TOSIMI RIDEP, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Case No. 333

Trial Division of the High Court

Palau District

May 5, 1970

Appeal from conviction of driving under the influence of intoxicating liquor. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that where appellant was formally charged only with reckless driving he could not be convicted of driving while under the influence of intoxicating liquor as each of such offenses is separate and distinct.

Remanded with instructions.

1. **Evidence—Hearsay**

   Where information officers were giving in their testimony was obtained days after incident in question from someone not called as a witness such testimony was plainly hearsay and not admissible.

2. **Criminal Law—Admissions**

   The admissions of the accused could have been received in evidence if there had been a showing they were voluntarily made after the warnings to the accused had been given as required by Section 464 of the Trust Territory Code. (T.T.C., Sec. 464)

3. **Criminal Law—Admissions**

   Testimony containing defendant's admissions of facts, but not a confession, were admissible upon a proper foundation.

4. **Criminal Law—Evidence—Written Statement of Accused**

   By his signature to a written statement and his signature to the standard notice to the accused the writings in question were admissible absent a showing by the accused that he had been unfairly imposed upon and that as a result his signature was not voluntarily written.

5. **Driving While Intoxicated—Generally**

   The mere admission by the accused that he had been "drinking vodka" did not establish he was under the influence of liquor. (T.T.C., Sec. 815(a))

6. **Evidence—Hearsay**

   Hearsay is defined as evidence which derives its value, not solely from the credit to be given to the witness upon the stand, but in part from the veracity and competency of some other person who saw the accused.

7. **Criminal Law—Complaint**

   Person charged with violation of a law in connection with one incident cannot be convicted on that charge by showing violation in connection with an entirely different incident, without any charge covering the latter incident being preferred.

8. **Criminal Law—Complaint**

   Rule 14(b) of the Rules of Criminal Procedure, while ambiguous, does not permit conviction of a greater crime without that crime being charged. (Rules of Crim. Proc., Rule 14(b))

9. **Criminal Law—Lesser Included Offense**

   Conviction of the greater merges all lesser included offenses, whether charged or not, but the reverse is not true.

10. **Criminal Law—Lesser Included Offense**

    Even though reckless driving and driving while intoxicated are set forth under Section 815, Trust Territory Code, they are separate crimes dependent on distinct and separate acts and one is not the lesser of the other offense. (T.T.C., Sec. 815)

11. Criminal Law—Lesser Included Offense
Test of whether the same act constitutes a violation of two distinct statutory provisions is whether each provision requires proof of an additional fact which the other does not.

12. Criminal Law—Lesser Included Offense
Whenever there is reasonable doubt as to whether a certain cause of action constitutes more than one crime, all the charges believed warranted should be presented to the same court at the same time.

13. Evidence—Hearsay
Sketch of scene of incident, made by officer from information given by persons who did not testify, is just as much hearsay and inadmissible as oral statements of persons not called as witnesses.

14. Evidence—Hearsay
The hearsay rules apply as forcibly to written statements, documents and other instruments as it does to oral testimony.

15. Constitutional Law—Self-Incrimination
One of the fundamental rights of a person charged with a crime is to remain silent, in or out of court.

16. Confessions—Generally
There can be no such thing as confession of guilt by silence in and out of court.

17. Constitutional Law—Self-Incrimination
A criminal defendant, if he hears a statement charging him with guilt, is not morally or legally called upon to make denial or suffer his failure to do so as evidence of guilt; the only time, generally, an accused is obliged to speak up is when he is arraigned and enters his plea to the charge.

18. Driving While Intoxicated—Generally
Intoxication is not presumed from the mere consumption of liquor. (T.T.C., Sec. 815(a))

19. Driving While Intoxicated—Generally
The presumption, until evidence to the contrary is produced, is that a person is in a state of sobriety. (T.T.C., Sec. 815(a))

Assessor:	JUDGE FRITZ RUBASCH
Interpreter:	PETER NGIRAIBIOCHEL
Counsel for Appellant:	FRANCISCO ARMALUUK
Counsel for Appellee:	BENJAMIN N. OITERONG

TURNER, *Associate Justice*

This appeal raises serious questions of criminal law and procedure which should be answered for guidance of dis-

trict courts generally. The appellant was accused of reckless driving and was convicted of driving while under the influence of intoxicating liquor. The record indicates a formal charge of driving while intoxicated was not included in the complaint and that the trial judge did not formally amend the complaint in accordance with his authority under Rule 13(h)(2), Trust Territory Rules of Criminal Procedure.

The appellant also was accused of violation of Section 812(a), Trust Territory Code, driving without an operator's license, to which he pled guilty, and to driving a motorcycle without wearing a helmet contrary to Palau District Code, Section 707(a), to which he pled not guilty and was found guilty.

The only witnesses at the trial were two investigating police officers who visited the scene of the incident on Peleliu Island and interviewed witnesses, including the accused, five days after the event. In addition to their testimony they introduced in evidence a statement of the accused written by one of the officers and signed by the accused; a Trust Territory "Notice to the Accused" signed by the accused; and a sketch of the accident scene made by one of the officers in the presence of the accused and apparently made from information obtained from one of two eye witnesses who were not called to testify.

[1, 2] At the close of the prosecution—being the testimony of the two investigating officers—counsel for the accused moved to strike the testimony and exhibits on the grounds they were hearsay. The better procedure would have been to object to the testimony when it became apparent the information officers were giving was obtained days after the incident from someone not called as a witness. The testimony was plainly hearsay and was not admissible, except for those statements purportedly made by the accused which were in the nature of admissions. These

admissions could have been received in evidence if there had been a showing they were voluntarily made after the warnings to the accused had been given as required by Section 464, Trust Territory Code, as amended by Public Law 4–5, August 21, 1968, which adopted the recommended applicable provisions to the Trust Territory of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 and set forth in *Trust Territory v. Benson Poll*, 3 T.T.R. 387.

[3, 4] On the appeal no reference was made to the testimony containing defendant's admissions of facts, but not a confession, which were admissible upon a proper foundation. There was argument on the appeal, however, as to the admissibility of the written statement which accused signed. By his signature to the statement and his signature to the standard notice to the accused the writings were admissible absent a showing by the accused he had been unfairly imposed upon and that as a result, his signature was not voluntarily written.

Because the testimony of the investigating officer was hearsay and not admissible, the only evidence properly before the court was the accused's statement:—

"On Jan. 12, 1970, I was at Ichiro Kuk's house drinking vodka then left on a motorcycle and as coming near Obak's house, Rebes was walking so I hit him and that is how his arm broke."

[5] There is nothing here to support the charge of reckless driving, but even more importantly, the most that could be said in support of a charge, had one been made by an amendment ordered by the trial judge, of driving while under the influence of intoxicating liquor, is that had there been additional testimony establishing that the accused was under the influence an amendment under the rule would have been proper. The mere admission by the accused that he had been "drinking vodka" did not establish he was under the influence of liquor.

[6] Both police officers testified the accident occurred because the accused was drunk. Even if the conclusions of the officers were admissible, and we cannot say they were because they were opinions without foundation, they also were clearly not acceptable because they rested on hearsay. Hearsay is defined as evidence which derives its value, not solely from the credit to be given to the witness upon the stand, the police officers in this case, but in part from the veracity and competency of some other person who saw the accused and perhaps concluded he was drunk and expressed this opinion to the investigating police.

Irrespective of all other objections to the evidence, it could not result in a conviction upon a charge never formally made. Recognition of this basic principle of criminal law is found in the result reached (without citation of authority) in *Fred v. Trust Territory*, 1 T.T.R. 600.

[7] Analogous to the present case is *Flores v. Trust Territory*, 1 T.T.R. 377, wherein the court said at 380:—

" . . . the court strongly repudiates the Government's implied argument that a person charged with violation of a law in connection with one incident can be convicted on the charge by showing a violation in connection with an entirely different incident without any charge covering the later incident being preferred."

[8, 9] In the present case the government argued that reckless driving was a lesser included offense in the offense of driving while intoxicated and that a conviction of the greater offense was proper because the lesser merged into the greater, under the provisions of Rule 14(b), Rules of Criminal Procedure. Granted the rule relied upon is confusingly ambiguous it does not permit conviction of the greater crime without that crime first being charged. Conviction of the greater merges all lesser included offenses, whether charged or not, but the reverse is not true.

[10, 11] Even though the two offenses are set forth under Section 815, Trust Territory Code, they are separate crimes dependent on distinct and separate acts and one is not the lesser of the other offense. The distinction between separate offenses is mentioned in *Paul v. Trust Territory*, 2 T.T.R. 603 at 611:—

" . . . in a number of cases involving the question of whether the same act constituted a violation of two distinct statutory provisions, it has been announced that the test is 'whether each provision requires proof of an additional fact which the other does not.'" See *Blockburger v. U.S.* (1932), 284 U.S. 299, 52 S.Ct. 180, 182.

[12] In this same case at 2 T.T.R. 615 the court said:—

"It is strongly recommended that in the future whenever there is reasonable doubt as to whether a certain cause of action constitutes more than one crime, all the charges believed warranted be presented to the same court at the same time, so that the whole incident may be fairly evaluated . . . ."

This admonition should have been heeded in this case.

[13, 14] Another point to be noted is that the sketch of the scene, made by the officer from information given by persons who did not testify, is just as much hearsay and inadmissible as oral statements of persons not called as witnesses. The hearsay rules apply as forcibly to written statements, documents and other instruments as it does to oral testimony. 10 A.L.R.2d 1037. *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477. *Mitchell v. Farr* (Tenn.), 222 S.W.2d 218, noted at 10 A.L.R.2d 1047.

The *Mitchell* case, supra, involved a map or diagram indicating positions of automobiles at the time of a collision, which was prepared by a witness who was not present when the collision occurred. The sketch was not admitted.

[15–17] The prosecution argued on appeal that the sketch was made in the presence of the accused and that

he made no objection to it. One of the fundamental rights of a person charged with a crime is to remain silent, in or out of court. There can be no such thing as confession of guilt by silence in and out of court. A criminal defendant, if he hears a statement charging him with guilt, is not morally or legally called upon to make denial or suffer his failure to do so as evidence of guilt. The only time, generally, an accused is obliged to speak up is when he is arraigned and enters his plea to the charge. 29 Am. Jur. 2d, Evidence, § 525.

The record indicates the prosecution might have presented a proper case by calling witnesses present at the time the accused ran into Rebes. If the government also had seen fit to bring a charge of driving while under the influence it could have obtained testimony as to the accused's actions as a result of "drinking vodka", not merely the conclusions of a police officer who hadn't seen him at the time but nevertheless testified that he "was drunk".

[18, 19] Intoxication is not presumed from the mere consumption of liquor. The presumption, until evidence to the contrary is produced, is that a person is in a state of sobriety. 29 Am. Jur. 2d, Evidence, § 206.

Because there was no valid evidence to sustain any charges presented, the case is remanded and the trial court is instructed to enter a judgment of acquittal on the charges of reckless driving and driving a motorcycle without a helmet. The guilty plea to the operator's license count is affirmed.

The judgment and sentence on the charge of driving a motor vehicle while under the influence of intoxicating liquor is vacated and quashed. It is surplusage. The appellant was not charged with such offense.