ing the time to file to August 5, 1973, no brief has ever been filed.

It is abundantly clear the appellant has failed to perfect his appeal, and the same is hereby dismissed pursuant to Rule 32(d), Rules of Criminal Procedure.

PIO ONA, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Appeal No. 41

Appellate Division of the High Court

Truk District

September 30, 1974

Prosecution for rape. The Appellate Division of the High Court, Hefner, Associate Justice, held that force existed even though it was not applied during the whole time of the commission of the offense and did not exist during the time of penetration.

1. **Rape—Elements—Unlawful Intercourse**

   Unlawful sexual intercourse with a female not the wife of the accused, an element of rape, was established where the complainant and defendant both testified that they were not married and had had sexual intercourse. (11 TTC § 1302)

2. **Rape—Elements—Force**

   Sexual intercourse was against rape complainant's will and by force, two of the necessary elements of rape, where trial court believed complainant's testimony that she was thrown to the ground, her clothes ripped and she was forced, though she struggled, and testimony that she tearfully reported the incident to her mother. (11 TTC § 1302)

3. **Appeal and Error—Instructions—Non-Jury Cases**

   Any erroneous oral interpretation of rape statute by court at trial before the judge without a jury was cured where it was corrected in the later written opinion.

4. **Appeal and Error—Evidence—Weight**

   Court to which rape conviction was appealed would not reweigh the evidence.

5. **Rape—Elements—Force**

   Force, an element of rape, need not be applied during the whole course of the commission of the offense before it can be found to have occurred.

Before BURNETT, *Chief Justice*, ARVIN H. BROWN, JR., *Associate Justice* and HEFNER, *Associate Justice*

HEFNER, *Associate Justice*

Defendant, Pio Ona, was charged with rape, a violation of 11 TTC 1302 and was tried, convicted, and now appeals.

On or about December 7, 1971, the complaining witness, a fourteen year old girl, and the defendant were walking along a path on the island of Tol in the Truk District, it being the intent of the girl to visit her family in the village of Foup as there was no school scheduled for the day in question. It was during this trip that sexual intercourse took place between the defendant and the complaining witness, and of this there can be no doubt whatsoever. However, the testimony of each of the two parties directly concerned was diametrically opposed as to the circumstances surrounding the events giving rise to the charge.

The complaining witness testified that the defendant threw her to the ground, ripped her clothing, and although she struggled in vain, he forced his unwanted attentions upon her. Thereafter, she bathed in a nearby stream, continued on to her village and, in tears, related to her mother what had taken place. The latter caused her to be examined by a Medical Officer whose report was received in evidence together with written interrogatories directed to him and his answers thereto.

The defendant readily admitted having had intercourse with the complaining witness but steadfastly maintained that it was with her consent.

As is almost invariably the case in a criminal case involving a charge of rape, there were no eyewitnesses.

11 TTC 1302 defines rape as follows:

"Rape. Every person who shall unlawfully have sexual intercourse with a female, not his wife, by force and against her will, shall be guilty of rape . . . "

Thus, to establish the crime of rape, the burden is upon the prosecution to establish beyond a reasonable doubt each of the three elements which must be so established before the defendant may be found guilty. These three elements are: (1) unlawful sexual intercourse with a female not the wife of the accused; (2) by force; and (3) against her will.

[1] The first element was established by uncontradicted evidence. Both the complaining witness and the defendant testified that they were not married to one another, and that sexual intercourse took place. No further discussion is necessary as to this element of the crime.

[2] The evidence likewise was sufficient to justify the finding of the trial court that the intercourse was against the will of the complaining witness. The fact that the latter tearfully reported the alleged incident to her mother was a factor that cannot be lightly disregarded, nor was it disregarded by the trial court. The testimony of the complaining witness and Exhibits 1 and 2, the torn clothes, was sufficient to establish beyond a reasonable doubt the second element.

As to the element, force, the appellant makes much of the fact that the trial court (contrary to the court reporter's certified transcript) erroneously stated the law when it made an oral announcement at the conclusion of the trial.

After the evidence had been received, and after closing arguments had been made, the court stated, in part:

"This, like every case of this kind, is a hard case for the court to reach a fair and correct judgment. We have the testimony of the complaining witness that the intercourse was against her will, and incidentally, that is what the statute requires. *Resistance is not required by statute* but it is a matter to be shown as to whether or not the act was consensual or against the will of the woman." (Emphasis ours.)

Thereafter, the defendant was found guilty as charged, was sentenced, and ever since has remained free on bail pending appeal.

At a later date, counsel executed the following stipulation which the trial court ordered to be and it was made a part of the record on appeal.

"It is hereby stipulated and agreed by and between counsel for the parties to this action that, for purposes of any issues raised on appeal pertaining to or involving the Court's comments after closing arguments and before making its oral finding of guilty, the word 'Force' should be considered as having been used instead of the word 'Resistance' in the sentence beginning at line 10 from the end of page 51 of the 'Transcript of Evidence'; and that this stipulation shall be made a part of the record on appeal herein."

If there was a jury deciding this case and it was instructed that force was not required to be shown by the prosecution, there would be no doubt this would be error.

However, the very same trial court which (for the purpose of this appeal) orally misstated the law, prepared and signed a subsequent written opinion which discussed the evidence dealing with the resistance of the complaining witness and the force of the defendant. (5 T.T.R. 634.)

[3] If there was an erroneous interpretation of 11 TTC Sec. 1302 at the conclusion of the trial and during the oral announcement of the court's decision, it certainly was corrected in the written opinion. The statute in its entirety with all elements was determined to have been violated by the defendant.

An erroneous jury instruction cannot be equated with an erroneous statement by a trial court judge, particularly where there is a subsequent opinion written which properly interprets the law. The reasons for this are obvious. A jury is composed of laymen, not trained in the law. Once they are instructed, they deliberate in private and then render their verdict. The opportunity for the jury to cor-

rect an erroneous instruction is practically nonexistent since they have neither the legal knowledge nor the practical method of informing the Court that they, themselves, have corrected the Court's own instruction. They simply announce their verdict in open court without giving the reasons for their verdict.

The trial court judge in this case rendered his oral remarks on March 9, 1972. The written opinion is dated March 27, 1972. An erroneous oral interpretation by the trial court judge at the conclusion of the trial, not repeated at the time of the entry of the formal opinion 18 days later, does not in any way indicate a reversal is required. It is apparent that if the trial court was in error at the time of the trial, it certainly was not in error when it rendered its written opinion. If the trial court did not find force at that time it could have corrected its error by vacating its judgment and entering a judgment of acquittal. (Rules of Criminal Procedure, Rule 14d.)

This the trial court did not do which leads to only one conclusion, that if the trial court did have an erroneous belief of the law at the close of the trial, it corrected that belief and still found that the prosecution proved its case beyond a reasonable doubt.

Appellant also urges a reversal on the grounds that the trial court should have resolved the conflicts between the testimony of the complaining witness and the defendant by finding in favor of the defendant.

[4] Appellant concedes that the findings of the trial court based upon evidence will not be set aside unless there is manifest error. *Arriola v. Arriola*, 4 T.T.R. 486; 6 TTC 355(2). What the appellant wishes this court to do is re-weigh the evidence but, this, the court cannot do. *Arriola v. Arriola, supra.* As pointed out in the brief of the prosecution, sufficiency of evidence is tested on what the trial court could legally accept, not on what ap-

pellant or his counsel wants believed, and the verdict will not be disturbed if it is supported by substantial credible evidence, even though there is evidence to the contrary. *Oingerand v. Trust Territory*, 2 T.T.R. 385, *Opisbo v. Trust Territory*, 2 T.T.R. 565. See also *Helgenberger v. Trust Territory*, 4 T.T.R. 530.

The testimony of the complaining witness, her father and the police officer, plus the physical evidence, the torn clothes, was certainly substantial credible evidence or sufficient competent evidence.

The medical evidence by way of interrogatories produced evidence to support the testimony of the defendant in that entry was not by force but the evidence is opinion only and the trial court can and did weigh the probative value of it. The medical evidence bears on the absence of trauma to the vagina and in no way contradicts the force taking place prior to entry. The law does not require the female to resist to the utmost. *Trust Territory v. Manalo*, 5 T.T.R. 208.

[5] Force is a relative matter as the law implies force when the female does not consent and the act need be accomplished only with sufficient force to be against the woman's consent. *Trust Territory v. Ona*, 5 T.T.R. 638. This simply means that once force is proved to have occurred sometime before intercourse, this element of the crime of rape is satisfied. Force need not be proven to be applied all of the time prior to and during sexual intercourse.

The trial court had the opportunity to observe the witnesses and thus pass upon the credibility of them, and to resolve the conflicts and inconsistencies in the testimony, and to determine the weight to which the evidence is entitled. *Kirispin v. Trust Territory*, 1 T.T.R. 628, *Debesol v. Trust Territory*, 4 T.T.R. 556. In effect the appellant asks this court to disbelieve the complaining witness and believe the defendant, and accept the medical officer's opin-

ion. There is no demonstration of a manifest error. The defendant is asking for a re-weighing of the evidence and this is not the function of this Court.

The judgment of conviction is affirmed.

BROWN, J.

It is my belief that the defendant was deprived of his substantial rights, and that the record reveals such grave error that the judgment of conviction should be reversed.

The facts as set forth in the majority opinion appear to be clear, concise, accurate and complete, and they will be discussed herein only as may be necessary for the sake of clarity. The defendant was charged with and convicted of the crime of forcible rape, a violation of 11 TTC 1302. As pointed out by the majority, that crime consists of three elements, namely (1) unlawful sexual intercourse with a female not the wife of the accused; (2) by force; and (3) against her will; and the burden is upon the prosecution to prove beyond a reasonable doubt each one of these three elements. Thus, while it is not necessary that the prosecution dispell all possible doubt as to each and every element of the crime, it must demonstrate the guilt of the defendant to a moral certainty. *People v. Van Dyke,* 11 N.E.2d 165 (Ill.), cert. den. 345 U.S. 978, 73 S.Ct. 1127.

The evidence was more than sufficient to constitute proof beyond a reasonable doubt as to the first and third of the three necessary elements referred to above, and therefore they need not be discussed. It is the treatment of the second necessary element, force, that leads to my dissent. Considering the record in its entirety, I cannot accept the assertion that the element of force was proven beyond a reasonable doubt; in fact, the record indicates that that element was not considered by the court below at the time the defendant was found guilty as charged. Immediately before finding the defendant guilty, the trial judge stated:

"This, like every case of this kind, is a hard case for the court to reach a fair and correct judgment. We have the testimony of the complaining witness that the intercourse was against her will, and, incidentally, that is what the statute requires. *Resistance is not required by statute* but it is a matter to be shown as to whether or not the act was consensual or against the will of the woman." (Emphasis added.)

Some time after the defendant had been found guilty and had been sentenced, counsel entered into the following stipulation which the trial court ordered to be, and it was made a part of the record on appeal:

"It is hereby stipulated and agreed by and between counsel for the parties to this action that, for purposes of any issues raised on appeal pertaining to or involving the Court's comments after counsel's closing arguments and before making its oral finding of guilty, the word 'Force' should be considered as having been used instead of the word 'Resistance' in the sentence beginning at line 10 from the end of page 51 of the 'Transcript of Evidence'; and that this stipulation shall be made a part of the record on appeal herein."

This stipulation changes nothing, for in a case such as is before us now, the words "resistance" and "force" should be treated essentially as synonyms. One need only to turn to Webster's Third New International Dictionary to find that a definition of the word "resistance" is "an opposing force." Without force, there can be no resistance. It would seem clear that the trial court, at the time of the finding of guilt, was of the opinion that force was not an essential element of the crime of forcible rape. The fact that some two weeks later the trial judge prepared a written opinion in which he discussed evidence pertaining to the force used by the defendant and the resistance exerted by the complaining witness persuades me of nothing other than that these matters were discussed in a written opinion prepared more than two weeks after the defendant had been found guilty of forcible rape. The matter of importance is that

that finding of guilty followed immediately after the trial court had made a statement to the effect that resistance (or force) is not a necessary element of the crime of rape. This statement illustrated the state of mind of the trial court at the very moment the defendant was found guilty and is far more significant than the words found in an opinion prepared some two weeks thereafter.

If we are to assume that at the finding of guilty the court mistakenly believed that force is not an element of the crime of forcible rape—and logic and reason dictate that this is the only valid assumption that can be made—then the question of defendant's presumption of innocence must necessarily arise.

The presumption of innocence and the burden of proving the defendant guilty beyond a reasonable doubt are fundamental to our system of law. A defendant in a criminal case is presumed to be innocent until the contrary is proved, and in case of reasonable doubt he is entitled to an acquittal. The effect of this presumption is to place upon the prosecution the burden of proving him guilty beyond a reasonable doubt. *People v. Miller*, 154 P. 468 (Cal.); *People v. Daugherty*, 256 P.2d 911 (Cal.). Reasonable doubt has been defined as follows: "It is not a mere possible doubt; because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711 (see *People v. Miller, supra*). More properly the definition should have referred to the trier of fact, be it judge or jury; for the definition and the entire presumption of innocence apply with equal force to a jury and to a trial judge who hears the case without a jury.

Here, as is abundantly clear, the trial judge revealed his state of mind by stating that the essential element of force was not applicable. Having done so, one is entitled to question whether or not he measured the presumption of innocence against the evidence which had been adduced for the purpose of establishing that necessary element. One may ask legitimately why there is any reason at all to assume that he had done so, for he had stated, and stated clearly, that force is not a necessary element of the crime of rape.

An appellate court must not re-weigh the evidence, and findings of fact by the Trial Division of the High Court will not be set aside by an appellate court unless clearly erroneous. *Osawa v. Ludwig*, 3 T.T.R. 594. In no way do I reweigh any evidence brought before the court below; but evidence of force that was considered by the trial court does call for comment, and in making such comment I bear in mind that although modern courts no longer require that a woman must "resist to the uttermost", still she must resist in fact. *People v. Brown*, 33 P.2d 460; *People v. Crosby*, 120 P. 441 (Cal. App.). It is in this connection that evidence regarding the opinion of the Medical Officer who examined the complaining witness becomes of great importance. Neither his report nor his answers to interrogatories put to him could have given the court much assistance in determining whether or not force accompanied the intercourse. He did find abrasions in the area of the complaining witness's knees and about her upper posterior chest, and he stated that these could be indicative of a struggle on the part of the girl. Had he stopped there, the matter would not have presented as many difficulties as now appear, but he did not stop at that point; instead, he went on to say that the girl's normal excitement while lying upon the grass during the intercourse equally could have caused those very same abrasions. Likewise, a vaginal examination proved to be of little significance other than

that the examining Medical Officer found that he was able to introduce two fingers into the vagina without eliciting any particular pain or discomfort; and, to him, this was an indication that the girl had had previous sexual experience. Thus, in essence, the evidence so adduced established only that a girl who was not a virgin had engaged in sexual intercourse during which force might or might not have been exerted against her. It is an understatement to say that this evidence was equivocal.

Nowhere can it be found that the trial court weighed the presumption of innocence against the medical evidence, and this is not surprising in that trial judge erroneously believed that force is not a necessary element of the crime of forcible rape. Had the court been correct as to the law, there would have been no reason for it to have considered and to have applied the presumption, but the court was incorrect in its understanding of the law, and this constituted error. I believe that the error so committed was fatal.

In its affirming opinion, the majority concede that had the case been tried to a jury and had the jury been instructed in accordance with the trial court's statement, then there would be no doubt that this would have been error; and this is, indeed, correct. However, the majority take the position that an erroneous jury instruction cannot be equated with an erroneous statement by the trial judge, particularly where there is a subsequent written opinion which properly interprets the law. In this case, I disagree.

First, we must recognize that while a jury's duty is to decide upon the facts and to apply to those facts the law as given by the judge who presides over the case; where there is no jury, the trial judge must decide upon the facts and then apply the law to those facts. If the trial judge applies erroneous law to those facts, the result can be just as erroneous as would be the case were a jury to apply erroneous legal principles given by the judge. The crucial question,

then, is whether or not the trier of fact applied erroneous law; it is not whether or not the trier of fact happens to be a jury or a judge sitting without a jury. In either case, the damage done is identical.

Second, much is made over the fact that since the trial judge stated the law correctly in its written opinion, any error was cured. I cannot accept that assertion insofar as it pertains to this case. It is the state of mind of the trial court as of the time a finding of guilty or not guilty is made that properly should be the controlling factor, rather than the state of mind of the trial court at the time of the filing of a written opinion more than two weeks after the defendant had been found guilty as charged. It is true, as stated by the majority, that under Rule 14d of the Rules of Criminal Procedure, the trial court could have corrected its error by vacating its judgment and entering a judgment of acquittal. However, and as is clearly shown by Rule 14d, such corrective action must be pursuant to a motion for new trial. No such motion was made. Instead, and as he had every legal right to do, appellant sought relief by way of an appeal rather than by a motion for new trial. We should not engage in speculation as to why the defendant chose not to move for a new trial, for to do so would be merely to guess, and thus would serve no valid purpose whatsoever. It is sufficient only to note that Rule 14d would not appear to be applicable in view of the entire record which came up from the court below.

The defendant was entitled to the presumption of innocence throughout the trial and certainly at the time the trial judge made his determination as to defendant's guilt or innocence. The record, taken as a whole, causes me to doubt that the presumption of innocence was even considered, much less applied.

So, too, any defendant is entitled to demand that the trial judge apply the correct law to the facts established during

the course of trial, and he is entitled to this not some two weeks after the completion of the trial but throughout the trial itself, and, most assuredly, at the moment the trial judge announces his decision as to guilt or innocence. This substantial right was denied to the defendant.

In view of the foregoing, it seems more than clear that reversible error occurred in the trial court, and this fatal error served to deprive the defendant of his substantial rights; and further, from the entire record sent up on appeal, it seems inescapable that the defendant was denied a fair trial. Accordingly, I would reverse.

SITANIS FENEI, Appellant

v.

PINENGIN, Appellee

Civil Appeal No. 79

Appellate Division of the High Court

Truk District

October 3, 1974

Appeal not perfected by appellant. The Appellate Division of the High Court, Burnett, Chief Justice, dismissed the appeal.

Appeal and Error—Notice and Filing of Appeal

Unperfected appeal would be dismissed.

BURNETT, *Chief Justice*

It appears from the record herein that judgment was entered on June 11, 1971, and notice of appeal filed on July 9, 1971. It further appears that appellant was first notified on August 2, 1971, of the estimated cost of transcript of evidence, and that on subsequent occasions he and counsel were advised of the manner in which one who is unable to pay such costs might proceed to obtain such tran-