ROP v. Ngiraboi, 2 ROP Intrm. 257 (1991)
REPUBLIC OF PALAU
Appellee,

v.

JESSE NGIRABOI,
Appellant.

CRIMINAL APPEAL NO. 4-89
Criminal Case No. 20-88

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: May 8, 1991

Attorney for Appellee: Ernestine K. Rengiil

Attorney for Appellant: Johnson Toribiong

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

NAKAMURA, Chief Justice:

I.

Jesse Ngiraboi appeals from his conviction and the sentence imposed below for the crimes of Attempted Murder in the Second Degree (Count I), Possession and Use of a Firearm (Count IV), and Possession and Use of Ammunition (Count V). He was sentenced to concurrent terms of 15 years imprisonment for Counts I and IV, and five years imprisonment for Count V.

Appellant raises the following questions on appeal:

I. May a defendant be found guilty of Attempted Murder in the Second Degree if the completed act constituted a lesser included offense of either Aggravated Assault or Assault and Battery with a Dangerous Weapon?

⊥258 II. May a defendant be convicted and sentenced for the crime carrying the greatest sentence where the facts of a case constitute more than one crime?

III. Did the Trial Court err in denying Appellant's Motion to Dismiss Counts IV and V by finding:

A) That 17 PNC Chapter 33, the Firearms Control Act, is not unconstitutionally ambiguous and uncertain with regard to"use" of a firearm;

B) That 17 PNC Chapter 33, the Firearms Control Act, is not an unconstitutional delegation of legislative power to the court with respect to establishing the maximum punishment that may be imposed under the statute;

C) That enforcement of 17 PNC Chapter 33, the Firearms Control Act, is not suspended with respect to Use of a Firearm;

D) That the punishment prescribed for Possession of Ammunition and Use of Ammunition is not disproportionate to the punishment for Possession of a Firearm simply because the punishment for Possession of a Firearm is not currently being enforced; and

E) That the Doctrine of Merger does not apply so as to merge the crimes of Possession of Ammunition and Use of Ammunition in the crimes of Possession of a Firearm and Use of a Firearm.

⊥259 II.

The first issue raised on appeal relates to Appellant's conviction for Attempted Murder in the Second Degree. Appellant claims that he intended to, and did, commit either Aggravated Assault or Assault and Battery with a Dangerous Weapon, but not Murder, when he fired the gun. He argues that, because he completed the crime of Aggravated Assault or Assault and Battery with a Dangerous Weapon, he cannot be found guilty of Attempted Murder in the Second Degree.

Appellant contends that "because there was no supervening cause preventing him from completing the act accomplished, there could not . . . have been an attempt to commit a crime." Appellant's Brief, 11. Appellee, however, argues that Appellant was prevented from completing his intended crime by the interference of a third party. *Id.* The evidence on the question was presented to the Trial Court, which ruled that Appellant had attempted to commit murder in the second degree.

It is not the role of an appellate court to reweigh the evidence, test the credibility of witnesses, or draw inferences from the evidence. The trial judge is the fact finder for all purposes, and his analysis and consideration will not be disturbed on appeal unless clearly erroneous. 14 PNC § 604; ROP R. Civ. Pro. Rule 52(a); *ROP v. Chisato et al.*, Crim. App. No. 7-88 (App. Div. April 1991); *ROP v. Tascano* , Crim. App. No. 5-89 (App. Div. Sept. 1990). The record supports the Trial Court's ruling that Appellant was prevented from completing his ⊥260 intended crime by the intervention of a bystander who took the gun away from him. The Trial Court's finding is not clearly erroneous, therefore, it must stand.

Appellant claims that the evidence does not prove beyond a reasonable doubt that he had the requisite intent for Attempted Murder in the Second Degree. Appellant contends that an act

which fits the definition of Assault and Battery with a Dangerous Weapon cannot also be considered an Attempted Murder.

Section 104(b) of Title 17 of the Palau National Code provides that any person who unlawfully attempts to commit murder, but falls short of actually committing that crime, is guilty of Attempted Murder.

Murder in the Second Degree is defined in Section 1702 of Title 17 as unlawfully taking the life of another with malice aforethought, or while in the perpetration of, or in the attempt to perpetrate, any felony other than those enumerated in Section 1701 of Chapter 17.

The statute specifies that a conviction for Murder in the Second Degree may be based on a showing of malice aforethought or perpetration, or attempted perpetration, of certain felonies.

Possession, use, custody or control of a firearm or ammunition constitute felonies in Palau pursuant to 17 PNC § 3306. The record shows that the Appellant had in his possession, custody and control a firearm and ammunition, which injured the victim when used by the Appellant. Based on the ⊥261 record, the Trial Court could reasonably conclude that Appellant unlawfully attempted to take the life of another while in the perpetration of a felony and convict Appellant of Attempted Murder in the Second Degree.

Sufficient grounds also exist to support a finding that Appellant acted with malice aforethought. Malice is said to include all those states and conditions of mind which accompany a homicide committed without legal excuse or extenuation. 40 Am. Jur. 2d., *Homicide* § 50. The phrase "malice aforethought" is a term of art denoting various mental states, such as intent to kill, intent to cause great bodily harm, intent to do an act imminently dangerous to others and evincing a depraved and malignant heart regardless of human life, and intent to commit a felony. 2 Wharton's Criminal Law 137 (14th Ed.); *Trust Territory v. Minor*, 4 TTR 324 (1969).

Where a homicide occurs without justification or excuse, and without sufficient provocation, malice may be implied. 40 Am. Jur. 2d *Homicide* § 51; *Trust Territory v. Minor* , supra; *State v. Trott*, 190 N.C. 674, 130 S. E. 627, 42 ALR 1114 (1925). Malice may exist even though there is no animosity, enmity or ill-will toward the victim, and even though there is no desire to take human life, if the killing is the actual consequence of an act capable of doing great bodily harm and committed so carelessly, recklessly or wantonly as to evidence depravity of mind and disregard for human life. 2 Wharton's Criminal Law 137; 40 Am. Jur. 2d, *Homicide* § 51, citing *State v.* ⊥*262* *McVay*, 47 R.I. 292, 132 A 436, 44 ALR 572 (1926); *Maxon v. State* , 177 Wis. 379, 187 N.W. 753, 21 ALR 1484 (1922); *People v. Howard*, 211 Cal. 322, 295 P. 333 (1930).

As the court stated in *Territory v. Techur*, 7 TTR 412, 421 (1976), "The element of malice aforethought, as applied to murder, is a question of fact and does not necessarily require ill-will toward the victim but signifies a general malignant recklessness toward others' lives and safety or a general disregard for one's social duty . . ."

The record shows that Appellant left the bar, went to the parking lot, picked up a gun and fired it in a manner that resulted in great bodily harm to the victim. Tr. Transcript, 57, 90, 97-99, 122. It was not error for the Trial Court to find malice aforethought from the fact that Appellant committed the inherently dangerous act of firing a loaded gun in so careless and reckless a manner as to evidence disregard for human life.

As stated above, an appellate court shall not set aside findings of fact made by the trial court unless those findings are clearly erroneous. This Court, having discovered no manifest error and finding that reasonable evidence did exist in support of the Trial Court's judgment on this issue, declines to go further and affirms the Trial Court's conviction of Appellant for Attempted Murder in the Second Degree.

⊥263 III.

Appellant's second question on appeal improperly relies on the "Doctrine of Lenity," a general principle of statutory construction that ambiguity concerning the interpretation of criminal legislation should be resolved in favor of lenity. *U.S. v. Batchelder*, 581 F.2d 626, 629 (CA7 1978), reversed at 442 U.S. 114, 99 S.Ct. 2198 (1979). It is a principle that comes into operation at the end of the process of construing what the legislature has expressed or intended with respect to an ambiguous statute, not at the beginning as an overriding consideration of being lenient to wrong-doers. *Russello v. U.S.* , 464 U.S. 16, 29, 104 S.Ct. 296, 303, 78 L.Ed.2d 17 (1983).

Appellant apparently relies on the Court of Appeals decision in *U.S. v. Batchelder*, supra, which held that two statutes that proscribe the same offense and require identical proof cannot subject an offender to different penalties. Even if the Court of Appeals decision had not been reversed by the U.S. Supreme Court, it would be inapposite to this case. See, *U.S. v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198 (1979).

There is no ambiguity to be resolved in the case before this Court. Different substantive elements must be established in order to prove Attempted Murder in the Second Degree, Aggravated Assault or Assault and Battery with a Dangerous Weapon. The legislative intent behind each of these three distinct provisions is clear from the language of the statutes. It is therefore unnecessary and inappropriate to ⊥264 apply the principle of lenity to the circumstances presented in this case.

IV.

Appellant argues several grounds for his contention that the Trial Court erred in denying his Motion to Dismiss Counts IV and V.

A.

First, Appellant charges that the Firearms Control Act, 17 PNC Chapter 33, is unconstitutionally vague because it does not include a definition of "use" of a firearm.

Silence regarding the specific definition of a term used in a statute compels us to start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. *Russello v. U.S.* , 464 U.S. at 21. The ordinary meaning of "use" certainly encompasses the manner in which Appellant used the firearm in this case.

It has long been held that statutes should be interpreted so that the manifest purpose or object can be accomplished. 2A *Sutherland Statutory Construction* 58.06, citing *Heydon's* Case, 3 Co. Rep. 7a, 76 Eng. [Rptr. Sic] 637 (Ex. 1584).

Appellant used a firearm in the conventional manner, causing the very type of injury sought to be prevented by the Firearms Control Act. It is therefore unnecessary at this time to consider whether "use" of a firearm is unconstitutionally vague as it applies to some unconventional manner of using a ⊥265 firearm. It is clearly not unconstitutionally vague when applied to the type of "use" at issue in this case.

B.

Similarly, it also is unnecessary to decide whether the Firearms Control Act unconstitutionally delegates to the Judiciary the legislative power to prescribe the maximum punishment that may be imposed under the statute. Appellant was not sentenced in excess of the minimum punishment.

C.

Appellant contends that enforcement of the Firearms Control Act, 17 PNC Chapter 33, must be suspended as to cases involving "use" of a firearm because its enforcement has been suspended as to cases involving "possession" of a firearm.

The findings of the *Kazuo v. ROP* ; Yano v. ROP, 1 ROP Intrm. 154 (App. Div. Nov. 1984), which are specifically limited to the "grave and serious" crime of Possession of a Firearm, are not applicable to a case involving Use of a Firearm. *Id.* at 168. This Court has already determined that the 15 year minimum sentence for Use of a Firearm prescribed by 17 PNC § 3306(a) is not unconstitutional. *ROP v. Leeman Singeo*, 1 ROP Intrm. 551, 560 (App. Div. Jan. 1989).

D.

Appellant apparently concludes that the punishment for Possession and Use of Ammunition is disproportionate to the ⊥266 punishment for Possession of a Firearm simply because the punishment for the latter crime is not currently being enforced. See, *Kazuo v. ROP*;

Yano v. ROP, supra.

The central question in *Kazuo/Yano* was whether the sentence imposed was grossly disproportionate to the gravity of the underlying crime. *Id.*, at 165. In order to determine this question, the Court in *Kazuo/Yano* applied the proportionality test set forth by the U.S. Supreme Court in *Solem v. Helm* , 463 U.S. 277, 103 S.Ct. 3001 (1983). But as the same court stated in *Rummel v. Estelle* , 445 U.S. 263, 100 S.Ct. 1133, 1138 (1980), which was not overruled by *Solem v. Helm* , "Outside the context of capital punishment, successful challenges to the proportionality of particular statutes have been exceedingly rare."

The lesson the *Rummel* court drew from the U.S. capital punishment cases was that the Eighth Amendment does not authorize courts to review sentences of imprisonment to determine whether they are proportional to the crime. See, *Rummel v. Estelle*, 445 U.S. at 274, 100 S.Ct. at 1139; *Solem v. Helm*, 463 U.S. at 306, 103 S.Ct. at 3018, Burger, dissent.

> Given the unique nature of the punishments considered . . . in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment . . . the length of the sentence actually imposed is purely a matter of legislative prerogative. *Rummel v. Estelle* , supra.

Under *Rummel*, the severity of punishment to be accorded different crimes is a matter of legislative, not judicial ⊥267 policy. *Id.*, at 282-283, n. 27; see, also *Hutto v. Davis* , 454 U.S. 370, 102 S.Ct. 703 (1982). The proportionality analysis set forth in *Solem v. Helm*, supra, should be limited to extraordinary cases, such as where reasonable persons cannot differ as to the excessiveness of a punishment. In all other cases, it would be inappropriate for this Court to second guess the Legislature as to whether a given sentence of imprisonment is excessive in relation to the crime. This is particularly true where the punishment is constitutionally mandated. To the extent the decisions in *Kazuo/Yano*, supra, and *ROP v. Sakuma* , Crim. App. No. 3-88 (App. Div. Jan. 1990), relied on the proportionality test of *Solem v. Helm* , they are overruled.

The delegates to the Palau Constitutional Convention, after thorough debate, concluded that a 15 year minimum sentence for possession or use of a firearm should be a constitutional mandate. Article XIII, Sec. 13; *Kazuo/Yano*, supra, at 168. The 15 year minimum sentence for Possession of a Firearm or Use of a Firearm cannot be unconstitutional because it is specifically mandated by the Constitution itself.

Under the Constitution, the Legislature has the exclusive power to regulate firearms and ammunition, with the proviso that a mandatory 15 year minimum sentence be imposed for violation of firearms laws. Article XIII, Sec. 12, 13. The Legislature has fulfilled its duty under the Constitution by enacting 17 PNC § 3306, which codifies the mandatory 15 year minimum sentence for firearms violations and establishes a ⊥268 maximum of five years imprisonment as an appropriate sentence for Possession or Use of Ammunition.

The Constitutional prohibition against cruel or inhumane treatment set forth in Article IV, Section 10 of Palau's Constitution cannot be used to subordinate or delete the equally weighty mandate contained in Article XIII, Section 13. See, *Ullman v. U.S.*, 350 U.S. 422, 428, 76 S.Ct. 497, 501 (1936).

In this case, the Constitutional requirements are clear and unambiguous. We therefore hold that the mandatory 15 year minimum sentence for Possession of a Firearm is Constitutionally and legislatively mandated, and does not conflict with the prohibition against cruel and inhumane treatment. Nor does the legislatively established five year sentence for Possession and Use of Ammunition.

E.

Finally, Appellant urges this Court to apply the "common law Doctrine of Merger" (Appellant's Brief, Attached Document, at 4) to merge Possession of Ammunition and Use of Ammunition in the crimes of Possession and Use of a Firearm, stating that "a firearm cannot be used as a firearm without the use of ammunition." *Id.*

The common law merger doctrine grew out of the procedural differences between a felony trial and a misdemeanor trial. 1 Wharton's *Criminal Law* 24 (14th Ed.). In Palau, as ⊥269 in the United States, an accused's rights in a felony trial are now essentially the same as an accused's rights in a misdemeanor trial. Therefore, there is no longer a need for a common law merger rule.

A different form of merger, distinct from the common law merger doctrine but more in line with Appellant's argument, may occur for purposes of punishment where a greater offense charged includes a lesser offense. *Ridep v. Trust Territory*, 5 TTR 61, 66 (1970); *Trust Territory v. Rasa*, 5 TTR 276, 281 (1970); *U.S. v. Cedar*, 437 F.2d 1033 (CA9 1971); *Dear Wing Jung v. U.S.*, 312 F.2d 73, 75 (CA9 1962).

Offenses merge only when proof of the elements of one necessarily establishes all of the elements of the lesser or included offense. *Ridep v. Trust Territory*, 5 TTR at 67, quoting *Paul v. Trust Territory*, 2 TTR 603, 611 (1959); *U.S. v. Cedar*, supra. Merger does not result simply because, in the particular circumstances, one of the offenses had to be committed in order to commit the other. *Id.* at 1036, n.3; see, *Morgan v. Devine*, 237 U.S. 632, 638, 35 S.Ct. 712 (1915).

In *Morgan v. Devine*, supra, the U.S. Supreme Court held that the test of identity of offenses is whether the same evidence is required to sustain them. If not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes. See, also, *ROP v. Chisato et al.*, Crim. App. No. 7-88 (App. Div. April 1991); *Paul v. Trust Territory*, 2 TTR at 611.

⊥270 In the case before this Court, the Legislature created two separate punishable offenses: Use of Ammunition and Use of a Firearm. It is apparent that they serve distinct public purposes

and there is nothing in their language or purpose to suggest that they were "merely variant formulations of the same wrong designed to afford prosecutors alternate approaches . . ." *U.S. v. Cedar*, 437 F.2d at 1036. Ammunition may be used independently of a firearm, to blow up a reef, to start a fire, or for other conceivable purposes. A firearm, as defined in Section 3306(b) of the Firearms Control Act (17 PNC Chapter 33), must be designed or modified to shoot or expel "ammunition" (as defined in Section 3303(a) of the Act) by action of an explosion, a release or an expansion of gas. This defines what constitutes a firearm, but it does not limit how such a device may be used.

Nor is it necessary for this court to do so at this time. Appellant has been convicted of using a firearm so as to fire ammunition in a manner that resulted in injury to the victim. Based on the specific facts of this case, Appellant could not have used the firearm without using ammunition. No evidence of other uses of ammunition by Appellant was presented, although other uses are conceivable. Use of Ammunition should have been merged in Use of a Firearm because, in this case, the identical criminal act (use of a firearm) constitutes both offenses.

This finding does not affect Appellant's conviction for ⊥271 Possession of Ammunition, a separate and distinct offense in this case. The record shows that Appellant had more than one unit of ammunition in his possession, although he used only one unit in firing the gun. In fact, 60 bullets for a .22 caliber rifle and 9 or 90 (unclear from the trial transcript) shotgun shells were found in Appellant's car and admitted into evidence. Tr. Transcript at 122-130. Because possession and use of ammunition are not limited strictly and necessarily to use of a firearm, they constitute separate and distinct crimes until it is demonstrated that the ammunition is possessed or used solely for the purpose of using a firearm. If it can be established that the possession or use is only in connection with the use of a firearm, the crime of Use of a Firearm includes that of Possession or Use of Ammunition. See, *ROP v. Chisato* , supra; *Schroeder v. U.S.*, 7 F.2d 60 (CA2 1925); *Pivak v. State*, 175 N.E. 278, 74 ALR 406 Anno. (1931). The facts of this case do not call for merger of Possession of Ammunition in the crimes of Possession and Use of a Firearm.

Appellant apparently has never raised the related issue of duplicitous pleading with respect to Counts IV and V, each of which joins the separate offenses of use and possession (of a firearm and ammunition, respectively), in one count. Appellant's failure to move to compel the prosecution to elect the charges on which it wished to proceed makes it unnecessary for this Court to address the issue.

Appellant also maintains that Possession of a Firearm ⊥272 and Use of a Firearm, and Possession of Ammunition and Use of Ammunition must merge in the offense of Attempted Murder in the Second Degree.

Appellant was convicted of unlawfully attempting to take the life of another with malice aforethought or while perpetrating a felony (17 PNC §§ 104, 1702). Based on our analysis above, the Trial Court reasonably could have implied malice aforethought from the manner in which Appellant fired a loaded gun. In order to prove malice aforethought, which is an essential element of Attempted Murder in the Second Degree, the prosecution must prove that Appellant

fired ammunition from the gun he possessed. Proof of the elements of Attempted Murder in the Second Degree necessarily establishes all of the elements of Possession and Use of a Firearm and Ammunition. The same evidence is required to establish each of those offenses, therefore, the offenses merge. See, *ROP v. Chisato* , supra; *Morgan v. Devine* , 237 U.S. at 715; *U.S. v. Cedar*, supra.

The same result is reached using perpetration of a felony as the basis for the Trial Court's finding that Appellant committed Attempted Murder in the Second Degree. Appellant was perpetrating the felonies of Possession and Use of a Firearm and Ammunition, which constitute a reasonable basis for the conclusion that Appellant unlawfully attempted to take the life of another under 17 PNC § 1702.

A complete merger is not called for, however, because of the existence of the separate felony of Possession of ⊥273 Ammunition. Appellant's possession of 60 rounds of .22 caliber ammunition and 9 or 90 shotgun shells constituted a distinct crime, unrelated to the charges of Attempted Murder in the Second Degree, Possession and Use of a Firearm, and Possession and Use of the single shotgun shell which was fired at the victim. The Trial Court could reasonably conclude that Appellant had committed Attempted Murder in the Second Degree by unlawfully attempting to take the life of another while perpetrating a felony (Possession of Ammunition).

This case is remanded to the Trial Court for re-sentencing in conformance with the decision of this Court that Use of Ammunition merges in Use of a Firearm, and Possession of a Firearm and Use of a Firearm merge in Attempted Murder in the Second Degree. The trial court's judgment and sentencing is otherwise affirmed.