excessive. See *Davis v. Gambardella & Son,* 82 A.L.R.2d 673, 161 A.2d 583.

We find no error and the judgment of the trial court is affirmed.

FREDRIECH HELGENBERGER, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Appeal No. 27

Appellate Division of the High Court

September 24, 1969

Appeal from conviction of first degree murder. The Appellate Division of the High Court, H. W. Burnett, Associate Justice, reversed the conviction holding that it was error to allow prosecution to substitute a previously given statement for a witness's testimony under the guise of "refreshing recollection", and also that it was improper to introduce into evidence the entire transcript of testimony taken at a prior proceeding without requiring that a proper foundation be laid for its admission by proof as to its correctness and accuracy in reproduction and by identification of the contents of such transcript as the evidence given at the former proceeding.

Conviction reversed.

Robert Clifton, Temporary Judge, dissented.

1. Criminal Law-Corpus Delicti

The corpus delicti in a homicide consists of two elements, the first of which, the fact of death, is to be shown as a result of the second, that is, the criminal agency of another, and it must be shown beyond a reasonable doubt.

2. Criminal Law-Corpus Delicti

In proving the fact and manner of death, it is not necessary that a witness state with absolute certainty that death did result in the manner alleged by the Government, rather it is sufficient if the medical testimony establishes that a condition existed which could have resulted in death as alleged.

3. Criminal Law-Trial Procedure-Triers of Fact

Both the corpus delicti and the ultimate fact of the liability of the accused are for the triers of fact.

4. Criminal Law-Trial Procedure-Triers of Fact

In the Trust Territory in a prosecution for murder the triers of fact are the presiding judge together with two special judges provided for under Section 125 of the Trust Territory Code. (T.T.C., Sec. 125)

5. Criminal Law-Trial Procedure-Triers of Fact

The special judges sit, in effect, in the place of a jury, since they are limited to participating with the presiding judge in deciding, by majority vote, all questions of fact and sentence; the judge of the High Court, who presides, alone decides all questions of law. (T.T.C., Sec. 125)

6. Appeal and Error-Scope of Review-Facts

It is not the province of the 'Appellate Division to substitute its belief as to what the trier of fact should have found, and the Appellate Division must sustain the verdict if there is sufficient competent evidence in the record to support the lower court's finding.

7. Appeal and Error-Scope of Review-Facts

Appellate Division will not hesitate to set aside a finding of guilt when the evidence leaves it with reasonable doubt as to the justification of that finding.

8. Appeal and Error-Scope of Review-Facts

A finding of fact by the Trial Division of the High Court shall not be set aside unless clearly erroneous. (T.T.C., Sec. 200)

9. Criminal Law-Witnesses-Impeachment of Testimony

Where the witness asserted only that he did not remember, there was no testimony which was subject to impeachment.

10. Criminal Law-Witnesses-Refreshing Witness' Recollection

When the court is satisfied that a memorandum on its face reflects the witness's statement or one the witness acknowledges, and in his discretion the court is further satisfied that it may be of help in refreshing the person's memory,the witness should be allowed to refer to the document and it then becomes proper to have the witness, if it is a fact, to say that his memory is refreshed and, independent of the exhibit, testify what his present recollection is.

11. Criminal Law-Witnesses-Refreshing Witness' Recollection

To read a witness's statement aloud for refreshing recollection to the witness, hostile or not, is patent error.

12. Criminal Law-Witnesses-Refreshing Witness' Recollection

It is not possible to fill in memory gaps of a witness by reading his former statement to him aloud.

13. Criminal Law-Evidence-Transcript of Testimony

There is no question as to the admissibility of testimony taken at a prior proceeding, providing a proper predicate is laid.

14. Criminal Law-Evidence-Transcript of Testimony

Testimony taken at a prior proceeding may be used for purposes of impeaching contradictory testimony of an adverse or hostile witness, refreshing the recollection of a witness, or it may be received as substantive evidence, if the party offering such testimony establishes to the satisfaction of the court that the witness is unavailable, whether

by reason of death, absence from the jurisdiction, infirmity, or a present claim by privilege.

15. Appeal and Error-Evidentiary Error

Where there is fundamental error which goes to the very competence of the evidence which is produced, the court may properly take notice on its own motion.

16. Criminal Law-Appeals-Prejudicial Error

In exceptional circumstances, especially in criminal cases, appellate courts, in the .public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.

17. Criminal Law-Evidence-Transcript of Testimony

To permit the admission in evidence of stenographic notes or transcript thereof or other record to prove the testimony of a witness at a former trial or preliminary hearing, assuming that they are otherwise admissible, it is necessary that a proper foundation be laid for their admission by proof as to their correctness and accuracy in reproducing the evidence given at the former trial, and in absence of such proof the stenographic notes or the transcript thereof are not competent to prove the former evidence.

18. Courts-Judges-Special Judges

Under Section 125 of the Trust Territory Code, special judges of the High Court are appointed to sit in the trial of murder cases in the Trial Division and participate with a presiding judge of the High Court in deciding, by majority vote, all questions of fact. (T.T.C., Sec. 125)

19. Courts-Judges-Special Judges

It is not required that special judges appointed to sit in trial of murder cases be learned in the law; they do not sit as judges, but as triers of fact when no jury is provided. (T.T.C., Sec. 125)

Counsel for Appellant: ROGER L. ST. PIERRE, ESQ.
Counsel for Appellee: JOHN D. McCaMISH, ESQ.

Before TURNER and BURNETT, *Associate Justices,* CLIFTON, *Temporary Judge*

BURNETT, *Associate Justice*

Appellant was found guilty of First Degree Murder in the death of his wife which occurred the night of May 31, 1966. On this appeal he raises seven questions of law on

which he predicates error.' Essentially however, he contends, first, that the Government failed to prove the corpus delicti, second, that there was error in allowing examination of a Government witness on the basis of a prior inconsistent statement, and third, that evidence as to defendant's intoxication negated the specific intent required for a conviction of First Degree Murder.

It was the theory of the prosecution that death resulted from a beating administered by appellant. Testimony of the Medical Officer who examined the body, which appellant challenges as being inconclusive, was to the effect that he found a bruise on the forehead and other bruises on her neck, either of which could have caused death. He declined to give any firm opinion, either on direct or cross-examination, as to which bruise caused death and did not rule out the possibility that death could have occurred from some other undetermined cause. He did testify, however, that, except for those bruises, the deceased appeared to be normal and he found nothing else to which he could attribute death. There was no autopsy, but only a visual examination of the body.

Further evidence was presented by the prosecution to establish a beating over a period of approximately two hours through testimony of witnesses as to what they heard occurring in the house occupied by appellant and his deceased wife.

[1, 2] The corpus delicti in a homicide consists of two elements, the first of which, the fact of death, is to be shown as a result of the second, that is, the criminal agency of another. It must be shown, as must the ultimate fact of liability of the accused, beyond a reasonable doubt. It is not necessary, however, in proving the fact and manner of death, that a witness state with absolute certainty that death did result in the manner alleged by the Government. It is sufficient if the medical testimony establishes that a

condition existed which could have resulted in death as alleged.

[3-5] Both the corpus delicti and the ultimate fact are for the triers of fact. In the Trust Territory in a prosecution for murder these are the presiding judge together with two special judges provided for under Section 125 of the Trust Territory Code. The special judges sit, in effect in the place of a jury, since they are limited to participating with the presiding judge in deciding, by majority vote, all questions of fact and sentence; the judge of the High Court, who presides, alone decides all questions of law.

[6,7] As this court has consistently held, it is not the province of the Appellate Division to substitute its belief as to what the trier of fact should have found, and must sustain the verdict if there is sufficient competent evidence in the record to support the lower court's finding. *Fattun v. Trust Territory of the Pacific Islands,* 3 T.T.R. 571. *Uchel v. Trust Territory of the Pacific Islands,* 3 T.T.R. 578. Nevertheless, the court has not hesitated to set aside a finding of guilt when the evidence left it with reasonable doubt as to the justification of that finding.

"Our difficulty is that from a totality of the evidence we cannot say that a more exhaustive presentation at a new trial is not indicated in the interests of justice." *Decena v. Trust Territory of the Pacific Islands,* 3 T.T.R. 601.

[8] The inherent improbability of much of the testimony for the Government,. as well as the inconclusive nature of the medical testimony, might well lead us to follow the same course as in Criminal Appeal No. 26, 3 T.T.R. 601. For example, we may be excused a reasonable doubt that appellant could have beaten deceased for a period of two hours, with a fixed purpose of causing her death, and produced so little evidence of physical abuse.

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

In any event it is unnecessary to do so, since, for the reasons which follow, error in the reception of evidence in the trial of this case was of such magnitude as to require reversal.

A key witness for the prosecution was Joseph Helgenberger, the son of the appellant and the deceased. Upon being called to testify, he responded to preliminary questions by the District Attorney relating to the night of his mother's death by saying that he did not remember. The District Attorney then made the following statement:-

"Mr. McComish: Your Honor, this is an obviously hostile witness and is a surprise to me. I questioned Joseph Helgenberger yesterday and asked him about the contents of the statement which he made to the Police Department sometime before, and he stated to me that he recalled the facts and would be able to testify to them. I would like the consent of the Court at this time to impeach this witness and refresh his recollection, if possible, with the statement that I showed him before."

On being told by the court to proceed, the District Attorney produced the statement and requested the witness to read it through and "tell me if that refreshes your recollection or if that is a correct statement you made." Appellant's objection at this point was overruled, although no answer appears in the record. After an exchange involving both counsel and the court, and identification of the witness's signature on each of three pages, he was directed by the court to read the statement. A further discussion, concerning the manner in which it was to be read, included the following by defense counsel:-

"Mr. St. Pierre: Your Honor, I object to the whole procedure. The witness is being coerced into testifying to something that he has testified that he knew nothing about."

Without ruling directly on the objection, the court determined that a sentence-by-sentence reading would be best, and directed the witness to read the statement aloud. The statement itself, which was not under oath, was later received in evidence together with an English translation.

The entire procedure constituted error. The District Attorney, in the statement quoted, requested the consent of the court to "impeach this witness and refresh his recollection". While noting that these two functions are not the same, it is clear that the statement was not admissible as substantive evidence under either approach.

[9] In the Government's brief, Section 799 of Title 58 Am. Jur., Witnesses, is quoted in part to support the proposition that a hostile or unwilling witness may be impeached by the party who calls him, provided the surprise is substantial. In the same section, however, the concluding sentence reads:-

"Even where there is a real surprise it is not .proper to permit the impeaching testimony to go beyond the only purpose for which it is admissible-the removal of the damage the surprise caused."

And the following from Section 804 of the same title:-

"But the rule generally followed is that such previous inconsistent statements of the witness cannot be accorded any value as substantive evidence. . . . Their only office and use is to impeach the witness and to negate or neutralize his testimony. In short, the impeaching and contradictory statements are admitted only to destroy the credit of the witness, to annul and not to substitute his testimony."

In this instance the witness asserted only that he did not remember. There was, in short, no testimony which was subject to impeachment.

[10,11] Any effort to utilize the statement in a proper fashion for the purpose of refreshing the recollection of the witness appears to have been abandoned at a very early stage. In an almost identical situation, the United States Court of Appeals for the Eighth Circuit condemned just such a practice as was followed here. The court there said:-

"However, in conjunction with the court's ruling the government sought specifically to utilize the statement not as impeaching evidence but through leading questions to refresh the witness's recollection of it. Refreshing a witness's recollection by memorandum or prior testimony is perfectly proper trial procedure and control of the same lies largely in the trial court's discretion. However, if a party can offer a previously given statement to substitute for a witness's testimony under the guise of 'refreshing recollection,' the whole adversary system of trial must be revised. *The evil of this practice hardly merits discussion. The evil is no less when an attorney can read the statement in the presence of the jury and thereby substitute his spoken word for the written document.* See *United States v. Block,* 2 Cir., 82 F.2d. '* * * the contents of the statements are not to be put in evidence before the jury.' *Young v. United States,* 94 U.S.App.D.C. 62, 214 F.2d 323, at 238."

* * * Proper foundation requires the witness's recollection to be exhausted, and that the time, place and person to whom the statement was given be identified. When the court is satisfied that the memorandum on its face reflects the witness's statement or one the witness acknowledges, and in his discretion the court is further satisfied that it may be of help in refreshing the person's memory, the witness should be allowed to refer to the document. It then becomes proper to have the witness, if it is a fact, to say that his memory is refreshed and, independent of the exhibit, testify what his *present recollection is. United States v. Socony-Vacuum Oil Co.,* supra, 310 U.S. at 232, 60 S.Ct. 811. But to read the statement aloud for refreshing recollection to the witness, hostile or not, is patent error." *Goings v. United States,* 377 F.2d 753 (1967).

[12] The witness conceded that he had made the statement and had made the answers set forth in the statement,

but refused to affirm them and stated that he was unable to say it was all the truth. In the *Goings* case, supra, it was urged by the Government that, since the witness there affirmed the correctness of the statement, he had adopted it under oath. The court held that, even if this is true, the error is not cured since it still constitutes a hearsay statement, suggested to the witness rather than his own testimony, and that it is not possible to fill in memory gaps of a witness in this manner.

The Government here contends, however, that even if it was error to admit the statement, the doctrine of harmless error under Sections 337 and 497 of the Trust Territory Code must apply, particularly in view of the witness's similar testimony at the preliminary examination.

Seven witnesses testified for the prosecution at the preliminary hearing, including three who were present and gave testimony at the trial. Prior to the commencement of the trial, counsel for the appellant, without objection by the Government, moved that the transcript of testimony taken at the preliminary hearing be made a part of the record. The following is included under "REMARKS" in the Record of Criminal Trial:-

> "Counsel for the Accused moved that transcript of evidence taken at the preliminary hearing, held before the Honorable Andreas Weilbacher in Kolonia, Ponape District, on June 16, 1966, be made part of the evidence. The motion was granted and transcript was received into evidence."

The record is otherwise silent as to any steps having been taken to produce, identify, or in any manner authenticate the transcript now included in the appellate record, nor was there any stipulation of counsel as to its accuracy or authenticity.

[13, 14] To say that this procedure is unique is an understatement. There is no question as to the admissibility of testimony taken at a prior proceeding, providing

a proper predicate is laid. Thus, such testimony may be used for purposes of impeaching contradictory testimony of an adverse or hostile witness, refreshing the recollection of a witness, or it may be received as substantive evidence, if the party offering such testimony establishes to the satisfaction of the court that the witness is unavailable, whether by reason of death, absence from the jurisdiction, infirmity, or a present claim of privilege. None of the foregoing was resorted to in the present instance.

To illustrate the result in the case of the witness Joseph Helgenberger, the record now contains what purports to be his testimony at the preliminary hearing, his extrajudicial statement read into evidence, the statement itself, and his testimony on trial apart from the enforced reading of the statement. In passing we may note that the District Attorney, in his attempt to either impeach or refresh the recollection of the witness, chose to refer, not to his testimony at the preliminary hearing, but rather to the statement given the police which, as was established on trial, was not under oath.

[15-17] No exception to consideration of the testimony at the preliminary examination is before us; under the circumstances of it having been introduced upon motion by the appellant we would ordinarily decline to notice the "invited error". For this reason we find no reviewable error in the failure of either party to offer, or the court to require, a proper predicate for introduction of the testimony, and would consequently proceed to give it full effect if the error stopped there. Where there is fundamental error, however, which goes to the very competence of the evidence which is produced, the court may properly take notice on its own motion.

"The guiding principle with respect to spontaneous notice of errors, which also applies to notice of assertions of error made by counsel for the first time on appeal, was clearly and succinctly

stated in *United States v. Atkinson,* 1936, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 as follows: 'In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.' " *Lash v. United States,* 221 F.2d 237.

The transcript of testimony taken at the preliminary hearing was not identified, authenticated, or proved in any manner. It was not an official transcript, required to be kept by statute or our rules, nor was it certified by the reporter as being a true and accurate transcript of such testimony. The Clerk of Courts who served as reporter on that occasion was the interpreter on the trial, and was consequently immediately available to testify for the record as to the identity and accuracy of the transcript now before us. Nothing of this sort was done and, as a result, the transcript is fundamentally defective, is not competent to prove the testimony at the preliminary hearing, and should not have been considered. See the *Annotation: Mode of proving former testimony* 11 *A.L.R.2d 30,* in which, at *Section* 13 *on page* 75 there is the following:-

"To permit the admission in evidence of stenographic notes or transcript thereof or other record to prove the testimony of a witness at a former trial or preliminary hearing, assuming that they are otherwise admissible, it is necessary that a proper foundation be laid for their admission by proof as to their correctness and accuracy in reproducing the evidence and by identification of the contents of such notes as the evidence given at the former trial. *In the absence of such proof the stenographic notes or the transcript thereof are not competent to prove the former evidence."* (Emphasis supplied.)

As noted, there was no stipulation of counsel to cure the failure to supply such proof. I find no exception to the rule as there summarized, nor do I think it proper to depart

from that rule now, notwithstanding the apparent concurrence of counsel.

It takes no exhaustive reading of the testimony and statement of the witness Joseph Helgenberger to determine that their improper admission constituted prejudicial error. He was one of two witnesses for the prosecution to testify at some length on preliminary examination as to the alleged beating of the deceased. It was he alone who there professed to have heard his father say: "I will be beating you till I kill you", thus in very large measure providing the major corroboration of the prosecution's theory that the bruises, which the medical witness testified could have caused death, did in fact cause death at the hands of the accused.

Quite apart from any question of error in this case, it is difficult to see what legitimate purpose can ever be served by wholesale inclusion in the record of all testimony taken at the preliminary hearing. Whatever the purpose, confusion and error are the most likely results.

Since the verdict must be set aside we do not consider appellant's assignment of error with respect to intoxication.

[18,19] Under Section 125 of the Trust Territory Code special judges of the High Court are appointed to sit in the trial of murder cases in the Trial Division and participate with a presiding judge of the High Court in deciding, by majority vote, all questions of fact. It is not required that such special judges be learned in the law; they do not sit as judges, but as triers of fact when no jury is provided.

While it is not necessary to any present determination, I think it appropriate to suggest that it is incumbent upon the presiding trial judge to take such steps as are necessary to insure that special judges are fully and completely instructed on the law of the case. The gravity of a charge of first degree murder, carrying with it upon conviction a mandatory sentence of life imprisonment, demands that

those who determine the facts, whether sitting as a jury or as special judges in lieu of a jury, have the benefit of all the rules by which they are to be guided in making their determination. A homicide may be murder in either the first or second degree, or it may be manslaughter, either voluntary or involuntary. The question of degree is one of fact, but can be answered only on the basis of a thorough understanding of the distinctions between offenses and degrees of offense.

I recognize that this view has not previously been voiced in the Trust Territory and I do not wish, by doing so now, to cast any reflection upon the efforts of those who served in the demanding capacity of a special judge. It is imperative, however, that we accord every ligitimate protection to one accused of such a crime. We cannot presume that a special judge, who is called upon only in the fortunately rare case of a prosecution for murder, will be readily familiar with the laws of homicide which must guide him in making his findings of guilt or innocence.

For the foregoing reasons the conviction of Fredriech Helgenberger of first degree murder must be, and is hereby, reversed.

Dissenting Opinion of JUDGE CLIFTON:

I dissent.

The majority opinion has reversed the judgment in this case, so that a new trial must be had, apparently on two grounds: 1. That the transcript of the preliminary examination should not have been received in evidence. 2. That the statement of the witness Joseph Helgenberger should not have been read into evidence.

As to the first ground, the matter of the transcript of the preliminary examination has two facets, that is, the question as to its authenticity and the question of the way it was used. The transcript of the trial shows that the following took place at the trial:-

"Mr. st. Pierre: Your Honor, I move that the transcript of testimony taken at the preliminary hearing be made a part of the record.

Court: To be considered as evidence in this case?

Mr. St. Pierre: Yes.

Court: What is the government's position on this?

Mr. McComish: I have no obection, your Honor.

Court: The motion is granted."

In addition to this, the record of trial, which was made in accordance with Rule 15bl of the Rules of Criminal Procedure, states:-

"Counsel for the Accused moved that transcript of evidence taken at the preliminary hearing, held before the Honorable Andreas Weilbacher, in Kolonia, Ponape District, on June 16, 1966, be made part of the evidence. The motion was granted and transcript received in evidence."

The Clerk of the Court certified to the court the documents showing the proceedings in the Trial Division. ThIS includes among the listed documents a "transcript of testimonies", and there is in the file the said transcript entitled "Transcript of Testimonies of Witnesses Taken at Preliminary Examination". This has written on it "Received into evidence at the trial 11-1-67" (the first day of the trial, the date on which counsel asked that it be received in evidence).

The document itself states in the first paragraph "Preliminary examination was held before Andreas Weilbacher on June 16, 1966, at Kolonia, Ponape Caroline Islands, Tomisiano Martin, District Sheriff of Ponape represented the government and Yoster Carl represented the accused. Judah C. Johnny was the reporter." The transcript then shows the introduction of pictures into evidence and the testimony of the witnesses at the preliminary examination.

It is true that the transcript shows no further authentication except as above noted. It should be observed that

in the questioning of the first witness, Mr. St. Pierre asked the following questions of Dr. Jano.

"Q: Doctor, do you recall testifying at the preliminary examination of the defendant, Fredriech Helgenberger?
A: Yes.
Q: Do you recall being cross-examined by a representative of the Public Defender, Yoster Carl?
A: Yes.
Q: Do you remember this question, Doctor: 'Meaning that Elmintes Helgenberger is the first person you examined in this kind of death.' This question was posed to you by Mr. Yoster Carl. Do you remember this question and do you remember your answer?
A: Yes.
Q: What did you answer to that question, Doctor?
A: That it was my first to be alone conducting that type of work."
(Transcript pages 6 and 7.)

The question quoted by Mr. St. Pierre was taken verbatim from the transcript at the preliminary hearing-on page 3 thereof.

There is no record in any part of the proceedings in this case of any objection of any kind to *the use of the transcript, no statement as to any improper certification or identification. In the specification of alleged errors counsel for the apiiellant did not in any way object totheuse" of the transcript of the preliminary hearing-nor in any way suggest that* it *was improperly certified or improperly before the court.*

This case was submitted without oral argument and no showing was made before the Appellate Division that the transcript of the preliminary examination was not considered as part of the evidence as requested by defense counsel. As a matter of fact after reading the transcript of the trial and the order that the transcript of the prelimi-

nary examination be received into evidence, I read the said transcript of the preliminary examination.

Up to the time of the writing of the majority opinion, no question was raised as to its genuineness or correctness. In what manner should the record of the preliminary hearing have been certified or in what manner was the keeping of the record improperly done? Section 466 of the Trust Territory Code provides in part as follows:-

"466(c) Procedure

1. If the arrested person does not waive preliminary examination, the official shall hear the evidence within a reasonable time.

(d) Disposition of the Record. After concluding the proceedings the official shall transmit forthwith to the Clerk of Courts for the district, all papers in the ,proceedings and any bail taken by him...."

Wherein is there a showing that this was not done, that the transcript certified by the Clerk of the District Court to this court, along with other papers, is *not* one of the papers in the proceedings? The record of the Preliminary Hearing in Criminal Case No. 83 has been signed by Andreas Weilbacher and it shows the names and addresses of all of the witnesses whose testimony is included in the transcript of the testimony. Is this together with the certificate of the Clerk of Courts not all the authentication that is required? I can see no reason for the conclusion that the transcript of testimony at the preliminary examination containing the testimony of seven witnesses was not properly before the three judges who tried this case.

This evidence is not in the same category as evidence received over the objection of defense counsel. Nor is it in the category of evidence which might have been objectionable but was received because of the failure of defense counsel to object to it. Instead it was received as evidence, with a statement that it was to be considered as evidence at the request of *defense counsel-upon his own motion.*

When it was offered in evidence it was offered in the shape it was in the transcript which was a part of the records in the case and I think that the record of the trial substantiates the conclusion that this was the transcript and that it is correct, especially in view of the fact that no objection has been made to it and no showing that a single word is wrong. If we are going to look at the records for authentication in cases where no questions have been raised, I am sure we can find innumerable things which show a lack of authentication. The exhibits, for instance, do not bear the signature of the clerk, the reporter or the judge.

In the face of all of the above, I do not see how we can hold that it should not have been used because it was not authenticated, particularly where this point was not raised, and in view of the record above *does* seem to be properly authenticated and correct. Furthermore, the exclusion of this evidence on the ground that it was erroneously admitted is directly opposed to the rule established by Rule 4 of the Rules of Evidence adopted by the Chief Justice for the High Court. Rule 4 reads as follows:-

> "A verdict or finding shall not be set aside, nor shall the judgment or decision thereupon be reversed by reason of the erroneous admission of evidence unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection."

Here there was *no* objection-the evidence was received on motion of the counsel for the defendant.

As to the matter of the "unique" use of the transcript of the preliminary hearing heretofore alluded to, it is true that it was not mentioned except once in the examination of a witness, that is, questions and answers in the transcript were mentioned. Nor does the record show that it was specifically used to cover the testimony of a witness who was unavailable. However, it was used as evidence,

that is, the same as testimony from the witnesses at the trial. As has been pointed out several times before, this was received *at the request of defense counsel,* although if it had been offered as evidence by the prosecution it might have been excluded except on the laying of a foundation showing the absence of a witness, it may have been considered, or it may have been considered as impeaching testimony if used to impeach the testimony of a witness whose testimony had been testimony of substance, as distinguished from mere statements of a loss of memory. In view of the verdict of guilty, in retrospect it would seem that defense counsel should have kept the transcript out of the evidence, rather than himself putting it into evidence. This brings one down to the question of whether his actions in introducing the transcript into evidence in the fashion in which he did bring this trial into the category of a trial in which a defendant has been denied due process of law because he was represented by incompetent counselor counsel who failed to make objections to improper questions, failed to raise what appear to be logical defenses or failed to raise questions as to the inadmissibility of evidence because of the violation of constitutional guarantees against unreasonable searches and seizures.

In recent years there have been a number of reversals on this ground of lack of due process, both in the state and Federal courts. The courts should be very careful about reversing cases on that ground, upsetting the verdicts of judges or juries who have rendered verdicts on the evidence before them and in reliance on the attorneys for the defendants to properly present their cases before the courts. In reading some opinions it appears that some actions of counsel in failing to object to apparently objectionable testimony-or a failure to present certain defenses has not been the result of incompetence of counsel or a mistake on the part of counsel, but has been part of

the trial tactics which counsel has felt should be used, although he well knew the other procedure. He may have let some testimony in because he knew that other more damaging testimony would be produced in its stead. He may have dropped a possible defense so as to emphasize what he thought was a much better one. Innumerable other examples could be given as to why, because of tactical reasons, counsel has not objected to testimony or has apparently neglected to use possible defenses. As a matter of fact, it appears very clearly that defendant's counsel introduced the transcript into evidence because he felt that the inability of the doctor to testify as to the cause of death because he had no autopsy would clear the defendant, and so he was anxious to get the transcript of the testimony at the preliminary hearing into evidence at the trial.

As to the statement that the introduction of the transcript was "unique" it is difficult to understand how the majority opinion could have reached this conclusion. It can be pointed out that in thousands of cases, cases have been submitted for decision on the transcripts of the testimony taken at preliminary hearings. Although this is often done in lieu of a plea of "guilty" it is also done because the defense counsel believes that the defendant will be acquitted because of some legal or factual situation which is covered by the transcript. It is also true that such use of transcripts may sometimes be used by counsel as a time-saving device and when used for this purpose alone it has been criticized. The article on "Criminal Justice: The Problem of Mass Production" by Dean Barrett of the University of California School of Law at Davis, California, in the Report of the American Assembly on "The Courts, the Public and the Law Explosion" mentions such use of transcripts as the entire evidence in the case, as follows on page 111 of said work:-

"For the cases taken to the courts there are many techniques for handling volume. Much of the problem exists in the magistrates courts and is described below. However, even at the level of superior court trial of a contested felony case, short-cut methods have been introduced. In California, for example, many cases are tried by the superior court on the transcript of the preliminary hearing held in the lower court. The superior court, with the concurrence of the defendant, decides the merits of the case on the basis of the information present in the transcript. This device saves the court time involved in hearing the witnesses again, and is extensively used. In California as a whole during 1963, there were in felony cases 2,373 jury trials, 3,306 court trials, and *2,885 superior-court trials on transcripts.* Some indications of the pressures of volume toward the most expeditious method of disposing of cases can be gained by contrasting the figures for Los Angeles County and those for the 35 least populous counties in California. In Los Angeles during 1963 in felony cases there were 976 jury trials, 2,789 court trials and 2,521 superior-court trials on transcripts. In the 35 small counties, by contrast, there were 233 jury trials, 46 court trials and only 38 trials on transcripts. Thus jury trials, the most time consuming, constituted just over 16 .per cent of the total trials in the superior court of Los Angeles County and just over 73 per cent in the least populous counties."

Besides such use of the transcripts as the entire record in a case, it is a very common practice and probably covered by the statistics mentioned, for counsel in California to stipulate that the case be tried upon the transcript of the preliminary examination plus any additional testimony either side might wish to introduce. This was in effect the way it was used in this case.

Associate Justice Goss, who presided at this trial in the Trial Division of the High Court, practiced law in Ventura County, California, and was on the Municipal Court bench in that county which is a comparatively large county and which is adjacent to Los Angeles County. He was undoubtedly familiar with the great use of the transcripts of the preliminary hearings by the superior courts in

California. His care in the matter of this transcript is shown by his question posed to defense counsel before he allowed it to be used. As previously noted, defense counsel said, "Your Honor, I move that the transcript of testimony taken at the preliminary hearing be made a part of the record." Associate Justice Goss then asked, "To be considered as evidence in this case?", to which the defense counsel answered, "Yes", and the Justice then asked, "What is the government's position on this?", to which the counsel for the government answered, "I have no objection, your Honor" and Justice Goss then said, "The motion is granted."

In the face of the well-known practice outlined above of the use of transcripts of preliminary hearings, the care of Justice Goss in ascertaining how the transcript should be used, and the fact that defense counsel himself moved that the transcript be made a part of the record and considered as evidence, how can we say that Justice Goss committed error in granting the motion to receive the transcript in evidence and himself and the special judges considering it along with the other evidence in the case?

If the transcript had contained testimony which was beneficial to the defendant (in addition to the testimony of the doctor which defense counsel contends favors the defendant) the defendant could well be heard to complain if it were not considered by this court and we would be remiss in our duties if we refused to consider it. Plaintiff's counsel in his brief (p. 7) relied upon this transcript, as follows:-

"There was ample uncontroverted evidence to support the findings of the trial court both at the trial and in the transcript of the proceedings at the preliminary examination which was before the trial court, and Joseph Helgenberger's similar testimony at the preliminary examination was before the court."

Certainly the widespread use of the transcripts of preliminary hearings has not resulted in the over-turning of decisions in other jurisdictions. Here, where the defendant's counsel introduced it into evidence and has not even raised a question as to the propriety of the use of the transcript so that the District Attorney has never been given an opportunity to state why the transcript should be kept in the record instead of its being gratuitously "thrown out" on the motion of Appellate Division judges who signed the majority opinion, we would be remiss in refusing to consider it and the testimony of the seven witnesses contained therein and in holding that the trial judge was in error in using the transcript.

Nor can I agree with the statement about "the inherent improbability of much of the testimony for the government." The testimony of a number of witnesses showed that the defendant, who had been drinking, retired for the night with his wife in their house. The wife went to bed with no appearance of sickness or injury. The witnesses testified that for a number of hours they heard a "pounding" which they concluded was a beating by the defendant of his wife, with her piteous cries for him to forgive her, and of his statement, "I will be beating you till I kill you." The noise of the beating and the cries of the wife and the defendant awakened the son of the defendant and a friend, another young man, and a woman who was living with the defendant as his wife, and they conferred together throughout the night as to what should be done. At the request of the woman, the young man Alfred entered the house to do something about what was going on-but after he entered, she changed her mind and told him not to do anything because the defendant might hurt them, and they withdrew, although the noise of the beatings and the cries of the victim continued. Slowly the cries became weaker and she was heard to say she was

dying, and still begged forgiveness until her voice became weaker and she died. In the early morning hours the defendant announced that she was dead and asked a witness not to tell about "their playing", and the dead body then bore the marks on her head and throat which the doctor testified were evidence of injuries that were sufficient to cause death.

What is improbable about this? Haven't other drunken or sober husbands beaten their wives to death? Haven't there been many occasions where bystanders have stood by afraid to act or failing to act because they did not fully realize that the assault might result in death? All of the attendant circumstances in this case show not improbable testimony but a complete cohesive story which is entirely believable and which *was* believed beyond a reasonable doubt by the three judges.

I thoroughly agree that there was error under previous U.S. rules in the reading of the statement of the witness Joseph Helgenberger, compounded by the fact that the witness himself was compelled to read his own statement. However, long study has led me to the conclusion that this was so-called "harmless error" under the standards set by Sections 337 and 497 of the Trust Territory Code and also that it was harmless beyond a reasonable doubt under the rule or a similar rule to *Chapman v. State of California*, 87 S.Ct. 824, wherein it was said (in relation to federal constitutional error) "Before a federal constitutional error can be held harmless the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

The statement made to the police was almost identical to the testimony of Joseph Helgenberger at the preliminary hearing and this was almost identical with the testimonyof the witness Alfred Ramez at the trial and at the

preliminary hearing-so it really added nothing to the other testimony at the trial.

It is evident that the conclusion of the majority opinion that the reading of the statement of Joseph Helgenberger could not be considered "harmless error" was based on a consideration of the testimony without the testimony taken at the preliminary hearing. As previously stated, in my opinion such testimony was properly before the trial judges and should be considered by us. Furthermore, although so far the decisions in the Trust Territory have not commented upon Rule 63(1) of the Rules of Evidence adopted in 1966, it is possible that the statement of the witness Joseph Helgenberger which he gave to the police and also his testimony given at the preliminary hearing might have received at the trial under Rule 63(1) and may be available at the re-trial (after the transcript or the portion containing his testimony is re-authenticated). At the trial he professed not to remember what had happened the night of the death of Elminter Helgenberger. However, he was present and available for cross-examination under the exceptions to the hearsay rule provided by said rule. Rule 63(1) reads as follows:-

"RULE 63. Hearsay Evidence Excluded-Exceptions. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:-

(1) Previous Statements of Persons Present and Subject to Cross-Examination. A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness; ...."

The Rules of Evidence adopted in 1966 were based on the Uniform Rules of Evidence approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association, and the change in the

former rules of evidence in relation to "hearsay evidence" is in line with changes which have been made in many states in the United States. An example of this change in the rules of evidence is Section 1235 of the California Evidence Code adopted in 1965. Section 1235 reads as follows:-

"Inconsistent statements. Evidence of a statement made by a witness is not inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."

The comments of the California Law Revision Commission show the former rule and the changes made by Section 1235 of the California Evidence Code. They are as follows:-

"Comment-Law Revision Commission

Under existing law, when a prior statement of a witness that is inconsistent with his testimony at the trial is admitted in evidence, it may not be used as evidence of the truth of the matters stated. Because of the hearsay rule, a witness' prior inconsistent statement may be used only to discredit his testimony given at the trial. *Albert v. McKay & Co.,* 174 Cal. 451, 456, 163 Pac. 666, 668 (1917).

Because a witness' inconsistent statement is not substantive evidence, the courts do not permit a party-even when surprised by the testimony-to impeach his own witness with inconsistent statements if the witness' testimony at the trial has not damaged the party's case in any way. Evidence tending only to discredit the witness is irrelevant and immaterial when the witness has not given damaging testimony. *People v. Crespi,* 115 Cal. 50, 46 Pac. 863 (1896); *People v. Mitchell,* 94 Cal. 550, 29 Pac. 1106 *(1892); People v. Brown,* 81 Cal.App. 226, 253 Pac. 735 (1927).

Section 1235 permits an inconsistent statement of a witness to be used as substantive evidence if the statement is otherwise admissible under the conditions specified in Section 770-which do not include surprise on the part of the party calling the witness if he is the party offering the inconsistent statement. Because Section 1235 permits a witness' inconsistent statements to be considered as evidence of the matters stated and not merely

as evidence casting discredit on the witness, it follows that a party may introduce evidence of inconsistent statements of his own witness whether or not the witness gave damaging testimony and whether or not the party was surprised by the testimony, for such evidence is no longer irrelevant (and hence, inadmissible).

Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the .prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. *Moreover, Section* 1235 *will provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case."*

Rule 63(1) of the Trust Territory Code says nothing as to whether a previous statement of a witness need be inconsistent with his testimony at the trial, so that arguments that a professed failure to remember would not be "inconsistent" would not apply under Rule 63(1). I have dwelt at length on the question· of the admissibility of the two statements of Joseph Helgenberger, not only because of my belief that there was no error in receiving them in evidence, but also because, if properly authenticated so as to meet the objections in the majority opinion, at least the testimony of Joseph Helgenberger in the transcript may be received in evidence on the re-trial of the defendant.

Looking at this case from its "four corners" as well as the specific points of error alleged by defense counsel,

I feel that there was no error, the defendant had a fair trial and that the trial judges were justified in finding him guilty beyond a reasonable doubt. There may have been some question as to whether there was premeditation so as to justify a verdict of murder in the first degree but in view of the majority opinion, I shall not discuss this phase of the case.

NGIRBLEKUU DEBESOL, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Appeal No. 29

Appellate Division of the High Court

October 9, 1969

Appeal from conviction for voluntary manslaughter. The Appellate Division of the High Court, D. Kelly Turner, Associate Justice, reversed the conviction holding that appellant was convicted solely upon improperly admitted evidence, prior written statements not made under oath and without opportunity for cross-examination.

Reversed and remanded.

1. Homicide--Voluntary Manslaughter-Element of Offense

   A conviction of voluntary manslaughter may not be sustained without evidence that the killing was done upon a sudden quarrel or heat of passion.

2. Appeal and Error-Generally

   All assignments of error not briefed or argued are deemed waived.

3. Appeal and Error-Generally

   If appellant had a particular extrajudicial statement in mind which "clearly exhibited prejudice" toward him he was obliged to point it out to the appellate court and was duty bound to have made objection during the trial.

4. Criminal Law-Trial Procedure--Objections

   Objection made by the government does not inure to the benefit of the accused.

5. Appeal and Error-Generally

   A verdict of guilty may not be reversed for any prejudice shown toward the government.