

the fine finally imposed or the total already paid if the case is disposed of without the imposition of any fine upon new trial, is then to be returned to the accused Timas.

LORNIS and ROFINA, Appellants

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Case No. 117

Trial Division of the High Court

Truk District

December 23, 1959

Appeal from conviction in Truk District Court of adultery in violation of local custom under T.T.C., Sec. 434. Appellant claims that complaint did not properly charge crime, that sole witness for prosecution served as assessor, and that evidence was insufficient to support conviction. The Trial Division of the High Court, Chief Justice E. P. Furber, held that defects in complaint must be objected to by motion before trial, that witness for prosecution could not serve as assessor, and that evidence was insufficient to prove adultery beyond a reasonable doubt.

Reversed and remanded.

1. Criminal Law—Complaint—Defect

Objection that complaint in criminal proceeding is improperly drawn must be raised by motion before trial. (Rules of Crim. Proc., Rule 9)

2. Criminal Law—Complaint

Where complaint sufficiently charges persons accused with having committed adultery with each other, in violation of local custom and at place within jurisdiction of court and on date within statute of limitations, and complaint cites Code section violated, accused could not have been misled to their prejudice. (T.T.C., Sec. 434)

3. Criminal Law—Complaint—Defect

Failure to present defense or objection to defect in complaint, information or citation by motion before trial constitutes waiver of such defense. (Rules of Crim. Proc., Rule 9)

4. Criminal Law—Complaint—Defect

Criminal complaint must refer to provision of law which accused is alleged to have violated, but error or omission may be corrected by leave of court any time prior to sentence, and is not ground for reversal if not misleading to accused's prejudice. (T.T.C., Sec. 445a)

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5. Criminal Law—Witnesses

Person serving as witness in criminal prosecution may not also serve as assessor to judge.

6. Criminal Law—Admissions

In criminal case where accused pleads not guilty, admissions in open court should not be accepted in place of evidence unless they are clear and voluntarily made and with understanding of effect.

7. Criminal Law—Admissions

In criminal prosecution, mere ambiguous statement of accused in open court is insufficient evidence to show adultery beyond reasonable doubt.

8. Truk Custom—Divorce—Recording

Under Truk custom, marriage may be dissolved by either spouse at any time at will without action by any court, Magistrate or official. (T.T.C., Sec. 714)

9. Truk Custom—Divorce—Criminal Liability

Under Truk custom, "throwing away" of spouse does not constitute crime.

10. Truk Custom—Adultery

Presumption under Truk custom, that person who has "thrown away" spouse has committed adultery before the "throwing away," is not strong enough to make evidence of "throwing away" sufficient in itself to prove adultery beyond a reasonable doubt on part of one throwing spouse away.

11. Truk Custom—Adultery

Since parties who are married under Truk custom cannot commit customary crime of adultery with each other, question as to whether intercourse occurred before or after customary divorce from former spouse is of utmost importance in prosecution for adultery.

<i>Assessor:</i>	JUDGE ICHIRO MOSES
<i>Interpreter:</i>	F. SOUKICHI
<i>Counsel for Appellants:</i>	ANDON L. AMARAICH
<i>Counsel for Appellee:</i>	MITARO S. DANIS

FURBER, *Chief Justice*

These appeals are from convictions of both accused (in the same case) of the offense designated by the court as "Limitation on Punishment for Violation of Native Custom" in violation of Trust Territory Code Section 434. It

appears from the complaint taken as a whole, however, that what the accused were really charged with was adultery in violation of local custom.

Counsel for appellants, in his oral argument, raised three grounds of appeal, namely, (1) that the complaint did not properly charge any specific crime, (2) that according to the record the sole witness for the prosecution also sat as assessor in the case, and (3) that the evidence was insufficient to support a conviction for either adultery in violation of local custom or any other crime.

Counsel for the appellee argued that the court should make allowance for the limited training and experience of the trial assistants in the Mortlocks. He admitted that technically there was not enough evidence alone to show adultery, but contended that the fact that the accused when called upon to plead, had stated "For sweetheart, yes it's true" constituted an admission which, added to the evidence, was sufficient to support the conviction even though pleas of "not guilty" had been entered.

OPINION

[1-4] 1. The appellants' first point, namely, that the complaint was not properly drawn, would have had merit if it had been raised by motion before trial. It is clear that the wrong title was used for the crime alleged and also that the law alleged to have been violated was not correctly stated. Taking the complaint as a whole, however, it is believed that it sufficiently charged the accused with adultery committed between each other on or about a particular date, well within the statute of limitations, and at a place within the jurisdiction of the court, in violation of local custom, and that the additional reference to its being allegedly in violation of Trust Territory Code Section 434, specifying the limitation on punishments for violation of native custom, could not have misled either ac-

cused to his prejudice. Certainly there has been no showing that either was prejudiced thereby.

2. Rule 9 of our Rules of Criminal Procedure provides in part as follows: "Defenses and objections based upon defects in the institution of the prosecution or in the statement of the charge or charges (whether in an information, complaint, citation, or otherwise), other than that the court lacks jurisdiction or that no offense has been charged, may be raised only by motion before trial. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver."

The Trust Territory Code Section 445(a) also provides in part as follows:

"The complaint shall refer to the Regulation, Ordinance, District Order, native custom, or other provision of law which the accused is alleged to have violated, but any error in this reference or its omission may be corrected by leave of court at any time prior to sentence and shall not be ground for reversal of a conviction if the error or omission did not mislead the accused to his prejudice."

It is therefore too late at this time to raise any such technical points as to the wording of the complaint, as a ground for reversal.

[5] 3. The appellants' second point, namely, that the sole prosecution witness also served as assessor, is most disturbing to this court. It is utterly contrary to the whole spirit of a fair and impartial trial to have one of the material witnesses for one side, to say nothing of the sole witness for that side, also act in such a confidential relation to the court as is expected of an assessor. It is believed that the same considerations which under Section 181 of the Trust Territory Code, would disqualify a judge from sitting in any case, should also disqualify a person from sitting as assessor. This use of a material witness as assessor is, at least, most irregular, and it is hoped that all Trust Territory Courts will avoid doing so in the future.

The danger of prejudice from this, it would seem, must have been so obvious at the time of trial and could so easily have been avoided by the trial court if it had been called to its attention at the time, that it may be the appellants should be considered to have waived any objection to it by not objecting at the time of the trial, but fortunately in this case, it is not necessary to decide whether there was any such waiver, as the decision of the District Court must be upset for other reasons.

[6, 7] 4. There is clearly insufficient evidence in the record to show adultery beyond a reasonable doubt unless it is to be inferred from the statement, "For sweetheart, yes it's true", which the accused made when called upon to plead. Exactly what, if anything, they meant to admit by these words is not at all clear. In the trial court, the prosecutor stated that he didn't want this word "sweetheart" to be admitted, apparently on the theory that this implied or was a claim of a defense which he did not think was applicable. It is clear from the entire record, however, that they did not intend to admit they had committed any crime. In criminal cases in which an accused pleads "not guilty", admissions of the accused in open court should not be accepted in place of evidence unless they are clear and voluntarily made with a good understanding of their effect. In this instance, the court holds that the evidence, even aided by the words quoted above, is insufficient to show that the accused had been guilty of adultery beyond a reasonable doubt.

[8-11] 5. The sole witness for the prosecution, although he twice testified that the accused Lornis had a wife named Mino, also testified later that Lornis "threw away" Mino, apparently referring to the common method of divorce under Trukese custom. There is no indication in the record whether the divorce under Trukese custom

occurred before or after the alleged adultery. For the guidance of all concerned in the new trial ordered in this case, attention is invited to the fact that this court has already held in the case of *Purako v. Efou*, 1 T.T.R. 236, which arose in the Truk Atoll, that under Trukese customary law any marriage may be dissolved by either spouse at any time at will without action by any court, magistrate, or other official, and that under Trukese custom, the "throwing away" of a spouse does not constitute a crime. This court is well aware of the many difficulties and misunderstandings which have been caused in the Truk District by the very different way in which the average American speaks of and thinks of a divorce case from that in which a Trukese does, and that there is a pretty strong presumption among Trukese that a person who has "thrown away" his or her spouse, has been guilty of adultery before the "throwing away", unless it is clear that the spouse "thrown away" was guilty of adultery. This court is clear, however, that this presumption, particularly in view of the limitation on it indicated above, is not strong enough to make evidence of the "throwing away" of a spouse sufficient in itself to prove adultery, beyond a reasonable doubt, on the part of the one throwing the spouse away. Of course if neither of the accused was legally married, or if they were legally married to each other, at the time of the alleged sexual intercourse, the intercourse could not constitute adultery. The question of whether any divorce which Lornis may have obtained under Trukese custom was before or after the alleged intercourse is, therefore, of the utmost importance. In this connection, attention of all concerned is also invited to the memorandum of December 20, 1954, which was sent by the Chief Justice and the then Associate Justice to the District and Community Court Judges in the Truk District on the subject of "Divorce Under Local Custom in the Truk District", in

which we endeavored to clarify a number of points concerning such divorces and to reduce misunderstandings concerning them. While the court recognizes the possibility that there might be some variation between the customary law in Truk Atoll and that in the Mortlocks, all concerned are urged to give careful consideration to the matters referred to in this paragraph before proceeding with the new trial.

JUDGMENT

The findings and sentences of the District Court for the Truk District in its Criminal Case No. M-88, are hereby set aside and the case remanded to the District Court for new trial upon a new or amended complaint, or an information, properly setting forth such charge or charges as the Government feels are warranted by the facts after careful consideration of them and the foregoing opinion.