

established Marshallese custom it is clear that this alleged will failed for lack of approval of the *Iroi j Lablab*. Therefore, it is the opinion of this Court that the plaintiff has indeed established his claim and that the plaintiff is the rightful *alab* of *Monbole wato* on Utrik Island.

JUDGMENT

It is ordered, adjudged, and decreed:—

1. As between the parties and all persons claiming under them:—

(a) The plaintiff, Lokal, is the *alab* of *Monbole wato*, Utrik Island, Marshall Islands District.

(b) The defendant, Lolen, shall cease, as of this date, to exercise the rights of *alab* on *Monbole wato*. However, any rights defendant may have as *dri jerbai* on said *wato* are not affected by this judgment.

(c) This judgment shall not affect any rights-of-way there may be over the land in question.

2. No costs are assessed to either party.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Plaintiff

v.

BENEMANG, Defendant

Criminal Case No. 123

Trial Division of the High Court

Yap District

March 9, 1970

See, also, 5 T.T.R. 22, 42

Judgment on charge of assault and battery with a dangerous weapon and attempted assault and battery with a dangerous weapon. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that the charge of attempted assault and battery with a dangerous weapon was invalid, but found defendant guilty of the charge of assault and battery with a dangerous weapon and held also that defendant's claim of self-defense was unfounded.

TRUST TERRITORY v. BENEMANG

1. Assault—Attempt

It is the general rule that a criminal charge may not be made for attempted assault.

2. Assault—Generally

Assault is an attempted battery, that is, it is an action which falls short of battery but includes an intent to inflict injury. (T.T.C., Sec. 378)

3. Criminal Law—Attempt

A charge may not be made upon an attempt to commit an attempt.

4. Criminal Law—Attempt

To constitute attempt there must be an act done with intention of committing a crime, tending to but falling short of the act intended.

5. Assault and Battery—Attempted Battery

Attempted battery falls short of the crime and becomes an assault. (T.T.C., Sec. 379)

6. Assault—Generally —

Assault is an intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as create well-founded fear of imminent peril, coupled with an apparent present ability to execute attempt, if not prevented. (T.T.C., Sec. 378)

7. Assault and Battery—Attempted Battery

An assault and an attempted battery both consist of an intent to harm another together with an overt act toward its commission but which falls short of completion; they are one and the same. (T.T.C., Sec. 379)

8. Assault and Battery With a Dangerous Weapon—Attempt

The two elements of attempt and of assault are intent and action which falls short of a battery, thus an attempt to commit assault and battery with a dangerous weapon is the same as an assault with a dangerous weapon, but there is no such crime in the Trust Territory Code. (T.T.C., Sec. 377-A)

9. Assault—Aggravated Assault—Generally

The Code sets forth the crime of aggravated assault and defines it as a battery with a dangerous weapon with intent to kill, rape, rob, inflict grievous bodily harm or to commit any other felony against the person of another. (T.T.C., Sec. 377)

10. Assault—Aggravated Assault—Generally

Aggravated assault is distinguishable from assault and battery with a dangerous weapon in that the latter omits any reference to intent to inflict grievous bodily harm. (T.T.C., Secs. 377, 377-A)

11. Assault and Battery—Generally

One act cannot be both an assault and a battery since assault is only an attempt to inflict harm whereas battery is the actual unlawful infliction of harm. (T.T.C., Sec. 379)

12. Assault and Battery With a Dangerous Weapon—Assault

An assault is merged in the battery in the crime of assault and battery with a dangerous weapon; the statutory intent of the code is to set forth the crime of battery with a dangerous weapon thus the term assault is surplusage adding nothing to the definition. (T.T.C., Sec. 379)

13. Assault and Battery—Attempted Battery

A charge of attempted battery is improper as an attempted battery is an assault. (T.T.C., Sec. 379)

14. Assault and Battery With a Dangerous Weapon—Generally

While evidence showed that defendant threatened the complaining witness with a machete, obviously a dangerous weapon, where the defendant did not inflict harm it was not a battery with a dangerous weapon. (T.T.C. Sec. 377-A)

15. Assault and Battery With a Dangerous Weapon—Generally

A charge of attempted assault and battery with a dangerous weapon was an invalid charge and the defendant was entitled to a dismissal upon that count. (T.T.C., Secs. 377-A, 431)

16. Assault—Generally

An intent to cause bodily harm plus the act of throwing a rock was sufficient to sustain a charge of assault even though the rock missed and no harm was done. (T.T.C., Sec. 378)

17. Assault and Battery With a Dangerous Weapon—Dangerous Weapon

The fact that persons admitted throwing stones at complainant, one of which hit him, would sustain a charge of assault and battery with a dangerous weapon as well as an assault charge. (T.T.C., Secs. 377-A, 378)

18. Criminal Law—Witnesses

It is proper that a witness remain silent rather than deny an incident falsely and thus commit perjury.

19. Criminal Law—Rights of Accused—Failure to Testify

A defendant in a criminal case need not take the witness stand and no unfavorable inference against him may be drawn from his failure to be a witness in his own behalf.

20. Criminal Law—Rights of Accused—Accused as Witness

When the accused voluntarily testifies he is subject to the same rules as other witnesses, and his failure to deny a material fact within his knowledge previously testified to against him warrants the inference it is true.

21. Criminal Law—Self-Defense

One who provokes a fight runs the risk of suffering the normal results of such provocation and cannot fairly claim self-defense as an excuse for using a dangerous weapon to resist such results.

TRUST TERRITORY v. BENEMANG

22. Criminal Law—Self-Defense

Where the accused was a trespasser and attempted to engage in a fight with complainant, the complainant had a legal right to chase the accused from the yard, and as the accused was not in any danger and was not forced to perform acts of self-defense then the theory of self-defense was inapplicable.

23. Yap Custom—Trespass

Under Yapese custom, the accused, being from Woneyan Village was without privilege or justification in entering the complainant's village, Gachapar, and the complainant's enclosed yard.

<i>Assessor:</i>	JUDGE MATHIAS FINIGINAM
<i>Interpreters:</i>	BARBARA J. LEEGUROY and EDWARD FITLOG
<i>Reporter:</i>	SAM K. SASLAW
<i>Counsel for Prosecution:</i>	DOUGLAS CUSHNIE, <i>District Attorney,</i> and LAWRENCE MANGARFIR, <i>District Prosecutor</i>
<i>Counsel for Defendant:</i>	WILLIAM E. NORRIS, <i>Ass't. Public Defender,</i> and FRANK FLOUNNUG, <i>Public Defender's Representative</i>

TURNER, *Associate Justice*

Defendant was charged upon a two-count information filed in this court with assault and battery with a dangerous weapon in violation of Section 377-A, Trust Territory Code, and by Count II attempted assault and battery with a dangerous weapon in accordance with Section 431 relating to attempts and Section 377-A of the Code relating to the crime.

In a proceeding upon a complaint charging the same offenses, Yap Criminal Case No. 2040, the accused had entered a plea of guilty. After he commenced serving sentence of imprisonment an appeal was taken to this Court on the principal ground that the defendant did not voluntarily enter the plea with an understanding of the nature of the charges nor the consequences of the plea. As

a result of this appeal the judgment and sentence of the District Court was vacated, the motion to withdraw the plea of guilty was granted and the case ordered retained in this Court for trial. (See: *Benemang v. Trust Territory*, 5 T.T.R. 22).

In addition to the customary obligation upon a trial court in a criminal case to determine whether or not the prosecution has submitted sufficient evidence to overcome the presumption of innocence applying to the defendant and to establish his guilt beyond a reasonable doubt, there is in this case a serious legal question involving construction of the Trust Territory statutes. This relates to whether or not a charge of attempted assault and battery with a dangerous weapon is legally permissible.

[1-3] It is the general rule that a criminal charge may not be made for attempted assault. Assault is an attempted battery, that is, it is an action which falls short of battery but includes an intent to inflict injury. A charge may not be made upon an attempt to commit an attempt, in this situation an attempted battery.

[4] Attempt is defined as:—

“To constitute ‘attempt,’ there must be an act done with intention of committing a crime, tending to but falling short of the act intended.” *People v. O'Brien*, (Cal.) 23 P.2d 94.

[5, 6] “Attempted” battery falls short of the crime and becomes an assault, which Black’s Law Dictionary, 4th ed., defines as:—

“Assault. An intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward person of another, under such circumstances as create well-founded fear of imminent peril, coupled with apparent present ability to execute attempt, if not prevented.” P. 147.

[7] An assault and an attempted battery both consist of an intent to harm another together with an overt act

toward its commission but which falls short of completion. They are one and the same.

[8-10] Thus the two elements of attempt and of assault are intent and action which falls short of a battery. An *attempt* to commit "assault and battery with a dangerous weapon" is the same as an *assault* with a dangerous weapon. But there is no such crime in the code. The code sets forth the crime of aggravated assault and defines it as a battery with a dangerous weapon "with intent to kill, rape, rob, inflict grievous bodily harm, or to commit any other felony against the person of another." Aggravated assault is distinguishable from assault and battery with a dangerous weapon in that the latter omits any reference to intent to "inflict grievous bodily harm etc."

Section 378 of the Trust Territory Code sets forth the crime of assault as an "attempt . . . to do bodily harm to another."

[11-13] What is the effect then of combining the term "assault" and "battery?" One act cannot be both an assault and a battery since the "assault," as defined is only an attempt to inflict harm whereas "battery", or as Section 379 of the Code provides, "assault and battery" is the actual unlawful infliction of harm. An assault is merged in the battery in the crime of assault and battery with a dangerous weapon. Our Code simply misstates the two crimes and then combines them. The statutory intent, clearly, is to set forth the crime of "battery with a dangerous weapon." The term "assault" is surplusage adding nothing to the definition. The charge of attempted battery is improper because an attempted battery is an assault.

[14] The evidence in Count II of this case shows the defendant threatened the complaining witness with a machete, which obviously is a dangerous weapon. The defendant did not inflict harm, therefore it was not a battery with a dangerous weapon.

[15-17] The act was an "assault with a dangerous weapon," but that is not a crime under our statutes. At most the evidence sustains the crime of assault, as defined. But the charge was "attempted assault and battery with a dangerous weapon." From what has been said it is an invalid charge and the defendant is entitled to a dismissal of Count II against him. Two or three valid charges were available to the prosecution in lieu of the invalid one chosen. The evidence shows that in addition to the nighttime machete incident on which Count II was based, which would have sustained a charge of assault, the first rock the defendant threw at the complainant missed. The intent to cause bodily harm plus the act of throwing was sufficient to also sustain a charge of assault even though the stone missed and no harm was done. Also two of the defense witnesses admitted throwing stones at the complainant one of which hit him during the nighttime incident. This action would sustain assault and battery with a dangerous weapon as well as an assault charge against the two witnesses.

As to Count I the charge is that the defendant committed the crime of assault and battery upon the complaining witness with a rock. The uncontradicted evidence was that during the afternoon the accused threw stones at Yatman, hit him twice and injured him sufficiently to require medical treatment the next day at the Yap District Hospital.

Two facets of defendant's testimony are worthy of note. The first of these was defendant's failure to deny that he threw rocks at the complainant.

Complainant was hit by a third rock, thrown at night, and as to this incident the defendant denied knowing anything about "rock throwing" which denial was scarcely creditable. He also called two witnesses who admitted that

they, and not the defendant, threw rocks during the night-time incident while they were with the defendant.

But the defendant was strangely silent as to the rock throwing during the afternoon. Even his counsel avoided direct reference to the incident. The defendant was asked by his counsel:—

“Q. When you threw the rock at Yatman then he began to chase you?”

Defendant’s counsel withdrew that question before an answer was given and then asked:—

“Q. Was there something or an action that took place between the time that you ran out from his residence and the time you fell down?”

“A. The only thing was running.”

This answer was given in the face of the prosecution testimony that the defendant threw rocks at the complaining witness, that two of them hit him causing injury and bleeding that required medical treatment. The defendant watched the complainant demonstrate in the courtroom how he scooped up rocks and threw them.

[18] It is proper that a witness remain silent rather than deny an incident falsely and thus commit perjury. It is obvious this is the reason for the defendant’s silence. Even his counsel, in final argument to the court, acknowledged the rock throwing but advanced the theory it was done in self-defense.

[19, 20] A defendant in a criminal case need not take the witness stand and no unfavorable inference against him may be drawn from his failure to be a witness in his own behalf. But when the accused voluntarily testifies he is subject to the same rules as other witnesses, and his failure to deny a material fact within his knowledge previously testified to against him warrants the inference it is true.

The U.S. Supreme Court in *Caminetti v. U.S.*, 242 U.S. 470, 37 S.Ct. 192 at 197 and 198 lays down the rule applicable to the defendant's testimony. The court said:—

“A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so, no inference unfavorable to him may be drawn from that fact . . . but where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him . . . it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so.”

Also see: *Johnson v. U.S.*, 318 U.S. 189, 63 S.Ct. 549 and *State v. Aime* (Utah), 220 P. 704, 32 A.L.R. 375, wherein the Court said that the failure of the accused “to deny a material fact within his knowledge previously testified to against him warrants the inference that it was true.”

The Court finds from the prosecution evidence and the defendant's failure to explain or deny it that the accused did indeed throw stones at the complaining witness, that those stones were of such size and were so used as to be dangerous weapons, and that these hurled stones struck the complainant and caused bodily harm. All evidence that is necessary to find the defendant guilty of Count I of the information is before the court, unless the defense suggestion on summation is accepted that the stones were thrown in self-defense.

The defendant entered the complainant's premises, woke the complainant from sleep and quarreled with the complainant who refused to drink beer the defendant had brought him. The complainant went outside his house and started after the defendant who then ran and began throwing rocks—at least three, two of which hit the complainant. At all times the parties, by the defendant's admis-

sion, were at least twenty feet apart. Even if it were true, which the complainant denies, that he had a knife or machete the defendant was in no danger from the knife or from the complainant while maintaining a distance of twenty feet between them.

In *Santiago v. Trust Territory*, 3 T.T.R. 575, the Court refused to consider "what rights of self-defense the appellant had since it is clear that he was the aggressor and had to move 15 feet in order to stab Ihper. He was in no immediate danger when he was 15 feet away"

[21] Also this Court said in *Asako v. Trust Territory*, 3 T.T.R. 191 at 193:—

"One who provokes a fight runs the risk of suffering the normal results of such provocation and cannot fairly claim self-defense as an excuse for using a dangerous weapon to resist such results."

[22] The accused was a trespasser and attempted to engage in a fight. The complainant had a legal right to "chase" the accused from the yard. The accused was not in any danger and was not forced to perform acts of self-defense. *Yaoh v. Trust Territory*, 1 T.T.R. 192. *Partridge v. Trust Territory*, 1 T.T.R. 265.

According to the complainant's account of the afternoon affair the defendant came to his house with a can of beer and:—

"Then he said to me, 'drink this or I will beat you up.' I told him to go for I will not drink it. . . . He was still talking when I told him to leave my home and get out and he said he would not. . . .

"When I came outside he left and went outside the yard and picked up some stones.

"He threw the first stone but missed me. I ran after him. He picked up another stone, he threw it and it hit me."

The defendant's account of the same events ignored and failed to deny the complainant's version. The defendant said:—

"Yatman was lying down. I woke him up and told him about the beer.

"He took a knife and I ran away."

The defendant's counsel urged the court to find that the defendant threw the rocks, if he threw them, as a matter of self-defense. The foregoing testimony demonstrates that the theory of self-defense is not applicable.

[23] Under Yapese custom, the accused, being from Woneyan Village was without any privilege or justification in entering the complainant's village, Gachapar, and the complainant's enclosed yard. His conduct while there being without legal justification, the Court has no alternative but to find him guilty of assault and battery with a dangerous weapon.

It is ordered, decreed, and adjudged:—

1. That Benemang is guilty as charged of the crime of assault and battery with a dangerous weapon.
2. That the charge of attempted assault and battery with a dangerous weapon is quashed and vacated.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Plaintiff

v.

BENEMANG, Defendant

Criminal Case No. 123

Trial Division of the High Court

Yap District

March 16, 1970

See, also, 5 T.T.R. 22, 32

Motion to reopen trial for purpose of specifically denying commission of crime charged. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that motion for reopening trial would be granted where an element of defense was overlooked through inadvertence or misunderstanding and it was probable there was no great dispute about the facts involved,