

for the fact that the case must be remanded for further trial anyway. This appellate court is in very much the same situation as was the court in *Decena v. Trust Territory*, 3 T.T.R. 601, in which it was said:—

“Our difficulty is that from a totality of the evidence we cannot say that a more exhaustive presentation at a new trial is not indicated in the interest of justice.”

We believe the trial should be re-opened to give the prosecution an opportunity to produce “substantial” corroborative evidence and likewise to give the defense further opportunity to object to the admission of the statements of the accused on the ground their right to have counsel present during their interrogation was not knowingly waived. It is, therefore,

Ordered that the finding and sentence are set aside and the case is remanded to the District for further trial in accordance with the principles herein laid down.

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TRUST TERRITORY OF THE PACIFIC ISLANDS, Plaintiff

v.

MIKEL MAD, Defendant

Criminal Case No. 332

Trial Division of the High Court

Palau District

May 19, 1970

Criminal case involving charge of murder by torture. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that while there was no intent to kill there was an intent to inflict pain and suffering and malice aforethought necessary to convict could be inferred either from the wanton and wilful disregard of consequences to human life or from the intent to do great bodily harm.

**1. Homicide—Generally**

An unlawful killing is one without legal excuse or justification.

**2. Homicide—Generally**

Malice aforethought is manifested by the doing of an unlawful act intentionally, deliberately and without legal cause or excuse.

**3. Homicide—Generally**

Malice requires or evolves from an intent to wilfully take the life of a human or an intent to inflict great bodily harm, or an intent wilfully to act in callous and wanton disregard of the consequences to human life.

**4. Homicide—Generally**

Malice aforethought does not necessarily imply any ill will, spite or hatred towards the individual killed.

**5. Homicide—Generally**

Since no one can look into the heart or mind of another, the only means of determining whether or not malice existed at the time of a killing is by inference drawn from the surrounding facts and circumstances, as shown by the evidence in the case.

**6. Homicide—Generally**

Malice aforethought may be inferred from either a finding of an intent to inflict great bodily harm or a finding of a wanton and wilful disregard of an obvious human risk.

**7. Homicide—Murder by Torture—Elements of Offense**

The elements of murder by torture are an intent to cause cruel suffering or intent to inflict pain, actual pain suffered, some protraction in time and the death must have been caused by the torture. (T.T.C., Sec. 385)

**8. Homicide—Murder by Torture—Elements of Offense**

The purpose or motive for intending to inflict pain is not an element of the offense of murder by torture. (T.T.C., Sec. 385)

**9. Homicide—Murder by Torture—Elements of Offense**

The argument that no inference as to intent and malice may be drawn as a general rule when the killing is with bare hands is not applicable to murder charged by torture because an intent to kill, from which malice aforethought may be inferred, is not required. (T.T.C., Sec. 385)

**10. Criminal Law—Sentence—Modification**

Under a statute making life imprisonment mandatory upon conviction the court is not authorized to diminish a sentence of life imprisonment by allowing bail or granting stay of execution pending appeal nor may the court reduce the penalty by ordering suspension of sentence after a fixed period of imprisonment.

**11. Courts—Jurisdiction**

When sentence has been imposed the court loses jurisdiction of the case except for certain purposes connected with an appeal.

**12. Criminal Law—Sentence—Modification**

Modification of a mandatory penalty provision may be accomplished only by the High Commissioner's power of parole.

TRUST TERRITORY v. MAD

*Special Judges:* *Presiding District Court Judge,*  
PABLO RINGANG, and  
*Associate District Court Judge,*  
FRITZ RUBASCH

*Interpreter:* SINGICHI IKESAKES

*Reporter:* SAM K. SASLAW

*Counsel for Prosecution:* JAMES E. WHITE, *District At-*  
*torney,* and  
BENJAMIN OITERONG, *District*  
*Prosecutor*

*Counsel for Defendant:* WILLIAM E. NORRIS, *Public De-*  
*fender,* and  
FRANCISCO ARMALUUK, *Pub-*  
*lic Defender's Representative*

TURNER, *Associate Justice*

This judgment was prepared and filed in response to request of the Public Defender for findings of fact and conclusions of law.

The defendant, Mikel Mad, was accused of murder in the first degree. Although the information contained a single count, alternative grounds were set forth:—

(a) the unlawful killing of Eyangel with malice aforethought by torture, or

(b) the unlawful killing of Eyangel with malice aforethought by wilful, deliberate, malicious and premeditated killing.

The accused was convicted of first degree murder, as charged, on the grounds of murder by torture. The mandatory sentence of life imprisonment was imposed. As part of the proceedings, after summation by counsel, and before deliberation by the judges, the law of the case, set forth in formal instructions, was read by the Associate Justice to the two special judges.

## FINDINGS OF FACT

1. Eyangel, wife of the defendant Mikel Mad, was dead when examined by a medical officer in her home at 7:30 a.m., March 10, 1970. The doctor estimated death occurred three or four hours earlier and possibly could have occurred five or six hours earlier, but in no event more than six hours.

2. The wife of the defendant died as a direct and proximate result of blows to her head inflicted by the defendant. The cause of death was subdural and subarachnoid hemorrhages of the brain which resulted from the repeated blows to the face and sides of the head inflicted by the defendant. The defendant and his wife had driven from their home to a secluded area at Ngetmeduch Island adjoining the causeway to Renrak, the ferry crossing, where the beating occurred.

3. When defendant first struck his wife his intent was to force her to admit an infidelity, which previously she had denied. When she confessed, the defendant described it as "when she told the truth," he then continued the beating and subjected her to other physical abuse as punishment.

4. The beating was administered by the defendant over a protracted period and caused severe pain from which the victim cried out before she lost consciousness.

5. When the defendant administered the fatal beating to his wife he was not drunk and his ability to form an intent was not diminished by intoxicating liquor which he had drunk a few hours before the killing. When he slapped his wife he admitted he knew what he was doing.

6. Eyangel was either dead or in a coma from which she never recovered, after the beating and while being driven home.

7. From the defendant's admissions and from the circumstantial evidence obtained at the scene, when the

defendant commenced the assault he did not intend to kill his wife but did intend to inflict severe pain. The continued protracted infliction of the physical abuse by slapping and other means caused Eyangel to lapse into a coma from a brain hemorrhage which caused death.

8. There is no Palauan custom which condones or justifies a husband slapping or beating his wife because she was unfaithful.

#### CONCLUSIONS OF LAW

1. The defendant, Mikel Mad, unlawfully took the life of his wife with malice aforethought.

2. Killing resulting from the criminal offense of assault and battery is an unlawful killing. Malice aforethought may be inferred from the act as a matter of law.

3. Palauan custom does not justify a husband striking his wife for infidelity and any custom that might pertain to that act is abrogated and nullified by the statutory prohibition against assault and battery.

4. The slapping here involved was done with malice aforethought and constituted torture as a matter of law. When the victim died as a result of the torture it was the unlawful killing with malice aforethought by torture and as such constituted murder in the first degree.

5. The defendant intentionally and maliciously inflicted pain over a protracted period upon his wife, Eyangel, for the purpose of forcing a confession of infidelity from her and to punish her after she confessed the infidelity.

6. It is unlawful to strike a woman with a person's hands in that it constitutes the offense of assault and battery proscribed by Section 379, Trust Territory Code.

7. The admissions of the defendant on the witness stand, his out of court confession to his daughter, and

the circumstantial evidence obtained at the scene of the crime by the police was evidence of guilt of first degree murder by torture beyond a reasonable doubt.

8. Circumstantial evidence adduced in this case was clear and convincing corroboration of the defendant's admissions from the witness stand and his out of court confession.

#### OPINION

We believe the charge, murder by torture, has been made for the first time in the Trust Territory in this case. Finding no guidance from the Trust Territory cases it is necessary to resort to United States court decisions to ascertain the several elements of the offense of murder by torture.

The statute, Section 385 of the Trust Territory Code, is explicitly concise. It provides:—

“Whosoever shall unlawfully take the life of another with malice aforethought, by . . . torture . . . shall be guilty of murder in the first degree.”

[1] An unlawful killing is one without legal excuse or justification and in this case resulted from the commission of the criminal offense of assault and battery.

[2-4] Malice aforethought is manifested by the doing of an unlawful act intentionally, deliberately and without legal cause or excuse. Malice requires or evolves from an intent (1) to wilfully take the life of a human or (2) an intent to inflict great bodily harm, or, (3) an intent wilfully to act in callous and wanton disregard of the consequences to human life; but malice aforethought does not necessarily imply any ill will, spite or hatred towards the individual killed.

[5] Malice is the term used as the name of a certain state or condition of a person's heart or mind. Since no one can look into the heart or mind of another, the only means

of determining whether or not malice existed at the time of a killing is by inference drawn from the surrounding facts and circumstances, as shown by the evidence in the case. Federal Jury Practice and Instructions, § 38.05. California Jury Instructions, Criminal, § 301. Perkins on Criminal Law, p. 38. 40 Am. Jur. 2d, Homicide, § 10.

[6] By its findings and conclusions, the court found there was no intent to kill but found, instead, an intent to inflict great bodily harm and a wanton and wilful disregard of an obvious human risk. Malice aforethought may be inferred from either of the two findings.

The final essential component of the charge upon which the first degree murder conviction was obtained was the element of torture. A recent United States decision, *State v. Brock* (Ariz.) 416 P.2d 601, is closely analogous to the case at bar. That it clearly sets forth the law pertaining to and the elements of murder by torture is best evidenced by American Jurisprudence paraphrasing the decision as its treatment of the subject. 40 Am. Jur. 2d, Homicide, § 48.

[7] The elements of murder by torture set forth in the *Brock* case are:—

1. Intent to cause cruel suffering or "intent to inflict pain".
2. Actual pain suffered.
3. Some protraction in time.
4. The death must have been caused by the torture.

[8] The court also sets forth the reasons for intent to cause "cruel suffering" as being for "revenge, extortion, persuasion or to satisfy some other untoward propensity."

However, the purpose or motive for intending to inflict pain is not an element of the offense.

Here the findings and conclusions show that the defendant had no initial intent to kill but that he commenced the beating intending to inflict pain to persuade the victim to confess to an infidelity and thereafter he

continued with the intent to inflict pain as punishment which amounted to "some other untoward propensity".

The defense twice moved for dismissals of the first degree murder charge and for dismissal of the lesser included offense of second degree murder. It also urged acquittals of these offenses in its summation. The argument employed was ingenious.

It first was urged that an intent to take human life may not be inferred from the use of a person's hands. This proposition is correct and is in contrast to the rule intent to kill may be inferred from use of a dangerous weapon.

Defendant's proposition was followed by its conclusion that when there is no intent to kill malice aforethought cannot be inferred without such intent and therefore the homicide is not murder. An unlawful killing with malice aforethought is a requisite of murder. In support the defense offered the extensive annotation of 22 A.L.R.2d 854.

[9] The argument is correct and applicable to the usual first degree murder charge of wilful, deliberate, malicious and premeditated killing because no inference as to intent and malice may be drawn as a general rule when the killing is with bare hands. But the argument is not applicable to murder charged by torture because an intent to kill, from which malice aforethought may be inferred, is not required.

In the present case the court found there was no intent to kill but did find an intent to inflict pain and suffering and from the unlawful acts employed to accomplish this intent the necessary malice aforethought is inferred either from the wanton and wilful disregard of consequences to human life or from the intent to do great bodily harm.

TRUST TERRITORY v. MAD

"If murder is committed by means of poison, or while perpetrating or attempting to perpetrate any of the felonies named in the statute, it is first degree murder even in the absence of an actual intent to kill. This actual intent is essential, however, to constitute a 'wilful, deliberate and premeditated' murder." Perkins on Criminal Law, p. 74.

That torture is subject to the same rule as quoted for poison, is demonstrated by Perkins by his discussion of the "standard" murder statute and its variation by additions. The Trust Territory statute enlarges the "standard" statute with the addition of "torture" to "poison" in the statutory language. Perkins on Criminal Law, p. 72.

On appeal this decision will depend entirely upon the law determined to be applicable to murder by torture. If, for any reason, the trial court has misconstrued that law the defendant may not be found guilty of first degree murder and the charge on retrial must be limited to no higher degree of murder than second degree. Because if there was no intent to kill, and the court determined such intent not present, then there can be no premeditation. An intent to create bodily harm or a wanton and wilful disregard of the consequences is sufficient to support malice aforethought required in second degree murder but does not sustain a finding of premeditation.

[10] One other ruling of the court should be challenged upon appeal. It relates to the propriety of the court's determination that the statute makes life imprisonment mandatory upon conviction. The court is not authorized under the mandatory penalty theory to diminish a sentence of life imprisonment in either of two suggested ways:—

1. It may not reduce the penalty by allowing bail or granting stay of execution pending appeal, and

2. It may not reduce the penalty by ordering suspension of the sentence after a fixed period of imprisonment.

[11, 12] The court believes that either bail or suspension of imprisonment is as much a modification as if it were now to attempt to reduce the sentence. When sentence has been imposed the court loses jurisdiction of the case except for certain purposes connected with an appeal. This want of jurisdiction is briefly discussed in the judgment order entered August 20, 1968, in *Trust Territory v. Takeo Yamashiro*, 4 T.T.R. 95. Modification may be accomplished only by the High Commissioner's power of parole.

#### JUDGMENT

It is the judgment of the court that the accused, Mikel Mad, is guilty of murder in the first degree and that he shall be sentenced to life imprisonment.

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BAULANG IKEDA, Plaintiff

v.

IKEDA NGIRACHELBAED, Defendant

Civil Action No. 436

Trial Division of the High Court

Palau District

May 25, 1970

Complaint for divorce, property settlement and children's support. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that as wife had been cast off under the custom by the husband her relief of property settlement should be decided by custom rather than under the Code and decreed property settlement accordingly.

**1. Palau Custom—Divorce—"Tilobed Ra Rebai"**

When a wife is *tilobed ra rebai* she is cast off under Palauan custom by the acts of the husband amounting to adultery or by a new marriage with another under the custom.

**2. Palau Custom—Divorce—"Olmesumech" and Food Money**

Under Palauan custom when a wife is *tilobed ra rebai* she is entitled to a property settlement in addition to the payments of *olmesumech*, or "parting money."