TRUST TERRITORY OF THE PACIFIC ISLANDS

v.

SINGERU TECHUR

Criminal Case No. 330

Trial Division of the High Court

Palau District

June 9, 1970

Prosecution for murder in the second degree. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that where accused was advised of his right to silence but he chose not to remain silent he could not later complain of the consequences of his action and that seized items obtained without a search warrant were properly obtained pursuant to permission of joint user of premises.

1. **Search and Seizure—Motion to Suppress Evidence**

   The rule that a motion to suppress must be brought prior to the trial is only a rule of procedure and therefore it is not to be applied as hard and fast formula to every case. (T.T.C., Sec. 485)

2. **Search and Seizure—Motion to Suppress Evidence**

   Court could properly "pause" to consider motion to suppress raised during trial. (T.T.C., Sec. 487)

3. **Criminal Law—Pre-Trial Procedure**

   Public has social interest in seeing that guilty persons do not go free merely because of error on the part of the constabulary which has no bearing on question of guilt of accused.

4. **Criminal Law—Generally**

   Trust Territory courts and counsel appearing before them should be interested in substantial justice in criminal proceedings rather than technicalities.

5. **Criminal Law—Pre-Trial Procedure**

   No violation of the provisions in Trust Territory Code, Chapter 6, including provisions for a motion to suppress, will in and of itself entitle an accused to an acquittal. (T.T.C., Sec. 458)

6. **Confessions—Admissibility—Waiver of Right**

   The fact that accused's understanding of his rights was erroneously limited to the right to decline to make a formal written statement as against orally discussing the subject and making an "informal" confession was not sufficient to exclude the confession.

7. **Confessions—Admissibility—Waiver of Right**

   Where defendant was warned that he could remain silent and he did not do so he could not be heard to complain of the consequences.

8. Search and Seizure—Consent to Search—Joint User

A joint or equal user has authority to consent to a search.

9. Evidence—Hearsay—"Res Gestae"

The theory of the *res gestae* rule is that utterances, accompanying or forming part of a transaction or occurrence spoken spontaneously in response to nervous stimulation produced by the transaction or occurrence, are admissible in evidence to explain or characterize it.

10. Evidence—Hearsay—"Res Gestae"

Since the utterance, under the *res gestae* rule, is made under the immediate and controlled domination of the senses rather than reason and reflection, and during the brief period when consideration of self-interest could not have been fully brought to bear, the utterance may be taken as expressing the real belief of the speaker as to the facts just observed by him.

11. Evidence—Hearsay—"Res Gestae"

The statements by the victim at the time she was struck by the knife; and repeated shortly thereafter to her mother; and perhaps an hour later to a hospital nurse are all admissible as part of the *res gestae.*

12. Evidence—Hearsay—"Res Gestae"

An hour was sufficient under the circumstances to make the statement part of the *res gestae* and therefore admissible.

13. Evidence—Hearsay

Defendant's statement to his mother-in-law at the time of the wounding was admissible both as a part of the *res gestae* and as an admission against interest; both rules sanction admission into evidence of hearsay.

14. Homicide—Generally

Malice aforethought may be inferred from the wilful and wanton disregard of human life evidenced by the defendant in flinging a butcher knife across a room at his small son and unintentionally fatally wounding his wife.

Special Judges:	*Presiding District Judge,* PABLO RINGANG and *Associate District Judge,* WILLIAM O. WALLY
Interpreter:	SINGICHI IKESAKES
Reporters:	SAM K. SASLAW and SANAE N. SHMULL
Counsel for Prosecution:	JAMES E. WHITE, *District Attorney,* and BENJAMIN N. OITERONG, *District Prosecutor*

Counsel for Defendant: WILLIAM NORRIS, *Assistant Public Defender*, and FRANCISCO ARMALUUK, *Assistant Public Defender's Representative*

TURNER, *Associate Justice*

The defendant was charged by information with murder in the second degree. He was convicted and sentenced to, what is deemed to be a minimum sentence under the statute, five years imprisonment plus 10 years suspension on condition. Release for good behavior, being one-third of total sentence, would not be effective until the five year mandatory minimum was served. The question of mandatory minimum is one to be raised on appeal. For the purpose of appeal the Public Defender has asked for findings of fact and conclusions of law.

FINDINGS OF FACT

1. Ngedebus, wife of the defendant Singeru Techur, was struck in the left back side of her head by a stainless steel kitchen butcher knife thrown by her husband. The injury was inflicted at approximately 6:00 p.m., March 1, 1970, in Koror Municipality, Palau District.

2. Ngedebus died at approximately 7:00 p.m., March 3, 1970, in the U.S. Navy Hospital, Guam.

3. Cause of death was a brain hemorrhage resulting from a penetrating wound of the skull made by a sharp pointed instrument which produced a three-quarter inch cut into the brain. The fatal wound was inflicted by the knife thrown by the defendant.

4. Before her death and after her injury the victim underwent Caesarean section for an eight-month pregnancy. This operation did not contribute to the medical cause of death.

5. The defendant did not intend to hurt his wife but threw the knife to punish for disobedience the small son,

Peter, of the couple. In a successful effort to protect the son from harm the mother was fatally injured.

6. The defendant admitted the fatal act to his mother-in-law in whose house he and his wife, their children, and his sister, all lived.

7. The defendant admitted the knife throwing to the police and identified for them the lethal knife. (Ex. 10.)

8. The victim told a hospital nurse, within an hour of the injury, that she had been cut by a knife thrown by the husband at their little son. The statement was made in response to the question, "what happened?"

9. The victim also told her mother, Itwong Temengil, who was a trial witness, that she had been hurt by a knife thrown by her husband when she went to protect her little son. This statement was made immediately after the incident.

CONCLUSIONS OF LAW

1. The defendant, Singeru Techur, unlawfully took the life of his wife, Ngedebus, with malice aforethought when he threw a butcher knife at his small son, Peter, which struck his wife in the head and inflicted the fatal injury.

2. Malice aforethought is inferred as a matter of law by the act of throwing the butcher knife in wilful and wanton disregard of consequences to human life.

3. The defendant's confession to the police wherein he identified the knife he threw to inflict the fatal wound, was knowingly and voluntarily made after he had been informed of his rights.

4. The defendant voluntarily waived his right to remain silent after he had requested counsel and had consulted him, the assistant public defender's representative.

5. Statements made by the defendant both immediately after the fatal wounding and several hours later in the

presence of his wife and mother-in-law at the hospital were admissible as part of the *res gestae*.

6. Statements made by Ngedebus to the hospital nurse within the hour of the injury and in response to the question "what happened?" were admissible as part of the *res gestae*.

7. The only time the police made a "search and seizure" (Ex. 9) in the home of the defendant their entry was consented to by two of the joint-residents, who had authority as a matter of law to give consent. Because of the authorized consent given a search warrant was not required.

8. The police obtained two stainless steel knives, one of which was the lethal weapon, Ex. 10, when they requested them from residents of the house. The police did not enter the house to obtain them and although they were obtained without a search warrant they were lawfully obtained and therefore not subject to a motion to suppress.

9. Under the procedural rule a motion to suppress should be made before trial, but it is within the court's discretion to consider the motion during trial, to recess the trial and to take evidence on the propriety of the seizure as a matter of law. It also is within the court's discretion to ascertain during these special proceedings whether any statements made while defendant was in custody were admissible as admissions or confessions.

10. The defendant's and his victim's *res gestae* statements, the confession of the defendant after consultation with counsel while in custody, and the corroborating evidence that the defendant hurled a knife at his son, Peter, which struck and penetrated his wife's skull 3/4 of an inch, such conduct being in wilful and wanton disregard of consequences and from which malice aforethought is inferable, established beyond a reasonable doubt the defendant's guilt of second degree murder.

OPINION

A unique procedural situation arose in this trial as result of defense motions to suppress evidence obtained from the home of the defendant without a search warrant. Section 485, Trust Territory Code, provides for the motion to suppress and for return of the property unlawfully seized and that it "shall be made before trial or hearing" except that "the court in its discretion may entertain the motion at the trial."

Because this was a murder trial requiring two special judges under Code Section 125 who participate in deciding "all questions of fact" but not questions of law, it was necessary to recess the trial to determine in a separate evidentiary hearing whether the motion to suppress should be granted as a matter of law and if denied, the admissibility, as a matter of law, of the evidence in question.

Also determined as a question of law was the admissibility of a confession to the police by the defendant. The admission, amounting to a confession, came after the accused had consulted with counsel and quite apparently had been advised to not make a statement. The accused, after the conference with counsel, declined to make either an oral or written statement to the police.

What he did do, with appropriate comment, was to identify the knife he used in inflicting the fatal wound upon his wife. The accused while in custody and after being instructed by his counsel not to make a statement was shown a butcher knife taken from his home. (Ex. 9.) He thereupon told the police:—

"This is not the knife that I had when I hurt my wife. The knife I used is stainless (steel) which is much longer than this."

When shown two stainless steel knives obtained from his home the police asked him to identify "the one he had used at the time of the incident." According to the police testimony the "defendant picked up the one with the

sharp tipped end," which also was slightly bent near the tip. (Ex. 10.)

At the conclusion of the special hearing the presiding judge determined, as a matter of law, that the knives and the statement about them by the defendant—which constituted a confession—were admissible. The trial was then resumed and the testimony and evidence adduced at the special hearing was repeated for the record of the trial and the information of the two special judges.

[1, 2] Legal justification for this unusual procedure, if any is required, is amply elaborated in *Gouled v. U.S.* 255 U.S., 298, 41 S.Ct. 261, 266. In that case the trial court's special hearing on the "propriety" of how evidence was obtained was drawn into issue. The Supreme Court pointed out that the rule that the motion to suppress must be brought prior to the trial, "is only a rule of procedure and therefor it is not to be applied as hard and fast formula to every case." The court's "pausing" to determine the question of law was approved.

[3] Eleven years ago the Appellate Division of the High Court in *Fontana v. Trust Territory*, 2 T.T.R. 616, 618, said:—

> "... the Insular Constabulary have, as yet, had only limited training and experience in operating under the system of law set forth in the Trust Territory Code and so far are making commendable progress in enforcing the laws of the Trust Territory. Some mistakes must be expected and the public has an important social interest in seeing that guilty persons do not go free merely because of error on the part of the constabulary, which would have no bearing on the guilt of the accused."

It has been this court's experience that one of the areas where training and guidance has been woefully lacking has been in the doctrine of employment of search warrants to obtain physical evidence. Warrants are seldom issued and until now the issue of suppressing evidence has not been raised in this district.

A warrant was not issued here but the motion to suppress was denied on the grounds the search of the premises and acquisition of the knives was pursuant to consent by the person in charge of the residence at the time the evidence was obtained.

Even if consent by a person authorized to give it was not obtained, it is not deemed that admission of the knives in evidence was prejudicial to the defendant and therefore was not substantial or reversible error. The guilt of the defendant was demonstrated by the defendant's own admission and confession which was corroborated by testimony of the other witnesses. The physical evidence supplied additional rather than essential corroboration.

[4, 5] This very point was made in *Yinmed v. Trust Territory*, 2 T.T.R. 492, 495:—

"Trust Territory courts and counsel appearing before them should be interested in substantial justice rather than technicalities. This is made very clear by Sec. 497 of the Code . . . . Sec. 498 that no violation of the provisions contained in Chapter 6, which includes Sec. 458 (providing for motion to suppress) . . . shall in and of itself entitle an accused to an acquittal." (Parenthetical by the court.)

Also see: *Ngeruangel v. Trust Territory*, 2 T.T.R. 620.

The two principal questions of law raised during this trial:—

1. The admissibility of the defendant's confession to the police, and

2. The propriety of "search and seizure," were considered in the very recent United States Supreme Court decision, *Frazier v. Cupp* (1969) 89 S.Ct. 1420.

In *Frazier* after the defendant began his statement he told the police:—

"I think I had better get a lawyer before I talk any more."

But the questioning continued until a full confession was given.

The court held this was not a denial of right of counsel because no firm request for counsel had been made. The record also showed the police lied to defendant about a confession his co-defendant made. The Supreme Court considered all the "relevant" facts for and against admission of the confession, admitted it and said:—

"These cases must be decided by viewing the totality of the circumstances . . . ."

Viewing the totality of circumstances in the present case we find the defendant was advised of his rights, was furnished counsel, consulted with him and thereafter proceeded to describe which knife he used in inflicting the fatal wound which is a far more compelling case for admission than the Supreme Court decision in *Frazier*.

[6, 7] The fact, if it was a fact as the defense suggests, that defendant's understanding of his rights was erroneously limited to the right to decline to make a formal written statement as against orally discussing the subject and making an "informal" confession is not sufficient to exclude the confession. What went on in the defendant's mind after he was given adequate warning of his rights in conformity with the statutory requirement does not remove the voluntariness of the confession. It was clearly admissible whether the defendant was fully aware of that result or not because of some possible confusion between an oral and written statement. The warning given him was that he could remain silent. He did not do so and may not now be heard to complain of the consequences.

The other facet of *Frazier* having relationship to this trial has to do with the search and seizure and introduction of physical evidence—in this case two knives and in *Frazier* clothing taken from a barracks bag shared with the co-defendant.

[8] The rule of *Frazier* is applicable to this case. A joint or equal user has authority to consent to a search,

Here the house was owned by Ngedebus' mother. She was at the hospital with her daughter when the police first came. The defendant was in custody. The only residents of the house who were present were the defendant's sister and the victim's sister.

They, as joint users under the *Frazier* doctrine, could authorize the police search. The following day the police went back to the house and upon request were given two knives by a resident of the house. The defendant identified one of the two, Ex. 10, as the one he threw at his son which pierced the skull of his wife causing the brain hemorrhage that resulted in death.

[9] Another first impression is noted in this case which involves admission of statements which are hearsay but may be let into the record as part of the *res gestae*. Many definitions of the phrase may be found in the cases. 37 Words & Phrases 210 et seq. The generally accepted definition is found in *Ammundson v. Tinholt* (Minn.) 36 N.W.2d 521:—

"The theory of the *res gestae* rule is that utterances, accompanying or forming part of a transaction or occurrence spoken spontaneously in response to nervous stimulation produced by the transaction or occurrence, are admissible in evidence to explain or characterize it."

[10] Also in *Keefe v. State* (Ariz.) 72 P.2d 425, 427, the theory of admissibility is explained as follows:—

"The admissibility of such exclamation is based on our experience that, under certain external circumstances of physical or mental shock, a stress of nervous excitement may be produced in a spectator which stills the reflecting faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and controlled domination of the senses rather than reason and reflection, and during the brief period when consideration of self-interest could not have been fully brought to

bear, the utterance may be taken as expressing the real belief of the speaker as to the facts just observed by him."

Also see: *State v. Woolery* (Ariz.) 378 P.2d 751, 756.

[11, 12] Under these expressed reasons for admitting hearsay when it is part of the *res gestae* it is clear that the statements by the victim at the time she was struck by the knife ("Singeru you have hurt me"); and repeated shortly thereafter to her mother; and perhaps an hour later to the hospital nurse are all admissible as part of the *res gestae*. It is noted "immediately" after the event is relative and depends upon the circumstances. Here an hour is sufficient under the circumstances to make the statement part of the *res gestae* and therefore admissible.

[13] As to the defendant's statement to his mother-in-law at the time of the wounding—"I am sorry, I didn't intend to do that. She intended to protect Peter and at that time she got hurt."—it is clearly admissible both as a part of the *res gestae* and as an admission against interest. Both rules sanction admission into evidence of hearsay.

[14] One final point of law in the case relates to permissible inference of malice. In the recent decision *Trust Territory v. Mikel Mad*, 5 T.T.R. 195, malice is defined and the three ways it may be inferred are set forth. In the present case malice aforethought is inferred from the wilful and wanton disregard of human life evidenced by the defendant in flinging a butcher knife across a room at his small son and unintentionally fatally wounding his wife.

JUDGMENT

It is the judgment of the court that the accused, Singeru Techur, is guilty of murder in the second degree and that he shall be sentenced to 15 years' imprisonment, the last 10 of which being suspended on conditions of good and lawful behavior as elsewhere set forth.