Liep v. ROP, 5 ROP Intrm. 5 (1994)
MCQUEEN LIEP,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 6-92
Criminal Case No. 145-92

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: October 14, 1994

Counsel for Appellant: Oldiais Ngiraikelau

Counsel for Appellee: Nicholas Mansfield, AG

Before: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; PETER T. HOFFMAN, Associate Justice

HOFFMAN, Justice,

On October 19, 1992 McQueen Liep was convicted of rape for which he received a sentence of 10 years imprisonment, of which five years of the sentence were suspended. On appeal Liep assigns as error the trial court's 1) reopening of the case for further questioning of the complainant after the court had already begun its deliberations; 2) exhibiting bias in favor of the prosecution; and 3) failing to dismiss the charges against the defendant for insufficient evidence to prove the lack of consent element of the crime. We hold that none of the defendant's rights were violated; we therefore affirm.

FACTS

Viewed in the light most favorable to the prosecution, the facts are as follows. On the night of April 7, 1992 the complainant, a 15 year old girl, was staying at a relative's house in Topside. McQueen Liep, also a relative of the complainant, was staying in the same building and was the adult responsible for her at the time. At approximately 10:15 p.m. Liep asked the complainant to accompany him to buy soap. The complainant went with Liep in his red 4X4 pick-up to the T and O Store. After purchasing the soap, Liep drove the complainant to the KB Bridge, in the opposite direction from the apartment where they were staying. Although the complainant asked twice where they were going, Liep refused to tell her.

Liep drove to the Airai side of the KB Bridge and parked near the pine trees. It was dark and there were no other people ⊥6 around. Liep got out of the car and walked around to the passenger side. The complainant was frightened and locked her door. Liep returned to the driver's seat, climbed over the complainant, and opened the passenger door. He pushed the complainant down so that she was lying on the car seat. Liep then began removing the complainant's clothes. The complainant hit Liep in an attempt to prevent him from taking off her clothes. She started crying and yelled out, "help me, there is somebody trying to hurt me." After removing all of the complainant's clothes Liep took off his own and had intercourse with her for three to four minutes. The complainant was crying during this entire period. Liep then drove the complainant back to the Topside apartment where she was staying and told her not to tell anyone what happened. The complainant cried all the way back from Airai.

As soon as she returned home the complainant called her aunt and asked her to come and pick her up. The complainant's aunt testified that the complainant sounded "scared, sad and angry." The complainant's aunt did not pick her up that night, so the complainant phoned her aunt the next day, Wednesday, to ask her again to pick her up. On Thursday evening the aunt came to pick the complainant up. When she arrived and asked what happened the complainant told her that Liep had taken her to the KB Bridge and raped her. Upon hearing this, the complainant's aunt called Liep. Later that night Liep went to the complainant's aunt's house and told her he wanted to apologize "for what I did to [the complainant]. I was perhaps high on marijuana."

The following day, Friday, April 10, 1992, the complainant's aunt took the complainant to Dr. Yano's clinic and to the hospital so that the complainant could be examined for indications of rape. The complainant was also concerned that she was pregnant. The doctors who examined the complainant were unable to determine whether she had been raped because of the delay of three days between the incident and her visit to the hospital. After leaving the hospital the complainant and her aunt went to the police and reported the incident.

On Friday afternoon Liep visited the complainant's aunt and gave her $200 and said, "take this and use this and if you want anything just tell me. . . . I am afraid to go to jail." Later that evening Liep visited the complainant's aunt for a third time and asked her if she "had gone and erase[d] the claim or whatever that you wrote at the police station." Liep was crying, and told the complainant's aunt again that he was very afraid of going to jail.

⊥7 DISCUSSION

1. Reopening the Case.

Liep argues that the trial court erred in reopening the case to take additional testimony from the complainant after the court had already begun its deliberation. The trial court reopened the case to ask the complainant several questions regarding the location of Liep's truck on the night of the incident. During the prosecution's case-in-chief the complainant placed the truck near the main road; when the case was reopened she testified that it was in a more remote location further from the main road. Liep was afforded the opportunity to cross-examine the complainant but he chose not to.

As Liep recognizes, it is within the trial court's sound discretion to reopen a criminal case for further testimony or evidence. See 75 Am. Jur. 2d Trial § 392 (1991) ("The trial judge may in his discretion reopen the case for the reception of additional evidence after the submission of the case" to the fact finder.). Liep cites to several cases from the United States where criminal convictions were reversed due to the trial court's reopening of the case for further testimony after the jury had already begun its deliberation. The principal rationale for reversing in these cases was that evidence heard after both sides have rested may be given "undue emphasis" by the jury. See, e.g., *Jones v. State* , 692 S.W.2d 775, 777 (Ark. App. 1985); *People v. Olsen* , 313 N. E. 2d 782, 784-86 (N.Y. 1974); see generally 75 Am. Jur. 2d Trial at § 393 ("[N]ew evidence introduced during the jury's deliberations is likely to [be] given undue emphasis with consequent distortion of the evidence as a whole, giving rise to the real possibility of prejudice to the party against whom the evidence is offered.").

Such a rationale has little relevance in Palau, where, except in murder cases, the trial court sits as the sole finder of fact. While this does not mean that a trial court's decision to reopen a case for further testimony can never be an abuse of discretion, in a non-murder case trial courts in Palau have greater latitude in making this choice since there is no possibility that a fact-finder may be unduly influenced. See Am. Jur. 2d Trial at § 379 ("Greater liberty should be allowed in the matter of opening the proofs when the case is tried before a court without a jury."). We therefore hold that, absent a showing of undue prejudice or surprise, the trial court may on its own motion reopen a case for further testimony at any time prior to judgment as long as the parties are afforded an opportunity to cross-examine the recalled witness and to call any rebuttal witness necessary to eliminate undue prejudice.

⊥8 As Liep was afforded an opportunity to cross-examine the complainant on recall, and as recalling Nglice did not produce undue prejudice or surprise, we hold that the trial court did not abuse its discretion by reopening the case for further testimony.

2. Trial Court's Conduct.

Liep claims the trial judge was partial to the prosecution, and that this bias deprived him of his right to a fair trial. For support, Liep points to the following acts of the trial judge: Reopening the case and examining the complainant about the location of Liep's truck; referring to the prosecutor as the complainant's lawyer and allowing the complainant to talk to the prosecutor during trial recesses; asking the complainant if she was married to Liep and thereby supplying an essential element of the government's case; finding that the complainant was in a "state of shock" when the evidence allegedly did not support such a finding; limiting Liep's cross-examination of the complainant by not allowing him to ask her if she had sex prior to the incident in question; and admitting certain statements made by Liep over his objection. All of these actions together, Liep claims, reflect bias on the part of the trial judge and deprived him of his constitutional right to a fair trial.

Whether the trial court abused its discretion in reopening the case has already been discussed; that the trial court elicited testimony from the complainant is not objectionable since a

trial judge can question witnesses. See ROP Evid. Rule 614(b).

Next, although it was inaccurate to call the prosecutor the complainant's lawyer, such a mistake is harmless error. Furthermore, the trial court did not abuse its discretion in allowing the complainant to speak with the prosecutor during trial recesses. See 75 Am. Jur. 2d Trial § 257 (1991) ("The control over the witnesses in the trial of a case rests primarily in the sound discretion of the trial court, and an appellate court will not review the exercise thereof in the absence of an abuse.").

Liep suggests that the trial court erred in asking the complainant if she was married to Liep and thereby establishing an essential element of the charge. As noted above, the trial court is entitled to question witnesses. This includes eliciting facts inadvertently overlooked by the prosecution which are necessary to its ease. See *United States v. Hinderman*, 625 F.2d 994, 996 (l0th Cir. 1980) (no abuse of discretion to reopen case to prove venue, inadvertently unestablished during government's case-in-chief).

⊥9 Liep argues that the reference to the complainant's "state of shock" in the trial court's written findings was "vital evidence" that the trial court supplied despite the lack of any testimony to that effect. First, although the complainant did not actually use the words "state of shock," a reasonable fact finder could infer this from the complainant's testimony that during the incident she was "afraid," and "scared," and that her body "felt different." Furthermore, even if such an inference were not reasonable, it is incorrect to call the "state of shock" finding "vital evidence," as such a finding was not necessary to convict Liep of rape.

Liep points to two evidentiary decisions made by the trial court, one precluding questioning concerning the complainant's prior sexual activity and the other overruling a defense objection to the admission of statements by Liep, as evidence of partiality. However, Liep in his brief makes no attempt to argue that the court's evidentiary rulings were legally incorrect. Without such a showing, he cannot complain that the rulings exhibited unfairness.

In conclusion, a finding of partiality on the part of the trial court cannot rest on selected excerpts from the record. Rather, such a finding must come, if at all, "from an abiding impression left from a reading of the entire record." *Offut v. United States*, 75 S.Ct. 11, 12 (1954). After examining the entire record in the present case we are not left with an "abiding impression" that the trial court was partial to the prosecution. Liep's fair trial claim is therefore without merit.

3. Sufficiency of the Evidence.

Liep argues that the evidence presented at trial was insufficient to support a finding that the complainant did not consent to the sexual intercourse, lack of consent being an essential element of the offense of rape. We view challenges to the sufficiency of evidence by considering whether, when viewing the evidence in the light most favorable to the prosecution and giving due deference to the trial judge's opportunity to hear the witnesses and observe their demeanor, any reasonable trier of fact could have found that the essential elements of the crime were established beyond a reasonable doubt. If this standard is met, the conviction must be upheld. *Minor v. ROP*, 5 ROP Intrm. 1, 3 (1994).

In the present case there is sufficient evidence to support a finding that the complainant did not consent to the sexual intercourse. The complainant testified that she locked her door when Liep first approached. After Liep succeeded in opening ⊥10 the door the complainant hit him and tried to prevent him from taking her clothes off. Finally, the complainant cried throughout the incident and yelled out, "help me, there is somebody trying to hurt me."

Liep argues that the complainant must have consented because she did not flee, but lack of consent can be established without a showing that the victim of a rape attempted to flee. See *Trust Territory v. Loney* , 7 TTR 172, 176 (Tr. Div. 1975) ("The conduct of the female person need only be such as to make the absence of consent and the actual resistance reasonably apparent."); see also *Bulls v. State*, 241 P. 605, 606 (Okla. 1926) ("The law does not require that the woman shall do more than her age, strength, the surrounding facts, and all attending circumstances make it reasonable for her to do in order to manifest her opposition."). Based on the evidence presented at trial, a reasonable fact finder could have found that the complainant did not consent to the sexual intercourse.

In sum, there is sufficient evidence to support the trial court's verdict. We AFFIRM. The stay of execution of sentence is hereby vacated.