

JESUS A. SONODA, Appellant
v.
TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee
Criminal Appeal No. 55
Appellate Division of the High Court
Mariana Islands District
November 16, 1976

Prosecution for obtaining government funds by false pretenses. The Appellate Division of the High Court, Brown, Associate Justice, held that defendant, convicted of false pretenses and punishable by maximum imprisonment not to exceed five years, was not entitled as of right to statutory preliminary hearing as to probable cause nor to trial by jury, and that defense of selective prosecution was not a valid defense.

1. Constitutional Law—Due Process—Particular Cases

Defendant, convicted of cheating and false pretenses by filing fraudulent document under which he sought and obtained \$144 from government as reimbursement for claimed expenditures for rental of automobile, was not denied right of due process by government's lack of written regulations governing travel voucher payments to guide traveller and point out to him that he was not entitled to reimbursement of funds not actually expended by him. (11 TTC § 853)

2. Constitutional Law—Jury Trial

In determining whether defendant, who made timely request for jury trial which was denied, had been denied of his rights to due process and equal protection of law, reviewing court must be guided by laws in force in Trust Territory unless it finds those laws to be such as to require court to hold them to be invalid.

3. Constitutional Law—Jury Trial

Statute which gives right to trial by jury limits jury trials to cases where jurisdiction lies exclusively with Trial Division of High Court. (5 TTC § 501)

4. Criminal Law—Defenses—Selective Prosecution

Fact that other persons obtained money from government by false pretenses but were not prosecuted for their misdeeds was no defense for defendant convicted of seeking and obtaining \$144 from government by filing fraudulent document for claimed expenditures for rental of automobile.

5. Criminal Law—Probable Cause—Charge

Purpose of preliminary hearing statute is to determine whether or not probable cause exists, and if it does not, to assure prompt dismissal of charges against accused person. (12 TTC § 67(2))

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6. Criminal Law—Probable Cause—Hearing

Where a justice of the High Court is physically present at place of trial, statutory preliminary hearing is not a matter of right, but a matter of discretion that rests with Trial Division of High Court. (12 TTC § 67(2))

7. Criminal Law—Probable Cause—Hearing

Where no justice of the High Court is present at place of trial and an accused is detained or otherwise in a position where his liberty is substantially restrained, accused is entitled to prompt determination as to whether or not there is probable cause that he is guilty of crime with which he is charged, which is accomplished by statutory preliminary hearing. (12 TTC § 67(2))

8. Criminal Law—Probable Cause—Hearing

Where defendant had not been detained, and at all times pertinent a justice of High Court was present and available to hear matters properly before the court and to rule upon them, and in exercise of his sound discretion justice deemed that defendant's motion for preliminary hearing should be denied, Appellate Division would not interfere with trial court's exercise of its discretionary powers. (12 TTC § 67(2))

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General*

Before HEFNER, *Acting Chief Justice*; Brown, *Associate
Justice*; PEREZ, *Designated Judge*

BROWN, *Associate Justice*

Appellant was convicted of a violation of 11 TTC 853 (Cheating, False Pretenses), the maximum penalty for that offense being imprisonment for a term not to exceed five (5) years.

The gravamen of the charge is that on or about April 18, 1974 Appellant filed with the Trust Territory Government a fraudulent document under which he sought and obtained the sum of \$144.00 (one hundred and forty-four dollars) as reimbursement for the claimed rental of an automobile on Rota, Mariana Islands, during a period of several days in

February, 1974, and thereby intended to and did permanently defraud the rightful owner of those funds.

Several grounds for appeal are urged. The first two grounds considered by us may be disposed of summarily; they are without merit. It is basic law that to support a conviction each and every element of the crime charged must be proved beyond a reasonable doubt. *In re Winship*, 397 U.S. 538; 390 S.Ct. 168 (1970). We agree with that proposition, but we do not agree with Appellant's contention that the prosecution failed to establish that Appellant intended to defraud the Government. A review of the transcript convinces us that the evidence properly brought before and considered by the trial court was more than sufficient to sustain its finding of guilt. This being so, an appellate court cannot reweigh that evidence.

[1] The contention that the Government's lack of written regulations governing travel voucher payments denied Appellant his due process right likewise is wholly without merit. The evidence established that he received funds from the Government as reimbursement for expenditures he claimed to have made but, in truth and in fact, had not made. Written regulations are not needed to guide the traveller and point out to him that he is not entitled to reimbursement of funds not actually expended by him.

[2] Appellant made a timely request for a trial by jury, and that request was denied by the trial court. It is argued that this denial constituted a violation of Appellant's rights to due process and to equal protection of the law. Had this question arisen before a Federal Court in the United States of America, Appellant's position would perforce prevail under the provisions of the Sixth Amendment to the Constitution of the United States which guarantees the right to trial by jury. However, we must be guided by the laws in force in the Trust Territory unless we find those laws to be such as to require us to hold them to be invalid.

In 1 TTC Section 4 (sometimes called the Bill of Rights of the Trust Territory), certain inalienable rights are enumerated. Conspicuous by its absence is the right to trial by jury. Instead, 5 TTC Section 501 provides that an accused may effectively demand a trial by jury only where the potential punishment exceeds five (5) years and/or a fine in excess of \$2,000.00 (two thousand dollars). Further, there can be no right to trial by jury until after the District Legislature in the District where a jury trial is to be held has adopted the provisions of 5 TTC Section 501.

The only Trust Territory case which has considered this matter is *Sechelong v. Trust Territory*, 2 T.T.R. 526 (Tr. Div. 1964). That Court, speaking through then Chief Justice Furber, stated at page 530:

Under the Trusteeship Agreement the United States, as administering authority, may apply to the Trust Territory, subject to any modifications which the administering authority may consider desirable, such laws of the United States as it may deem appropriate to local conditions and requirements. It therefore appears clear to the Court that any right to jury trial in the Trust Territory must depend on some specific action of the administering authority and that United States constitutional provisions on this subject do not of themselves apply to the Trust Territory, which has clearly not been incorporated into the United States. The Court is unable to find any such specific action extending the right of jury trial to this area. The Trust Territory Code clearly makes no provision for jury trials and its provisions, particularly those dealing specifically with murder trials, appear inconsistent with the thought of jury trials. The Court therefore holds that there is at the present time no right to trial by jury in the Trust Territory.

[3] Some time after *Sechelong*, 5 TTC Section 501 was promulgated which gives a somewhat limited right to trial by jury. It would appear that provision was sought to provide for jury trial only in cases where jurisdiction lay exclusively with the Trial Division of the High Court and to bar jury trials in the District Courts. Those cases which could be tried before District Courts clearly were not

regarded as being so serious as to warrant being tried by juries.

In the United States, several of the States have provided certain "cut-off lines" between those cases where jury trials are a matter of right and those where they are not. See: *Ludwig v. Massachusetts*, 44 L.W. 5173 (U.S.S.C., June 1976.) It is clear that these "cut-off lines" are far below that established in the Trust Territory, but they have come before the Supreme Court of the United States and have been found to be valid. It appears to us that the matter is merely one of degree coupled with the recognition of the Congress of Micronesia that not a single Judge of the District Court has formal legal training.

Appellant next contends that he was refused the opportunity to raise the defense of selective prosecution. A close reading of the transcript leaves some doubt as to what Appellant sought to establish, although we infer that it was Appellant's purpose to bring before the Court and attempt to establish as a defense that other persons obtained money from the Government by false pretenses but were not prosecuted for their misdeeds. There is a split of authority on the question of selective prosecution. In *Murguia v. Municipal Court*, 540 P.2d 44 (Cal.), the Supreme Court of the State of California held that under a proper showing selective prosecution is a valid defense. On the other hand, the traditional rule that it is not, is set forth in *Grell v. United States*, 112 F.2d 861, 875-76, where the Court stated:

That others are violating the laws is no defense to the prosecution of an accused person, whether the fact should be deemed to extenuate or aggravate a particular offense may be relevant to the punishment, not to question of guilt or innocence.

[4] We believe that *Grell* adopts the better rule. Appellant relies upon *United States v. Berrigan*, 482 F.2d 171 (C.A.3, 1973) in support of his contentions concerning

his allegations of selective prosecution. A reading of *Berrigan* reveals that not only does it not support the position taken by Appellant; it supports the prosecution and makes clear that the rulings of the justice presiding at the trial were correct. We note, too, that the court in *Berrigan* cited with approval the observation made by Chief Justice (then Circuit Judge) Burger in *Newman v. United States*, 382 F.2d 479, 480 (App. D.C., 1967) who stated that:

Few subjects are less adopted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.

[5-8] Finally, Appellant urges that the failure to grant him a preliminary hearing constituted such error as to require a dismissal of the charge in spite of the finding of guilt. We disagree. The contention regarding preliminary hearing in the Trust Territory is a matter that seemingly has confused many persons who come before the Trial Division of the High Court. In this jurisdiction, preliminary hearings are governed by the provisions of 12 TTC Section 67(2). In essence, the purpose of this statute is to determine whether or not probable cause exists, and if it does not, to assure the prompt dismissal of charges against the accused person. It was properly recognized that a certain District may be without the presence of a justice of the High Court for extended periods of time. Under those circumstances, provision had to be made to protect the substantial rights of the person accused. It was determined that such rights under the circumstances we have related could best be safeguarded by the utilization of preliminary hearings. However, where a justice of the High Court is physically present at the place set for trial, the reason for utilization of a preliminary hearing ceases, for the presence of the justice of the High Court will assure a speedy trial,

and any substantial rights of the person accused that might otherwise be in jeopardy can be protected by the High Court. Where a justice of the High Court is physically present at the place of trial, as was the case here, a preliminary hearing is not a matter of right; it is a matter of discretion that rests with the Trial Division of the High Court. That court may or may not direct that a preliminary hearing be held. However, if no justice of the High Court is present at the place set for trial, and if the person accused is actually detained or otherwise in a position where his liberty is substantially restrained, then, and in that event, he is entitled to a prompt determination as to whether or not there is probable cause that he is guilty of the crime with which he is charged. This is accomplished through a preliminary hearing which then becomes a matter of right. In the case now before us, Appellant had not been detained, his liberty had not been restrained, and at all times pertinent a justice of the High Court was present and available to hear matters properly brought before the court and to rule upon them. In the exercise of his sound discretion he deemed that Appellant's motion for preliminary hearing should be denied. We shall not interfere with the trial court's exercise of the discretionary powers it so obviously possessed.

In view of the foregoing, the Judgment of the trial court is affirmed and the cause remanded for further proceedings in connection with the matter of restitution which had heretofore been stayed by the latter Court pending the determination of this appeal.