute and therefore not subject to suspension, was in error, and trial court would be given an opportunity to consider whether any of the five years of imprisonment should be suspended, since trial court has authority to suspend a mandatory term of imprisonment provided by statute unless there is legislative intent to contrary and no contrary legislative intent was found. (11 TTC § 752)

14. Criminal Law—Rights of Accused—Allocution

Where trial court, in prosecution for murder in second degree, did not allow defendant to exercise his right of allocution as provided in Rules of Criminal Procedure, defendant was entitled to be resentenced, [overrul-

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ing trial court's holding in *Benemong v. Trust Territory*, 5 T.T.R. 22, 28 (Trial Div. 1970), that loss of right of allocution was sufficient to vacate judgment of guilt]. (Rules Crim. Procedure, Rule 14c(1))

Counsel for Appellant: Public Defender's Office, Palau
Counsel for Appellee: District Attorney's Office, Palau

Before BURNETT, *Chief Justice*, HEFNER, *Associate Justice*, and WILLIAMS, *Associate Justice*

WILLIAMS, *Associate Justice*

Defendant-Appellant was charged by information with murder in the second degree for unlawfully taking the life of his wife Ngedebus. He was convicted in the Palau District High Court of murder in the second degree and sentenced to fifteen (15) years imprisonment with the last ten years suspended upon conditions of good behavior. It is from this conviction and sentence that appellant appeals.

The record reveals that at approximately 6:00 p.m., March 1, 1970, in Koror Municipality, Palau District, the appellant threw a stainless steel kitchen butcher knife at his small son, Peter, to punish him for disobedience. Ngedebus, wife of the appellant, in an effort to protect the child, was struck in the back of the head by the knife thrown by appellant. As a result of the blow, Ngedebus received a penetrating wound three-quarters of an inch into her brain and died of a brain hemorrhage at 7:00 p.m., March 3, 1970, in the U.S. Naval Hospital on Guam.

Appellant's first assignment of error concerns the Trial Court's denial of appellant's motion to suppress physical evidence seized by the police without a warrant and statements made by the appellant to police officers while he was in custody.

Appellant was initially arrested on charges of assault with a deadly weapon, and fully advised of his rights on March 3, 1970, between 8:30 a.m. and 9:00 a.m. Appellant

declined to make a statement and requested assistance of counsel.

A police officer contacted the Public Defender's Office for appellant, and a representative of the Office went to the jail and consulted with him. Some time after appellant consulted with counsel, around 12:30 p.m., appellant was approached by a police officer, admonished that he had previously been advised of his rights, and shown a knife taken from his house on the day of the incident. Appellant then stated, "This is not the knife that I had at the time when I hurt my wife. The knife I used is stainless, which is much longer than this one." The police then went to appellant's house, obtained two stainless knives and showed them to the appellant with a request that he identify the one he used, and appellant identified one of the knives as the weapon used. Later the same day, appellant was released on bail. The victim died that same night and appellant was arrested the next day for the crime of second degree murder. After being fully advised of his rights, a second time, appellant declined to make any statement, and again requested assistance of counsel.

Although no formal statements were taken from appellant, the prosecution sought to introduce appellant's admission and subsequent identification of the murder weapon. Appellant attempted to suppress the statements and identification, contending they were involuntarily made without presence of counsel who the police knew represented him.

[1, 2] Appellant urges that after appointment of counsel, no interrogation can take place without counsel being notified and given an opportunity to be present, and absent such notice, he cannot properly waive his right to remain silent. The mere fact that appellant previously invoked his right to remain silent and consult with counsel does not necessarily render any subsequent statement or confession

inadmissible, as long as he is aware of his rights and voluntarily proceeds to answer questions. *United States v. Cobbs*, 481 F.2d 196, (3rd Cir. 1973); *State v. Nicholson*, 463 P.2d 633 (Wash. 1969). The Court in *Moore v. Wolff*, 495 F.2d 35, (8th Cir. 1974) stated the rule as follows:

If an accused can voluntarily, knowingly, and intelligently waive his right to counsel before one has been appointed, there seems no compelling reason to hold that he may not voluntarily, knowingly, and intelligently waive his right to have counsel present at an interrogation after counsel has been appointed. Of course, the Government will have a heavy burden to show that the waiver was knowingly and intelligently made, *Miranda v. Arizona*, supra, 384 U.S. at 475, 86 S.Ct. 1602, but we perceive no compelling reason to adopt the per se rule advocated by petitioner. In fact, *Miranda* expressly recognizes that such interrogation may continue without presence of counsel, though the burden of showing a knowing and intelligent waiver is a heavy one

Any determination concerning whether the prosecution has met its heavy burden of demonstrating a knowing and intelligent waiver as set forth in *Moore v. Wolff*, supra, must be made from the totality of the circumstances from the whole record. *United States v. Harden*, 480 F.2d 649 (8th Cir. 1973).

The Trial Court, after consideration of the totality of the circumstances, found the appellant's statements were voluntarily made after adequate notice of his rights and therefor admissible. We believe such finding to be clearly erroneous.

Although it was not improper for the police officer to show the knife to the appellant with a request for him to identify it, we believe it is extremely significant in this particular case that the officer did not again fully advise him, at least orally, of his rights. The statements of appellant were in response to a request by the police officers some four hours after he had been initially advised of his rights, at which time he declined to make any statement.

[3] We believe the fact that every other time appellant was fully advised of his rights and declined to make a statement, coupled with the fact he was not adequately advised of his rights prior to the police officer's request for him to identify the murder weapon clearly indicates he did not knowingly waive his right to remain silent; therefore the statement should have been suppressed by the Trial Court.

The physical evidence appellant sought to suppress was the knife used by him to inflict the fatal wound upon the deceased. The house from which the knife was taken was owned by Itwong, mother of deceased, and jointly occupied by Itwong, her husband Temengil, the appellant Singeru, his deceased wife Ngedebus, and three persons named Susan, Franciscia and Natuso. On the day of the incident, March 1, 1970, police officers went to the crime scene to investigate. Upon their arrival Susan and Franciscia were the only ones present at the house. The police asked to see the knife and the place the deceased was sitting when she was struck. The police were shown the scene by Susan and Franciscia, and Susan gave them a knife she believed to be the one thrown by the appellant. The officers took the knife to the police station and later, some time after his arrest on March 3, 1970, showed the knife to the appellant. When shown the knife, the appellant indicated it was not the knife he used, and that the knife he used was longer and made of stainless steel. A police officer then returned to the house to locate the knife described by the appellant. Upon his arrival at the house, he did not go in but asked one of the occupants if they had a stainless steel knife. She indicated they had two stainless steel knives and gave both of them to the police officer. The officer then took the two knives back to the police station where the appellant identified one of the knives as the one he used.

[4, 5] It is well established that a joint occupant of the premises can consent to a search. *United States v. Davis*, 327 F.2d 301, (9th Cir. 1964); *State v. Breckenridge*, 481 P.2d 26 (Wash. 1971). Although the procedures followed by the police officers were not illegal, we believe the evidence to be inadmissible under the "fruit of the poisonous tree" doctrine and therefore should have been suppressed by the Trial Court pursuant to appellant's motion. Where evidence is obtained as the result of an illegally obtained statement of the defendant, such evidence cannot be used against him, unless the evidence has "become so attenuated as to dissipate the taint." *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963). There is no question in this case that the sole basis of the police officer's acquisition of the murder weapon was the result of the statements of the appellant; therefore, the evidence is inadmissible.

[6] Although the statements of appellant to police officers and the physical evidence should have been suppressed, we do not consider admission of the evidence to constitute reversible error. Improperly admitted evidence is not ground for reversal unless there is actual prejudice to the defendant. *Murdock v. State*, 351 P.2d 674, (Wyo. 1960). The appellant's guilt is more than adequately established by the testimony of other witnesses; therefore, any error in this case is harmless. *State v. Barr*, 515 P.2d 840 (Wash. 1973)

Appellant also assigns error to the Trial Court admission into evidence of two separate statements made by the victim as part of the *res gestae*.

The first statement was adduced during the testimony of the victim's mother Itwong Temengil. It appears from the record that Itwong was sitting outside the house when she heard someone shout "Singeru, you have hurted me" or "I am hurt." (TR 23) She immediately went inside the house.

The appellant asked her to get a taxi to take her daughter to the hospital and acknowledged he was the one who "hurt" her. (TR 23-26). Itwong then asked the victim what was wrong and she said, "I have been hurt with a cut in the back of my head" (TR 27) and she further stated that "Singeru did it." (TR 27)

The second statement of the victim admitted by the Court was made to a nurse at the hospital within approximately one hour after the incident. The record reflects the deceased was immediately taken to the hospital by her mother. During an examination for medical treatment and in response to a question of the nurse, the deceased stated, "My husband had thrown a knife and hurt my head." (TR 100)

[7-10] A statement comes within the *res gestae* when made immediately before, during or following the event to which it relates, under such circumstances that the declaration is the product of the event and not of the declarant's deliberation. *Wharton's Criminal Evidence*, 13th Edition, Vol. 2, § 297-298, pp 60-78. The amount of time elapsed between the event and the statement together with the distance travelled by the declarant are factors to be considered in determining if the statement should be admitted as part of the *res gestae*, but there are no specific combinations of the two which are determinative, *Guthrie v. United States*, 207 F.2d 19 (D.C. Cir. 1953). The question whether given evidence comes within the *res gestae* rule is left to the discretion of the Trial Judge and will not be disturbed unless a clear abuse of discretion is shown. *Pietrzak v. United States*, 188 F.2d 418, (5th Cir. 1951). The Trial Court considered all of the relevant factors and we find no abuse of discretion in admitting the two statements as part of the *res gestae*.

Appellant's next assignment of error concerns the Trial Court's method of instructing the Special Judges about law applicable to the case.

[11] The Trust Territory Code 5 TTC § 204 requires the appointment of two Special Judges to act as Assessors in all murder cases and they participate with the Presiding Judge in deciding by a majority vote all questions of fact and sentence. *Helgenberger v. Trust Territory*, 4 T.T.R. 530, (App. Div. 1969). There is no requirement in the statutes of the Trust Territory or Rules of the High Court requiring the Presiding Judge to instruct the Special Judges concerning the law as is required in a trial by jury. The procedure whereby the Presiding Judges inform the Special Judges concerning the law applicable is discretionary.

We have reviewed the record and find no error in the procedures utilized by the Presiding Judge to advise the Special Judge concerning the law nor do we find any error in the nature of the "instructions" given by the Presiding Judge.

[12] Appellant further contends on appeal that the evidence does not support the finding of the Court and is not in accord with applicable law. The evidence is overwhelming that appellant threw a knife at his small son and fatally wounded his wife as she attempted to protect the child. The element of malice aforethought, as applied to murder, is a question of fact and does not necessarily require ill will toward the victim but signifies a general malignant recklessness toward others' lives and safety or a general disregard for ones' social duty. *Theford v. Sheriff of Clark County*, 476 P.2d 25, (Nev. 1970). The use of a deadly weapon to inflict a fatal wound as in this case is sufficient evidence for the Court to find the requisite malice. *State v. Intonga*, 419 P.2d 59, (Ariz. 1966). We find the

evidence clearly supports the finding of the Court and the Judgment is in accord with the applicable law.

Appellant also contends the sentence imposed by the Court is contrary to the law.

[13] The Court sentenced appellant to 15 years imprisonment and suspended the last 10 years on conditions. The Trust Territory Code 11 TTC § 752 provides that every person upon conviction of second degree murder shall be imprisoned for a period of not less than five years or for life. The Trial Court made it clear, at the time of sentencing, the five years imprisonment was imposed on defendant because the Court considered it to be a mandatory minimum under the 11 TTC § 752, therefore not subject to suspension by the Court. This Court has previously held in *Mad v. Trust Territory*, 6 T.T.R. 550, (App. Div. 1973), that the Trial Judge has the authority to suspend a mandatory term of imprisonment provided by statute, unless there is legislative intent to the contrary. We find no contrary legislative intent and therefore the Trial Court should be given the opportunity to consider whether any of the five years of imprisonment should be suspended.

[14] A further reason this matter should be remanded for sentencing is that the Trial Court did not allow the appellant to exercise his right of allocution as provided in Rule 14c(1), Trust Territory Rules of Criminal Procedure. We expressly overrule the Trial Court's holding in *Benemong v. Trust Territory*, 5 T.T.R. 22 (Trial Div. 1970), that loss of the right of allocution is sufficient to vacate a judgment of guilt. However, we do believe denial of an appellant's right to allocution entitles him to be resentenced. *Jenkins v. United States*, 249 F.2d 105, (D.C. Cir. 1957).

We have considered appellant's other assignments of error and find them to be without merit; therefore, they will not be discussed herein.

Appellant's conviction of murder in the second degree is hereby AFFIRMED. The sentence imposed by the Court is vacated and the case is remanded to the Trial Division for reimposition of sentence.

HEFNER, *Associate Justice*, concurring

I concur in the decision of the Majority of the Court to affirm the conviction and remand for imposition of the sentence.

However, I would find that the Trial Court did not commit error in denying the motion to suppress the statements and physical evidence.

There is no question the defendant was initially fully advised of his rights and must have completely understood them as he refused to make a statement and requested assistance of counsel. The appellant conferred with counsel and thereafter a police officer confronted the appellant with a knife. As the Majority concedes, the appellant was "admonished that he had previously been advised of his rights." The appellant then made a voluntary incriminating statement and provided information which prompted the police to go back to appellant's house for the knife the appellant used in the homicide.

The Trial Court found that the appellant made a knowing and intelligent waiver after he had consulted counsel as required by *Moore v. Wolff*, 495 F.2d 35 (8th Cir. 1974). I would not disturb that finding. The "totality of the circumstance" reinforces the finding of a knowing and intelligent waiver even though the burden of proof is a heavy one on the prosecution.

The impression left by the Majority of the Court is that the police must advise a defendant in custody in a criminal case of his rights each time they talk to him. This is not required by *Miranda v. Arizona* nor any case following

thereafter. To initiate such a requirement would impose an almost impossible burden on the police and open the door for attacks on every statement made by a defendant in a criminal case where there is interrogation at various times, and it is not clear whether the full rights were given to the defendant each time.