LONE LINO, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Appeal No. 43

Appellate Division of the High Court

July 30, 1973

Appeal from conviction of two counts of assault and battery with a dangerous weapon. The Appellate Division of the High Court, Benson, Temporary Judge, held that evidence sufficiently showed every element of the offenses.

1. **Assault and Battery—Elements**

   A battery need not be a direct striking blow, but may be indirect.

2. **Civil Procedure—Witnesses—Impeachment**

   Witness could be impeached by use of leading questions eliciting a prior inconsistent statement.

3. **Civil Procedure—Witnesses—Refreshment of Memory**

   Where witness who was clearly reluctant to testify often answered "I don't know", and was each time reminded of prior conference with prosecutor at which witness had given the information sought at trial, and witness then gave the information sought, and leading questions were twice used, there was no error.

4. **Civil Procedure—Witnesses—Duration of Memory**

   Testimony as to conferences witnesses to assault and battery with a dangerous weapon had with prosecutor was not made inadmissible by fact offense occurred a long time before trial, as only the weight to be given the testimony was affected.

5. **Judgments—Erroneous Wording**

   Where a part of written judgment contained erroneous and inappropriate words, but the findings were fully supported by the record and the court correctly decided the case, there was no reversible error.

6. **Assault and Battery With a Dangerous Weapon—Evidence—Admissibility**

   Admission of machete in evidence in trial of two counts of assault and battery with a deadly weapon, the machete, was not error. (11 TTC § 204)

Counsel for Appellant: BENJAMIN M. ABRAMS, *Assistant Public Defender*

Counsel for Appellee: RUSSELL W. WALKER, *District Attorney*

Before BURNETT, *Chief Justice*, BROWN, *Associate Justice* and BENSON, *Temporary Judge*

BENSON, *Temporary Judge*

The defendant-appellant was tried on an amended information on April 6 and 7, 1972, in the Trial Division of the High Court, sitting on Ebeye, Marshall Islands. The appellant was accused in Count 1 of Assault and Battery with a dangerous weapon (machete) upon Kimura Riklens and in Count 2 of the same offense upon Nelson Tobej, in violation of Title 11, Section 204 of the Trust Territory Code. Judgment of guilty as to both counts was entered on May 27, 1972. On May 30, 1972, the defendant was sentenced as to the first count to confinement for six months with the last four months suspended, and as to the 2nd Count, confinement for six months with the entire six months suspended upon certain conditions. The sentences were to run consecutively.

Sufficient evidence was presented at the trial which would entitle the trial court to find as to the first count that defendant had pursued and then attacked Kimura Riklens with a machete and that the victim received severe wounds from the attack.

As to the second count, evidence was presented that the words and acts of the defendant presented a threat, that the victim reached for the machete that the defendant was carrying, and that the defendant pulled the machete away to prevent being disarmed, which caused the victim's hand to be cut.

This recitation of findings answers the appellant's first assignment of error which contained in part that the evidence has failed to establish all the essential elements of defendant's guilt of the counts. There was substantial evidence which the trial court could believe as to each

element including the one particularly stressed by the appellant, the identity of the attacker of Kimura Riklens.

[1] We concur with the trial court in its conclusion of law that a battery need not be a direct striking blow and adopt the reasoning contained in the trial court's judgment on this point.

"We conclude there is criminal liability because application of force need not be a direct striking blow but may be indirect. Wharton's Criminal Law, Volume 1, page 687, says:—

While a battery is often described as the inflicting of 'bodily harm' or 'injury', any unlawful touching of the person of another constitutes a battery even though no physical injury is inflicted thereby. (Citing.)

"Perkins, Criminal Law, 1957, pages 622, 623, 624, and 625, discusses the causal relationship between the acts of the wrongdoer and the 'normal response' to the situation whereby the victim is injured. We hold the 'normal response' in the situation arising here would be to disarm the individual who threatens harm. Defense's argument that an attempt to take the machete from Lone was 'abnormal' is totally rejected. Equally unacceptable is defendant's suggestion that the accused 'was standing holding a knife in an innocuous fashion.' The evidence is to the contrary." (Judgment, p. 3.)

[2] In oral argument, the appellant emphasized particularly his assignment of error as to the questioning of Kimura Riklens by the prosecutor. We have carefully considered the appellant's assignments of error III, IV, and V. All are directed to the questioning by the prosecutor during the course of trial. One instance occurred during the cross-examination by the prosecutor of one of the defense witnesses. The witness testified on cross-examination that the defendant said nothing in his presence. The prosecutor then referred him to a conference held 2 or 3 days earlier and the witness then in response to leading questions conceded that he did say at that conference that the defendant had asked who among the group (which included the

witness) was Kimura's friend and wanted to help him. Impeachment by a prior inconsistent statement of the witness is generally permitted and specifically so under Rule 20 of the Rules of Evidence. That this is a permissible manner of examination is so well established as to require no further authority.

[3] The other instance that the appellant cites involving improper questioning arose during the direct examination of the victim Kimura. The witness answered "I don't know", then admitted to a conference with the prosecutor two or three days earlier and that he had at that conference given the information which was sought by the questioning.

In examining the appellant's assignment of error in regard to this matter, the court has examined the entire transcript. Several times this witness answered "I don't know", was then reminded of the earlier conference and then gave the information that was sought by the question.

We have concluded that this line of questioning of a witness who was clearly reluctant to testify did not constitute impeachment of that witness. The answer "I don't know" is not the subject of impeachment. (*Helgenberger v. Trust Territory*, 4 T.T.R. 530 at p. 536.) The recollection of the witness may be refreshed. One of appellee's citations on this point will be cited:—

"The Court may, in its discretion, permit a party to put questions to his witness on direct examination to refresh his recollection, by directing his attention to a particular matter or asking questions relating to prior statements or prior testimony, or by reading to him his prior testimony or portions therefrom, especially when it appears that the witness is unfriendly toward the party calling him, or is trying to evade the questions put to him." Vol. 3, Wharton's Criminal Evidence, page 224, Section 849, Right to Refresh Witness Recollection.

We note in regard to these assignments of error, which the appellant characterized as his main points in oral argument, that the prosecutor did not ask leading questions except on two occasions.

We find that the court committed no error in this regard and that the court was well within the limits of its discretion when it did permit leading questions.

Appellant in his brief, when arguing this assignment of error, argues in length as to the coercive atmosphere surrounding the witnesses at conferences with the prosecutor prior to the trial. This line of argument is appellant's inference. There is not any testimony to support this line of argument, although the appellant could have examined into the matter at the trial. He chose not to.

[4] Also argued by the appellant is that, since the alleged offense occurred such a long time before the trial, the conferences and what the witness said at those conferences were inadmissible. This line of argument would affect only the weight to be given the testimony and not the admissibility. We hold that it was properly admitted.

[5] In the written judgment of the trial court concerning the second count, this language appears:—

"With respect to the assault upon Nelson, the Court takes the version given by the defense witnesses as to what happened. According to these witnesses, when the accused approached a group sitting outside the Kitco Bar after it closed, he asked:—

". . . who among us was Kimura's (the other victim) friend that is willing to stand up and help Kimura?"

According to another defense witness, Heskaia Ramon:—

". . . people shouted to us, telling us to watch out for the knife he had."

Nelson and two others jumped up toward the accused, and according to Nelson:—

"I was reaching out to grab hold of the knife, that is how I cut my hand."

Another witness explained the scene:—

"Q: Before Nelson walked towards Lone to grab the knife, were there any words that he said to him?

A: None, the only thing he said was, 'Lone, give me that knife.' "

. . .

"I seen Nelson, he was trying to take the knife away from this gentleman and when he pulled the knife away from Nelson he cut his hand."

"Taking the testimony in the light most favorable to the accused, which is contrary to the rule, the Court concludes the accused, to prevent being disarmed, pulled a machete out of the victim's hand, thereby cutting him. As to the rule that the evidence should be considered in a light most favorable to the government, see *Debesol v. Trust Territory*, 4 T.T.R. 556, and cases cited.

"The question of law then is whether or not the accused is criminally liable when instead of striking the victim with the machete, he pulled it from the victim's hand when he grabbed the blade to take the knife away from the accused."

In his first assignment of error, the appellant contends that this language in the second from last paragraph shows that the trial court failed to presume defendant's innocence and require the government to prove its case beyond a reasonable doubt; in other words, that the language shows an incorrect application of the burden imposed on the government. We do not agree. The government witness presented one version of the attack on Nelson, and the defense witnesses testified that the injury was inflicted in a different manner. Taken as a whole, this portion of the judgment means that the court believed the defense witnesses, and their version was one more favorable to the defendant, in that it showed that he was attempting to prevent himself from being disarmed and was not attacking and hitting the victim as the government witness testified. To take the language of the portion of the judgment and de-

cide that it meant that the court was applying the incorrect burden would require reading into the words something more than appears. We will not imply such a meaning. It is not at all clear from this passage in the judgment that the trial court applied an incorrect burden in convicting the defendant. We hold that this erroneous statement does not require a reversal in order to achieve substantial justice. 6 TTC § 351.

It is true that this passage contains erroneous and inappropriate words. At the least, the words are surplusage. However, the findings of the court are fully supported by the record and it is generally held that an erroneous statement of law will not be ground for a reversal when the record supports the decision.

"Where a correct judgment, or order, has been made which contains inaccurate or erroneous declarations of law such declarations are harmless error and not grounds for reversal. It is generally held that in actions tried by the court without jury, error cannot be predicated upon such erroneous declarations if the court made proper determination of the case. This leaves us with little doubt but that the correct ruling upon the plea in abatement, even though prompted by the incorrect theory that it was not permitted to review the transcript to ascertain the sufficiency of the evidence, relieves from the charge that reversible error was committed." *State v. Alexander* (1958), 324 P.2d 831, at p. 833.

See also Wilkin, California Criminal Procedure, Sec. 682 (f); *People v. Cartier* (1960), 54 C.2d 300, at p. 311 et seq.; *People v. Borchers* (1958), 50 C.2d 321, at pp. 329 & 330, 325 P.2d 97; *People v. Evans* (1967), 249 C.A.2d 254 at p. 257 (57 Cal. Rptr. 276).

[6] We have carefully considered the appellant's assignment of error II that the court over appellant's objection improperly permitted a witness to testify, and that portion of assignment of error I as to the admission in evidence of the machete. We conclude that the trial court committed

no error in permitting the testimony of Kimura Riklens or in admitting the machete in evidence.

To summarize briefly the main points decided, we find that there was sufficient testimony that the trial court could believe covering every element of each count and upon which the conviction could rest; that the prosecutor's refreshing the recollection of Kimura Riklens by referring to the conferences and his impeachment of Atrik Nelson by showing a prior inconsistent statement were entirely proper; and finally that the erroneous statements of law contained in the judgment do not clearly demonstrate that the trial court applied an incorrect burden or an incorrect standard in weighing the evidence and these statements may properly be disregarded.

The judgment of conviction is affirmed.

ANDRES A. SAN NICOLAS and ADELA R. SAN NICOLAS, Appellants

v.

BANK OF AMERICA, Appellee

Civil Appeal No. 103

Appellate Division of the High Court

September 7, 1973

Motion to dismiss untimely appeal. The Appellate Division of the High Court, D. Kelly Turner, Associate Justice, held that the appeal would be dismissed where notice was a day late.

Appeal and Error—Notice and Filing of Appeal—Late Filing

Where notice of appeal was filed one day later than 30-day period for filing, and no unusual circumstances warranted exception to rule that late appeal will not be accepted, appeal would be dismissed. (6 TTC § 352)