

KIKI OTOKICHY, Petitioner

v.

APPELLATE DIVISION OF THE SUPREME COURT OF THE  
FEDERATED STATES OF MICRONESIA, Respondent

Certiorari No. C-2-82

Appellate Division of the High Court

March 11, 1983

Writ of certiorari. The Appellate Division of the High Court, Miyamoto, Associate Justice, held that Federated States of Micronesia Supreme Court did not have jurisdiction to hear a criminal case which arose out of offenses allegedly committed in one of its states prior to the effective date of the National Criminal Code, and therefore Writ of Prohibition issued by Appellate Division of the Federated States of Micronesia Supreme Court which instructed its Trial Division to retain jurisdiction was reversed.

**1. Micronesia—Supreme Court—Jurisdiction**

Federated States of Micronesia Supreme Court did not have jurisdiction to hear a criminal case which arose out of offenses allegedly committed in one of its states prior to the effective date of the National Criminal Code.

**2. Courts—Jurisdiction**

Jurisdiction of courts is determined by statute or constitution, not by rules.

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nape

Before MUNSON, *Chief Justice*, MIYAMOTO, *Associate*  
*Justice*, and LAURETA, *Associate Justice*<sup>1</sup>

MIYAMOTO, *Associate Justice*

On May 28, 1981, the Truk State Attorney (equivalent

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<sup>1</sup> U.S. District Court Judge, Commonwealth of the Northern Mariana Islands, designated as Temporary Associate Justice by Secretary of Interior.

to a state Attorney General), filed an information in the Trust Territory High Court in Truk against Kiki Otokichy and eight others for committing certain felonies on May 4, 1981, within Truk State, in violation of Title 11 of the Trust Territory Code.<sup>2</sup> All Truk criminal cases (13-81 and 16-81) relating to this incident, and 18-81 that relates to an incident on March 7, 1981, are deemed to be consolidated for the purposes of this appeal.

On December 4, 1981, the Federated States of Micronesia, through its Attorney General, filed a motion in the Trust Territory High Court in Truk, to refer the case to the FSM Supreme Court, and on December 10, 1981, Associate Justice Mamoru Nakamura of the Trust Territory High Court, sitting as a Trial Division Judge, certified the case to the FSM Supreme Court on the question of jurisdiction pursuant to Special Joint Rule No. 1 executed by the Chief Justices of the Trust Territory High Court and the FSM Supreme Court.<sup>3</sup>

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<sup>2</sup> Title 11 of the Trust Territory Code is a comprehensive Criminal Code, including misdemeanors and felonies, adopted by the Congress of Micronesia. Title 11 offenses are still being enforced in the various states of the FSM in the Trust Territory courts where there is an absence of offenses in the FSM National Criminal Code, such as firearm and narcotics violations.

<sup>3</sup> "The Supreme Court of the Federated States of Micronesia has now been certified by the Chief Justice of the Trust Territory High Court and has begun to exercise its jurisdiction throughout the Federated States of Micronesia. The Trust Territory High Court shall remain active in the Federated States of Micronesia to hear only those cases which do not fall within the jurisdiction of the Supreme Court of the Federated States of Micronesia. It is the intent of this jointly adopted rule that both Courts shall cooperate to assure that the Supreme Court of the Federated States of Micronesia immediately shall exercise the full scope of its jurisdiction under the Constitution and laws of the Federated States of Micronesia, and that the Supreme Court shall determine the scope of its own jurisdiction. The following rule is therefore adopted jointly by the Courts to specify procedures to be followed in cases originally filed in the Trust Territory High Court or a Trust Territory District Court.

"1. Either party may, at any time, file a motion with the Court where the case is pending, asserting that the case falls within the jurisdiction of the Supreme Court of the Federated States of Micronesia. Upon receipt of any such motion, the Trust Territory High Court or the Trust Territory District Court, as the case may be, shall promptly certify the question of jurisdiction to the Supreme Court of the Federated States of Micronesia.

"While the question of jurisdiction remains pending before the Supreme Court of the Federated States of Micronesia, the certifying Court shall retain jurisdiction of the litigation. For purposes of statutes of limitations, the doctrine of laches, or other similar or related questions involving lapse

On March 11, 1982, Associate Justice Richard Benson of the FSM Supreme Court, sitting as the Trial Division Judge in Truk, denied the motion to transfer the case to the FSM Supreme Court, claiming, *inter alia*, that Title 11 of the Trust Territory Code was not a FSM national law at the time of the commission of the alleged offenses and therefore, the jurisdiction over the defendant and others was with the Trust Territory High Court.<sup>4</sup>

Subsequently, the FSM Attorney General filed a Petition for Writ of Prohibition in the Appellate Division of the Supreme Court seeking to prevent this case from being transferred back to the Trust Territory High Court. On August 13, 1982, the Appellate Division of the FSM Supreme Court issued a Writ of Prohibition instructing its Trial Division "to retain jurisdiction and to proceed in the cases in whatever manner the Trial Division Justice deems appropriate."<sup>5</sup> In the meanwhile, on May 5, 1982, the peti-

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of time, such litigation, whether or not accepted for decision on the merits by the Supreme Court of the Federated States of Micronesia pursuant to the jurisdictional motion, shall continue to be regarded as having been initiated at the original time of filing of the litigation with the Trust Territory High Court or the Trust Territory District Court."

<sup>4</sup> In the ruling on Truk criminal case 18-81 (later applied to Truk criminal cases 13-81 and 16-81), Justice Benson held, in part,

"The court concludes that Title 11 is not a national law. Article VIII, § 1, of the Constitution states, 'A power expressly delegated to the national government, or a power of such an indisputably national character as to be beyond the power of a state to control, is a national power.' This criminal jurisdiction of Title 11 was not 'expressly delegated' to the national government, nor is it of an 'indisputably national character.'

"The term 'expressly delegated' needs to be distinguished from that power given to the Congress of the Federated States of Micronesia to define major crimes. Art. IX § 2(p) FSM Const.

"On the date of these alleged offenses, the criminal jurisdiction of Title 11 had not been expressly delegated to the national government. Nor had Congress's exercise of that power, the National Criminal Code, become effective.

"Title 11 continued in effect under the Constitution of the Federated States of Micronesia, but not as a national law."

<sup>5</sup> The opinion of the Appellate Division of the Supreme Court in TZ-1982, reads, in part, as follows:

"In adopting the National Criminal Code, Congress asserted control over every section of Title 11 within the range of Congressional power. As of July 12, 1981, Title 11 was repealed 'to the full extent of National Government jurisdiction' over the matters covered there.

"Without more, all prosecutions under Title 11 would have been prevented or abated. Section 102 of the Code is a savings clause, the antidote

tioner was tried and acquitted by the Trust Territory High Court of all pending charges against him.

As a consequence of the issuance of the Writ of Prohibition, the Petitioner filed a Petition for a Writ of Certiorari with the Appellate Division of the Trust Territory High Court pursuant to the authority vested in the Trust Territory High Court by Secretarial Order 3039,<sup>6</sup> and the writ was issued on November 26, 1982. A hearing on the appeal was held in Ponape on February 2, 1983.

The fundamental issue here is one of jurisdiction, whether the FSM Supreme Court had jurisdiction to hear a criminal case which arose out of offenses allegedly committed in one of its states prior to the effective date of the National Criminal Code. The FSM National Criminal Code (Public Law No. 1-134) was enacted by the Congress of the Federated States of Micronesia, and approved by the President on January 7, 1981, and became effective on July 12, 1981, or slightly over two months after the commission of the alleged offenses.

The initial issue to be ascertained is exactly what the Supreme Court is in relation to the state courts and to the presently coexisting Trust Territory Courts.

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to the Section 2 repealer. Section 102 is authorization by national law of initiation or continuation of prosecutions of Title 11 offenses committed before July 12, 1981. Thus, Case Nos. 13-81 and 16-81 are now Section 102 prosecutions and fall within the jurisdiction of the Trial Division of this Court.

"Accordingly the writ of prohibition requested by petitioner will issue. The Trial Division is instructed to retain jurisdiction and to proceed in the cases in whatever manner the Trial Division Justice deems appropriate."

Section 5b. of the Secretarial Order 3039 reads:

"b. *Appellate Functions.* As the functions of the Community Courts, the District Courts, and the Trial Division of the High Court have been phased out and transferred to the local courts pursuant to the provisions of Section 5a of this Order, the Appellate Division of the High Court shall retain jurisdiction by *writ of certiorari* to entertain appeals from the courts of last resort of the respective jurisdictions of the Federated States of Micronesia, the Marshall Islands, and Palau. (Emphasis added.)

"The ruling of the High Court of the Trust Territory of the Pacific Islands upon all appeals shall be final, binding, and enforceable in accordance with their terms. All appeals now pending or taken before the determination has been made pursuant to Section 5a of this Order that functioning courts exist in a jurisdiction shall be retained by and disposed of by the High Court."

The FSM National Government is a republican form of government patterned after the national government of the United States. It is a federal form of government, sharing the governance of its people with the state government and other local governments.<sup>7</sup> These shared responsibilities are prescribed in the National Constitution and in the Constitution or Charters of the four states which comprise the Federated States of Micronesia. It is a *de facto* government established within the Trust Territory of the Pacific Islands, and Secretarial Order 3039 subdelegated the authority of the government of the Trust Territory of the Pacific Islands to three entities, viz.: Federated States of Micronesia, the Marshall Islands, and Palau, until the termination of the Trusteeship Agreement.<sup>8</sup>

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<sup>7</sup> Articles VII and VIII of the Constitution of the Federated States of Micronesia provide as follows:

ARTICLE VII

Levels of Government

Section 1. The three levels of government in the Federated States of Micronesia are national, state, and local. A state is not required to establish a new local government where none exists on the effective date of this Constitution.

Section 2. A state shall have a democratic constitution.

ARTICLE VIII

Powers of Government

Section 1. A power expressly delegated to the national government, or a power of such an indisputably national character as to be beyond the power of a state to control, is a national power.

Section 2. A power not expressly delegated to the national government or prohibited to the states is a state power.

Section 3. State and local governments are prohibited from imposing taxes which restrict interstate commerce.

<sup>8</sup> Section 2 of Secretarial Order No. 3039 reads,

“Section 2. *Delegation of Authority.* Until the termination of the Trusteeship Agreement and subject to the limitations contained in this Order and in existing treaties, laws, and regulations of the United States generally applicable in the Trust Territory of the Pacific Islands, executive, legislative, and judicial functions of the Government of the Trust Territory of the Pacific Islands are, except as otherwise provided herein, hereby delegated to the three political subdivisions of the Trust Territory known as the Federated States of Micronesia, the Marshall Islands, and Palau.”

Likewise, the judicial responsibilities are shared between the national, state and local governments. The jurisdiction of the Supreme Court is prescribed in Section 6 of Article XI of the FSM Constitution, as follows:

(a) The trial division of the Supreme Court has original and exclusive jurisdiction in cases affecting officials of foreign governments, disputes between states, admiralty or maritime cases, and in cases in which the national government is a party except where an interest in land is at issue.

(b) The national courts, including the trial division of the Supreme Court, have concurrent original jurisdiction in cases arising under this Constitution; national law or treaties; and in disputes between a state and a citizen of another state, between citizens of different states, and between a state or a citizen thereof, and a foreign state, citizen, or subject.

(c) When jurisdiction is concurrent, the proper court may be prescribed by statute.

In essence, the FSM Supreme Court is, as in the case of the United States Supreme Court, a court of certain specified jurisdiction, i.e., limited to national and international matters, to disputes between citizens and governments of different states, and others so specified. It has no jurisdiction over land cases and other cases considered purely local in nature, such as probate, domestic relations, etc. It has authority to govern the transfer of cases between state and national courts; however, it has no administrative control over the state courts or their personnel. Except for Yap State Court, which was certified by the Trust Territory Chief Justice on March 9, 1982, pursuant to Secretarial Order 3039, none of the other state courts (Truk, Ponape and Kosrae) are in existence, either by authority of a state constitution, a statute or by a charter passed by the Congress of Micronesia. This void is filled by the continuing existence of the Trust Territory Courts (the High Court,

the District Courts and the Community Courts).<sup>9</sup> The judges and staff of these courts continue to be Trust Territory employees.

The second issue to be ascertained is what law did the petitioner violate when the alleged crimes were committed. There is no question that the petitioner may have violated the Trust Territory law because it was still in existence in the State of Truk at the time of the alleged incident.<sup>10</sup> The FSM Attorney General contends that the National Crimes Act in fact made the Trust Territory Title 11 crimes national crimes by the retroactive effect of the National Criminal Code. Convoluting arguments are presented to support this view but we find the arguments totally without merit. The answer lies in Section 102 of the National Criminal Code which provides:

(1) Except as provided in Subsection (2) of this Section, *this Code does not apply to offenses committed before its effective date.* For purposes of this Section, an offense is committed before the

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<sup>9</sup> Section 5a. of Secretarial Order 3039 reads:

“a. *Pending Cases.* The present Community and District Courts and the Trial and Appellate Divisions of the High Court of the Trust Territory of the Pacific Islands shall continue to function and operate in accordance with the present procedural and jurisdictional provisions of Trust Territory law until the Federated States of Micronesia, the Marshall Islands, and Palau have established functioning Courts pursuant to the terms of their respective constitutions. The determination that such functioning courts exist shall be made in writing by the Chief Justice of the High Court of the Trust Territory of the Pacific Islands upon written request of the chief judicial officer of the respective jurisdictions. A denial of the request may be appealed to the Secretary.

“Once such a determination has been made for a jurisdiction, all cases, except for suits against the Trust Territory of the Pacific Islands Government or the High Commissioner, currently pending but not in active trial before the Community Courts, the District Courts, and the Trial Division of the High Court shall be transferred to the functioning courts of such jurisdiction, provided that the legal rights of the parties in any case in controversy pending before a Community Court, a District Court, or the Trial or Appellate Division of the High Court shall in no way be impaired by this Order. Determination as to whether a case is in ‘active trial’ shall be made by the Judge before whom such case is pending.”

<sup>10</sup> Section 4c. of Secretarial Order 3039 reads:

“Laws in effect in each jurisdiction on the effective date of its constitution shall continue in effect until modified or repealed pursuant to the provisions of the constitution or laws enacted thereunder.”

effective date if any of the elements of the offense occurred before that date. (Emphasis added.)

(2) *Prosecutions for offenses committed before the effective date are governed by the prior law, which is continued in effect for that purpose, as if the Code were not in force.* (Emphasis added.)

[1] Anything as clear as this section does not require interpretation by this court of matters advanced to support retroactivity, viz.: the intent of the FSM Congress, the interests of the United States in the discharge of its duty as the administering authority, whether the FSM Congress or the United States could make retroactive the FSM National Criminal Code, or whether Secretarial Order 3039 countenances such retroactivity. We also do not find anything in Section 2 of the National Criminal Code that lessens the vitality of Title 11 of the Trust Territory Code, under the circumstances of this case.

The FSM Attorney General further contends that comity and primacy of FSM interests in this case require that the Trust Territory Courts abstain from re-deciding this case, claiming that to do so might threaten the harmonious relations between the Trust Territory and the FSM. Citing federal cases, the FSM Attorney General suggests that this court follow a practice of "abstention," i.e., a federal court abstaining from rendering a decision in a case where a state court decision might obviate the need for the federal court to act. This suggestion, although well-intentioned, is clearly misplaced. Apart from the patently awkward comparison of the High Court-Supreme Court relationship to that of Federal-State Court relationship in the United States, there is nothing here to justify abstention by this court. Surely, we cannot abdicate responsibility because the problem presented in this case is one of the prime reasons why the High Court was given certiorari jurisdiction.

In advancing the argument of abstention, the FSM Attorney General contends that, "[w]here there are paral-



1el, and occasionally overlapping, judicial systems the possibility of strained relations exists despite the best intention of all parties. We are faced with such a case here.” The idea that the Supreme Court and the High Court may have parallel and possibly overlapping jurisdiction is a misconception that leads to cases of this type. As explained earlier, the Supreme Court, as a national court in a federal system, exercises only such jurisdiction as is prescribed by the FSM Constitution. It is not a general jurisdiction court. It cannot exercise jurisdiction over matters which are within the exclusive province of the state courts. The High Court, on the other hand, has distinct and discrete jurisdiction, readily distinguishable from that of the Supreme Court. Besides its character as a general jurisdiction court within the FSM states where state courts have not been established, once the state courts are certified and the cases in “active trial” or on appeal are disposed, the High Court will, pursuant to Secretarial Order 3039, (a) continue exclusive jurisdiction over suits against the Trust Territory of the Pacific Islands Government or the High Commissioner filed within FSM, Palau, and the Marshall Islands, and (b) by writ of certiorari, entertain appeals from the courts of last resort of the Federated States of Micronesia, Marshall Islands, and Palau.

[2] The FSM Attorney General also argues that because of the provisions of Special Joint Rule No. 1 issued by the High Court and the Supreme Court, this case was dispositively decided when it was certified to the FSM Supreme Court. Somehow, there is a gross misunderstanding as to what the Special Joint Rule is. Jurisdiction is determined by statute or constitution.<sup>11</sup> Rules are promulgated to assist

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<sup>11</sup> In the Trust Territory, in addition to statute, special jurisdiction has been reserved or conferred on the Trust Territory High Court by Secretarial Order, as explained earlier.

in the procedural handling of cases and for administration of the court system. Rules, however well-intentioned, cannot change the jurisdiction of the courts. This document was simply a memorandum adopted to express general agreements to create an atmosphere for smooth transition and cooperation. Anything specific that takes away the authority of a court or adds to that of another court without authority is simply gratuitous without any force or effect.

Accordingly, the opinion of the Appellate Division of the Supreme Court is reversed, the Writ of Prohibition issued is vacated, and the Trust Territory High Court is vested with the jurisdiction to try and dispose of this case and cases of like import.

**REVERSED.**