MOSES FIGIR

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS

Criminal Case No. 108

Trial Division of the High Court

Yap District

June 25, 1969

See, also, 3T.T.R. 455

Petition for writ of habeas corpus. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that the writ would issue only to attach the jurisdiction by which a person is imprisoned or to correct a failure of due process of law but could not be used to determine the guilt or innocence of the accused.

Petition denied.

1. Habeas Corpus-Hearing-Procedure

   It is the usual procedure on an application for a writ of habeas corpus under Sections 300-306, Trust Territory Code, for the court to issue the writ and on the return to hear and dispose of the case, however, the court may, without issuing the writ, consider and determine whether the facts alleged, if proved, would warrant discharge of the prisoner. (T.T.C., Sees. 300-306)

2. Habeas Carpus-Nature of Proceeding

   The petition for the judicial action of issuance of the writ of habeas corpus is the institution of a new suit in the nature of a civil action rather than criminal proceeding.

3. Habeas Corpus-Hearing-Appeal

   Denial of the petition for issuance of the writ of habeas corpus is a judicial determination of a case or controversy, reviewable on appeal to the Appellate Division of the High Court.

4. Habeas Corpus-Jurisdictional Error

   Habeas corpus attacks the jurisdiction by which a person is imprisoned, not the proceedings themselves.

5. Habeas Corpus-Generally

   Determination of the guilt or innocence of the prisoner is not the function of habeas corpus.

6. Habeas Corpus-Jurisdictional Error

   A judgment and sentence of a court is within the court's jurisdiction if it is authorized to act upon the subject matter and the person is before it.

7. Habeas Corpus--Jurisdictional Error

Only when the court does not have jurisdiction and is without authority to act, may its judgment be said to be void and therefore subject to be set aside ina habeas corpus proceeding.

8. Habeas Corpus--Jurisdictional Error

The general rule is that when the court has jurisdiction by law of the offense charged, and of the party so charged, its judgments are not nullities, however, an unconstitutional statute or a proceeding which denies the accused due process of law, is an exception to the general rule and accordingly results in a void judgment which is subject to collateral attack.

9. Constitutional Law-Due Process

The mere fact that a person is unsuccessful in a court in a matter involving life, liberty, or property does not show that there has been a violation of due process of law guaranty.

10. Habeas Corpus--Due Process

Only when there has been such a failure in the proceedings that the accused is denied a fair trial can it be said there has been a denial of due process, that the resulting judgment is void and may be set aside on habeas corpus.

11. Habeas Corpus-Generally

Court will not retry case in a habeas corpus proceeding nor remand petitioner to another trial to permit new strategy to be employed by new counsel.

12. Criminal Law-Custom

Yapese custom which calls for certain methods of revenge as asserted, if it ever did prevail, does not make any of the crimes committed in revenge lawful.

13. Criminal Law-Intent

Motive may be shown as a defense in mitigation of the punishment.

14. Criminal Law-Intent

Motive does not make the criminal statute inapplicable to the person who acted under compelling motive.

15. Criminal Law-Intent

Motive, no matter how compelling, does not make that act lawful which is declared by statute to be a crime.

16. Arson-Generally

As arson is a crime under the written law it necessarily supersedes and replaces any applicable custom pursuant to Section 20 of the Code. (T.T.C., Secs. 390, 20)

17. Criminal Law-Burden of Proof-Reasonable Doubt

The prosecution is not obliged to negative beyond a reasonable doubt a defense not raised in the trial.

18. Habeas Corpus--Generally

While petitioner's argument that he should have been acquitted because the prosecution failed to meet its obligation to show beyond a reasonable doubt that petitioner's act was in violation of customary law may have been considered on an appeal, it was not appropriate in a habeas corpus proceeding to set aside a finding that petitioner violated, beyond a reasonable doubt, the criminal arson statute. (T.T.C., Sec. 390)

19. Yap Custom-Revenge

Since the adoption of the Trust Territory Code in 1952, traditional Yapese custom has been superseded by the written law with respect to retaliation by a family member for the killing of the head of the family; the written law now provides punishment.

20. Yap Custom-Revenge

Whether old custom permitted a murder victim's family to retaliate by murder, by arson, or by larceny, is now immaterial because custom has been abrogated by the statutory punishment for murder, thus the old custom is no longer the law, only the statutes are applicable in such situation.

TURNER, *Associate Justice*

The petitioner was convicted and sentenced for the crime of arson defined by Section 390, Trust Territory Code, October 4, 1967. March 26, 1969, a petition for issuance of writ of habeas corpus was filed asserting "no proof was offered and no judicial notice taken on the record as to an essential element of the crime for which he was convicted, that element being that his act was done "unlawfully."

Petitioner argued orally and in written memorandum that the defendant Figir had the "right and duty" to burn the victim's house under Yapese custom. Petitioner argued:-

"... when he burned down Moolang's house, his decision and its execution conformed fully with the rules of Yapese customary law."

Affidavits attached to the written argument purported to state "customary law".

The petition for issuance of the writ was orally argued to the court April 30, 1969, and thereafter, petitioner and the District Attorney submitted written argument.

[1] It is the usual procedure on an application for a writ of habeas corpus under Sections 300-306, Trust Territory Code, for the court to issue the writ and on the return to hear and dispose of the case. However, the court may, and here did, without issuing the writ, consider and determine whether the facts alleged by the petition, if proved, would warrant the discharge of the prisoner.

[2,3] Although the Clerk of the Court gave the petition the same docket number as previously given to the criminal information upon which the conviction was found, the petition for the judicial action of issuance of the writ is the institution of a new suit in the nature of a civil action rather than criminal proceeding. Therefore, denial of the petition for issuance of the writ is a judicial determination of a case or controversy, reviewable on appeal to the Appellate Division of the court. To avoid confusion, we retain the original criminal case docket number. *Ex parte Quirin,* 317 U.S. 1, 63 S.Ct. 1, 9.

Petitioner asks, in argument support of his petition, to set aside the conviction and discharge from prison on the ground the prosecution failed to prove-and could not under Yapese custom-the essential elements of arson recited in Section 390, Trust Territory Code. The statute provides:-

"Whosoever shall unlawfully, wilfully and maliciously set fire to and burn any dwelling ... shall be guilty of arson ...."

The burning of the house in this case, says petitioner, may have been wilful and malicious but it was not unlawful because it was permitted under Yapese custom. The District Attorney suggests use of the term in the statute is surplusage, that it is a legal conclusion and not a neces-

sary element of the crime of arson. He cites Perkins on Criminal Law, p. 172, and 41 Am. Jur., Pleading, § 20.

Petitioner counters with a quotation from Burdick on The Law of Crime, Sec. 126, that "unlawfully always means without legal justification, and implies that an act is not done as the law allows or requires." The law in this case, says petitioner,. is Yapese custom which "allows or requires" the burning of the house in revenge or retaliation for the prior murder of petitioner's father by the owner of the burned house.

The court does not agree with either the District Attorney that the word in the statute is surplusage because a legal conclusion nor with the petitioner that the burning in this case was with "legal justification" under the custom.

Before considering this issue we are compelled to examine the jurisdiction of the court to entertain habeas corpus as a means of discharging a prisoner previously lawfully charged, tried, convicted and sentenced by this court which had jurisdiction of both the subject matter and of the accused.

[4, 5] Habeas corpus attacks the jurisdiction by which a person is imprisoned, not the proceedings themselves. Determination of the guilt or innocence of the prisoner is not the function of habeas corpus.

[6,7] A judgment and sentence of a court is within the court's jurisdiction if it is authorized to act upon the subject matter and the person is before it. Only when the court does not have jurisdiction and is without authority to act, may its judgment be said to be void and therefore subject to be set aside in a habeas corpus proceeding.

[8] The United States Supreme Court said in *Ex parte Bigelow,* 113 U.S. 328, 5 S.Ct. 542:-

"It may be confessed that it is not always very easy to determine what matters go to the jurisdiction of the court so as to make its action when erroneous a nullity. But the general rule

is that when the court has jurisdiction by law of the offense charged, and of the party so charged, its judgments are not nullities."

The court points out an unconstitutional statute or a proceeding which denies the accused constitutional guaranties, including due process of law, may be the exception to the general rule and accordingly results in a void judgment which is subject to collateral attack.

Petitioner attempts to sustain applicability of habeas corpus by arguing a denial of due process guaranteed by Section 4, Trust Territory Code. Petitioner was denied due process, he urges, because he should have been acquitted.

[9] Such is not the law. It also misconstrues the meaning of due process. The general rule is stated in 16 Am. Jur. 2d, Constitutional Law, § 553:-

"The mere fact that a person is unsuccessful in a court in a matter involving life, liberty, or property does not show that there has been a violation of due process of law guaranty."

An attempt similar to petitioner's to employ habeas corpus in lieu of an appeal on the theory the prisoner was deprived of guaranteed rights under due process is found in *Carpenter v. Lainson,* 84 N.W.2d 32, 71 A.L.R.2d 1151. In this case a juvenile petitioned by habeas corpus to be released on the grounds he. was not represented by counsel and that was a denial of due process. The court found there had been an effective waiver of counsel and went on to say:-

"Due process of law under both federal and state constitutions requires that one charged with crime receive a fair trial. ... We have often said, it is not the purpose of habeas corpus proceeding to determine the guilt or innocence of the petitioner of the crime for which he is held, nor to ,pass upon errors in his trial, nor to retry the facts and pass upon the sufficiency of the evidence to sustain the charge. Unless there was no jurisdiction in the

court, the judgment is not void and he cannot attack it collaterally by habeas corpus."

[10] Only when there has been such a failure in the proceedings that the accused is denied a fair trial can it be said there has been a denial of due process, that the resulting judgment is void and may be set aside on habeas corpus. Such is not the case here.

Petitioner argues he was denied due process because he was convicted when he should have been acquitted. Guilt or innocence is not a subject of inquiry in this proceeding.

In a case in which denial of due process was claimed, the Federal Court said in *Bowen v. U.S.,* 192 F.2d 515, cert. den. 343 U.S. 943:-

"... it is also of the essence ... that judgments have finality; and that trials, conducted in accordance with law and ending in a conviction, some day be at an end. Especially is it of the essence of orderly trials that the right to counsel accorded to defendant by the Constitution be not regarded, as argument here would seem to regard it, as a mere one way street such that, if the strategy and tactics of his trial counsel, in determining not to raise constitutional questions, prove unsuccessful, defendant, without appealing from the judgment, may many years later set it aside in order that, on another trial with another counsel, another course raising these questions may be taken, and so on ad infinitum." *Larson v. U.S.,* 275 F.2d 673.

[11] We note here that the public defender did notsuggest, nor the court consider the defense now attempted to be asserted by another counsel. We will not retry the case in a habeas corpus proceeding nor remand the petitioner to another trial to permit new strategy to be employed by new counsel.

Even if we were to do so, we are not convinced either by the factual allegations in the petition or the affidavits in support, which would not be admissible in a new trial since they are hearsay, that the defense now proposed would require an acquittal.

The argument now presented is that under the circumstances of the case it is not unlawful to wilfully and maliciously burn the dwelling of another because Yapese custom condones the act. Under traditional custom, says petitioner, it is the "right and duty" and therefore not unlawful, to atone for or obtain revenge for a prior homicide by killing the murderer, or by burning his house, or stealing his canoe.

[12] Yapese custom which calls for the methods of revenge asserted by petitioner, if it ever did prevail, does not make any of the crimes committed in revenge lawful. Petitioner attributes the act to the compulsion of custom. This goes to motive for commission of the act, not its justification.

[13,14] Motive may be shown as a defense in mitigation of the punishment. It does not make the criminal statute inapplicable to the person who acted under compelling motive.

Many examples are known to the law of the United States. For instance, it is the "custom" to employ as a defense the "unwritten law" to excuse a husband charged with murder for killing his wife's paramour.

The United States Supreme Court passed upon a series of cases attacking the Congressional act making polygamy a crime. It was argued that the statutes abridged the constitutional guarantee of religious freedom.

These cases are reviewed in *Davis v. Beason,* 133 U.S. 333,10 S.Ct. 299, where the argument was made the statute was not applicable to members of the Mormon Church because of their religious belief in the practice of plural wives. The argument is substantially the same as that presented here that the criminal statute punishing arson is not applicable to anyone who burns another's house or kills him or takes his canoe because it is "compelled" by custom, or it is the "right and duty" to burn and murder

under the custom. The same reasons the Supreme Court gave for refusing to exempt Mormon polygamists from the statute are applicable to the proposed exemption of Yapese from the arson statute.

The court said in the *Davis* case at 10 S.Ct. 301:-

". . . the only question which remains is whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would introduce a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"

[15,16] We consider it equally absurd to contend that the statute making arson a crime and defining it as "unlawfully, wilfully and maliciously" burning is not applicable to the Yapese under their custom but is applicable to all other Micronesians who do not assert a similar practice as their traditional custom. Motive, no matter how compelling, does not make that act lawful which is declared by statute to be a crime. Arson is a crime under the written law, Section 390, Trust Territory Code. It necessarily supersedes and replaces any applicable custom pursuant to Section 20 of the Code.

We reject utterly petitioner's argument he should have been acquitted because the prosecution failed to meet its obligation "to show beyond a reasonable doubt that petitioner's act was in violation of customary law."

[17, 18] The prosecution is not obliged to negative "beyond a reasonable doubt" a defense not raised in the trial. Such argument may have been considered on an appeal but it is not appropriate in a habeas corpus proceeding to set

aside a finding that petitioner violated, beyond a reasonable doubt, the criminal arson statute.

ORDER

It is ordered that the petition for issuance of writ of habeas corpus to the Sheriff of the Yap District to bring the prisoner Moses Figir before the court for hearing on the lawfulness of his imprisonment be and the same is hereby denied.

Supplemental Order
to
Order Denying Petition

Entered July 1, 1969

The Order Denying Petition for Issuance of Writ of Habeas Corpus was written in Koror, Palau District, and was not seen by the trial Assessor, District Judge Joseph Fanechoor, until it had been received and filed by the Clerk of Courts. When the July, 1969, session of the High Court in Yap commenced, the trial Assessor made comment and observation upon the Yapese custom relied upon by petitioner. His observation is pertinent and significant for future guidance, and accordingly the court believes it should be included in the opinion denying the petition.

[19] Whatever the custom may have been in the "old days" (and the Assessor does not agree it was accurately stated either by petitioner nor by the supporting affidavit of the anthropologist) since adoption of the Trust Territory Code in 1952, traditional Yapese custom has been superseded by the written law with respect to retaliation by a family member for the killing of the head of the family. The written law now provides punishment.

The Assessor noted that in the present case, the person who killed petitioner's father had been charged with mur-

der in the first degree and was convicted in the High Court of second degree murder on October 13, 1952.

He further points out that the victim of petitioner's arson, Moolang, was in prison serving the murder sentence imposed upon him when petitioner destroyed his home and its contents by setting fire to it April 27, 1967.

[20] Whether old custom permitted a murder victim's family to retaliate by murder, by arson, or by larceny as petitioner alleges, is now immaterial because custom has been abrogated by the statutory punishment for murder. The punishment imposed upon Moolang by the Trust Territory government for killing petitioner's father replaced the private right of revenge asserted by petitioner. The old custom is no longer the law. Only the statutes are now applicable in this situation.

SUPPLEMENTAL ORDER

It is ordered that the foregoing opinion be made a supplement to the Opinion and Order denying petitioner's application for writ of habeas corpus for the purpose of effectuating his discharge from the lawful sentence imposed upon him for the crime of arson.