ROP v. Chisato, 2 ROP Intrm. 227 (1991)
REPUBLIC OF PALAU,
Appellee,

v.

LIBERIO CHISATO, and NORMAN SOKAU,
Appellants.

CRIMINAL APPEAL NO. 7-88
Criminal Case No. 159-88

Supreme Court, Appellate Division
Republic of Palau

Appellate opinion
Decided: April 30, 1991

Attorney for Chisato: James F. Senal[1]

Attorney for Sokau: Johnson Toribiong

Attorney for Appellee: Ernestine K. Rengiil

BEFORE: MAMORU NAKAMURA, Chief Justice; ARTHUR NGIRAKLSONG, Associate Justice; FREDERICK J. O'BRIEN, Associate Justice.

O'BRIEN, Associate Justice:

James Pedro was found dead in a tapioca patch in Aimeliik on December 21, 1987. Thereafter, Appellants were arrested, tried, ⊥228 and convicted of Murder in the First Degree and related offenses. Chisato was sentenced to life imprisonment plus 25 years. Sokau was sentenced to life imprisonment plus 10 years. They appeal on various grounds.

I.

Liberio Chisato's appeal must be dismissed out of hand due to its untimely filing. Chisato was sentenced on November 16, 1988, so the 30 day limit imposed by 14 PNC § 602 and ROP R. App. Pro. 4(a) would have expired December 18, 1988, a Sunday. But ROP R. App. Pro. 26(a), extends any deadline falling on a Saturday, Sunday, or a holiday, so the Notice of Appeal should have been filed on Monday, December 19, 1988. Chisato's Notice of Appeal was filed December 22, 1988, three days late.

In *Sebaklim v. Uehara*, 1 ROP Intrm. 649, 652 (App. Div. Aug. 1989), we said that ". . .

[1] Defendant was represented by other counsel prior to Mr. Senal's entry into the case, which occurred after the notice of appeal had been filed.

the Appellate Division is without jurisdiction to entertain an appeal where the notice of appeal is untimely filed." *See, Babul v. Singeo*, 1 ROP Intrm. 123 (App. Div. May 1984); *In the Matter of the Angaur Trust* , 1 ROP Intrm. 403 (T.T. High Court, App. Div. July 1987); *United States v. Robinson*, 361 U.S. 220, 80 S.Ct. 282 (1960).

Inasmuch as the Court lacks jurisdiction of Chisato's appeal, it must be and hereby is DISMISSED.

⊥229 II.

Appellant Sokau's grounds for appeal are: (a) He was denied due process of law because he was not given a trial by jury. (b) He was denied due process of law because he was tried by a presiding judge and two special judges. (c) The special judges had no right to participate in the deliberations on the non-murder charges. (d) He was improperly convicted of both 1st Degree Murder and Accessory After the Fact to 1st Degree Murder. (e) There was insufficient evidence for his conviction on any of the charges.

a.

There have never been jury trials in Palau. During the Trust Territory days, the United States chose to apply only modified U.S. law to the Trust Territory. Article 3 of the Trusteeship Agreement does not call for the administering authority to apply all of its laws to the Trust Territory. Instead, discretion is given as to what laws are to be applied:

> The administering authority shall have full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modificat ions which the administering authority may consider desirable such of the laws of the United States as it may deem appropriate to local conditions and requirements.

Further, Article 6(1) of the Trusteeship Agreement requires ⊥230 the United States, "In discharging its obligations under Article 76(b) of the Charter" to, inter alia:

> promote the development of the inhabitants of the trust territory toward self-government or independence as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of the peoples concerned, and . . . give due recognition to the customs of the inhabitants in providing a system of law for the territory. . . .

Apparently, the administering authority deemed the right to jury trial not to be "appropriate to local conditions and require ments," as is amply demonstrated by the omission of the right to trial by jury in 1 TTC 4, the "Trust Territory Bill of Rights." The enactment of 5 TTC 501, et seq., in 1966, which gave each district the option to have jury trials, was in keeping with the administering authority's responsibility to "give due recognition to the customs of the

inhabitants in providing a system of law for the territory."

The Palau District could have had jury trials at least as early as 1966, as provided by 5 TTC 501, et seq. But Palau did not exercise that option. Later, during the Constitutional Con - vention, the jury trial issue was again considered, but rejected, so the ROP Constitution contains no right to trial by jury. [2] The ⊥231 people of Palau have understood the concept of trial by jury for a quarter of a century, so their rejection of it was not accidental.

The Palau Constitution took effect on January 1, 1981. With that, the United States, as administering authority, fulfilled one of its most important responsibilities under the Trusteeship Agreement. With 78% of the voters ratifying the Constitution, [3] "the freely expressed wishes of the people concerned" had been implemented, and the United States had "provid[ed] a system of law for the territory."

The issue of the right to trial by jury in criminal cases in the Republic has not specifically been ruled on by this Court, but in *ROP v. Santos*, 1 ROP Intrm. 274, 276 (App. Div. Dec. 1985), we implied that there was no right to a jury trial in Palau when we held that the use of special judges in murder cases as provided in 5 TTC § 204[4] was constitutional.

We now hold, therefore, that the due process clause of the Palau Constitution does not, by implication or otherwise, grant the right to trial by jury in the Republic of Palau.

⊥232 b.

Appellant Sokau challenges the use of special judges at his trial. As indicated above, *Santos, supra*, is dispositive of this issue. The use of special judges in murder cases does not violate the Republic of Palau Constitution.

c.

Appellant Sokau complains that the special judges improperly participated with the presiding judge in the deliberations on the non-murder charges. The relevant language of 4 PNC§ 309(b) is:

> When a murder case is assigned for trial, the justice of the Supreme Court assigned to preside shall assign two special judges to sit with him in the trial thereof. The special judges shall participate with the presiding judge in deciding, by majority vote, all questions of fact and sentence, but the presiding judge alone shall decide all quest ions of law involved in the trial and deter mination of the case.

This issue is one of first impression. We note the use of the following terms: *murder*

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[2] Committee on Civil Liberties and Fundamental Rights, SCR-11, February 20, 1979.
[3] *Gibbons v. Salii*, 1 ROP Intrm. 333, 344 (App. Div. Sept. 1986).
[4] Presently, 4 PNC § 309.

case, in the trial thereof , and *all questions of fact and sentence* . We also note that murder cases often involve related charges, such as Use of a Firearm. It is our view that the use of the aforementioned terms does not bar the special judges from participating in the deliberations on any accompanying non-murder charges. The use of these terms suggests to us that the special judges were intended to participate in all ⊥233 of the factual determinations necessary for resolution of the *trial* of the *case*.[5] We feel certain that, if the legislative intent was to limit the special judges' role to the findings on the murder charge only, such would have been specifically stated.[6]

We fail to see any prejudice to a defendant which would flow from the consideration by the special judges of the facts on which the non-murder charges are based. The special judges function as jurors, and they must follow the instructions of the presiding judge regarding the applicable law to be applied to the facts in deliberating on the evidence. It seems to us that this gives the defendant a greater opportunity for a finding of reasonable doubt, which would inure to his benefit, not to his detriment.

We hold, therefore, that in murder cases, the special judges shall participate in the deliberations on the non-murder charges.

d.

Appellant Sokau next argues that he could not lawfully be convicted of both 1st Degree Murder and Accessory After The Fact ⊥234 to 1st Degree Murder. The crime of Accessory After The Fact is defined in 17 PNC § 103 as follows:

> Every person who, knowing that an offense against the Republic has been committed, receives, relieves, comforts, or assists the offender *in order to* hinder or prevent his apprehension, trial, or punishment, is an accessory after the fact. (emphasis added).

Sokau drove his vehicle to the scene of the crime, with the victim and Chisato as his passengers. Following the murder, he drove back to Koror with Chisato as his only passenger. Query whether Sokau did thereby receive, relieve, comfort or assist Chisato? Another way to look at it is to ask whether Sokau's intent was to help Chisato to avoid the legal consequences of his (Chisato's) criminal conduct. If we think of Chisato as the actual killer, Sokau is guilty as an aider and abetter, so Sokau is a principal under the law. If, instead, we look at Sokau as the killer, he is a principal. Either way, Sokau is a principal in the murder.

An accessory after the fact is *usually* not a principal, but someone who had no part in the planning or execution of the crime. After the crime has been committed, this person may then hide the criminal, provide him money, a car, a false passport, give false information to the police,

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[5] If the legislature had intended the special judges' role to be limited to the findings and sentence on the murder charge only, all that was required was to use the word *charge* instead of the word *case* in the statute. 2 Sutherland Statutory Construction, 4 Ed., Section 45.12.

[6] *United States v. Lexington Mill and Elevator Co.*, 232 U.S. 399, 34 S.Ct. 337, 340 (1914).

or otherwise help him to escape detection and capture. Where, as here, two persons go somewhere ⊥235 to commit a crime and then merely return home, neither can be said to be an accessory after the fact.

On this question of law, we fail to see how a principal can also be an accessory after the fact, unless there is such a break in the sequence of events that it can be said that the criminal activity has been completed, and that the conduct upon which the accessory after the fact charge is based has no direct connection with that activity. No such attenuation is evident here. The conduct upon which the accessory after the fact charge is based followed immediately upon the execution of the criminal activity. If, after their return to Koror, Chisato and Sokau had separated, and then Chisato had come to Sokau with a request for assistance in avoiding detection or capture; or if, Sokau and Chisato had returned to Koror and gone to the party at T-Dock, and later, they learned that the police were after them; in either situation, if at that point Sokau did anything to help Chisato get away, he would be an accessory after the fact.

We hold, therefore, that whenever two or more persons commit a crime and leave the crime scene together, none of them can be said to be accessories after the fact *by that action alone*.

e.

Sokau argues that there is insufficient evidence to convict him of any of the charges. He says that the evidence is entirely ⊥236 circumstantial, that there is no direct evidence to connect him to any of the crimes.

Sokau was convicted of Murder in the First Degree, Conspiracy to Commit Murder, Accessory After the Fact to 1st Degree Murder, Kidnapping, Aggravated Assault (baseball bat), and Aggravated Assault (scissors). Since we have already dealt with the Accessory After the Fact charge, we will not discuss it further.

Regarding Appellant Sokau's conviction for Aggravated Assault with a baseball bat, the evidence showed that while at Malakal, Sokau removed a baseball bat from his truck and that James Pedro fled in panic. The evidence does not show that Sokau struck or tried to strike James Pedro with the bat on that occasion, or that at any time prior to arrival in Aimeliik, either Sokau or Chisato assaulted him with the bat. The only grounds for the conviction, therefore, is the use of the bat on James Pedro in Aimeliik, which was part of the murder. The conviction for this crime merges into the conviction for 1st Degree Murder and, therefore, is reversed.

As to Sokau's conviction for Aggravated Assault with a pair of scissors, the evidence shows that Chisato had the scissors at Malakal and that he used them on James Pedro enroute to Aimeliik. We adopt the rationale of *Paul v. Trust Territory* , 2 TTR 603, 612 (App. Div. 1959), that "a single continuing crime cannot legally be split up by time into parts for separate prosecutions." ⊥237 The multiple lacerations on James Pedro's body, as testified to by Dr. Mesubed, justify a finding that Chisato or Sokau inflicted additional injuries on James Pedro while enroute to Aimeliik or after arriving at the Ueki farm. These injuries were part of the

"continuing crime" of murder and, thus, merge with it. Therefore, we also reverse this conviction of Aggravated Assault.

Before addressing Appellant Sokau's convictions for First Degree Murder, Conspiracy and Kidnapping, we take note that this Court and its predecessor have expressed the standard of appellate review for criminal cases in many different ways. This has led to a lack of clarity as to what that standard is. We feel that it is important to the development of the jurisprudence of this Republic that a clear standard be enunciated.

We have studied the statutes and caselaw from the beginning days of the Trust Territory administration to this Court's most recent pronouncement on the subject in *Gaag v. ROP*, Criminal Appeal No. 1-91, decided March 5, 1991, and believe that today's holding is in conformity with that history.

In light of our past decisions, we hold that 14 PNC § 604(a) and (b) apply to criminal appeals. Despite our knowledge that the "clearly erroneous" standard had its genesis in Rule 52, Federal Rules of Civil Procedure, we recognize that this standard has been ⊥238 the law in Palau for over a quarter century, and was accepted by the Olbiil Era Kelulau when it enacted the Palau National Code.

Accordingly, we hold that in a criminal appeal from the Trial Division,[7] where the appellant challenges the sufficiency of the evidence, i.e., argues against the findings of fact which led to his conviction, the Appellate Division shall not set aside such findings unless it finds that they are clearly erroneous.

The "clearly erroneous" standard was defined in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542 (1948):

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

In *Anderson v. City of Bessemer*, 470 U.S. 564, 105 S.Ct. 1504 (1985) the "clearly erroneous" standard was further explained:

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty . . . if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard . . . appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*" (citation omitted). If the [trial] court's ⊥239 account of the evidence is plausible in light of the record viewed in

[7] This standard does not apply to appeals from the National Court or the Court of Common Pleas: ". . . but in all other cases the appellate or reviewing court may review the facts as well as the law. 14 PNC § 604(b).

> its entirety, the [appellate court] may not reverse it even though convinced that had it been sitting as the trier of fact it would have decided the case differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous. *Id.* 470 U.S. at 573-574, 105 S.Ct. at 1511 (emphasis in original).

Given that those definitions come from civil cases, there are other factors to be considered in determining attacks upon the sufficiency of the evidence in criminal cases.

One factor is that the evidence is to be viewed in the light most favorable to the prosecution. *Kirispin v. Trust Territory* , 2 TTR 628, 630 (App. Div. 1960); *Trust Territory v. Morei*, 8 TTR 379, 383 (App. Div. 1983); *ROP v. Tascano* , Criminal Appeal No. 5-89, decided September 14, 1990 (slip opinion, p.7).

Another factor to be considered is that the conviction must be supported by sufficient competent evidence. *Yamashiro v. Trust Territory* , 2 TTR 638, 642-643 (App. Div. 1963); *Trust Territory v. Morei, supra* . See also, *Glasser v, United States* , 315 U.S. 60, 62 S.Ct. 457 (1941); *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). *Jackson* enunciated the test as:

> . . . whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 443 U.S. 319, 99 S.Ct. 2789 (emphasis in original).

⊥240 A third factor to be considered is that direct evidence and circumstantial evidence are equally valid.

> [A] crime may be proved beyond a reasonable doubt by purely circumstantial evidence . . . [S]uch evidence in a criminal case may be fully as satisfactory as direct testimony, and will sometimes outweigh it. 20 Am. Jur., *Evidence* §§ 273 and 1218.

Soilo v. Trust Territory , 2 TTR 369, 369 (Tr. Div. 1962). See also, *Ngiracheluolu v. Trust Territory*, 6 TTR 86, 88 (Tr. Div. 1972); *Trust Territory v. Morei, supra*; *ROP v. Tascano, supra*.

A fourth factor is deference to the trial court's opportunity to hear the witnesses and to observe their demeanor. *Kirispin v. Trust Territory, supra* ; *Eyoul v. Trust Territory* , 8 TTR 242, 245 (App. Div. 1982); *ROP v. Gaag, supra*.

In sum, we hold that when the Appellate Division determines a challenge to the sufficiency of the evidence in a criminal case, it shall ascertain whether the conviction is clearly erroneous by viewing the evidence of record in the light most favorable to the prosecution, giving deference to the Trial Division's opportunity to assess the credibility of the witnesses, treating direct and circumstantial evidence equally, and studying the record to learn whether there is sufficient competent evidence to support a rational fact-finder's conclusion of guilt

beyond a reasonable doubt as to every element of the crime.

We have carefully reviewed the evidence regarding Defendant ⊥241 Sokau's convictions for First Degree Murder, Conspiracy to Commit Murder, and Kidnaping. Utilizing the standard enunciated today, we conclude that the verdict was not "clearly erroneous." The competent evidence of record was sufficient to warrant finding Defendant Sokau guilty beyond a reasonable doubt of these crimes.

III.

In conclusion, Liberio Chisato's conviction must stand, as we are without jurisdiction to entertain it. We affirm Defendant Sokau's convictions for Murder in the First Degree, Conspiracy, and Kidnaping. We reverse Sokau's two convictions for Aggravated Assault and his conviction for Accessory After The Fact, and we remand Mr. Sokau's case to the Trial Division for resentencing.

SO ORDERED.