

**TRUST TERRITORY OF THE PACIFIC ISLANDS,
Plaintiff-Appellee**

v.

**HERBERT RODRIQUEZ and RAY IRIARTE,
Defendants-Appellants**

Criminal Appeal No. 103

Appellate Division of the High Court

August 1, 1985

Appeal by two defendants from their convictions for Attempted Murder in the Second Degree and Murder in the Second Degree. The Appellate Division of the High Court, Hefner, Associate Justice, held that felony-murder rule was inapplicable to two escaping prisoners where a third escaping prisoner had actually injured a policeman and killed a radio announcer while in the act of escape, since Second Degree Murder statute only applies to the felon who actually kills another while perpetrating a felony, and not the other participants in the felony, and therefore convictions of two defendants were reversed.

1. Homicide—Murder in Second Degree—Felony Murder

Charge of second-degree murder based on felony-murder rule against two prisoners escaping from prison was erroneous, where charge was based on a shooting by a third escaping prisoner in which a police officer was injured but not killed, since without a homicide the felony-murder rule is not applicable. (11 TTC § 752)

2. Homicide—Murder in Second Degree—Felony Murder

Second-degree murder statute was not properly applied against two prisoners who were in the act of escaping from prison when a third escaping prisoner shot and injured a police officer, since language of felony-murder provision makes it clear that only the person who actually kills another while perpetrating a felony is liable, and not other participants in the felony. (11 TTC § 752)

3. Criminal Law—Attempt

Criminal statute defining “attempts” does not permit or allow any transferred intent or vicarious criminal liability; a bystander to an attempted crime is not included in the coverage of the statute. (11 TTC § 4)

4. Criminal Law—Attempt

An attempt to commit a crime requires specific intent, the performance of an act towards the commission, and the failure to consummate the act.

5. Homicide—Attempted Murder

Where during a joint escape, one prisoner shot and injured a police officer, and there was no finding of intent by two other escaping prisoners to attempt to murder the officer, nor any act toward the commission of the crime, the two other escaping prisoners could not be convicted of attempted murder. (11 TTC § 4)

6. Homicide—Murder in Second Degree—Felony Murder

Attempted felony murder is a legal impossibility. (11 TTC § 4)

7. Homicide—Murder in Second Degree—Felony Murder

Second-degree murder statute was not properly applied against two prisoners who were in the act of escaping from prison when a third escaping prisoner shot and killed a person, since language of felony-murder provision makes it clear that only the person who actually kills another while perpetrating a felony is liable, and not other participants in the felony. (11 TTC § 752)

8. Homicide—Murder in Second Degree—Felony Murder

Government could not prosecute co-felons under “common law” felony-murder rule, since no person is subject to criminal prosecution in Trust Territory except under *written* law. (1 TTC § 103)

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Before MUNSON, *Chief Justice*, MIYAMOTO, *Associate Justice*, and HEFNER*, *Associate Justice*

HEFNER, *Associate Justice*

Defendants Herbert Rodriquez and Ray Iriarte appeal their convictions for the crimes of Attempted Murder in

* Chief Judge, Commonwealth of the Northern Mariana Islands, designated as Temporary Associate Justice by the United States Secretary of Interior.

the Second Degree and Murder in the Second Degree. For the reasons stated herein we reverse these convictions for both defendants.

BACKGROUND

On January 19, 1980, the defendants were prisoners in the Ponape jail and they escaped from the facility with three other prisoners, Ioanis Roberts (a.k.a. Bambo), Kas-miro Amos, and Albert Atem.¹ As the five prisoners were departing the prison, a policeman (Perez Alik) was assaulted by Bambo with the officer's gun and then Bambo handcuffed him. The prisoners broke into the armory and took several guns and some ammunition. They then went outside and commandeered a police jeep. However, before leaving the grounds, Bambo went back in to the police station and shot Officer Alik in the back as he was laying down on the floor.² Both Rodriquez and Iriarte were outside the jail at the time the shooting occurred. This is the basis for the conviction of the charge of Attempted Murder in the Second Degree.

After Bambo emerged from the jail the five prisoners left in the police jeep and proceeded to the local radio station. The jeep was parked and Bambo approached the radio station and shot the radio announcer in the head, killing him instantly. Rodriquez and Iriarte did not enter the building but waited in or around the jeep. Approximately five minutes expired from the time Bambo left the jeep and returned from the radio station. This event is the basis for the conviction of Murder in the Second Degree.

¹ In addition to the five persons listed, another prisoner, Sosai Kilmeti was charged with escape. However, he did not leave the jail premises with the other five. The main defense the defendants offered at the trial is that Bambo was the prison bully and he coerced, threatened, and forced the defendants to escape against their will. This defense was rejected by the trier of fact and no appeal is taken on this issue.

² Officer Alik survived the shooting.

Rodriguez and Iriarte were both sentenced to 10 years confinement for the Attempted Murder conviction while Rodriguez received 30 years for the Murder conviction and Iriarte received 25 years.

DISCUSSION

The prosecution's theory for both convictions is based on the felony murder rule.

Turning first to the Attempted Murder conviction which was charged in Count 7,³ this can be easily (but not briefly) disposed of.

The felony murder rule originated in England and at common law the author of an unintended homicide is guilty of murder if the killing takes place in the perpetration of a felony. *Boyd v. United States*, 142 U.S. 450, 35 L. Ed. 1077, 12 S. Ct. 292; 2 *Wharton's Criminal Law*, 14th Ed., § 145 at page 201. Thus malice is implied by the law and what is intended is the felony and an unintended homicide.

An expansion of the felony murder rule is seen when two or more participants in a felony adventure results in a homicide by one of the participants and the net of the felony murder rule collects the other participants as murderers also. *People v. Washington*, 44 Cal. Rptr. 442, 402 P.2d 130; 2 *Wharton's Criminal Law*, § 149. The malicious intent of the actual murderer is transferred to the other co-felons.

The theory behind the felony murder rule is that since the participants engage in a felonious act and a homicide occurs during the commission of the underlying felony, all co-felons should suffer the same fate as the actual mur-

³ Count 7 reads:

"On or about the 19th day of January, 1980, Kolonia, State of Ponape, Federated States of Micronesia: Kasmiro Amos, Albert Atem, Ray Iriarte, Sosai Kilmeti and Herbert Rodriguez did unlawfully attempt to take the life of another, Perez Alik, while in the perpetration of a felony, Escape, in violation of 11 TTC 752 and 11 TTC 4." The reason Bambo was not charged is that he is deceased, presumably during the shootout at the time of the recapture of some of the defendants.

derer. In essence, the common law imposes a punishment factor which is intended as a deterrent for such acts by all the felons. *People v. Washington*, supra at p. 133.⁴

[1] It becomes instantly clear that the felony murder rule even in its expanded version cannot be used to support the Attempted Murder convictions. There was no homicide or killing of Alik. This is the most basic requirement for the application of the felony murder rule. Without a homicide the felony murder rule simply does not come into play.

[2] Additionally, the charging sections of the Trust Territory Code for Count 7, the attempted murder count, are not applicable to the facts of this case. 11 TTC § 752 would apply to Bambo (assuming a homicide) but does not extend to co-felons such as the defendants.⁵ Section 752 subjects a person to criminal prosecution for murder in the second degree if that *same* person kills another while perpetrating a felony. The statute is broad in applying the section to the perpetration of any felony, but it is limited in its application to include only the person taking the life of another and not to other participants in the felony. The type of statute that the prosecution would have to rely upon to include defendants Rodriquez and Iriarte would be similar to California Penal Code, Section 189.⁶ This section is all encompassing and includes both the actual murderer and any other participants in the commission or attempted commission of the felony. The Trust Territory Code does

⁴ *People v. Washington* dealt with the killing of a co-felon by an intended robbery victim. However, the basic reasoning behind the felony murder rule is discussed.

⁵ 11 TTC § 752 reads:

Every person who shall unlawfully take the life of another with malice aforethought, or while in the perpetration of, or attempt to perpetrate, any felony other than those enumerated in Section 751 of this Chapter, shall be guilty of murder in the second degree, and upon conviction thereof shall be imprisoned for a period of not less than five years or for life.

⁶ The pertinent portion of Section 189 reads:

All murder which is . . . committed in the perpetration of, or attempt to perpetrate [certain felonies] is murder of the first degree; and all other kinds of murders are of the second degree. (Emphasis added.)

not have such a statute. Therefore, the charging section, 11 TTC § 752, is not applicable to defendants Rodriquez and Iriarte.

[3] Section 4 of Title 11, the other section said to be violated by the defendants in Count 7, is also of no assistance to the government.⁷ This section does not permit or allow any transferred intent or vicarious criminal liability. A bystander to an attempted crime is simply not included in the coverage of the section.

[4, 5] It is basic criminal law that an attempt to commit a crime requires specific intent, the performance of an act toward the commission, and the failure to consummate the act. 21 Am. Jur. 2d Criminal Law § 152. There was simply no attempt made by Rodriquez and Iriarte to murder Alik. The evidence is uncontradicted that Rodriquez and Iriarte were outside the police station at the time Bambo reentered to shoot Alik. There is no evidence that would support a finding of intent by the defendants to attempt to murder Alik nor is there any act of Rodriquez or Iriarte toward the commission of the crime. The act of shooting Alik in the back by Bambo was the latter's act, not that of the appellants and the fact that it occurred during the joint

⁷ 11 TTC § 4 reads:

Attempts.—(1) Except as otherwise provided in subsection (2) of this section, every person who shall unlawfully attempt to commit any of the crimes named in this title, or in any other title of this Code, which attempt shall fall short of actual commission of the crime itself, shall be guilty of attempt to commit the said crime, and where no separate provision is made by law for punishment upon conviction of such attempt, a person so convicted shall be punished by imprisonment for a term not exceeding one-half of the maximum term of imprisonment which may lawfully be imposed upon conviction for commission of the offense attempted, or by a fine in an amount not exceeding one-half of the fine which may lawfully be imposed upon conviction for commission of the offense attempted, or by both such fine and imprisonment.

(2) Every person who shall unlawfully attempt to commit murder, which attempt shall fall short of actual commission of the crime itself, shall be guilty of attempted murder, and shall be sentenced as follows.

(a) For attempted murder in the first degree, imprisonment for a term of thirty years; and

(b) For attempted murder in the second degree, imprisonment for a term of not less than thirty months nor more than thirty years.

escape cannot support the conviction of Attempted Murder by the appellants.

[6] The common law fiction of *transferred* intent is used to support the felony murder rule. There is such a basic and logical inconsistency between the *specific* intent required for an attempted crime that an attempted felony murder is a legal impossibility.⁸

Consequently, the convictions under Count 7 must fail as not being supported in fact or law.

The shooting and killing of the radio announcer at the radio station does produce a death required for the application of the felony murder rule. For this event, the defendants Rodriquez and Iriarte were charged in Count 11 which states in pertinent part: “. . . Ray Iriarte . . . and Herbert Rodriquez did unlawfully take the life of another, Deruit Maruame, while in the perpetration of a felony, escape, in violation of 11 TTC Section 752.”

[7] Again, it is clear that the facts of the case do not fit the wording of 11 TTC § 752. There is no doubt that Bambo was the one who approached the radio station and shot the radio announcer. He is the “person” who did the act required to sustain a conviction under 11 TTC § 752. The failure of the section to include the other participants who may be perpetrating a felony is fatal to the government’s case.

[8] The question remains whether the government can still prosecute the co-felons under common law felony murder doctrines pursuant to the catch-all clause in 1 TTC

⁸ Defendants’ counsel provided the court with the recent case of *Colorado v. Waits*, 695 P.2d 1176 (Colo. 1985). The court in *Waits* termed the “crime” of attempted felony murder as an “impossible offense.”

⁹ To further clarify the import and scope of § 752, if we assume Bambo entered the radio station for the sole purpose of committing an assault and battery with a dangerous weapon on one person and the radio announcer surprised him during the act and Bambo’s gun inadvertently discharged, killing the radio announcer, Bambo could be charged under § 752 since he would be the person taking the life of another while he was perpetrating a felony but the defendants waiting outside could not be so charged or convicted.

§ 103. This section provides, *inter alia*, that the rules of the common law as generally understood and applied in the United States shall be the rules of decision in the courts of the Trust Territories in cases to which they apply. Assuming for the purposes of argument that the common law felony murder rule encompasses co-felons, § 103 is still not available to prosecute the defendants. The last portion of § 103 states “. . . , PROVIDED, that no person shall be subject to criminal prosecution except under the *written* law of the Trust Territory” (Emphasis added.) Simply put, there is no written law to charge the defendants under the facts of this case.

Both the appellants and appellee have briefed and argued whether the felony murder rule is applicable to the felony of escape and whether the escape had terminated by the time Bambo killed the radio announcer. In view of the above conclusions, it is unnecessary for us to decide those issues.

The convictions of defendants Iriarte and Rodriguez under Counts 7 and 11 of the Information are REVERSED.