TRUST TERRITORY OF THE PACIFIC ISLANDS

v.

CHARLES P. MILLER

Criminal Appeal No. 34

Appellate Division of the High Court

June 1, 1972

Appeal from second degree murder conviction. The Appellate Division of the High Court, Arvin H. Brown, Jr., Associate Justice, held that conviction would be reversed where evidence raised presumption of guilt of some offense, but did not show what offense.

1. **Homicide—Murder in Second Degree—Evidence Held Insufficient**

   Where two men and a woman were stranded for two months on a boat that had run aground on a reef, one of the men and the woman were rescued, the next day the man, defendant, stated in an affidavit that the other man fell overboard at night and was last seen face down being carried away by a current so strong as to make rescue probably impossible and too risky, and a few days later the man was found dead in the forward hold of the grounded boat as a result of being shot in the back of the head, all of the evidence was circumstantial and there was no direct evidence bearing upon what actually happened; and though it was established beyond a reasonable doubt that death was due to accident, negligence or homicide, it was not established beyond a reasonable doubt which was the case and conviction of second degree murder would be reversed.

2. **Appeal and Error—Scope of Review—Weight of Evidence**

   It is not the function of the Appellate Division to weigh evidence.

3. **Evidence—Hearsay**

   Generally, hearsay may not be allowed to lift itself by its own bootstraps to the level of competent evidence.

4. **Homicide—Murder in Second Degree—Hearsay**

   Where defendant on trial for murder of man he had been stranded on boat with had stated by affidavit that man had fallen overboard at night and that strong current made rescue probably impossible and too risky, and man was later found dead in forward hold of boat as a result of a bullet in the back of the head, testimony of conversations in which defendant stated, in essence, what he had stated in the false affidavit was admissible under exception to hearsay rule.

5. **Evidence—Extra-Judicial Statements—Impeachment**

   Extra-judicial statement by a party-opponent may be used against him as an admission if it is inconsistent with the facts.

6. **Homicide—Murder in Second Degree—Hearsay**

Out-of-court statement by co-defendant in murder trial, exculpatory as to herself and tending to accuse her co-defendant, was inadmissible hearsay where admitted through witness to whom the statement was made, and admission in evidence was error of such magnitude as to require reversal of judgment convicting her co-defendant of second degree murder.

7. **Evidence—Self-Serving Declaration**

Out-of-court statement by co-defendant in murder trial, exculpatory as to herself and tending to accuse her co-defendant, was a self-serving declaration and would not have been admissible in her own behalf.

8. **Evidence—Hearsay—Statements Exonerating Others**

An out-of-court confession by a defendant, exonerating a co-defendant, is inadmissible hearsay.

9. **Appeal and Error—Evidentiary Error—Admission of Evidence**

If erroneous admission of evidence is highly prejudicial to an accused, it will be deemed to be "inconsistent with substantial justice" and warrant disturbing a judgment. (6 T.T.C. § 351)

10. **Appeal and Error—Prejudicial Error**

Error alone is not sufficient to warrant disturbing a judgment; prejudicial harm must be shown.

11. **Homicide—Presumptions—Guilt**

Presumption that accused was guilty of a criminal offense arose from his false statement that homicide victim accidently drowned, together with fact body was found a few days later, concealed, death having been caused by a gunshot wound in the back of the head.

12. **Homicide—Murder in Second Degree—Presumption of Guilt**

Although presumption of guilt of some offense arose where defendant on trial for first degree murder had made out false affidavit regarding victim's death, there was no evidence proving how the death occurred, and it could not reasonably be said that presumption of guilt presumed defendant guilty of the second degree murder of which he was found guilty.

13. **Homicide—Murder in Second Degree—Malice**

A conviction of second degree murder requires a finding that the killing was malicious as well as unlawful and wilful.

14. **Homicide—Murder Generally—Malice**

The malice necessary to a murder conviction is merely an inference from the facts surrounding the killing.

15. **Homicide—Murder Generally—Burden of Proof**

The rule that a murder conviction cannot be had unless guilt is proven beyond a reasonable doubt applies to the whole and every material part

of the case, including the act and manner of the killing, the reason for it and its commission.

16. Homicide—Murder in Second Degree—Evidence Held Insufficient

Second degree murder conviction could not stand where the evidence did not show, or warrant the inference, that appellant fired fatal shot.

17. Homicide—Murder in Second Degree—Hearsay

In trial resulting in second degree murder conviction, it was error for court to rely on out-of-court exculpatory statements, admissible only for impeachment purposes, for the necessary substantive evidence of the elements of the crime.

18. Criminal Law—Burden of Proof—Reasonable Doubt

Where evidence is exclusively circumstantial, rule that proof of guilt of a crime must be established beyond a reasonable doubt should be applied more stringently.

19. Constitutional Law—Self-Incrimination

The privilege against self-incrimination renders a defendant's silence and refusal to take the stand neutral in effect with respect to the judgment of the trier of fact.

For the Appellant: ROGER ST. PIERRE, ESQ., *Public Defender*

For the Appellee: ROBERT I. BOWLES *District Attorney*

Before TURNER, *Associate Justice*, BROWN, *Associate Justice*, BENSON, *Temporary Judge*

BROWN, *Associate Justice*

The appellant, Charles P. Miller, was tried by the Trial Division of the High Court in Truk District on an information charging him with murder in the first degree, was found not guilty of murder in the first degree, was convicted of murder in the second degree, a lesser included offense, was sentenced to imprisonment for a term of twenty years, and has appealed.

Appellant was the owner of a thirty-eight foot vessel, "Conchita." On or about December 5, 1969, he, Georgina Molina, and Donald G. Wilhelm, now deceased, left Truk

aboard that craft. Seemingly, all went well at first, but two days after the departure, the engine failed and could not be restarted; and the vessel drifted until it finally ran aground upon Oroluk Reef, situated between Moen, Truk District and Ponape. The occupants of "Conchita" subsisted on shellfish, lobster and other seafoods until on or about February 5, 1970 when the survivors, being only appellant and Georgina Molina, were rescued by a United States Navy aircraft and flown to Truk.

After the stranding of appellant's boat upon the reef, on or about February 1, 1970, a Japanese fishing vessel likewise became stranded on the same reef about four miles from "Conchita," and the next day another Japanese vessel came to its aid. The following day, one more Japanese fishing vessel arrived at the scene; and unsuccessful efforts were made to rescue the two people aboard "Conchita". Shortly thereafter, all of the operable fishing vessels departed.

It appears that on or about February 3, 1970 the United States Navy received a report that two persons (but not three persons) were stranded on Oroluk Reef. The next day, confirmation was made by the United States Air Force, and the rescue, referred to above, was accomplished.

A day after his arrival in Truk, appellant prepared an affidavit in which he stated that Donald G. Wilhelm had fallen overboard the night of February 2, 1970 and was last seen in the water, face down, and being carried away by a current so strong as to render any rescue attempts probably impossible and certainly too risky to be undertaken.

Upon learning of the events that reportedly happened at Oroluk Reef, on February 7, 1970 the Government diverted the field trip vessel, "Truk Islander" to Oroluk Reef to search for the body of Mr. Wilhelm.

On February 9, 1970, a 30-06 caliber rifle and a pistol were found in the cabin of "Conchita" by persons who boarded her from "Truk Islander"; but no evidence was offered that either weapon was capable of firing a shot. Because of an unusual odor aboard "Conchita," the forward hatch was opened; and a corpse was discovered which was soon after transported by air to Truk. We note that to remove the body from the hold, it became necessary to partially break open the foredeck of "Conchita" so as to provide an opening sufficiently large to allow the body to be removed.

The body which was removed was later identified by the Federal Bureau of Investigation as that of Donald G. Wilhelm; and an autopsy disclosed that he had been shot through the head, the bullet having entered from the rear.

Both appellant and Georgina Molina were charged with murder in the first degree, but because of a conflict of interest which became evident after three days of trial, the latter's case was severed and trial proceeded against the appellant only. As we have already noted, the Trial Division of this court found him not guilty of murder in the first degree but guilty of the lesser included offense of murder in the second degree and sentenced him to imprisonment for a period of twenty years.

[1, 2] From the facts, adduced at trial, it is established without question that within the forward hold of the boat from which the appellant and Georgina Molina were rescued there was the body of the late Donald G. Wilhelm with a bullet hole in the head. The direction in which the bullet is said to have traveled, the place and manner in which the body was situated, and the subsequent false exculpatory affidavit of the appellant, with Georgina Molina acquiescing, considered together, foreclose any reasonable doubt that death was proximately the result of suicide. We feel that the evidence established beyond a reasonable doubt

that Donald G. Wilhelm's death resulted from negligence, accident or homicide. Because the record does not establish beyond a reasonable doubt which of the alternatives should apply, we are compelled to reverse the trial court's decision. In doing so, we are not unmindful of the rule that it is not the function of the Appellate court to weigh the evidence. As this court said in *Helgenberger v. Trust Territory*, 4 T.T.R. 530, 535:

> "We are reluctant to do so, however, in view of the mandate of Section 200, Trust Territory Code (now 6 T.T.C. 355) that a finding of fact by the Trial Division of the High Court shall not be set aside unless 'clearly erroneous.' "

[3–5] There is no direct evidence bearing upon what actually took place aboard the boat when the victim met his death at Oroluk Reef; and reviewing the transcript of evidence, it appears that all of the evidence regarding the victim's death is entirely circumstantial. The only testimony which comes close to explaining how the deceased died was that of Commander Charles B. Buerris, U.S.N., and District Attorney Julius W. Sbedico which dealt with the substance of their conversations with the appellant. The contents of such testimony, in essence, is identical to the false exculpatory statements contained in the appellant's affidavit. During the trial, such testimony drew from the defense counsel objections as to its admissibility under the hearsay rule. This testimony, we feel, would be admissible, in a limited way, that is, only for the purposes of impeachment. For even though the rule on admissibility of evidence as stated in *Glasser v. U.S.*, 62 S.Ct. 456, 315 U.S. 60, (1941), forbids allowance of hearsay from lifting "itself by its own bootstraps to the level of competent evidence," there are exceptions to this rule. The testimony of Commander Buerris and District Attorney Sbedico would fall, in a proper case, within one of the exceptions

to the hearsay rule. The principle of this exception can be stated as follows:

". . . anything said by the party-opponent may be used against him as an admission, provided it exhibits the quality of inconsistency with the facts. . . . But regarded from the point of view of the legal rules of admissibility, the party's extra-judicial statements, are met and challenged by the hearsay rule. . . . How is it then . . . that they are able to pass the gauntlet of hearsay rule? Very simple. The answer is that the party's testimonial utterances do not pass the gauntlet of hearsay rule when they are offered for him . . . but they do pass the gauntlet when they are offered against him by his opponent, because he himself is in that case the only one to invoke the hearsay rule and because he does not need to cross-examine himself." Wigmore on Evidence, IV Sec. 1048. (see also Rules of Evidence—Rule 63(a) (c)).

In contrast to admission of the appellant's out-of-court statement is the testimony of Mrs. Verna Curtis who was allowed, over objection, to testify as to what the co-defendant, Georgina Molina, told her. The prosecution called Miss Molina as a witness; but she refused to testify under the privilege found in the Bill of Rights, 1 T.T.C. 4, that a person shall not be compelled in a criminal case to be a witness against himself. When Miss Molina declined to testify, the trial court ruled she was unavailable as a witness.

[6, 7] This, by itself, was in accordance with the rule of law discussed in 4 Wigmore, Evidence, Section 1409, page 163. Among the many citations in support, Dean Wigmore described as an "able opinion" *State v. Stewart*, 116 P. 489 (Kan.). But this holding alone did not open the door to any testimony the prosecution might offer. Hearsay testimony is admissible only if it comes within one of the recognized exceptions. Mrs. Curtis' testimony as to what she was told by Miss Molina was clearly hearsay. Miss Molina's statement was exculpatory as to herself and tended to accuse her co-defendant on trial. As a self-serving declaration, it was not admissible in her own behalf

had she been on trial. (29 Am.Jur.2d, Evidence, Secs. 621 et seq.).

[8] Instead of self-serving, had Miss Molina confessed to Mrs. Curtis and in so doing exonerated appellant, even then, the U.S. Supreme Court has said the hearsay is not admissible, although this rule is severely criticized. (*Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, and see the Holmes dissent.). In *Mason v. United States*, 257 F.2d 359, the court said:

"Assuming, however, that the companion did make a voluntary confession or statement . . . exculpating or exonerating the accused, modern and convincing authorities support its admissibility as a statement of fact against penal interest."

If there is good reason to admit the statement against penal interest, the reasons for excluding self-serving statements are equally strong. 29 Am.Jur., Evidence, Sec. 621 says:

"such declarations are untrustworthy; their introduction in evidence would open the door to frauds and perjuries, and the manufacturing of evidence."

[9, 10] We believe the reception of Mrs. Curtis' statement of what Miss Molina told her was error of such magnitude as to require reversal. We are not unmindful of 6 T.T.C. 351 providing that a judgment shall not be "disturbed" because of error in admission or exclusion of evidence unless it appears that such error is "inconsistent with substantial justice." If in fact the erroneous admission of evidence is highly prejudicial to the accused, we deem it to be "inconsistent with substantial justice." Error alone is not sufficient to disturb a judgment. Prejudicial harm must also be shown. In *Eram v. Trust Territory*, 3 T.T.R. 442, former Chief Justice Furber said:

"In an appeal the burden is on the appellant to affirmatively show that there has been some error and that he has been prejudiced thereby." *Gingerang v. Trust Territory*, 2 T.T.R. 385.

The prejudice to appellant by receipt of Mrs. Curtis' testimony is amply illustrated by the use made of it in the government's brief on appeal.

Mrs. Curtis quoted Miss Molina as declaring that Donald Wilhelm, "their good friend" had drowned and at the time of the drowning she (Molina) was on the reef "looking for clams for food." (Tr. 196) In its appeal brief, the government argued that ". . . Molina was out gathering food when the death occurred." And from this the government concludes: "The evidence shows conclusively that he (the appellant) was the sole person who could have fired the shot that killed Wilhelm."

Without the self-serving statement of Miss Molina, admitted erroneously, contrary to the rule excluding hearsay, the evidence—the false exculpatory statement of appellant —would have shown both Molina and appellant were on board when the victim was shot to death; and from their presence, it would have been impossible to argue appellant "was the sole person who could have fired the shot."

How much, if any, of Mrs. Curtis' story as to what Miss Molina told her influenced the trial judge in his decision, we cannot know. The mere fact such evidence might have had some effect on the decision is sufficient to warrant a reversal of the judgment of guilty of second degree murder.

[11–13] Without a doubt, from the entire evidence, there arises a presumption of homicide; no other reasonable interpretation can be made. From the appellant's false exculpatory statement, viewed against the almost certain concealment of the body of the deceased, there arises a second presumption, that of guilt on the part of the appellant. In *People v. Wayne*, 264 P.2d 547, (1953), the California Supreme Court enunciated this rule of presumption of guilt with the following words:

". . . where a material fact is established by evidence and it is shown that a defendant's testimony as to that fact was willfully

untrue, this circumstance . . . tends to show consciousness of guilt or liability and has no probative force in connection with other evidence on the issue of such guilt or liability. Such false testimony is in the nature of an admission from which with other evidence guilt or liability may be inferred."

However, even with these presumptions, there still remains unresolved the question as to what specific crime was committed by the appellant. It cannot reasonably be said that an inference of guilt presumes the accused guilty of second degree murder, absent proof of the material elements of such crime. "In order to support a conviction of murder in the second degree . . . it is essential there be a finding . . . that the killing was malicious as well as unlawful and willful." *Trust Territory v. Minor*, 4 T.T.R. 324 (1969). Further, the Government must still overcome the strongest presumption of all in the criminal law, that of innocence.

The Government, in its brief, urges that on the basis of the circumstantial evidence as respects the direction in which the bullet traveled through the head of the deceased, the kind of weapon used, the apparent concealment of the body, and the false exculpatory statement of the appellant, the principal elements of murder in the second degree, namely malice aforethought and unlawful taking of another's life have been convincingly established. This argument, at first blush, seems to have support from the rule in effect in a number of American jurisdictions "that where the unlawful killing of a human being is admitted or demonstrated, the crime is presumed to be a murder in the second degree." 40 Am.Jur.2d, Homicide, Sec. 260 (*State v. Davis*, 108 P.2d 641 (Wash.); *State v. King*, 181 A.2d 158 (N.J.)); but a close examination and analysis of the transcript shows that there is no evidence, direct or circumstantial, which establishes beyond a reasonable doubt that appellant did unlawfully and maliciously cause the firing of the weapon which shot the fatal bullet.

[14, 15] We fully agree with the definition of "malice" so diligently and ambitiously urged by the Government as being merely an inference from the surrounding facts of a killing, but we do not accept its applicability here. *Trust Territory v. Minor, supra.*) On the other hand, we equally recognize that the circumstantial evidence presented is of a type that can reasonably lead one to various equally logical conclusions as to how and why the deceased was shot. We cannot, on the basis of the evidence, determine in good conscience whether the appellant negligently, and without malice, shot the deceased (involuntary manslaughter); or whether he killed him in the "heat of passion" (voluntary manslaughter); or whether he killed him with malice aforethought (second degree murder); or whether he killed him in a willful, deliberate, malicious, and premeditated fashion (murder in the first degree). (See *Trust Territory v. Debeseol*, 4 T.T.R. 556, 1969).

"The prosecution may, and it is its duty to, give evidence of all those surrounding facts and circumstances which have any bearing on the manner of the death, and of the tendency to show whether it was natural, accidental, or felonious, and if the last, whether the deceased was *felo de se* or died by the hand of another." 40 Am.Jur.2d, Homicide, Sec. 285.

The reasoning has support in "the well-settled rule that a defendant shall not be convicted unless the evidence proves his guilt beyond a reasonable doubt applies to the whole and every material part of the case, no matter whether it is as to the *act of killing, or the reason for, or manner of, its commission.*" (emphasis added) *People v. Bushton*, 22 P. 127, 129 (Cal.). It is elementary that the guilt of the accused must be established "beyond a reasonable doubt" which means that facts proven, by virtue of their own probative force, establish guilt. *Schubert v. Pinder*, 9 N.Y.S.2d 311.

[16] We again note that the inferences to be drawn from the evidence (except the erroneously admitted statement of Miss Molina to Mrs. Curtis) do not warrant the conclusion appellant fired the fatal shot. Either he or his co-defendant could have done so.

The government indulges in ingenious casuistry by its argument that appellant was the only person physically able to "conceal" the body in the forward hold of the boat and concludes from that; "concealment of the body by appellant gives rise to an inference of guilt and that appellant was involved in the death."

We ask, "inference of guilt" of what crime? Murder or manslaughter or accessory after the fact are equally inferable.

[17] The evidence presented by the prosecution is not unlike the efforts of the prosecution in *Debesol v. Trust Territory*, 4 T.T.R. 556. In *Debesol* this court described as a "glaring weakness" in the government's case its failure to show what the circumstances of the killing were. The evidence in the present case is even more inadequate. The government presented false exculpatory statements by the defendants. The vast majority of authorities hold that prior out-of-court statements, not under oath, are admissible for impeachment purposes only and not as substantive testimony. This court so held in *Helgenberger v. Trust Territory*, 4 T.T.R. 530. We are mindful of the dissenting opinion in *Helgenberger* as well as Wigmore, Evidence, 3A, Sec. 1018; but we are persuaded that to hold otherwise could well open the door to frauds, perjuries and the manufacturing of evidence. Since neither the appellant nor his co-defendant testified, there was nothing to impeach; and it was error for the trial court to reply upon impeaching evidence for the necessary substantive evidence of the elements of the crime of second degree murder. See *Debesol* at 4 T.T.R. 569, 570.

[18, 19] Where evidence is exclusively circumstantial, proof of guilt beyond a reasonable doubt should be applied more stringently. In Matthews, "How to Try a Criminal Case," Vol. 2, Sec. 485, VII, it is stated:

> "Circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency to lead the mind to the conclusion that the facts exists which ought to be established. It must be such as to exclude every reasonable doubt of guilt of the defendant, . . ."

As has been pointed out in the case before us the appellant never took the witness stand nor in any way testified under oath. But this form of conduct under our concept of due process has neither negative nor positive implication on the guilt or innocence of the accused. The privilege against self-incrimination renders the defendant's silence and refusal to take the witness stand neutral in effect with respect to the judgment of the trier of the fact. (21 Am. Jur. 2d, Criminal Law, Sec. 356.)

In short, it appears clear to us that the evidence showed beyond a reasonable doubt Donald G. Wilhelm was killed by the hand of another, (either appellant, Georgina Molina, or both of them), and that the appellant is guilty of some crime; but there still remains before us the unresolved question as to what specific crime under our Criminal Code was committed and, how the appellant and, perhaps, Georgina Molina were involved, if Georgina Molina was involved at all.

For the above-stated reasons, the judgment of conviction of murder in the second degree is reversed and this case is hereby remanded to the Trial Division of the High Court for further proceedings in accordance with this opinion.