FEL NICHIG, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Case No. 5

Appellate Division of the High Court

December 29, 1953

Appeal from conviction of burglary and petit larceny in violation of T.T.C., Sec. 391 and Sec. 397 in Yap District. The Appellate Division of the High Court, Judge Paul D. Shriver, held that motion to suppress evidence obtained by illegal search and seizure must be presented before trial and that trial judge has discretion to refuse such motion when presented.

Affirmed.

1. Search and Seizure—Motion to Suppress Evidence

Person aggrieved by illegal search and seizure may move for return of property and to suppress its use as evidence, but such motion must be made before trial unless opportunity therefor did not exist or accused was not aware of grounds for motion, except that court, in its discretion, may entertain motion at trial or hearing. (T.T.C., Sec. 485)

2. Search and Seizure—Generally

Provisions of Trust Territory Code relating to search and seizure are construed in light of Federal Rules of Criminal Procedure, Rule 41(e).

3. Search and Seizure—Motion to Suppress Evidence

Trial court in criminal prosecution has discretion to refuse to entertain motion to suppress evidence obtained by illegal search and seizure when motion is presented at trial.

4. Burglary—Generally

Crime of burglary includes act of entering dwelling house by force with intent to steal or commit a felony or petit larceny. (T.T.C., Sec. 391)

5. Criminal Law—Evidence—Physical Evidence

Whenever goods are taken as part of criminal act, fact of subsequent possession is indication that possessor was taker and doer of whole crime.

6. Search and Seizure—Generally

If accused in criminal prosecution voluntarily complies with requests of police for evidence, it is not error to admit such evidence.

Counsel for Appellant: ROBERT GOODRICH

Counsel for Appellee: HORACE G. MARSHALL, *Attorney General*

Before FURBER, *Chief Justice*, SHRIVER and MANIBUSAN, *Temporary Judges*

SHRIVER, *Temporary Judge*

OPINION OF THE COURT

This is an appeal from the Yap District. The appellant was convicted on one count of burglary and three counts of petit larceny. Since the trial the Acting District Attorney has been appointed Public Defender and the Public Defender has been appointed District Attorney. Because of the change in status they determined that it would not be proper for either of them to represent the respective parties before this court. An attorney was appointed to represent the appellant and the Attorney General represents the appellee. They have requested the court to consider the appeal on the record without briefs or oral argument and we have agreed to do so.

Counts 1 and 2, Burglary and Petit Larceny:

The witness Fazoliy left her padlocked home in Wenifara in May, 1952, to go to Keng. When she returned in October of that year she found the padlock broken and several articles, including a piece of blue cloth, missing. While these articles were of small value it must be remembered that values are relative and that what to us may seem trivial may represent a sizeable portion of the worldly possessions of island indigenes. The witness complained to the police.

[1] The witness Goobuchun testified under cross examination that the appellant was *galasuw*, which, as we understand it, is a dialect expression indicating one who

is likely to steal or commit mischief. In any event two police officers, without a search warrant, as required by Section 479 of the Code of the Trust Territory of the Pacific Islands (hereafter referred to as the Code) went to appellant's home and requested to see the box in which he kept his belongings. The appellant brought the box to the porch for examination but before doing so attempted to conceal a piece of blue cloth. One of the officers entered the home and took the cloth from the place of concealment. This was subsequently identified as a piece of cloth which had been in the home of Fazoliy. The cloth was taken by the police officers. No motion to suppress the evidence so obtained was made until the trial. The trial court refused to suppress the evidence under the authority of Section 485 of the Code which provides that a person aggrieved by an illegal search and seizure may move for the return of the property and to suppress its use as evidence. Such a motion is to be made before trial unless opportunity therefor did not exist or the accused was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

[2, 3] This provision of the Code appears to be a paraphrase of Rule 41(e) of the Federal Rules of Criminal Procedure and will be construed in the light of the so-called "Federal Rule", rather than the more general rule that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence (Wigmore on Evidence, 3d Ed. 2183, et seq.). The appellant was represented by the Public Defender and clearly had the opportunity to move to suppress the evidence before trial. The trial court was well within its discretion in refusing to entertain the motion at the trial, assuming that there was an illegal search and seizure, upon which question we do not pass

(*United States v. Edmonds*, 100 F.Supp. 862).

Rule 41, Federal Rules of Criminal Procedure, 18 U.S.C.A. provides that a person aggrieved by an unlawful search and seizure may move to suppress for use as evidence anything so seized, but provides that such motion shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion. It further provides that the Court, in its discretion, may entertain the motion at the trial. In this case, opportunity to make the motion did exist before trial, and defendant was aware of the factual grounds for the motion; and I find herein no justification for the exercise of the discretion provided by the rule.

Defendant, however, contends that I am required to exclude the unlawfully seized evidence when objection is made for the first time at the trial, notwithstanding the plain terms of the rule to the contrary. This rule is but a codification of preexisting law and practice. Notes of the Committee, page 32, and refusal to exclude the evidence on the ground of defendant's failure to make seasonable objection thereto is fully supported in the following cases in the Supreme Court of the United States, United States Courts of Appeals for this and other jurisdictions, and this court: Adams v. New York, 192 U.S. 585, 24 S.Ct. 372, 48 L.Ed. 575; Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652; Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319; Segurola v. United States, 275 U.S. 106, 107, 48 S.Ct. 77, 72 L.Ed. 186; Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307; Bennett v. United States, 70 App.D.C. 76, 104 F.2d 209; Cromer v. United States, 78 U.S.App.D.C. 400, 142 F.2d 697, Certiorari denied 322 U.S. 760, 64 S.Ct. 1274, 88 L.Ed. 1588; Moore v. Aderhold, 10 Cir., 108 F.2d 729; Taylor v. Hudspeth, 10 Cir., 113 F.2d 825; United States v. Lewis, D.C.D.C., 87 F.Supp. 970, reversed on other grounds, 87 U.S.App.D.C. 274, 184 F.2d 394; Amos v. United States, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654; Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647; and Cogen v. United States, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275 are not to the contrary.

[4, 5] The appellant stated to the officers who took the blue cloth that it had been given to him by his brother, but his brother testified that the cloth in evidence was

not that which he had given the appellant (Tr. p. 53). Under Section 391 of the Code the crime of burglary includes the entering of dwelling houses by force with intent to steal or commit a felony or petit larceny therein. "Wherever goods have been taken as a part of the criminal act, the fact of subsequent possession is some indication that the possessor was the taker, and therefore the doer of the whole crime. Thus such possession is receivable to prove the commission of other acts than the simple crime of larceny. It is receivable to show the commission of burglary." (Wigmore on Evidence, 3d Ed. 153).

[6] The witness Tuwun, a police officer, testified that he went to appellant's house in November, 1952, with written instructions to ask appellant about a hank of twine and knife and a piece of iron; that after a search they found a piece of iron which appellant said was the one he used to break the lock on the door of Fazoliy's dwelling house. There was no search warrant and no warrant of arrest. The record in this case shows that the police acted with little regard for established processes and the appellant appeared to be very cooperative in establishing his guilt, but we cannot say that the trial court, with its advantage in seeing and hearing the witnesses and with the presence of an assessor was in error in giving credence to this testimony. We are not dealing here with people who are trained in the exercise of the rights of free men. Regardless of the effort to establish such rights, the appellant was raised under Japanese rule with its direct police methods. It is not surprising, therefore, that he would comply with the requests made by the police in investigating prior to the filing of charges.

We find no error in the record and the convictions on counts 1 and 2 are affirmed. It is unnecessary to consider whether but one crime was involved since the sentence

for petit larceny is to run concurrently with the sentence for burglary.

Counts 4 and 6, Petit Larceny:

These counts involve two separate thefts of the property of Goobuchun. Donom testified that the appellant kept a blanket in his home, which was identified as the property of Goobuchun and Goobuchun testified it had been taken from his home. (Tr. p. 20). In another month he found that a can of varnish, spool of thread, sharpening stone and a knife were missing (Tr. p. 21). The next day after the original visit of the police officers one of them returned to appellant's house with a letter instructing him to request the appellant to come to Colonia and to bring with him a blanket, a can of varnish and a hank of coconut fibre rope. The letter was conveniently lost. The appellant complied with the request. These articles were identified to the satisfaction of the trial court as having been stolen from Goobuchun on two separate occasions. The appellant offered no defense and in the absence of evidence to the contrary we must assume that the appellant produced the articles subsequently placed in evidence and accompanied the officer voluntarily. No motion to suppress was made until the trial and as pointed out *supra* the trial court properly exercised its discretion in refusing to suppress. We find no error in the record and the convictions on Counts 4 and 6 are affirmed.