

ROP v. Santos, 1 ROP Intrm. 274 (1985)
REPUBLIC OF PALAU,
Plaintiff/Appellee,

v.

STEVEN SANTOS,
Defendant/Appellant.

CRIMINAL APPEAL NO. 3-83
Criminal Case No. 272-82

Supreme Court, Appellate Division
Republic of Palau

Opinion

Decided: December 13, 1985

Counsel for Appellant: John S. Tarkong
Counsel for Appellee: Philip D. Isaac, AAG

BEFORE: MAMORU NAKAMURA, Chief Justice; ALAN L. LANE, Associate Justice; and
ROBERT W. GIBSON, Associate Justice.

GIBSON, Justice.

Appellant Steven Santos moves to dismiss and remand on the basis of our decision
Republic of Palau v. Kikuo, Crim. App. No. 4-83 (Crim. Case No. 365-82).

Appellee Republic of Palau stated the question as being one of “due process” and
requests that we limit *Kikuo* to prospective application only, overruling it as to pending matters.

In *Kikuo* we held that “there exists in Palau no requirement that Special Judges sit on
murder cases.” (Emphasis supplied).

We also noted that “. . . neither the Palau Constitution or Republic of Palau Public Law
No. 1-17 requires the presence of Special Judges on murder cases” (Emphasis again
added).

¶275 We further held “. . . that there was not at the time of trial, nor is there now, any
requirement in law or statute applicable in the Republic of Palau that three judges sit on a murder
case.” (Emphasis again supplied).

Appellee points out a seeming ambiguity in our Constitution. The third sentence of
Section 2, Article X, reads, “Matters before the Trial Division may be heard by one justice.” The
Government urges that the word “may” appearing therein can be either mandatory, permissive or

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perhaps more correctly, simply “non-restrictive” as to the number of judges sitting in those instances where “existing laws in force and effect in Palau immediately preceding the effective date of the Constitution” guarantee certain rights assured the people under the United States/United Nations Trusteeship Agreement. They propose that one of these rights in the pseudo-jury trial right accorded persons accused of murder, 5 TTC § 204 -- a right not expressly assured of continuance by RPPL No. 1-17, but, as they say, effectively carried over by Article XV, Section 3(a) of the Palau Constitution.

We are aware the new Palau National Code also omits Section 204, but as the effective date of that Code has not yet occurred, we do not speculate as to its possible effect.

In *Yukie v. ROP*, Spec. Proc. Nos. 7-83 and 8-83 (Crim. Cases Nos. 184-83 and 248-83) we looked to the United States Constitution and its interpretation to aid us in defining “cruel and inhumane punishment” as proscribed by the Trusteeship Agreement. It is therefore appropriate that we again look to that instrument and its corollaries to define the guarantee that the equal protection and due process clauses assure to the people of the Republic by Subsection 5, 6 and 7 of Article IV of the Palau Constitution.

Doing so we find that although the right to trial by jury, by its omission from the Palau Constitution, disables us from construing it to be a “fundamental right” available to all, in all circumstances, the Constitutional guarantees of “life, liberty, and the pursuit of happiness” make this added minimal majority decisional procedure a logical extension of due process.

Reasoning that since “there was not . . . any requirement . . . that three judges sit on a murder case” and that “such cases may and should be presided over by one judge . . .” we concluded that the use of the two Special Judges was “violative of Defendant’s right to due process.”

¶276 In so doing we too strongly emphasized the mandatory nature of the noted third sentence of Section 2, Article X while ignoring its alternative non-restrictive connotation, to the exclusion of an enhanced due process.

Accordingly we now asseverate the permissive purport of that Section by holding that the use of Special Judges for the purpose mentioned in 5 TTC § 204 is permissible, and, where properly seated, non-prejudicial to due process. To the extent that *Kikuo* may be read to the contrary it is overruled.

The Motion to Dismiss the Appeal and discharge the Defendant is DENIED.

¶277

NAKAMURA, Chief Justice, concurring:

The basic issue involved in this appeal, also raised in *Ignacio Franz v. Republic of Palau*, App. Div. Spec. Proc. No. 4-85 (Crim. Case No. 314-85), is whether 5 TTC § 204 is still

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applicable in the Republic of Palau. Succinctly, 5 TTC § 204 requires the assignment of two “special judges” to sit on a trail of a murder case with the presiding Justice.

A similar issue was considered by this Court in *Anataniao Kikuo v. Republic of Palau*, Crim. App. No. 4-83 (Crim. Case No. 365-82). In *Kikuo*, we held, in pertinent part:

Accordingly, we hold that there was not at the time of trial, nor is there now, any requirement in law or statute applicable in the Republic of Palau that three judges sit on a murder case. Such cases may be and should be presided over by one judge as are all other cases which come before the Trial Division of the Supreme Court of the Republic of Palau.

Upon reconsideration of the above issue, it is my opinion that our conclusion on the said issue in *Kikuo* was erroneous.

Accordingly, I conclude that since the Olbiil Era Kelulau has not repealed, revoked, or amended 5 TTC § 204, pursuant to Article XV, Section 3 of the Constitution, it is still the law of the land.