MIKEL MAD, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Appeal No. 35

Appellate Division of the High Court

July 11, 1973

Prosecution for murder by torture. The Appellate Division of the High Court, Brown, Associate Justice, held that intent to kill need not be shown, only intent to cause suffering for purposes of vengeance, extortion or other evil propensity.

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

   Under statute providing that "every person who shall unlawfully take the life of another with malice aforethought by poison, lying in wait, torture, or any other kind of wilful, deliberate, malicious, and premeditated killing," shall be guilty of first degree murder, there did not have to be an intent to kill, but only an intent that the victim suffer for purposes of vengeance, extortion or some other evil propensity, where unlawful killing of allegedly unfaithful wife with malice aforethought by torture was charged; and the torture made other evidence of premeditation unnecessary. (11 TTC § 751)

2. **Statutes—Construction—Legislative Intent**

   It is High Court's duty to carry legislature's intent into effect in the fullest degree, and a construction of a statute should not be such as to nullify, destroy or defeat that intent.

3. **Statutes—Construction**

   A statute should be construed so as to give effect to all its provisions.

4. **Bail and Recognizance—Generally**

   Court must construe incidents and effects of release on bail in accord with principles developed in the United States where bail was well understood there and entirely foreign to Micronesian customs.

5. **Criminal Law—Sentence—Suspension**

   Trial court may suspend part of a mandatory life sentence. (11 TTC § 1459)

6. **Criminal Law—Appeals—Stay of Sentence**

   Trial court had power to grant stay of execution of mandatory life sentence pending appeal.

7. **Bail and Recognizance—Pending Appeal—Murder**

   Trial court may grant bail pending appeal of a life sentence for murder, the execution of which has been suspended pending the appeal.

Counsel for Appellant: WILLIAM E. NORRIS, ESQ., *Assistant Public Defender*

Counsel for Appellee: JAMES E. WHITE, ESQ., *District Attorney*

Before BURNETT, *Chief Justice*, BROWN, JR., *Associate Justice*, MUECKE, *Temporary Judge* (United States District Court, sitting by designation pursuant to 5 TTC § 203)

BROWN, *Associate Justice*

In a one count information, appellant was charged with violating Sec. 385 of the Trust Territory Code (now Section 751 of Title 11 of the Trust Territory Code), was tried, was convicted of a violation of one of the two alternative grounds, murder by torture, of the single count of the information, and was sentenced to a term of imprisonment for life. The alternative grounds were as follows:—

(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.

Thereafter, appellant moved the trial court for a stay of execution pending appeal and for an order suspending the sentence after such fixed period of imprisonment as determined and ordered by the trial court.

The trial court denied the motion to allow bail or to stay execution upon the ground that a conviction of murder in the first degree carries with it a mandatory penalty of life imprisonment, and the granting of bail pending appeal or staying execution would have the effect of diminishing a mandatory sentence.

Likewise, and for the same reason, the trial court denied the motion of appellant for an order suspending the sentence after a fixed period of imprisonment.

In each instance, the trial court stated that it was of the opinion that either the granting of bail, staying execution or suspending all or any part of the imprisonment would be the same as an attempt to reduce a sentence already imposed, the court expressing itself that, "When sentence has been imposed, the court loses jurisdiction of the case except for certain purposes connected with an appeal. . . . Modification may be accomplished only by the High Commissioner's power of parole." *Trust Territory v. Mad*, 5 T.T.R. 195, 204.

The case arises out of a tragic chain of events which culminated in the untimely demise of Eyangel, the wife of the appellant.

Appellant, Eyangel, and their children were residents of Koror, Palau District. Prior to March 9, 1970, appellant left Koror and journeyed to Saipan where he succeeded in obtaining employment. As time passed, however, he received disturbing reports that Eyangel had been unfaithful to him and had been engaging in adulterous relations. Thereupon, appellant returned to Koror and went to the family dwelling. During the evening of March 9, 1970, Eyangel and the appellant, accompanied by others, visited a number of local nightclubs where, admittedly, alcoholic beverages were consumed. There was no evidence whatsoever that any of the party was intoxicated, and it is clear that the return of Eyangel and appellant to their home was uneventful.

Shortly after reaching their home, the couple set out again and drove to Ngetmeduch Island which is near Renrak, the ferry crossing between the islands of Koror and Babelthuap. While there, appellant struck his wife, and the evidence is uncontradicted that his purpose in so doing was to cause her to admit her unfaithfulness. At first she denied that she had been unfaithful; but as the beating continued, she finally confessed. Even then, appel-

lant continued to rain blows upon her. Finally, screaming with pain, Eyangel slipped into merciful unconsciousness, at which time appellant drove her home, dragged her into the house and placed her upon her bed. At that point in time, the record indicates that Eyangel was either in a coma or was unconscious.

When the usual time for arising came, Eyangel did not stir. At 7:30 A.M., March 10, 1970, a medical officer examined her, pronounced her dead and estimated that her death had occurred approximately three to four hours, and in no event more than six hours, earlier. Eyangel's death was directly and proximately caused by appellant's blows to her head, the same having caused both subarachnoid and subdural hemorrhages of the brain.

The beating at Ngetmeduch Island which resulted in Eyangel's death was protracted. Appellant, himself, estimated that it covered a period of some forty minutes.

Later, appellant admitted that he knew what he was doing, and the record is crystal clear that he intended to inflict severe pain; and the record also is clear that the defendant sought to inflict such pain in order to extort something from his victim, namely, a confession of her infidelity to him; and after Eyangel finally did confess the beating continued; its purpose being, beyond a reasonable doubt, to execute revenge for that infidelity.

The trial court found that appellant did not intend to take the life of the victim, and the record amply justifies that finding. Certainly, the evidence was insufficient to prove beyond a reasonable doubt that appellant was guilty of the unlawful killing of Eyangel with malice aforethought by wilful, deliberate, malicious and premeditated killing.

It is the appeal from the conviction of murder in the first degree, murder by torture, with which this court must

concern itself. As noted by the trial judge, this is a case of first impression in the Trust Territory.

At the outset, it will be recognized by all that former section 385 of the Trust Territory Code (now 11 TTC § 751) defines murder in the first degree specifically and with precision. It is not the common law definition. It provides:—

"§ 751 Murder in the first degree.

Every person who shall unlawfully take the life of another with malice aforethought, by poison, lying in wait, torture, or any other kind of wilful, deliberate, malicious, and premeditated killing, or while in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery, shall be guilty of murder in the first degree, and upon conviction thereof shall be sentenced to life imprisonment."

11 TTC § 751 is peculiarly similar to California Penal Code sec. 189 which provides:—

"All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing . . . is murder in the first degree."

Like the Trust Territory, California, Arizona and other jurisdictions have expanded upon the common law.

Under the common law, murder is defined as the felonious killing of a human being by another with malice aforethought. See 1 Wharton's Criminal Law, sec. 241, p. 522.

[1] The question thus arises: must there be an intent to kill in order to establish murder by torture? The answer, clearly, is in the negative. Torture of the victim makes other evidence of premeditation unnecessary. To constitute murder by torture, there need not be an intent to kill, there must only be *an intent that the victim suffer;* and it must appear that the defendant intended to cause the suffering in order to execute vengeance, to extort something from the victim, or to satisfy some other evil propensity. *People v. Turville* (Cal.), 335 P.2d 678; *People v. Misquez* (Cal.

App. 2d), 313 P.2d 206; *People v. Tubby* (Cal.), 207 P.2d 51. The case of *State v. Brock* (Ariz.), 416 P.2d 601 adds the additional element of some protraction in time. It will be noted that the court in *People v. Tubby* (supra) while recognizing the rules and the rationale for the establishment of murder by torture found them lacking under the facts of that case. In *Tubby,* the defendant administered a prolonged beating upon an aged victim, proximately causing the latter's death; but the defendant was extremely intoxicated, and the court held his reprehensible act was one of "animal fury" resulting from intoxication.

In *Oliver v. State* (Ala.), 175 So. 305, the defendant was convicted of first degree murder arising out of his beating his wife with his fists. Defendant's argument that the most the evidence showed was that the death of the deceased resulted from an unlawful act, the beating of the deceased by the defendant, which is ordinarily not calculated to produce death; that there was no specific intent to kill which could be inferred; that no deadly weapon was used, was rejected by the court. The defendant had periodically beaten his wife over a period of hours, took her home, and she died five or six hours later. The court held that the determination of whether or not this constituted murder lay with the jury.

[2, 3] The Congress of Micronesia enacted Section 385 of the Trust Territory Code (now 11 TTC § 751), and its constitutionality is not challenged. It is the duty of this court to carry the intention of the legislative branch into effect to the fullest degree. *United States v. American Trucking Assoc.*, 310 U.S. 534, 84 L.Ed. 1345, 1350. A construction should not be such as to nullify, destroy, or defeat the intention of the legislature. *Helvering v. Stockholms Erskilda Bank,* 293 U.S. 84, 79 L.Ed. 211, 218. Here, the Congress of Micronesia duly enacted a statute providing that murder by torture is murder in the first degree. It

would be not only improper but deplorable should this court disagree with the judgment of the Congress and seek to thwart its will, by either assuming that a constitutional question has been raised (which it has not) or by taking the position that the statute is ambiguous (which it is not) and interpreting it in a manner inconsistent with the will of the Congress. Were this court to do so, it would be engaging in judicial legislation—a dangerous and severely criticized practice. It has been truly said that sometimes "a hard case creates bad law." This merely means that to achieve a desired result, a court may sometimes shatter precedents, give strained meanings to statutes, or misconstrue what has been duly enacted by the legislative branch —all, of course, with the best of intentions, but far too often with unexpected and injurious results. The courts have too long and too consistently defined statutes pertaining to murder by torture to justify this court in veering from a well established course and embarking upon a new course. Instead, we must construe the statute in accordance with established rules of construction. In so doing, we recognize that it is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error. See Sutherland "Statutory Construction", Vol. 2, Sec. 4706 (3rd Edition).

12 TTC § 252 (formerly TTC Sec. 469) provides, in part: —

". . . After conviction bail may be allowed only if a stay of execution of the sentence has been granted and only in the exercise of discretion by a court authorized to order a stay or by a judge thereof."

[4] As the matter of bail is well understood in the United States and is entirely foreign to Micronesian customs, incidents and effect of release on bail must be construed in accordance with American principles. *Meyer v. Epsom*, 3 T.T.R. 54. Thus, we are justified in looking to courts in the United States for guidance in this regard.

As will be noted below, it is our opinion that the trial court, in its discretion, could have granted appellant's motion for a stay of execution.

In California, bail on appeal is a matter of right in all misdemeanor cases. (California Penal Code sec. 1272(1), (2).) Bail on appeal cannot be granted in a capital case, which is one in or for which the death penalty may, but need not necessarily be inflicted. In all other cases it is a matter of discretion with the trial court. (California Penal Code sec. 1272(3).) Earlier cases permitted bail on appeal only "where circumstances of an extraordinary character" have arisen after conviction. (See: *People v. Ephraim* (Cal. App.), 257 P. 801; *People v. Yant* (Cal.), 78 P.2d 1042.) The case of *In re Brumback* (Cal.), 299 P.2d 207, repudiated this limitation and held that a lower court judge may be compelled by mandamus to assume jurisdiction and consider an application on its merits, regardless of change of circumstances. Following this sound reasoning, the trial court in the case at bench had by no means lost jurisdiction to consider appellant's application for bail on appeal.

Likewise, the Federal courts have greatly liberalized the question of bail on appeal. Prior to July 9, 1956, bail was allowed pending appeal or certiorari only if it appeared that the case involved a substantial question which should be determined by the appellate court. Now, under Rule 46(a)(2), bail is allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for de-

lay. *Ward v. United States of America*, 76 S.Ct. 1063, 1 L.Ed. 25, 26.

[5] The next matter for consideration deals with whether or not the trial judge had the power to suspend any portion of a mandatory sentence to life imprisonment. The trial court took the position that since the penalty for murder in the first degree is imprisonment for life, it had no jurisdiction to suspend any portion of the sentence. No statute exists in the Trust Territory which supports such a premise. Section 1459, Title 11, of the Trust Territory Code states:—

"1459 Suspension of Sentence.

The court which imposes a sentence upon a person convicted of a criminal offense may direct that the execution of the whole or any part of a sentence of imprisonment imposed by it shall be suspended on such terms as to good behavior and on such conditions as the court may think proper to impose. A subsequent conviction by a court for any offense shall have the effect of revoking the suspension of the execution of the previous sentence unless the court otherwise directs."

Nowhere is there to be found any statutory provision which would make 11 TTC § 1459 inoperative as to a sentence to life imprisonment pursuant to a conviction of murder in the first degree. Had the Congress of Micronesia desired to exclude the suspension of sentences to imprisonment for life in cases of convictions of murder in the first degree, it obviously could have done so; but it did not. As was pointed out by the Supreme Court of the United States in the case of *Graves v. New York*, 306 U.S. 466, 83 L.Ed. 927, 932, the silence of the legislature when it has authority to speak may sometimes give rise to an implication as to the legislative purpose. In this connection it is noted that on the very question under consideration, the Congress of the United States, in 18 U.S.C. sec. 3651, specifically excluded from the Federal Courts the suspension of any sentence pur-

suant to a judgment of conviction for any offense punishable by death or life imprisonment. The Congress of Micronesia enacted no such restriction. Instead, it followed the age-old procedure described in *State v. Miller* (N.C.), 34 S.E.2d 143, that the practice of suspending judgments in criminal prosecutions, on terms that are reasonable and just, has existed so long that it may be considered established both by custom and judicial decision as part of the permissible procedure in criminal cases. Were this court to speculate and hold that the Congress of Micronesia, in enacting 11 TTC § 1459, meant to exclude convictions in cases of murder in the first degree, it would be to indulge in nothing more or less than judicial legislation, and, as we have already noted, such is not a proper function of a court.

[6] Finally, following the same reasoning as we have in connection with the granting of bail on appeal, we conclude that the trial court did have power to grant a stay of execution pending appeal.

[7] At no time did appellant claim that he had an absolute right to a stay of execution pending appeal, an absolute right to bail on appeal and an absolute right to the suspension of all or any part of the sentence imposed upon him. Obviously, no such absolute rights were held by him. He does, however, claim the right to be heard and to seek the exercise of the discretion of the trial court. In this, appellant is correct, and the trial court was in error in failing and refusing to hear on the merits appellant's motions for bail on appeal and for a suspension of all or a part of the sentence of imprisonment.

Accordingly, the judgment of conviction of the offense of murder in the first degree is affirmed. The trial court's refusal to entertain motions for bail on appeal and for suspension of all or a part of the sentence is reversed. The case

is hereby remanded to the Trial Division of the High Court for further proceedings in accordance with this opinion.

BURNETT, *Chief Justice* (dissenting):

I concur with that portion of the Court's opinion which finds the trial court to be in error in holding that it had no power to either grant bail pending appeal or to suspend any portion of the mandatory life sentence. I quite agree that he had the power, and should exercise it. It should, however, be noted that neither the California Statute nor Rule 46 of the Federal Rules govern this question here. The rule here, Rule 32(e), Rules of Criminal Procedure, as did Rule 46 prior to amendment in 1956, requires showing of a "substantial question of law" to warrant a stay and release on bail; obviously, there was a substantial question here, and the trial court here so certified.

I cannot subscribe to the view that this was a killing "by torture," and thus murder in the first degree, though I will agree that, if we were dealing in terms of a mathematical formula, the elements can be found. I see here no more intent to cause great pain or cruel suffering than to cause death, which the trial court specifically found did not exist. Here, there was no such primary intent; instead, there was the not unexpected reaction of a man to his wife's infidelity.

I recognize that the trial court's findings of fact lay the setting for appellate review. I would, however, prefer to set those findings in a perspective which would permit recognition of the human feelings which lead to such passionate response. This is, I believe, given the trial court's finding that there was no intent to cause death, no more than involuntary manslaughter, and would so hold.