TRUST TERRITORY OF THE PACIFIC ISLANDS

v.

CARLOS N. LUCAS

Crim. No. 13-74

Trial Division of the High Court

Mariana Islands District

April 26, 1974

Motion for bill of particulars and for pretrial discovery and inspection. The Trial Division of the High Court, Arvin H. Brown, Jr., Associate Justice, held that defendant charged with criminal trespass and disturbing the peace was entitled to a bill of particulars stating exact location of house where alleged offenses took place, the exact time thereof, the names and addresses of all who were present and the precise manner in which, and means by which, defendant allegedly committed the offenses, and was entitled to discovery of witnesses' statements, defendant's statements and physical evidence not available to defendant or consisting of internal government documents.

1. **Criminal Law—Pre-Trial Procedure—Discovery**

   Criminal procedure rule providing that "upon motion of the accused at any time after the filing of the information, complaint, copy of citation, or other statement of charges, the court may order the prosecutor to permit the accused to inspect and copy or photograph designated books, papers, documents, or tangible objects obtained from or belonging to the accused, or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable", is archaic, not in harmony with current authorities and violates existing substantive law.

2. **Courts—Rules**

   A rule of court can neither abrogate nor modify substantive law.

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

   Trial judges have inherent power to permit pre-trial discovery upon motion and hearing, irrespective of rules of court regarding the matter.

4. **Criminal Law—Bill of Particulars**

   Defendant charged with criminal trespass and disturbing the peace was entitled to a bill of particulars stating exact location of house where alleged offenses took place, the exact time thereof, the names and addresses of all who were present and the precise manner in which, and means by which, defendant allegedly committed the offenses.

5. **Courts—High Court—Function of Trial Division**

   Trial Division of the High Court is not an advocate in the administration of justice and must concern itself not with mere tactical advantage to be permitted one party or the other, but with the ascertainment and declaration of truth, and it cannot knowingly permit the truth to lie hidden.

6. **Criminal Law—Pre-Trial Procedure—Discovery**

   Arresting officer's original notes were not discoverable at time of motion for bill of particulars, and were not discoverable at all in the absence of a clear showing that they should be produced.

7. **Criminal Law—Pre-Trial Procedure—Discovery**

   Whether arresting officer's original notes should be produced is for the sound discretion of the trial court.

8. **Criminal Law—Pre-Trial Procedure—Discovery**

   An arresting officer's original notes are generally to be regarded as his work product and they are discoverable prior to trial only in the most unusual circumstances and only upon motion and order.

9. **Criminal Law—Pre-Trial Procedure—Discovery**

   Though an arresting officer's notes are discoverable prior to trial only in the most unusual circumstances, if he testifies, defendant may inspect the notes and use those inconsistent with the testimony for impeachment purposes, even though the notes or the statements therein are not used by the officer or the prosecution.

10. Criminal Law—Pre-Trial Procedure—Discovery

Any and all statements of witnesses contained in police reports, but not the reports themselves, are discoverable.

11. Criminal Law—Pre-Trial Procedure—Discovery

One accused of a crime is entitled to discovery of pre-trial statements made by him.

12. Criminal Law—Pre-Trial Procedure—Discovery

Defendant was entitled to discovery of the written or recorded statements of witnesses who were to testify, and of witnesses who were not to testify if their statements tended to exculpate defendant.

13. Criminal Law—Pre-Trial Procedure—Discovery

Defendant was entitled to inspect all physical evidence, including photos, held by the prosecution, if the evidence was not otherwise available to defendant and did not consist of internal government documents or material made non-discoverable by law.

14. Criminal Law—Pre-Trial Procedure—Discovery

Defendant's motion for discovery of all evidence held by the prosecution which was either favorable to defendant or relevant to his guilt was too broad in scope and would be denied.

BROWN, JR., *Associate Judge*

By complaint dated March 4, 1974, defendant was charged with violations of 11 TTC § 1351 (trespass) and 11 TTC § 551 (disturbing the peace.)

The pertinent portions of the complaint are set forth in their entirety:—

"CARLOS I. LUCAS of San Jose, Saipan, Mariana Islands, with criminal offense of TRESPASS and says: On or about February 23, 1974, at San Jose, Saipan in the Mariana Islands District, Trust Territory of the Pacific Islands, said CARLOS I. LUCAS did unlawfully violate the peaceful use and possession of the dwelling house of one JOSEPHA L. WILLIAM, in violation of Section 1351, Title 11, of the Trust Territory Code. On or about February 23, 1974, at San Jose, Saipan, Mariana Islands District, Trust Territory of the Pacific Islands, said CARLOS I. LUCAS, did unlawfully and willfully commit acts which disturb the undersigned complainant and other persons so that they are deprived of their right to peace and quiet, in violation of Section 551, Title 11, Trust Territory Code."

When the matter came on regularly before the District Court, Mariana Islands District, defendant, through his counsel, filed the following motion for Bill of Particulars:—

"Defendant, CARLOS I. LUCAS, through his undersigned counsel moves for an order requiring the Trust Territory of the Pacific Islands to furnish him within a time to be therein specified, a written bill of particulars as to the following matters alleged in the complaint herein, and requiring the Trust Territory of the Pacific Islands to furnish the following requested information in the said bill of particulars:

1. The exact location in San Jose, Saipan, where the dwelling house mentioned in the complaint is located.

2. The exact time of the alleged criminal acts charged in the complaint.

3. The name and address of each and every person who was present at the scene of the alleged crimes charged in the complaint.

4. The precise manner in which the crime charged in count one of the complaint and count two of the complaint is alleged to have been committed.

5. With respect to count one and count two, state by what means the defendant allegedly committed the crime charged."

"As grounds for the foregoing motion, counsel for the movant states that:"

"The complaint fails to state with the particularity or specificity required by law the location and time of the alleged crimes charged. The complaint merely charges that the alleged crimes took place somewhere on the Island of Saipan in San Jose, and is totally silent as to the time the alleged crimes occurred. The complaint further fails to state the names of all the persons involved in the alleged criminal acts and fails to state the names of all the parties present. Movant is without sufficient knowledge of the facts concerning the alleged criminal acts to enable him to prepare his defense. The information sought to clarify the complaint is within the particular knowledge of the Marianas District Attorney's office and cannot be obtained by means other than the legal process."

"WHEREAS, defendant respectfully moves the Court for an order directing the Marianas District Attorney's Office to serve a bill of particulars containing the above-requested information."

In the same manner, and at the same time and place, the following motion for Discovery and Inspection was filed:—

"Defendant, CARLOS I. LUCAS, through counsel, moves the Court for an order compelling the Marianas District Attorney's Office to make available to the defendant and his attorney:

1. The original notes of the arresting officer.
2. Any and all police reports containing statements of witnesses.
3. Any and all statements made by the defendant.
4. Any and all statements made by witnesses concerning the crimes alleged herein.
5. The names and addresses of all witnesses to said crime.
6. Any and all physical evidence including but not limited to, photographic evidence.
7. Any and all other evidence now in the possession of the Marianas District Attorney's Office favorable to the accused, or material evidence relevant to the accused's guilt and for such other and further relief as to this Court may seem just and proper."

Immediately thereafter, and without a hearing or ruling upon the motions, or either of them, the District Court requested that this court hear and decide the motions, and, by order dated March 20, 1974, this court assumed jurisdiction for that purpose only and considered both arguments and memoranda of law submitted in connection therewith.

In ruling upon the motions now before the court, it is hereby

Ordered that Defendant's Motion for Bill of Particulars be, and is granted; and it is further

Ordered that Defendant's Motion for Discovery and Inspection be, and it is granted in part and denied in part, particularly:—

(a) Section 1, seeking the original notes of the arresting officer, is denied;

(b) Section 2, insofar as the same pertains to any written or recorded witness statements in the custody or

under the control of the prosecution or any law enforcement agency connected therewith, is granted and in all other respects is denied;

(c) Section 3, seeking all statements made by defendant is granted;

(d) Section 4, seeking any and all statements by witnesses concerning the crimes alleged herein is granted insofar as the same may be in the custody of the prosecution or any law enforcement agency connected therewith;

(e) Section 5, seeking the names and addresses of all witnesses to the crimes alleged herein is granted with the same limitations as prescribed in (d) (supra);

(f) Section 6, seeking any and all physical evidence including, but not limited to, photographic evidence is granted; but defendant, his agents, attorneys, or any other person or persons acting in concert with him or on his behalf are specifically prohibited from removing any of said evidence or other items from the control of the custodians thereof without further specific order of court; and

(g) Section 7, seeking any and all other evidence now in the possession of the Marianas District Attorney's Office favorable to the accused, or material evidence relevant to the accused's guilt and for such other and further relief as to this Court may seem just and proper is denied as having, already been covered by the court's Orders herein and, where not so covered, denied as being too broad in the circumstances.

MEMORANDUM RE RULING

Until now, the courts of the Trust Territory of the Pacific Islands have not had occasion to consider and rule upon motions concerning the pre-trial discovery rights of defendants in criminal cases. The ascertainment and declaration of those rights are of great importance and deal

with the substantial rights of those accused of having committed crimes. Pre-trial discovery in a criminal case strengthens those rights, and the courts should be liberal in permitting it; for important though it is, the presumption of innocence, standing alone, does not give to a defendant in a criminal case all of those protections to which he is entitled.

Initially, Rule 7, Rules of Criminal Procedure, must be scrutinized with care. It provides:—

"Rule 7. Discovery and Inspection. Upon motion of the accused at any time after the filing of the information, complaint, copy of citation, or other statement of charges, the court may order the prosecutor to permit the accused to inspect and copy or photograph designated books, papers, documents, or tangible objects obtained from or belonging to the accused, or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place, and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

In passing, it will be noted that Rule 7 was discussed by the Appellate Division of this court in *Debesol v. Trust Territory*, 4 T.T.R. 556, 565, but the factual situation in *Debesol* clearly is distinguishable from that which faces the court here. It need only be stated that *Debesol* did not concern itself with pre-trial discovery and inspection; other than by way of dictum it dealt entirely with circumstances which arose during trial. To decide the questions presented herein, it is neither necessary nor desirable to regard *Debesol* as in any way binding.

[1, 2] In considering Rule 7 (supra), there can be no doubt as to its clarity of language; but as already pointed out, there is more than mere doubt as to the present legality of that language. It reflects the law as it once was but is no more. Bluntly stated, Rule 7 is archaic, not in harmony with current authorities, and violates existing

substantive law; and it is basic that a rule of court can neither abrogate nor modify substantive law. *Washington-Southern Nav. Co. v. Baltimore & P.S.B. Co.*, 263 U.S. 629, 44 S.Ct. 220 (1924).

[3] Pre-trial discovery is of relatively recent origin. At common law, no such protection was afforded defendants in criminal cases, the rationale apparently being that pre-trial discovery would in some manner interfere with the presentation of the government's prosecution of the case. *Shores v. United States*, 174 F.2d 838 (C.A. 8, 1949); *United States v. Singer*, 19 F.R.D. 90 (D.C. N.Y. 1956). The question of interference with the preparation and presentation of the case for the defense would seem to have been overlooked or perhaps regarded as of little importance. As time passed, the courts came more and more to conclude that the system which had been in effect for so many years, and which still exists in the Trust Territory, was not effective in promoting the interests of justice. In spite of rules of court, the courts themselves properly recognized the inherent power of trial judges to permit pre-trial discovery upon motion and hearing, and there can be no serious argument that such inherent power does not repose in a trial court. However, mere recognition of the court's inherent power is not sufficient to protect the rights of those who stand accused of crimes.

[4] With reference to the Motion for Bill of Particulars filed herein, defendant seeks no more than to be advised precisely as to the exact location of the dwelling house where the alleged offenses took place, the exact time thereof, the names and addresses of all who were present, the precise manner in which it is alleged the crimes were committed, and the means by which the defendant allegedly committed the offenses with which he has been charged. Surely it cannot seriously be claimed that he is

not entitled to have that information; without it, the preparation of his defense becomes infinitely more difficult, and unnecessarily so.

[5] In the administration of justice, the court is not an advocate and must concern itself not with mere tactical advantage to be permitted to one party or the other but with the ascertainment and declaration of the truth, and it cannot knowingly permit the truth to lie hidden.

Next to be considered are the seven items comprising defendant's motion for Discovery and Inspection.

[6–9] The original notes of the arresting officer, if such notes do, indeed, exist, are not discoverable at this time, and in the absence of proper showing are not discoverable at all. Being subjective in nature, they could serve to delude rather than enlighten the unwary defendant. Further, discovery of such notes could result in an unfair advantage being taken of the prosecution, and this is no more to be condoned than the taking of an unfair advantage of a defendant. The ordering of the production of such notes is a matter resting entirely with the sound discretion of the court; and in the absence of a clear showing by defendant that such notes should be produced, the court will not order their production. No such showing has been made here. Such notes generally are to be regarded as the work product of the arresting officer acting as an agent for the prosecution. Except in most unusual circumstances, and then only upon motion and order, is such material discoverable prior to trial. *Caldwell v. United States*, 338 F.2d 385 (C.A. 8, 1964). However, if the arresting officer should testify at trial, then the defendant may inspect such notes and use those portions inconsistent with the testimony of the witness on the stand for the purpose of impeachment; and this is true even though such statements or notes have not been used by the

witness in testifying or by the government in its interrogation. *United States v. Krulevitch*, 145 F.2d 76, 78 (C.A. 2, 1944).

[10] Any and all statements of witnesses contained in police reports are discoverable, although the police reports, per se, are not; for police reports, themselves, may be likened to the notes of the arresting officer. However, an entirely different situation prevails as to the statements of witnesses. In the Trust Territory the defense is entitled at present to the statement of a witness only after that witness has appeared in court and direct examination has been completed. Then, and only then, may the defense peruse the statement of that witness. That such a limitation does little to assure the defendant of a fair trial is patent. First, there often will be insufficient time to prepare cross-examination. Second, the statement itself might well open avenues for additional investigation by diligent defense counsel. Third, the defense must be allowed to study the statements of all witnesses; for one or more of such statements might prove to be favorable to the defendant; and basic fairness dictates that the defendant be permitted to know not only what unfavorable witnesses may claim but also what witnesses seem to be favorable to his cause and what those witnesses allege to be the truth. To permit less could adversely affect the substantial rights of a defendant. *Brady v. State of Maryland*, 373 U.S. 220, 83 S.C. 1194 (1963) holds that the withholding of extra-judicial statements made by a defendant's confederate amounted to a denial of due process. The same reasoning is applicable here.

[11] As to statements made by the defendant himself, there is a split of authority recognized both by this court and by counsel herein. It is believed that the better rule is that which allows discovery by defendant of his own

statement. *United States v. Peace*, 16 F.R.D. 423 (D.C., S.D.N.Y. 1954). Basic fairness to the prosecution and to the defense dictates that a defendant should be entitled to utilize pre-trial discovery to obtain and peruse his own prior statements. Almost universally, the courts now permit such pre-trial discovery, although many authorities require a prior showing of good cause. *Joe Z v. Superior Court*, 478 P.2d 26 (Cal. 1970). It is difficult to conceive of a situation where one accused of committing a crime does not have good cause to peruse that which he has previously stated. Plainly, the withholding of such relevant material could well contribute to an imbalance of advantage. Where relevant material reposes exclusively in the hands of the prosecution, an imbalance of advantage very likely will develop; and this is not to be encouraged. *United States v. Bryant*, 439 F.2d 642 (C.A. D.C., 1971).

[12] In connection with defendant's being entitled to discovery any and all witness statements, assuming that such statements do exist, there would appear to be no doubt but that such statements always are discoverable when the witnesses are to testify. Further, the defendant is entitled before trial to have the prosecution produce statements tending to exculpate him even though the government does not propose to call those witnesses. *United States v. Ladd*, 48 F.R.D. 266 (D.C. Alaska, 1969). Still, it must be recognized that no defendant has a right to rummage through the government's files. *United States v. King*, 49 F.R.D. 51 (D.C. N.Y. 1970). In short, pre-trial discovery is not a license to prowl at will through the files of the government. To open the gates so widely would be to place an almost impossible burden upon the government and to cause chaos within its judicial system. In the matter now before the court, defendant's request for all witness statements is reasonable and should be and is granted in the interest of justice. However, the statements

sought, if any there are, must be either written or recorded. While this court is unwilling to go so far as did the court in *United States v. Eley*, 335 F.Supp. 353 (N.D., Ga., 1972), it is of the opinion that matters of discovery should be treated liberally rather than restrictively.

[13] Defendant seeks to discover any and all physical evidence including, but not limited to photographic evidence. Such physical evidence as sought by defendant herein is discoverable where it is not otherwise available to defendant and where such evidence does not consist of "internal government documents" or material otherwise made by law non-discoverable. In the absence of a showing by the government that the physical evidence sought to be discovered is of such nature that defendant is not entitled to its disclosure, defendant clearly is entitled to inspect the same. *United States v. Ahmad*, 53 F.R.D. 186 (D.C. Pa. 1971).

[14] Defendant seeks any and all other evidence now in the possession of the Mariana Islands District Attorney favorable to him or material evidence relevant to his guilt. This must be and it is denied as already having, at least in part, been covered by the Order herein; and as to those portions not so covered, it is denied as being too broad in scope. As already stated, defendant's right to pre-trial discovery does not include the right of unlimited examination of the government's files. Citing *Jackson v. Wainwright*, 390 F.2d 288 (C.A. 5, 1968), defendant stresses that the District Attorney assumes the role of a quasi-judicial figure, and there can be no valid contention to the contrary. Nevertheless, in the absence of contradiction, this court assumes that if the government has information favorable to the defendant, it will furnish that information to him in sufficient time to be of use to him at his trial. *United States v. Jepson*, 53 F.R.D. 289 (D.C. Wis., 1971).

The case is hereby remanded to the District Court for further proceedings.
