case was tried to the Court or to a jury. *Winterton v. Lannon*, 330 P.2d 987 (Ariz.). The Courts of the Trust Territory have followed that rule consistently. We continue to do so. In *Arriola v. Arriola*, 4 T.T.R. 486, this Court stated:

> The Appellate Division of the High Court on appeal from a decision of the Trial Division cannot re-weigh the evidence and decide whether in its opinion it should reach the same or different conclusions as the trial judge did as to the facts.

[4] In essence, Appellate Courts deal with questions of law and are not constituted to consider questions of fact decided by the Trial Court. Such findings will not be disturbed when supported or sustained by competent evidence, especially where the evidence is conflicting or where different inferences can be reasonably drawn therefrom. *Kenyul v. Tamangin*, 2 T.T.R. 648.

[5] The evidence upon which the Trial Court arrived at its conclusion was competent and substantial; accordingly, the judgment is AFFIRMED.

TRUST TERRITORY OF THE PACIFIC ISLANDS,
Plaintiff-Appellee

v.

YUSIM O. MINOR, Defendant-Appellant

Criminal Appeal No. 30

Appellate Division of the High Court

Palau District

May 14, 1976

Appeal from conviction for second degree murder. The Appellate Division of the High Court, Hefner, Associate Justice, affirmed conviction, holding that it was harmless error for trial court to refuse defense's offer to admit into record inconsistent statement of witness for prosecution where witness readily admitted that statement was not true and witness' testimony was substantially corroborated by another government witness.

1. **Criminal Law—Information—Sufficiency**

   Information which showed that time of homicide was alleged to have been on or about November 24, 1968, at Koror, Palau District, and specified subject matter of alleged offense as well as Code section alleged to have been violated, was sufficient to meet requirements of Rules of Criminal Procedure. (Rules Crim. Procedure, Rule 6d)

2. **Trial—Argument of Counsel—Rebuttal Argument**

   Government did not obtain an "unequal privilege" when it was allowed a rebuttal argument where defendant in criminal proceeding did not demonstrate how he was prejudiced. (Rule Crim. Procedure, Rule 13)

3. **Courts—Special Judges—Powers**

   In criminal prosecution, where two special judges were assigned to sit with the high court justice, special judges could question witness just the same as the high court justice. (5 TTC § 204(2))

4. **Courts—Special Judges—Powers**

   In prosecution for murder, where it was argued that special judge injected word "osoched" and suggested this to witness as sound made by victim when "stoned", and record upon review revealed that if there was such suggestion, witness had rejected it and answered that sound was "like it came from the heart", no prejudice to defendant was shown and questions of special judge were not improper. (5 TTC § 204(2))

5. **Criminal Law—Witnesses—Impeachment of Testimony**

   Trial judge must be satisfied as to inconsistency between witness' testimony at trial and his prior statement when ruling on introduction of extrinsic evidence as to a witness' credibility. (Rules Evidence, Rule 22(2))

6. **Criminal Law—Witnesses—Impeachment of Testimony**

   In prosecution for murder, where witness testified as to what he had seen on night of homicide, and defense counsel, on cross examination, confronted witness with a written statement signed by witness prior to his testimony in court, which statement was furnished to defense by prosecution and with respect to which witness readily stated during trial that it was not true, and trial court refused defense's offer to admit statement into evidence for purpose of impeaching witness' credibility, it would not have been error to admit statement. (Rules Evidence, Rule 22(2))

7. **Criminal Law—Witnesses—Impeachment of Testimony**

   When witness whose credibility is being tested is testifying against accused, proper foundation is laid, all other requirements of admissibility are met, and no claim of privilege is raised against it, prior inconsistent written statement should be admitted, especially in criminal case. (Rules Evidence, Rule 22 (2))

8. **Criminal Law—Witnesses—Impeachment of Testimony**

   That portion of Debesol v. Trust Territory, 4 T.T.R. 556, 569 (App. Div. 1969) which held that "it is unnecessary to put into the record the prior

[inconsistent] statement since its only purpose is for impeachment and it is without probative value", is overruled. (Rules Evidence, Rule 22(2))

9. **Criminal Law—Witnesses—Impeachment of Testimony**

In prosecution for murder, where prosecution gave defense witness' signed inconsistent statement made before his testimony at trial in which he testified against accused, and witness readily admitted that statement was not true, and witness' testimony was substantially corroborated by another government witness, and defendant was able to unequivocally demonstrate to trier of fact that witness had made a prior inconsistent statement, it was harmless error for trial court to refuse defense's offer to admit witness' inconsistent statement in record. (Rules Evidence, Rule 22(2))

Counsel for Appellant: *Public Defender's Office,* Palau
Counsel for Appellee: *District Attorney's Office,* Palau

Before BURNETT, *Chief Justice*; HEFNER, *Associate Justice*, and WILLIAMS, *Associate Justice*

HEFNER, *Associate Justice*

The appellant, Yusim O. Minor, was convicted of murder in the second degree along with a co-defendant Kengei Yamashiro. The latter is deceased.

The appeal is based on several grounds but they can be combined into three areas. The first relates to the failure of the trial court to admit into evidence written statements of a government witness to show prior inconsistent statements and thus impeach the credibility of that witness. The second ground concerns the fact that one of the special judges at the trial asked questions and it is claimed he developed facts not suggested by the evidence and this caused a pre-judgment in the case. Thirdly, procedural errors are claimed to have been made in the Information and in allowing the government a rebuttal argument.

We will deal with these matters in reverse order.

[1] A review of the Information filed shows that the time of the homicide was alleged to be on or about November 24, 1968. The place was at Koror, Palau

District. The subject matter of the alleged offense is also specified as well as the Code section alleged to be violated. The Information satisfies the requirements of Rule 6d, Rules of Criminal Procedure. It is noted that the appellant does not show, nor does he argue, that he was misled or did not know what the charges were which he had to defend against.

[2] The appellant next claims that the government obtained an "unequal privilege" when it was allowed a rebuttal argument. Rule 13, Trust Territory Rules of Criminal Procedure, sets forth the "usual trial procedure, which may be modified by the Court to fit the circumstances of a particular case." There is nothing which limits the right of the Court to allow the government a rebuttal argument and, in fact, it is a common accepted practice to allow it. The appellant does not demonstrate how he was prejudiced and we find no merit in this contention.

[3] Pursuant to 5 TTC 204(2), two special judges were assigned to sit with the High Court Justice. The special judges participate in deciding questions of fact and sentence. The appellant concedes that the Court has the authority to examine witnesses and it follows that special judges may question witnesses just the same as the High Court Justice.

[4] The appellant fails to show how and in what way he was prejudiced by the questions asked by the special judges. It is argued that the special judge injected the word "osoched" and suggested this to the witness as the sound the victim made when stoned. However, a review of the record (Page 28 of the transcript) reveals that if there was such a suggestion, the witness rejected it and answered that the sound was "like it came from the heart." We find no prejudice to the defendant and we find no impropriety in the questions of the special judge.

Lastly, the appellant questions the Court's ruling when it refused to admit into evidence prior inconsistent written statements of a government witness.

The witness, Arkajus Orrukem, testified as to what he saw on the night of the homicide. On cross-examination, defense counsel confronted Orrukem with a written statement given to a representative of the Public Defender's Office. The statement was signed by the witness and it was prior to his testimony in court. In respect to the written statement, the witness readily stated that it was not true. Defense Counsel then offered it into evidence and the Court refused to admit it.

A second statement, made to the police and signed by the witness, was offered by the defense, but the record is not clear as to the purpose of the second statement. Counsel and the trial court apparently treated it in the same category as the statement made to the representative of the Public Defender.

It is conceded by the appellee that the defendant has the right to impeach a witness who testifies against him. *Boehm v. United States*, 123 F.2d 791, 806 (8th Cir. 1941); 81 Am.Jur.2d Witnesses § 521, Rules 20 and 22, Rules of Evidence.

Rule 20 provides that any party may introduce extrinsic evidence relating to a witness' credibility. Rule 22(2) provides that extrinsic evidence of prior contradictory written statements made by the witness may, in the discretion of the trial judge, be excluded unless the witness was so examined while testifying as to give the witness an opportunity to identify, explain or deny the statement.

[5] The trial judge must be satisfied as to the inconsistency between the witness' testimony and the prior statement. *Gruenwald v. United States*, 353 U.S. 391, 77 S.Ct. 963 (1957).

In this case, there was no doubt the prior statement made to the representative of the Public Defender's Office was inconsistent. The witness Orrukem readily stated that it was not true and therefore inconsistent with his testimony.

The appellant raises the intriguing question as to whether a witness can avoid the full impact of his prior statement by admitting he lied, and thereby prevent the statement from being seen by the trier of fact. He argues that the document must be seen or heard so the trier of fact can fully evaluate the credibility of the witness. The appellant also argues that the best evidence rule (Rule 16b, Rules of Criminal Procedure) demands the admission of the written statement into evidence.

What must be determined is whether the defendant was prejudiced and denied a fair trial because the statement was excluded by the Court, notwithstanding the discretion given to the trial judge.

In *Gordon v. United States*, 344 U.S. 414, 73 S.Ct. 369 (1952) the defendant was convicted principally by the testimony of one government witness. On cross-examination of the witness, it developed he had made prior inconsistent written statements in the possession of the government. The trial court denied defendant's motion to inspect the documents and the Supreme Court found that this was error.

If the statements in this matter were similarly withheld from the defendant, our task would be simple, but such is not the case as the defendant had inspected the documents and had access to them.

Since the trial court in *Gordon* denied the defendant's motion to inspect the documents, the trial judge did not decide whether the statement was admissible. However, the Supreme Court discussed this point and refused to accept the Court of Appeals determination that, once the witness admitted an implicit prior contradiction, there is no need to

resort to the statements and the admission was all the accused was entitled to demand. The Supreme Court stated that: "We think that an admission that a contradiction is contained in a writing should not bar admission of the document itself in evidence, providing it meets all other requirements of admissibility and no valid claim of privilege is claimed against it." (At 344 U.S. 420–421) The Court then proceeded to apply the best evidence rule "not merely because it will emphasize the contradiction to the jury, but because it will best inform them as to the documents' impeaching weight and significance." (At 344 U.S. 421)

In addition to the refusal to allow the defendant to inspect the documents and then admit them into evidence, the Supreme Court also found error in the exclusion of the court transcript of the testimony of the government witness at a prior hearing. After considering these errors, it held that the combination was sufficiently prejudicial to require reversal.

It is not clear whether the Supreme Court would have reversed the conviction if there was only the refusal of the trial court to admit the prior inconsistent statement. Therefore, we must apply the doctrine enunciated in *Gordon* to the case before us, considering all of the record.

[6, 7] We first conclude that it would not have been error to admit the statement, and where the proper foundation is laid, and all other requirements of admissibility are met, and no claim of privilege is raised against it, the prior inconsistent written statement should be admitted. This is particularly true when the witness whose credibility is being tested is testifying against the accused in a criminal case. The document is the best evidence and allows the trier of fact to be informed as to the weight and significance of the impeaching document.

[8] Our decision today inferentially, if not expressly, overrules that portion of *Debesol v. Trust Territory*, 4 T.T.R. 556, (App. Div. 1969), which held that "it is unnecessary to put into the record the prior statement since its only purpose is for impeachment and it is without probative value." We agree that the statement is for impeachment purposes only, but the implication that in all cases the statement should be refused admission into evidence, is rejected.

We must concede and grant to the trial judge wide discretion in whether he should admit such documents even though we may feel the better course would have been to admit the document.

Therefore, we must determine if the refusal to admit the document was so prejudicial as to require a reversal, or whether it was harmless error.

[9] We hold that in this case it was harmless error. The witness Orrukem was not the only witness of the government, and it was not a case where the prosecution stood or fell on the belief or disbelief of one witness, as in *Gordon*, supra. Orrukem was substantially corroborated by another witness, Elias Franz, and there was the fact of the death of the victim along with the medical testimony, all of which was consistent with the testimony of Orrukem as he related it on the witness stand.

As noted above, this is not a case where the government refused to allow the defendant to have access to Orrukem's prior statements. The defendant was able to unequivocally demonstrate to the trier of fact that Orrukem had made a prior inconsistent statement. This case falls far short of the situation found in *Gordon*, supra. The trial court here, knowing the government witness had made a prior inconsistent statement, still found facts sufficient to find the

defendant guilty beyond a reasonable doubt. We will not disturb that finding.

The Judgment of conviction is AFFIRMED.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

v.

HERMAN T. PALACIOS, Appellant

Criminal Appeal No. 54

Appellate Division of the High Court

May 28, 1976

Appeal by co-defense counsel from trial court ruling of contempt of court for failing to appear on original date set for criminal trial. The Appellate Division of the High Court, per curiam, reversed and remanded, holding that where trial court, on September 9, entered written order of contempt of court which stated that court found defense attorneys in contempt and ordered each to pay a fine of $100 and sentenced each to six months in jail, but suspended sentence on condition that fine be paid within three days, and stated that in event that fine was not paid, attorney not paying fine would be committed to jail until fine was paid, there was insufficient support for finding of contempt; and that where notice of appeal was filed on September 12, trial court's filing on September 19, of an amendment to its original contempt order, which amendment stated that trial court certified that it saw the conduct constituting contempt and that it was committed in actual presence of the court, and set forth precise facts upon which contempt was found, was without legal effect since it was not a correction of a clerical error and trial court had no jurisdiction, to enter amended order, because its power to act ended upon filing of notice of appeal.

1. **Courts—Jurisdiction—Correction of Clerical Errors**

   Where trial court, on September 9, entered written order of contempt of court which stated that court found defense attorneys in contempt and ordered each to pay a fine of $100 and sentenced each to six months in jail, but suspended jail sentence on condition that fine be paid within three days, and stated that in event that fine was not paid, attorney not paying fine would be committed to jail until fine was paid, there was insufficient support for finding of contempt; and where notice of appeal was filed on September 12, trial court's filing, on September 19, of an amendment of its contempt order, which amendment stated that court certified that it saw the conduct constituting contempt and that it was committed in actual presence of court, and set forth precise facts upon which contempt was found, was not correction of a clerical error and trial court had no jurisdiction to enter amended order, because court