NGIRMIDOL, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Case No. 83

SIMER, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Case No. 84

MOSES, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Case No. 85

Trial Division of the High Court

Palau District

June 16, 1955

Appeals from three separate convictions in Palau District Court of petit larceny in violation of T.T.C., Sec. 397, in which each defendant contends evidence insufficient to support conviction. The Trial Division of the High Court, Chief Justice E. P. Furber, held that cross-examination of witness by same counsel in another case does not take the place of right of cross-examination in pending case, and therefore convictions based only on such testimony and confessions are to be set aside.

Reversed and remanded.

1. **Criminal Law—Rights of Accused—Confrontation of Witnesses**
   Accused has right in all criminal prosecutions to be confronted with witnesses against him. (T.T.C., Sec. 4)

2. **Criminal Law—Rights of Accused—Confrontation of Witnesses**
   Essential purpose of defendant's right to be confronted with witnesses against him in criminal trial is to give accused opportunity for cross-examination and to let him know upon what evidence he is being tried. (T.T.C., Sec. 4)

3. **Criminal Law—Rights of Accused—Confrontation of Witnesses**
   While accused in criminal trial can waive right to be confronted with witnesses against him, either personally or through counsel, it cannot be taken away from him without his consent. (T.T.C., Sec. 4)

4. **Criminal Law—Rights of Accused—Confrontation of Witnesses**
   Cross-examination of witness by same counsel in another case does not take place of right to cross-examination in pending criminal trial since matter that has no proper place in trial of one accused may be of great importance in trial of another. (T.T.C., Sec. 4)

5. **Criminal Law—Prosecutor's Error or Omission**
   Accused in criminal prosecution is not entitled to acquittal as matter of right when prosecution rests without having covered essential point on which it appears probable that evidence is available. (Rules of Crim. Proc., Rules 1 and 13)

6. **Criminal Law—Prosecutor's Error or Omission**
   When prosecution in criminal case rests without having covered essential point on which it appears probable that evidence is available, court should re-open prosecution and take testimony on point not covered when it appears point was overlooked through inadvertence or misunderstanding and it is probable that there is no great dispute about facts involved.

7. **Appeal and Error—Scope of Review**
   Trial Division of the High Court has broad powers on appeal to set aside judgment and remand case with such directions for new trial as may be just, instead of merely reversing judgment. (T.T.C., Sec. 200)

8. **Criminal Law—Prosecutor's Error or Omission**
   Decisions by courts outside Trust Territory, holding that accused is entitled as matter of right to acquittal at close of prosecution's case where prosecution has failed to prove essential element of crime and that if this is not granted he should be acquitted on appeal, have no application here.

9. **Civil Procedure—Generally**
   Trials should be conducted with enough formality and order so that there can be no reasonable doubt as to what case or cases are being tried.

10. Civil Procedure—Generally

After trial judge has once indicated that taking of testimony is finished, he should not take further testimony without making clear to both sides he is re-opening case and giving them same opportunity to be heard concerning additional testimony that they would have had if it had been introduced at original trial.

11. Criminal Law—New Trial

Where justice requires granting accused in criminal appeal new trial if he so desires, accused may choose to let finding and sentence stand rather than proceed with new trial.

Assessor:	R. FRITZ
Interpreter:	FRANCISCO K. MOREI
Counsel for Appellants:	FUMIO, N. R.
Counsel for Appellee:	SGT. ULENGCHONG

FURBER, *Chief Justice*

These are appeals from three separate convictions of petit larceny of lumber belonging to the Trust Territory Government.

These appeals were heard together in accordance with agreement of counsel, although the cases are said by both counsel to have been tried separately in the District Court. The records indicate that they were all tried on the same days as the case against Marbou referred to below, which came up to this court on appeal as Palau District Criminal Case No. 82, 1 T.T.R. 269.

Each of the appellants and the appellee were represented at the hearing on appeal by the same counsel who had represented them at the trials in the District Court.

The appellants advanced two grounds for their appeals: —First, that the evidence in each case is insufficient to support the conviction; and second that a confession alone is not enough to justify a conviction. They argued that there was no evidence of intent to steal and no proof of the corpus delicti, and that the trial court should have

granted each accused's motion for acquittal at the close of the prosecution's case under Rule 13h of the Rules of Criminal Procedure. Counsel for the appellee agreed in open court that such motions were made and denied, although this does not appear in the record. The appellants asked that they now be acquitted on appeal.

The appellee argued that the convictions were justified by testimony given in the case of *Trust Territory v. Marbou*, Criminal Case No. 331 in the District Court, by a witness whose testimony the prosecutor had stated would be the same in these cases, and who the court had stated need not testify over again in these cases, and by certain testimony taken at the Police Station in, or at the same time as testimony in, the Marbou case after these three trials were "finished" (but apparently before any finding). The appellee did not claim that the accused had agreed that any testimony in the Marbou case should be considered in these cases; nor did it claim that anyone had requested or ordered that the testimony at the Police Station in the Marbou case should be considered in these cases.

Both counsel are duly authorized trial assistants, and both tried, apparently conscientiously, to describe to this court what happened in the trial court in connection with the trial of these three cases and the Marbou case. From their statements it appears that before trial of any of the four cases was started there was a discussion between counsel and the court about trying all four together, that it was decided they should be tried separately, and that the three cases now in question were tried during a suspension of the trial in the Marbou case, but that there was such confusion as to the exact arrangements for trial, just what it meant to try the cases separately, and what these trials being "finished" meant, that it is impractical to try to satisfactorily amend the record by

agreement of counsel. Since, however, the facts stated which are most favorable to the appellee, taken in conjunction with the records, are not sufficient to support the convictions, it is not believed worth while to make further effort to amend the present records.

The sole evidence on behalf of the prosecution appearing in the record of any of these cases is a written admission by the accused and the testimony of a policeman as to the obtaining of that admission. None of the admissions constitutes a full confession covering all elements of the alleged crime. These, even with the record of testimony offered by the accuseds, are clearly insufficient to support the convictions, and the appellee has not even claimed they are sufficient.

CONCLUSIONS OF LAW

[1–4] 1. An accused, under Section 4 of the Trust Territory Code, has the right in all criminal prosecutions "to be confronted with the witnesses against him". This is a well established and usual right in the United States. Its meaning and the limitations on it are explained in 14 American Jurisprudence, Criminal Law, Sections 176 to 188. Part of its essential purpose is to give an accused an opportunity for cross-examination and to let him know what the evidence is on which he is being tried. While he can waive the right, either personally or through counsel, it cannot properly be taken away from him without his consent. Cross-examination of a witness by the same counsel in another case does not take the place of this right. Matter that has no proper place in the trial of one accused, may be of great importance in the trial of another.

[5–8] 2. Rule 13h of the Rules of Criminal Procedure must be read with the rest of these rules—especially Rule 1 and the first paragraph of Rule 13. This

court has already held in the case of *Trust Territory of the Pacific Islands v. Pedro*, Palau District Criminal Case No. 35, that an accused is not entitled to an acquittal as a matter of right when the prosecution rests without having covered an essential point on which it appears probable that evidence is available. It was there stated in the remarks of the court, "In such case, the court believes it should reopen the prosecution and take testimony on the point not previously covered, when it appears this point has been overlooked through inadvertence or misunderstanding and it is probable there is no great dispute about the facts involved". Furthermore, Section 200 of the Trust Territory Code gives this court broad powers on appeal to set aside a judgment and remand the case with such directions for a new trial as may be just, instead of merely reversing the judgment. Consequently, decisions by courts outside the Trust Territory holding that an accused is entitled as a matter of right to an acquittal at the close of the prosecution's case, where the prosecution has failed to prove an essential element of the crime, and that if this is not granted he should be acquitted on appeal, have no application here. Compare 28 U.S.C., Section 2106, and 54 American Jurisprudence, 1954 Cumulative Supplement, U.S. Courts, Sec. 311 on page 114, addition to be made following note 1 on page 942 of the bound volume.

[9, 10] 3. In common fairness, trials should be conducted with enough formality and order so that there can be no reasonable doubt as to what case or cases are being tried at any particular moment. After a judge trying a case has once indicated that the taking of testimony in that case is finished, he should not take further testimony in the case without making clear to both sides that he is reopening it and giving them the same opportunity to be heard concerning the additional testimony that

they would have had if it had been introduced at the original trial.

[11] 4. In the circumstances disclosed by these appeals the court believes that justice will best be done by not acquitting the appellants, but by granting each accused, if he desires it, a new trial subject to certain directions. It is possible, however, especially in view of the decision by this court in the case of *Marbou v. Trust Territory of the Pacific Islands*, 1 T.T.R. 269, that one or more of the accused may prefer to let the present finding and sentence stand in his case rather than proceed with a new trial.

JUDGMENT

1. If within seven days after entry of this judgment, the accused in District Court for the Palau District's Criminal Cases Nos. 329, 330, or 332, files in that court a written waiver of right to a new trial, the finding and sentence already imposed by the District Court in his case shall stand, and, subject to the filing of such a waiver, that finding and sentence are affirmed.

2. If within seven days after the entry of this judgment, the accused in District Court for the Palau District's Criminal Cases Nos. 329, 330, or 332, has not filed in that court a written waiver of right to a new trial, the finding and sentence in his case are set aside and the case referred back to that court for a new trial, subject to the following directions: —

(a) The judge who originally heard the case is to reopen it and take any additional proper testimony either side wishes to offer, but he is also to consider the testimony already in the record without its being re-introduced.

(b) After taking such additional testimony, he shall finish the trial as if there had been no previous find-

ing and sentence; shall allow the usual opportunity for argument; make a new finding based on all the evidence; and, if the finding is guilty, allow the usual opportunity for hearing on the question of sentence, and enter a new sentence.

3. Any time already served, or fine already paid, under the original sentence in any one of these cases shall, however, be applied against any new sentence in the same case, and the fine already paid in Case No. 330 shall be retained, unless and until there is either a finding of not guilty in the case or a sentence imposed involving either no fine or a lesser fine, in which case any excess of the fine paid over any fine imposed by the new sentence shall be returned to the accused.