4. This judgment shall not affect any rights of way which may extend over the lands above described.

5. No costs are allowed or taxed in this proceeding.

FALEYOOR NICHIG, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Case No. 144

Trial Division of the High Court

Yap District

May 16, 1958

Defendant was convicted in Yap District Court of assault and battery in violation of T.T.C., Sec. 379. On appeal, defendant contended that prosecution failed to prove his guilt beyond reasonable doubt and that trial court erred in denying motion to suppress evidence. The Trial Division of the High Court, Associate Justice Philip R. Toomin, held that item of evidence not taken from defendant's person or premises is not illegally obtained. Court also held that where prosecution fails to prove actual or unequivocal appearance of attempt to do bodily harm, it has not made out case of assault.

Reversed and remanded.

1. Search and Seizure—Motion to Suppress Evidence

   Where knife placed in evidence in criminal trial was not taken from defendant's person or premises, defendant has no reasonable ground to move for suppression as knife was not illegally obtained.

2. Search and Seizure—Generally

   Defendant is not prejudiced by receipt of knife into evidence in criminal trial where there is no showing of attempt to use it unlawfully.

3. Assault—Generally

   Before there can be successful prosecution for crime of assault, it must appear there was attempt by force or violence to strike another or cause him bodily harm. (T.T.C., Sec. 378)

4. Assault—Generally

   Where complainant of alleged assault remains in hiding and is not menaced by defendant's knife, and there is no attempt to frighten or hit him with knife or other weapon, facts fail to make out case of assault. (T.T.C., Sec. 378)

5. Assault—Generally

   To constitute criminal assault, there must be overt act or attempt, or unequivocal appearance of attempt, with force and violence, to do physical injury to person of another. (T.T.C., Sec. 378)

Assessor: JOSEPH FANECHOOR
Interpreter: FEICHIN FAIMAU
Counsel for Appellant: RAPHAEL A. DABUCHIREN
Counsel for Appellee: JOHN A. YUGUMMANG

TOOMIN, *Associate Justice*

This is an appeal from a finding and judgment adjudging the defendant to be guilty of the crime of Assault and Battery, as defined in Section 378 of the Trust Territory Code, and sentencing him to imprisonment for a term of two weeks. Defendant appeals on the grounds (1) that there was a failure to prove him guilty beyond a reasonable doubt, and (2) that the court erred as a matter of law in denying his motion to suppress evidence.

The Government's case is based on the testimony of three witnesses. They tend to show that on the day in question the complaining witness was standing in front of his house when the defendant passed by. It appeared that both had been imbibing freely of intoxicating liquor. The complainant called the defendant over to explain "why he is so tough". As a result, an argument developed in which they used insulting language to each other. The defendant left and came back with a stick. More insults were then exchanged, but no attempt was made to assault the complainant. The defendant left once more and later returned with a knife. By this time the complainant had decided that caution was the better half of valor, so he retired to the bush. As a result, defendant did not find him and was unable to threaten him with the knife, or use it if that had been his intention. The knife was found by the complainant where it had been left, or thrown, by defendant, and delivered to police. Subsequently defendant filed a motion to suppress the evidence consisting of the knife, on the ground it was improperly taken by the police without a search warrant. This motion was denied by the trial court.

[1, 2] Passing on the second question first, it appears there is no merit to defendant's contention relative to suppression of evidence. The knife was not taken from the defendant's person, nor from his premises. It was either thrown away by the defendant or lost by him near complainant's dwelling. Complainant identified it as the knife he saw in defendant's hand as he was hiding in the bushes. Under these circumstances, defendant has no reasonable ground to move for suppression, for the knife was not illegally obtained. 20 Am. Jur., Evidence, § 401 and ffg. In fact, by doing so he is conceding the knife was his, in contradiction to the position taken by him at the trial. In any event, defendant could not have been prejudiced by the receipt of the knife in evidence, since there was no showing of an attempt to use it unlawfully.

[3] Reverting then to the principal point of the appeal, the court is of the opinion it is well taken. Before there can be a successful prosecution for the crime of Assault, it must appear that there was an attempt by force or violence to strike another, or cause him bodily harm. Trust Territory Code, Sec. 378.

[4] In the instant situation the complainant was not menaced by the knife, because he was in hiding. He states that defendant didn't try to frighten him with the knife, because he was not there. Nor did the defendant at any time try to hit him either with the knife, the stick, or his hand.

[5] These being the facts, they fail to make out a case of Assault, because there is lacking the element of attempt to do bodily harm. 4 Am. Jur., Assault and Battery, § 11, p. 133. The law is there stated as that "To constitute an assault there must be an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do physical injury to the person of another."

Since, therefore, we have no evidence of an actual, nor an unequivocal appearance of an attempt to do bodily harm, the District Court erred in its finding of guilty.

JUDGMENT

The finding of guilty and the judgment of the District Court of Yap District are reversed, and this cause is remanded to that court with directions to find the defendant not guilty.

FANAMTHIN, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Case No. 153

Trial Division of the High Court

Yap District

May 16, 1958

Defendant was convicted in Yap District Court of petit larceny in violation of T.T.C., Sec. 397. On appeal, defendant claimed that evidence did not prove him guilty beyond reasonable doubt and that court's finding as to damages and its order for restitution were excessive. The Trial Division of the High Court, Associate Justice Philip R. Toomin, held that trial court was warranted in its finding of guilt and that its finding as to value of property involved based on local values will be sustained by appellate court.

Affirmed.

1. **Larceny—Petit—Value**

   Where evidence shows taking of personal property worth less than fifty dollars from home of another with intent to convert it to accused's own use, trial court is justified in finding accused guilty of petit larceny. (T.T.C., Sec. 397)

2. **Larceny—Intent**

   In criminal prosecution for petit larceny, it is immaterial that defendant may have assumed he was merely borrowing property and would return it when it no longer served his needs. (T.T.C., Sec. 397)

3. **Larceny—Generally**

   Larceny is the fraudulent taking and carrying away of a thing without claim of right, with intention of converting it to use other than that of owner without his consent.