

Accordingly, for reasons advanced above, the court vacates the sentence of the trial court, and remands the case to the trial court for resentencing by a different judge with the prosecutor making the agreed-upon recommendation.

**REMANDED.**

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**KERAD LONEY, Appellant-Defendant**

**v.**

**TRUST TERRITORY OF THE PACIFIC ISLANDS,  
Appellee-Plaintiff**

**Criminal Appeal No. 83**

**Appellate Division of the High Court**

**Ponape District**

**March 11, 1983**

Appeal from conviction for assault and battery. The Appellate Division of the High Court, Munson, Chief Justice, held that where defendant was questioned by police after arrest without being informed of his statutory rights, defendant's statements should have been suppressed, and where defendant was never given an opportunity to obtain counsel prior to identification proceedings, defendant was denied the right of counsel, and therefore conviction was reversed.

**1. Criminal Law—Identification—Right to Counsel**

Confrontation for identification purposes in a criminal proceeding is a critical stage, affording an accused the right to the presence of counsel during any police identification proceedings.

**2. Criminal Law—Identifications—Right to Counsel**

The right to counsel in the Trust Territory applies to all identification proceedings, whether the suspect has been charged or not.

**3. Criminal Law—Rights of Accused—Generally**

Prior to any questioning by police, an arrested person is to be advised of certain rights set forth by statute. (12 TTC § 68)

**4. Criminal Law—Rights of Accused—Waiver**

Any statements made by an arrested individual are not admissible at trial, unless the individual is advised of his or her rights and the individual knowingly and voluntarily waives such rights.

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5. Criminal Law—Evidence Obtained in Violation of Rights

Statements made by defendant arrested for attempted rape should have been suppressed at trial, where defendant was not advised of his rights prior to questioning. (12 TTC § 68)

6. Constitutional Law—Right to Counsel—Particular Cases

Defendant arrested and charged with attempted rape was denied the right to counsel, where he was never advised of his statutory rights prior to police questioning, he was not given an opportunity to obtain counsel prior to identification proceedings, and prosecution did not make a convincing showing that in-court identification of defendant based on prior out-of-court identification had an independent origin. (1 TTC § 4)

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Before MUNSON, *Chief Justice*, MIYAMOTO, *Associate Justice*, LAURETA, *Temporary Justice*

MUNSON, *Chief Justice*

Appellant was arrested and charged with attempted rape in violation of 11 TTC § 1302 and 11 TTC § 4, and attempted rape in violation of Public Law 138–68. At trial, the District Attorney amended the information to include the lesser included offense of assault and battery in violation of 11 TTC § 203. Appellant was convicted of assault and battery, and this appeal followed.

The victim, an eleven year old girl and her nine year old friend who was a witness, described the victim’s assailant to the police on the day of the incident. Appellant met the general description given by the girls and the investigating officer recalled seeing appellant the day before wearing clothes similar to those described by the girls, namely, light blue pants and a T-shirt.

Appellant was arrested, taken to the police station and photographed. He was not advised of any rights he might have as an arrested person. He was then released. Appellant's photograph was then shown to the two young girls who identified him as the victim's assailant. It is uncontested that only the one photograph was shown to the girls and further that appellant was not advised of any rights he might have to a lawyer being present during the identification procedure, nor was anyone from the Public Defender's Office contacted. Appellant was then arrested a second time and charged as aforestated. Appellant made a pre-trial motion to suppress the identification of his photograph by the two girls and any subsequent identification of appellant by the girls. The motion was denied.

At trial, over objection, another detective, Detective Martin, testified for the prosecution. He stated that the appellant while in jail asked him to deliver a letter of apology for him to the stepfather of the victim's mother and further requested the detective to ask the stepfather to apologize to the victim's parents for what he had done to their daughter. Detective Martin testified that appellant's statements to him were made only after questions were directed to appellant and that he had not advised appellant that he had any right to remain silent or of any rights he may have had to assistance of counsel.

CONFRONTATION FOR IDENTIFICATION IS A  
CRITICAL STAGE.

"CONFRONTATION. In criminal law, the act of sitting a witness face to face with the prisoner in order that the latter may make any objection he has to the witness, or that the witness may identify the accused." *Black's Law Dictionary*, 372 (rev. 4th ed. 1968).

[1] In the landmark case of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, the court held confrontation for identification is a "critical stage," afford-

ing an accused the right to the presence of counsel during any police identification proceedings. We agree.

In *United States v. Wade*, 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926, the issue before the court was "whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for the identification purposes without notice to and in the absence of accused's appointed counsel." The court noted that the pre-arrest identification, as we have in the case before us, may be so suggestive as to preclude a fair trial to the accused. The court went on to emphasize that the presence of defendant's counsel at such a time could prevent or expose any unfairness.

The right to counsel for identification "confrontations" was recognized by the High Court in *Trust Territory v. Ngiraitpang*, 5 T.T.R. 282, 286 (Tr. Div. 1970).

"When the police arrange a lineup or other identification proceedings the suspect, whether he be charged or not, is entitled to have the Public Defender or his representative, or other defense counsel present. The suspect must be told this by the police and if he requests counsel the proceedings may not be held until counsel is present."

[2] The court made it clear that the right to counsel in the Trust Territory applies to all identification proceedings, whether the suspect has been charged or not. The court continued:

"The significance of this new rule is that it gives defense counsel, first, an opportunity to charge whether the identification of a suspect by the victim of the crime or other witness is fairly conducted and is not suggestive of the result the police believe should be reached as to identity, and, secondly, if the proceedings are unfair or prejudicial to the suspect defense counsel may be able to prevent an in-court identification if it stems from the out-of-court tainted proceedings. Thus the only identification available to the prosecution for the trial record is a convincing showing that the

in-court identification had an independent origin. That it did not arise out of the tainted pre-trial proceedings, but that it stemmed in some fashion from the crime itself." *Id.*, 5 T.T.R. at 286-87.

This court adopts the standard of the trial court in *Ngiraitpang*, *supra*.

### CUSTODIAL INTERROGATION

In *Miranda v. Arizona*, *supra*, the court's decision concerning "custodial interrogation" requires that prior to any questioning the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

[3-5] In *Trust Territory v. Poll*, 3 T.T.R. 387 (Tr. Div. 1968), the standards of *Miranda v. Arizona*, *supra*, were not adopted for the Trust Territory. However, it is now required that prior to any questioning by police, a defendant is to be advised of certain rights as set forth in 12 TTC § 68:

"... any person arrested shall be advised as follows: (a) that the individual has a right to remain silent; (b) that the police will, if the individual so requests, endeavor to call counsel to the place of detention and allow the individual to confer with counsel there before he is questioned further, and allow him to have counsel present while he is questioned by the police if he so desires; and (c) that the services of the Public Defender, when in the vicinity of his local representative, are available for these purposes without charge."

Absent such an advisement of rights and a knowing and voluntary waiver by the accused, any statements by the accused are not admissible. Detective Martin testified that appellant's statements to him were made only after questions were directed to appellant. Detective Martin was obligated to advise appellant of his 12 TTC § 68 rights

prior to questioning him about the letter, and since this was not done, statements made by appellant should have been suppressed.

1 TTC § 4 provides:

“In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”

[6] In the present case, appellant was never advised of his statutory rights, as contained in 12 TTC § 68 nor was he given an opportunity to be represented at the identification proceedings where his picture was shown to the two young girls. Further, the prosecution made no showing, and certainly not a “convincing” showing that the in-court identification had an independent origin. We therefore find that appellant was denied the right to counsel as stated in 1 TTC § 4.

No purpose would be served for consideration of the other issues raised by the notice of appeal.

The order of the trial division is REVERSED.

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FRANCISCO PERMAN, Appellant

v.

GOVERNMENT OF THE TRUST TERRITORY  
OF THE PACIFIC ISLANDS, Appellee

Civil Appeal No. 341

Appellate Division of the High Court

Ponape District

March 11, 1983

Appeal from Trial Division order dismissing a petition for review challenging an adverse administrative decision. The Appellate Division of the High Court, Miyamoto, Associate Justice, held that under Administrative Procedure Act, a person adversely affected by agency action is entitled to judicial review even if more than thirty days transpire between the agency action and the filing of the petition for review, and therefore dismissal of petition was reversed and the case remanded for further proceedings.