TRUST TERRITORY OF THE PACIFIC ISLANDS

v.

JESUS NGIRAITPANG

Criminal Case No. 244

Trial Division of the High Court

Mariana Islands District

December 15, 1970

Criminal case wherein accused was charged with the crimes of rape and burglary. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that where the identification in court of accused was not derived from any unfair or suggestive police procedure and it arose from the circumstances surrounding the crime itself the absence of counsel did not deprive defendant of counsel at a critical stage of the investigation leading to his trial and held further that the resistance offered by the prosecutrix was legally sufficient to establish that the accused was guilty of rape.

1. **Courts—High Court**

   While the Trial Division of the High Court is not bound by the United States Supreme Court decisions it should recognize such precedents as goals to be reached so far as they are applicable to conditions existing in the Trust Territory.

2. **Criminal Law—Rights of Accused—Counsel**

   When the police arrange a lineup or other identification proceedings the suspect, whether he be charged or not, is entitled to have the Public Defender or his representative, or other defense counsel present; the suspect must be so advised and if he requests counsel the proceedings may not be held until counsel is present.

3. **Criminal Law—Rights of Accused—Counsel**

   Where the identification of the accused in court was not derived from any unfair or suggestive police procedure and it arose out of the circumstances surrounding the crime itself, the absence of the public defender or his representative did not improperly deprive the accused of counsel at a critical stage of the investigation leading to his trial.

4. **Criminal Law—Burden of Proof—Reasonable Doubt**

   Even though the defendant was connected with the charged crimes, it became the obligation of the prosecution to prove beyond a reasonable doubt that the event was in fact a crime.

5. **Rape—Consent**

   The theory that a 50-year-old woman consented to intercourse in her home with a man she had never seen before at 4:00 o'clock in the morning is not credible.

6. **Rape—Consent**

   The absence of physical resistance does not establish consent.

7. Rape—Consent

It is primarily for the woman who is attacked to decide to what extent, if at all, she can safely resist and the law allows a woman a free choice of what she may consider the lesser of two evils.

Assessor: IGNACIO V. BENAVENTE, *Presiding District Court Judge*

Interpreter: IGNACIO C. BENAVENTE

Court Reporter: ELSIE T. CERISIER

Counsel for Prosecution: ROBERT I. BOWLES, *District Attorney* and MIGUEL M. SABLAN, *District Prosecutor*

Counsel for Accused: ROGER L. ST. PIERRE, *Public Defender*, and JESUS SONADA, *Public Defender's Representative*

TURNER, *Associate Justice*

The accused was charged with the crime of rape and, in connection with gaining access to the house where the crime was committed, with the crime of burglary. At a pretrial conference both the District Attorney and Public Defender requested the court to decide the legal propriety of the out-of-court identification procedure employed by the police.

The question was to be examined in the light of three U.S. Supreme Court decisions and related cases: *U.S. v. Wade*, 388 U.S. 218, 87 S.Ct. 1926; *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951; and *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967.

These cases set forth a U.S. Supreme Court "first impression" rule granting an accused the right to the presence of counsel at any time he is confronted—whether in a lineup or showup—barring a waiver (knowingly after proper explanation and admonishment of his rights) or exigent circumstances such as when the victim is dying or possibly in res gestae situations where a suspect is arrested at the scene of the crime and taken to the victim.

The rule arises from the U.S. Constitutional provisions, whose counterparts are found in Section 4, Trust Territory Code, that an accused shall not be compelled to be a witness against himself and shall "have the assistance of counsel for his defense."

The U.S. decisions are in two major parts: (1) the defendant does not have a right to refuse to appear in an identification lineup nor speak for voice identification purposes. The Court also pointed out it has held the privilege against self-incrimination offers no protection against compulsion to provide a blood sample, to try on an item of clothing, to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk or to make a particular gesture. *Wade* at 87 S.Ct. 1930. The second aspect of the U.S. decisions and the one applicable to the present case concerns the right to have defense counsel present during any police identification proceedings. Confrontation for identification is a "critical stage" under the rule of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602.

The court pointed out in *Wade* that the conditions under which a pre-trial, or even pre-arrest, identification made may be so suggestive as to preclude "fair trial" to the accused, that by the presence of defense counsel this unfairness, when it occurs, may be exposed or perhaps avoided. The court said:—

"Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup (for identification), which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial there can be little doubt that for Wade the postindictment lineup was a critical stage of the prosecution at which he was as much entitled to such aid of counsel as at the trial itself."

[1] This court is not bound by the U.S. Supreme Court decisions. But as was pointed out in *Trust Territory v. Poll*, 3 T.T.R. 387, 392, the same Constitutional guaranties are in the Bill of Rights of the Trust Territory Code, it is United States law applied and "practiced" here, and that the United States is the political administrator. Accordingly, this court should recognize the U.S. Supreme Court precedents "as goals to be reached so far as they are applicable to conditions existing in the Trust Territory."

We observe that in *Poll* the moderate dissenting opinion of the U.S. Court was adopted—not the majority view. Also, that in *Meyer v. Trust Territory*, 3 T.T.R. 586, the Appellate Division declined to even consider the rule in *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, because "we simply recognize Trust Territory realities."

The law in the U.S. Supreme Court of the rights and privileges of an accused to counsel and the law in the Trust Territory since 1965 when *Meyer* was decided has made substantial and perhaps startling progress in recognizing the rights of an individual suspected of crime.

In *Escobedo* the Supreme Court held "that the right to counsel was guaranteed at the point where the accused, prior to arraignment, was subjected to secret interrogation despite repeated requests to see his lawyer." (*U.S. v. Wade*, 87 S.Ct. 1926, 1931.) Counsel must be made available, upon request, it was held, whenever a person was "in custody" on suspicion and had not yet been formally arrested and charged.

In *Miranda v. Arizona*, supra, the Supreme Court went even further and laid down an entire set of rules concerning an individual's rights and privileges in custodial interrogation. The court explained in *Wade* at 87 S.Ct. 1932:—

". . . the rules established for custodial interrogation included the right to the presence of counsel. The result was rested on our finding that this and other rules were necessary to safeguard the

privilege against self-incrimination from being jeopardized by such interrogation."

Now the Supreme Court has taken another step in protection of a criminal suspect. *Wade* says he is entitled to counsel not only when he is being questioned by the police but also he is entitled to the presence of counsel during a "confrontation" for the purpose of identification.

It is observed that *Wade* and accompanying decisions was by a very divided Court. The majority in each instance concurred in the result rather than the reasoning reaching that result. It cannot be said these conflicting opinions constitute a mandate upon this Court. It can be said the result reached makes good sense and can be applied in the Trust Territory.

[2] When the police arrange a lineup or other identification proceedings the suspect, whether he be charged or not, is entitled to have the Public Defender or his representative, or other defense counsel, present. The suspect must be told this by the police and if he requests counsel the proceedings may not be held until counsel is present.

In effect this is the same as the rule governing presence of counsel at questioning sessions, only it is applied to identification proceedings. In *Poll* the Chief Justice allowed 90 days before the rule as to counsel at interrogation became effective. The court said at 3 T.T.R. 397:—

"The United States Supreme Court itself recognized that the safeguards which it has established in the *Escobedo* and *Miranda* cases are so new that in the public interest they should not be applied retroactively . . . . Similarly this court believes that prosecuting authorities in the Trust Territory should have reasonable notice before any such new standards are to be applied here. . .".

The significance of this new rule is that it gives defense counsel, first, an opportunity to judge whether the identification of a suspect by the victim of the crime or other witness is fairly conducted and is not suggestive of the re-

sult the police believe should be reached as to identity and, secondly, if the proceedings are unfair or prejudicial to the suspect defense counsel may be able to prevent an in-court identification if it stems from the out-of-court tainted proceedings. Thus the only identification available to the prosecution for the trial record is a convincing showing that the in-court identification had an independent origin. That it did not arise out of the tainted pre-trial proceedings, but that it stemmed in some fashion from the crime itself.

[3] In the present case the court is convinced the identification in court was not derived from any unfair or suggestive police procedure and that it arose out of the circumstances surrounding the crime itself. Thus the absence of the Public Defender or his representative did not improperly deprive the defendant of counsel at a "critical stage" of the investigation leading to his trial.

The first time the prosecutrix saw the defendant was two days after the attack. She was asked to come to the police station, where she sat in a room looking out of a window and there briefly saw the defendant walk by outside and alone. He had been called by the police for questioning and then released.

Later that day the prosecutrix rode in a police car through the village of San Antonio, where she, and it developed, the defendant lived. She spotted the defendant in a group of "three or four" persons. The police car did not stop as they passed the group.

Subsequently, the prosecutrix stood in a doorway and heard the defendant speak. His back was toward her and he had responded to a statement by an officer that he was being arrested and charged with the crime of rape.

If this had been the sole identification evidence it, in itself, was not sufficient to unfairly prejudice the defendant due to the absence of his counsel. *Stovall v. Denno*,

supra, teaches that not every identification requires the presence of counsel.

But in the present case more important, for identification, were the circumstances of the crime and the prosecutrix' statement:—

"I'll never forget that face."

The prosecutrix, by her calculation, had been nearly an hour in a semi-lighted room with the defendant and two or three times at the beginning the room light had been turned on briefly. The out-of-court viewing demonstratedly was performed to assist the police rather than a contrived proceeding by the police to construct identity in the prosecutrix' mind.

Even under the police lineup circumstances of *Wade*, the U.S. Supreme Court returned the case to the trial court to determine whether or not "the in-court identification had an independent source, or whether, in any event, the introduction of the evidence (pre-trial identification) was harmless error."

Having determined the in-court identification was not tainted by improper proceedings prior to trial, the question next to be considered was whether the offense had been committed, even though it was now established the defendant was involved in the affair.

[4] Even though the defendant was connected with the charged crimes, it became the obligation of the prosecution to prove beyond a reasonable doubt that the event was in fact a crime. In short, was the prosecutrix raped?

She told of the attack upon her, testified there had been intercourse, that it was against her will, that she did not resist but submitted "to save my life." That the defendant told her, "I have a gun. I am going to kill you." That she was terrified.

The prosecutrix' testimony was not contradictory, it was consistent and reasonable and bore on its face inherent

probability that the crime of rape had been committed. The defense offered no testimony but relied on the prosecution evidence to show there had been no physical resistance by the prosecutrix and therefore there had been submission with consent rather than against the will of the prosecutrix.

[5, 6] The theory that a 50-year-old woman consented to intercourse in her home with a man she had never seen before at 4:00 o'clock in the morning is not credible. The absence of physical resistance does not establish consent.

The necessity for resistance is treated in 44 Am. Jur., Rape, §§ 6 and 7. To select from the generalities there set forth does not solve the sole defense element of the present case.

[7] The California statute on rape has been interpreted on the question of the "necessity" for resistance in *People v. Lay*, 153 P.2d 379, a case which is quite similar to the one before this court. The defense in the California case was that the prosecutrix consented to the intercourse because she did not physically resist. The California court said:—

> "It is primarily for the woman who is attacked to decide to what extent, if at all, she can safely resist. Under such circumstances as the record here shows the law allows a woman a free choice of what she may consider the lesser of two evils and the prosecutrix had a right to choose between rape and possible strangulation."

Applying the California rule to the present case, it must be decided as a question of fact, that the resistance offered by the prosecutrix was legally sufficient. The defendant was accordingly guilty of the offense of rape and in order to enter the house to perpetrate the crime he also was guilty of burglary.

It is the judgment of the court that the defendant, Jesus Ngiraitpang, is guilty as charged.