

IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

MARK BAMBA ANGO,
Defendant-Appellant.

OPINION

Supreme Court Case No. CRA03-003
Superior Court Case No. CF0428-94

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Appeal from the Superior Court of Guam
Argued and submitted on October 15, 2003
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice, PETER C. SIGUENZA, JR., Justice *Pro Tempore*.¹

TYDINGCO-GATEWOOD, J.:

[1] Defendant-Appellant Mark Bamba Angoco (“Angoco”) appeals from the trial court’s denial of his motion to dismiss his retrial. Angoco was previously tried and convicted for felony aggravated murder. However, he successfully overturned the conviction by writ of habeas corpus based upon the ineffective assistance of his original trial counsel. The People of Guam (“People”) then sought to retry Angoco and he moved to dismiss arguing that retrial was barred by collateral estoppel and double jeopardy. The trial court denied Angoco’s motion and he appealed. We find that Angoco’s retrial will not offend collateral estoppel or double jeopardy principles and hold that Angoco may be retried for felony aggravated murder.

I.

[2] On January 18, 1995, Angoco was indicted for aggravated murder (intentional with premeditation), felony aggravated murder (with robbery as the underlying felony), robbery, and other charges. Upon submission of the evidence to the jury, the trial court failed to instruct the jury on the lesser-included offense of negligent homicide within the felony aggravated murder charge. The jury found Angoco guilty of felony aggravated murder. However, the jury acquitted Angoco of intentional and premeditated aggravated murder, the robbery charge and the remaining offenses.

[3] Angoco appealed, arguing in part that his acquittal for robbery required the reversal of the felony aggravated murder conviction. The District Court Appellate Division rejected Angoco’s argument and upheld the conviction. *People v. Angoco*, Crim. No. 95-00094A, 1996 WL 875777 (D. Guam App. Div. Oct. 16, 1996). In an unpublished decision, *People v. Angoco*, 131 F.3d 147 (9th Cir. 1997), the Ninth Circuit affirmed the Appellate Division’s decision without prejudice as to a claim of ineffective assistance of appellate counsel.

[4] Angoco filed a petition for writ of habeas corpus in the Superior Court on the ground of ineffective assistance of appellate counsel. The Superior Court granted the petition and issued a conditional writ of

¹ Retired Chief Justice Benjamin J.F. Cruz was appointed to this appeal as Justice *Pro Tempore*. After the oral argument, Justice Cruz became disqualified from participating in this proceeding and Retired Chief Justice Peter C. Siguenza, Jr. was appointed Justice *Pro Tempore* to replace him.

habeas corpus ordering the People to discharge Angoco unless it instituted proceedings to retry Angoco on the felony aggravated murder charge within thirty (30) days of the writ becoming final. *Angoco v. Bitanga*, SP0039-98 (Super. Ct. Guam June 17, 1999). The People appealed and in Supreme Court Civil Appeal CVA99-024, this court held that the failure of Angoco's counsel to raise the issue of lesser-included offense instruction for the felony aggravated murder charge on appeal, and the trial court's failure to *sua sponte* provide the instruction, amounted to prejudicial error. *Angoco v. Bitanga*, 2001 Guam 17, ¶ 22.

[5] On October 19, 2001, the People filed a motion to set trial for the retrial of Angoco. Angoco filed a motion to dismiss the charge arguing that further prosecution would violate the double jeopardy clause of the Fifth Amendment. The trial court denied Angoco's motion stating:

to prove felony aggravated murder the prosecutor must establish that the death of another human being was caused during the commission of a felony The felony does not have to be the robbery as long as the death was caused during the commission of a crime and that crime is a felony. Thus, the prosecution will not be precluded from retrying the Defendant on a different theory than that used in the original trial.

This Court holds that since the prosecution has in good faith argued that it will retry the Defendant on a different theory than that used in the original trial, the Defendant's motion to dismiss is denied.

Record on Appeal, tab 443, pp. 4-5 (Decision and Order). Angoco appealed.

II.

[6] This appeal is from an order denying a motion to dismiss on double jeopardy grounds. Title 7 GCA § 3108(b) grants this court discretionary appellate jurisdiction over orders, other than final judgments, to “[p]rotect a party from substantial and irreparable injury.” Title 7 GCA § 3108(b)(2) (1994). In *Abney v. United States*, the United States Supreme Court reasoned that “the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence.” *Abney v. United States*, 431 U.S. 651, 660 (1977). The harm to Angoco, would be irreparable because undergoing a trial that should be barred on double jeopardy grounds cannot be remedied. *Id.* at 662. Thus, pursuant to Title 7 GCA § 3108(b)(2), this court hereby exercises its discretion and considers this appeal as an interlocutory matter.

III.

[7] Angoco argues that retrial is barred by the doctrines of collateral estoppel and double jeopardy and because this court did not order a new trial in *Angoco v. Bitanga*, 2001 Guam 17. The denial of a pretrial motion to dismiss an indictment on double jeopardy or collateral estoppel grounds is reviewed *de novo*. *United States v. James*, 109 F.3d 597, 599 (9th Cir. 1997).

[8] “[T]he application of collateral estoppel to criminal cases [is] an embodiment of the Fifth Amendment Double Jeopardy Clause.” *People v. San Nicolas*, 1999 Guam 19, ¶ 12 (citing *Ashe v. Swenson*, 397 U.S. 436, 445, 90 S.Ct. 1189, 1195 (1970)). The *San Nicolas* court further noted:

Collateral estoppel, which applies to relitigation of factual issues, is analytically distinct from double jeopardy, which applies to retrial of offenses. Thus, collateral estoppel is conceptually separate from double jeopardy, but . . . when applicable, it is a component of the double jeopardy clause of the Fifth Amendment.

Id. at ¶ 15 n.11 (quoting *People v. Santamaria*, 884 P.2d 81, 84 (Cal. 1994)). Thus, in our *de novo* review, we examine Angoco’s collateral estoppel and double jeopardy issues separately.

A. Collateral Estoppel

[9] Collateral estoppel “means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” *San Nicolas*, 1999 Guam 19 at ¶ 12 (quoting *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194 (1970)). Angoco argues that he can only be retried for the offense upon which he was originally indicted and found guilty, felony murder based on criminal negligence.² Angoco states that he was acquitted of aggravated murder and its lesser included offenses of murder, manslaughter, and negligent homicide. He further states that pursuant to Title 9 GCA § 16.60, criminal negligence is an element of negligent homicide and therefore his acquittal of negligent homicide equates to a finding of no criminal negligence.³ Thus, Angoco argues that because the issue of criminal negligence was previously litigated and decided in his acquittal of negligent homicide, the issue cannot be retried. We disagree.

² The indictment states: “On or about the 29th day of October, 1994, in the Territory of Guam, MARK BAMBA ANGOCO and JOHN JUNIOR PANGELINAN, with *criminal negligence*, caused the death of another human being, that is, Darwin Datuin, during the commission of the felony of robbery” Appellant’s Excerpts of Record, p. 2 (Superceding Indictment) (emphasis added).

³ Section 16.60 states in part: “Criminal homicide constitutes negligent homicide when it is committed by criminal negligence.” Title 9 GCA § 16.60 (1993).

[10] Whether the doctrine of collateral estoppel applies is determined by a three part test:

- (1) An identification of the issues in the two actions for the purpose of determining whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine;
- (2) an examination of the record of the prior case to decide whether the issue was ‘litigated’ in the first case; and
- (3) an examination of the record of the prior proceeding to ascertain whether the issue was necessarily decided in the first case.

Id. at ¶ 13 (citations omitted).⁴ It is Angoco’s burden to prove that the issue he seeks to foreclose was decided in the first proceeding. *Id.*

[11] Part one of the *San Nicolas* test requires a determination that the issue of criminal negligence that was considered in the first trial is the same issue of criminal negligence that will be considered in the retrial. Because Angoco’s retrial would be for the same charge that was overturned on appeal due to ineffective assistance of counsel, the issue of criminal negligence as an element of that charge will not have changed. Thus, the issues of criminal negligence are sufficiently similar and material to justify invoking the doctrine. *See id.*

[12] Parts two and three of the *San Nicolas* test require our review of the record to determine whether the issue was “litigated” and “necessarily decided.” *Id.* Angoco argues that his acquittal of negligent homicide decided the underlying element of criminal negligence. We disagree.

[13] Aside from the verdict form showing that the jury found him not guilty of negligent homicide, Record on Appeal, tab 188 (Verdict Form 4), Angoco has not provided this court with a sufficient record for a proper examination under the *San Nicolas* test. Angoco designated only the superceding indictment and verdict forms from the original trial, and the motions filed subsequent to this court’s ruling in *Angoco*, 2001 Guam 17. *See* Record on Appeal, tab 454 (Defendant’s Amended Designation of Clerk’s Record filed June 20, 2003). Moreover, Angoco did not provide transcripts of any of the proceedings below in the instant case or from the original trial. *See* Docket Sheet, Seq. 448 (Defendant’s Certificate of “No Transcript” and Statement of Issues).

[14] We note Angoco’s argument that the People conceded the issue of criminal negligence in the prior appeal brought before this court by admitting that there was no evidence to support a guilty verdict for

⁴ Angoco’s Briefs fail to identify this test for collateral estoppel.

negligent homicide. Appellant's Reply Brief, p. 7 n.1 ("the government has conceded not just that the jury found Angoco not guilty of negligent homicide . . . but that '[t]here was no evidence to support verdict of guilty for Negligent Homicide.'") (quoting the government's opening brief in *Angoco v. Bitanga*, CVA 99-024).⁵ Angoco's argument is not convincing. The issue in the prior appeal, CVA99-024, was whether the failure to instruct on the issue of the lesser included offense of felony murder was reversible error. Whether the acquittal of negligent homicide collaterally estopped a conviction of felony murder was not at issue. Thus, the context in which the People's statement that "there was no evidence to support a verdict of guilty for Negligent Homicide" must be considered against this backdrop. *See id.* It is Angoco's express burden under *San Nicolas* to produce the portions of the record which demonstrate that the issue of criminal negligence was litigated before, and necessarily decided by, the jury. *See San Nicolas*, 1999 Guam 19 at ¶ 13. Merely providing a jury verdict form and citing to a footnote in a brief filed in the prior appeal concerning different issues do not meet the burden.

[15] Moreover, in the original trial, despite the acquittal on the negligent homicide lesser included offense, Angoco was convicted of felony aggravated murder based on criminal negligence. Thus, the jury's verdicts in this regard were inconsistent. As noted above, in his appeal to the District Court Appellate Division, Angoco argued that his conviction for felony aggravated murder was inconsistent with his acquittal on the underlying robbery charge. *Angoco*, 1996 WL 875777, at **6. The District Court Appellate Division found that there was sufficient evidence to support Angoco's conviction for felony aggravated murder, and rejected Angoco's argument that the guilty verdict on the felony aggravated murder charge was flawed because it was inconsistent with the verdict of acquittal on the robbery charge. *Id.* at **5, 6. In so holding, the Appellate Division cited the United States Supreme Court in stating that "a criminal defendant is precluded from attacking a conviction on one count of an indictment based on his inconsistent acquittal upon an entirely separate count." *Id.* (citing *United States v. Powell*, 469 U.S. 57, 105 S. Ct. 471 (1984)). Therefore, although Angoco was acquitted of negligent homicide, which carries a mental state of criminal negligence, because he was also convicted of felony aggravated murder, which also carries a mental state of criminal negligence, we cannot conclude that the jury in the original trial "necessarily

⁵ The government's opening brief in CVA99-024 states in relevant part: "Angoco cannot establish any possible prejudice as a result of Trial Counsel's failure to raise the issue of the [lesser included offense] on appeal. There was no evidence to support [] a verdict of guilty for Negligent Homicide. Therefore, it was not a lesser included offense of [a]ggravated "Felony" murder . . ." Government's Opening Brief, CVA99-024.

decided” the issue of criminal negligence in the context of Angoco’s acquittal on the negligent homicide charge. Where verdicts are inconsistent, collateral estoppel may be inapplicable. *See Powell*, 469 U.S. 57, 69, 105 S.Ct. 471, 478 (1984) (stating that “[t]he problem is that the same jury reached inconsistent results; once that is established [,] principles of collateral estoppel--which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict--are no longer useful.”).

[16] We find that Angoco fails to meet his burden under the three-part *San Nicolas* test and thus has not proven that collateral estoppel bars his retrial.

B. Double Jeopardy

[17] Angoco next argues that retrial is barred by the double jeopardy clause. Specifically, Angoco argues that retrial is barred by Title 8 GCA § 65.30(b) and Title 9 GCA § 1.26.⁶ These statutes apply the United States Constitution’s 5th Amendment Double Jeopardy Clause to Guam. *People v. Gill*, 59 F.3d 1010, 1012, n.1 (9th Cir. 1995) (“The protection provided by the Double Jeopardy Clause is made applicable to the Territory of Guam through 48 U.S.C. § 1421b(u), 8 Guam Code Ann. § 65.30(b), and 9 Guam Code Ann. §§ 1.24, 1.26.”); *see also People v. San Nicolas*, 2001Guam 4, ¶ 8 (stating that the double jeopardy clause is made applicable to Guam by the Organic Act). The Double Jeopardy Clause provides protection against a second prosecution for the same offense after acquittal or conviction, and it

⁶ Section 65.30 provides in relevant part:

(b) Except as otherwise provided by § 65.35, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the prosecuting attorney at the time of the commencement of the first trial.

Title 8 GCA § 65.30(b) (1993). Section 1.26 provides in relevant part:

A prosecution of a defendant for a violation of a different provision of the statutes or based on different facts than a former prosecution is barred by such former prosecution under the following circumstances:

(a) The former prosecution resulted in an acquittal or in a conviction as defined in §1.24 and the subsequent prosecution is for:

- (1) any offense of which the defendant could have been convicted on the first prosecution;
- (2) any offense of which the defendant should have been tried on the first prosecution under Subsection (b) of §65.30 of the Criminal Procedure Code unless the court ordered a separate trial of the charge of such offense; or
- (3) the same conduct, unless (A) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil

Title 9 GCA § 1.26 (1993).

protects against multiple punishments for the same offense. *Ohio v. Johnson*, 467 U.S. 493, 498, 104 S. Ct. 2536, 2540 (1984); *see also People v. Palisoc*, 2002 Guam 9, ¶ 35; *San Nicolas*, 2001 Guam 4, ¶ 8.

[18] Angoco argues that Title 8 GCA § 65.30 absolutely bars any retrial of Angoco because “the government does not seek a separate trial based on different conduct . . . [or] arising from a different criminal episode” and that Title 9 GCA § 1.26 bars the retrial because it is “for an offense of which Angoco should have been tried on the first trial.” Appellant’s Opening Brief, pp. 6 and 8.

[19] These arguments ignore the “general rule that the Double Jeopardy Clause does not bar the retrial of a defendant who has succeeded in getting his conviction set aside for error in the proceedings below.” *See Lockhart v. Nelson*, 488 U.S. 33, 39, 109 S. Ct. 285, 290 (1988). “[I]t is consistent with the guarantee against double jeopardy to retry a defendant who has succeeded in obtaining reversal of his conviction based on trial errors” *State v. Koedatich*, 572 A.2d 622, 625 (N.J. 1990). The United States Supreme Court stated: “It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.” *United States v. Tateo*, 377 U.S. 463, 466, 84 S. Ct. 1587, 1589 (1964).⁷

[20] However, if the reversal is for insufficient evidence, retrial is barred by the double jeopardy clause because such a ruling is in effect a ruling that the evidence was so lacking that the trial court should have acquitted the defendant rather than submitting the case to the jury. *Lockhart*, 488 U.S. at 39, 109 S. Ct. at 290 (citing *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141 (1978)); *see also People v. Sangalang*, 2001 Guam 18, ¶ 31 (distinguishing between a reversal for insufficient evidence, which bars a retrial, and a reversal because the verdict was against the weight of the evidence, which does not bar a retrial).

[21] For trial errors other than a conviction based on insufficient evidence, this court has reversed convictions and remanded the charges for retrial. *See People v. Jung*, 2001 Guam 15, ¶ 60 (reversal of conviction and remand due to trial court’s failure to properly instruct the jury); *People v. Quintanilla*, 1998 Guam 17 (reversing the conviction and remanding for further proceedings due to ineffective assistance of

⁷ We note that the People committed no error giving rise to the issues in this appeal. The error was committed by Angoco’s previous counsel and by the trial court in the original trial.

counsel); *People v. Reyes*, 1999 Guam 11 (reversing the conviction and remanding for new trial due to the People’s failure to disclose evidence); *Sangalang*, 2001 Guam 18 at ¶ 31 (reversing the conviction and remanding for retrial due to the verdict being against the weight of the evidence).

[22] In the instant case, the reversal of Angoco’s felony murder conviction was for ineffective assistance of counsel. A retrial after this type of reversal does not offend the Double Jeopardy Clause. *See People v. Navarro*, 562 N.E.2d 987, 988 (Ill. App. 1990) (stating that “concepts of double jeopardy do not prohibit a new trial where the procedure in the initial trial was flawed by the ineffective assistance of counsel”); *see also Pennycuff v. State*, 727 N.E.2d 723, 733 (Ind. App. 2000), *rev’d on other grounds*, 745 N.E.2d 804 (Ind. 2001). If retrial was barred after a reversal due to ineffective assistance of counsel, “any defendant no matter how guilty could escape a retrial by his or her attorney feigning incompetency.” *Navarro*, 562 N.E.2d at 988.

[23] In *People v. Murray*, the defendant was indicted on charges of intentional murder, felony murder based on robbery, and robbery. *People v. Murray*, 92 A.D.2d 617, 617 (N.Y. App. Div. 1983). The trial court dismissed the robbery charge for insufficient evidence, and submitted the remaining charges and an additional charge of attempted robbery to the jury. *Id.* The jury acquitted Murray of intentional murder, but was hung on the felony murder and attempted robbery charges. *Id.* In holding that the retrial for felony murder based on robbery or attempted robbery was not barred by double jeopardy principles, the court stated:

The trial court’s decision at the first trial to withdraw the first degree robbery count from the jury’s consideration on account of insufficient evidence was equivalent to an acquittal and barred further prosecution of that count. However, double jeopardy principles did not bar a new trial on the felony murder count. . . . [T]he completion of the underlying felony is not an essential element of felony murder. The two crimes are ‘substantively and generically entirely separate and disconnected offenses’ so that an acquittal of the underlying felony is not inconsistent with a conviction of felony murder.

Id. (citations omitted (quoting *People v. Berzups*, 402 N.E.2d 1155, 1160 (N.Y. 1980)). The *Murray* case is similar to the one at bar. However, the application of double jeopardy to bar a retrial in Angoco’s case is made even more remote because he was *convicted* of felony murder based on robbery, whereas, the jury in *Murray* was hung on the felony murder charge.

[24] We hold that the doctrine of double jeopardy does not bar the retrial of Angoco for felony aggravated murder.

C. Retrial Was Ordered

[25] In his Reply Brief, Angoco raises the issue that he cannot be retried because the Supreme Court, in *Angoco v. Bitanga*, 2001 Guam 17, did not order a new trial or direct a retrial. Appellant’s Reply Brief, pp. 1-2. Angoco argues that the affirmance was merely of the trial court’s granting of habeas corpus relief. Angoco misinterprets our holding. We held that “[t]he trial court’s **decision** granting Angoco habeas corpus relief is affirmed.” *Angoco*, 2001 Guam 17 at ¶ 22 (emphasis added). This holding affirmed the trial court’s order in its Conditional Writ of Habeas Corpus which stated

It is ordered that Eduardo C. Bitanga, Director of Corrections, Government of Guam, or whosoever may have the custody of . . . the body of petitioner, Mark Bamba Angoco, shall discharge petitioner, Mark Bamba Angoco, from custody insofar as he is held in custody by virtue of his conviction of the **second charge (felony aggravated murder) of the superceding indictment filed on January 18, 1995**, in *People of the Territory of Guam vs. Mark Bamba Angoco*, Case No. CF 428-94 in this Court, unless the Government of Guam shall institute proceedings to retry petitioner, Mark Bamba Angoco, **on such charge**

Angoco v. Bitanga, SP0039-98 (Super. Ct. Guam Corpus June 17, 1999) (emphasis added). Thus, by affirming the trial court’s decision, Angoco’s retrial on “the second charge (felony aggravated murder) of the superceding indictment filed on January 18, 1995” was implicitly ordered by this court in 2001 Guam 17. Therefore, retrial was ordered and is limited to this specific charge.⁸

IV.

[26] In his first trial, Angoco was acquitted of negligent homicide, which contains the element of criminal negligence; however, he was convicted of felony murder based on criminal negligence and robbery. Under the *San Nicolas* collateral estoppel test, Angoco failed to prove that criminal negligence was “litigated” and “necessarily decided” in the first trial. We hold that Angoco’s retrial is not barred by the doctrine of collateral estoppel.

⁸ Because we hold that Angoco can only be retried on the felony murder charge as specified in the indictment, we need not address the People’s argument that it may proceed with a felony murder charge based on a different underlying felony. We note however, that if double jeopardy prohibited Angoco’s retrial for felony murder based on robbery, Title 9 GCA § 1.26(a)(3)(A), *supra*, would not provide the People with an exception for a felony murder based on attempted robbery. Attempted robbery is a lesser-included offense of robbery and is proved by the same facts necessary for robbery. See Title 8 GCA § 105.58(b)(2) (stating that a lesser included offense “consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein”). Moreover, attempted robbery involves the intent to commit robbery. See Title 9 GCA § 13.10 (“A person is guilty of an attempt to commit a crime when, with intent to engage in conduct which would constitute such crime”). Thus, the laws prohibiting robbery and attempted robbery address the same harm or evil, the unlawful deprivation of the property of another.

[27] Angoco's conviction for felony aggravated murder was overturned on account of the ineffective assistance of counsel. We hold that a retrial of Angoco after a reversal due to such trial error does not offend the doctrine of double jeopardy and on retrial Angoco must be retried on the charge as it is specified in the superceding indictment. The trial court's Decision and Order denying Angoco's Motion to Dismiss is **AFFIRMED** on other grounds. This matter is **REMANDED** for retrial consistent with this Opinion.