

Kazuo v. ROP, 3 ROP Intrm. 343 (1993)
JULIO KAZUO,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 6-89

Supreme Court, Appellate Division
Republic of Palau

Opinion

Decided: October 28, 1993

Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: Susan Schwartz, AAG, for Appellee
(Richard Brungard, AAG, on the brief)

BEFORE: ARTHUR NGIRAKELSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice.

BEATTIE, Associate Justice:

On November 21, 1989, Appellant Julio Kazuo (“Kazuo”) was sentenced to serve ten years in prison on his plea of guilty to Aggravated Assault in violation of 17 PNC § 502 and fifteen years in prison on his plea of guilty to Use of a Firearm in violation of 17 PNC § 3306(a). The sentences were ordered to run consecutively to each other and consecutively to any sentence imposed in a criminal case then pending against Kazuo in the United States District Court for the Territory of Guam. On Appeal, Kazuo contends that: (1) the trial court had no authority to order that the sentences for the offenses run consecutively to the sentence to be imposed in the case pending in Guam; (2) the trial court erred in not holding that the sentences for Aggravated Assault and Use of a Firearm merged; (3) the mandatory minimum penalty of fifteen years in prison for Use of a Firearm constitutes cruel and unusual punishment and is therefore unconstitutional; (4) the Firearms Control Act is **§ 344** unconstitutionally ambiguous due to its failure to define what acts constitute use of a firearm; (5) The Firearms Control Act unconstitutionally delegates legislative power to the Courts in failing to specify a maximum term of imprisonment for Use of a Firearm; and (6) the enforcement of the Firearms Control Act was suspended by prior decisions of this Court. We reverse in part.

I

In May of 1989, in the State of Angaur, Kazuo took a gun and shot Carlos Ramon, seriously wounding him. Kazuo was charged with Aggravated Assault, Use of a Firearm, Possession of Ammunition, and Possession of a Firearm. He filed a motion to dismiss all charges, which was denied. While the case was pending, Kazuo was arrested by United States drug enforcement agents for violation of United States narcotics laws and was awaiting trial on the alleged drug violations. He then pled guilty to Aggravated Assault and Use of a Firearm and the government dismissed the other Counts against him pursuant to a negotiated plea agreement.

On November 21, 1989, Kazuo was sentenced to ten years' imprisonment on the Aggravated Assault charge and fifteen years on the Use of a Firearm charge. The trial court ordered that the sentences were to run consecutively to each other and to any sentence imposed in the pending drug case in Guam. Kazuo was eventually sentenced to a term of seven years in prison on the drug charges.

II

Kazuo assigns error to the trial court in ordering that the sentences imposed would run consecutively to any sentence imposed in the Guam drug case. No authority has been cited to us to support this novel contention. Clearly, a trial court has the discretion to determine whether its sentence should run concurrently or consecutively with a sentence anticipated, but not yet imposed, by another court in a separate criminal case. *United States* **1345** *v. Brown*, 920 F.2d 1212 (5th Cir. 1991). Kazuo's argument is without merit.

III

Kazuo contends that the trial court erred in denying his motion to dismiss. First he argues that the mandatory minimum sentence of fifteen years for Use of a Firearm provided in 17 PNC § 3306(a) constitutes cruel and unusual punishment under the United States Constitution, made applicable by the Trusteeship Agreement. In *Republic of Palau v. Sakuma*, 2 ROP Intrm. 23 (1990) we held that the minimum sentence of fifteen years was not cruel and unusual punishment under the Eight Amendment to the United States Constitution. Accordingly, Kazuo's contention is without merit.

Kazuo next argues that 17 PNC Chapter 33, the Firearms Control Act, (i) is unconstitutionally ambiguous due to the failure to specify what acts constitute "use" of a firearm; (ii) is unconstitutional because, by failing to specify a maximum penalty, it unconstitutionally delegates legislative power to the courts; and (iii) was suspended, at least insofar as its enforceability, by our decision in *Kazuo v. Republic of Palau and Yano v. Republic of Palau*, 1 ROP Intrm. 154 (1984). These precise arguments were all rejected in *Republic of Palau v. Ngiraboi*, 2 ROP Intrm. 257 (1991).¹ We decline to revisit them in this case except to say that,

¹ Here, like in *Ngiraboi*, Appellant was sentenced to the minimum sentence of fifteen years for use of a firearm. Accordingly, we need not decide whether the Firearms Control Act unconstitutionally delegates the power to impose a sentence in excess of fifteen years.

Kazuo v. ROP, 3 ROP Intrm. 343 (1993)

for the reasons stated in *Ngiraboi*, the trial court did not err in denying Kazuo's motion to dismiss.

IV

Kazuo contends that, due to the common law doctrine of merger, the trial court erred in imposing separate sentences for Aggravated Assault and Use of a Firearm. L346 Kazuo's argument is that his conduct in using a firearm supplied one of the elements to establish the offense of Aggravated Assault, so the offenses merge.

We considered the doctrine of merger in *Republic of Palau v. Ngiraboi*, 2 ROP Intrm. 257. In that case we concluded that the common law doctrine of merger had no viability in Palau, but that a “different form of merger . . . may occur for purposes of punishment where a greater offense charged includes a lesser offense.” *Id.* at 269. We further noted that “[m]erger does not result simply because, in the particular circumstances, one of the offenses had to be committed in order to commit the other.”

This “different form of merger” is perhaps more accurately described as a protection against double jeopardy. The Constitution of the Republic of Palau, in Article IV, Section 6, provides that “No person shall be placed in double jeopardy for the same offense”. It has been recognized that the United States Constitution's Double Jeopardy Clause, which is similar to Palau's, protects against (i) a second prosecution for the same offense after acquittal or conviction; and (ii) multiple punishments for the same offense in a single trial. *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084 (1990). “With respect to multiple punishments imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Missouri v. Hunter*, 459 U.S. 359, 366; 103 S.Ct. 673, 678 (1983). Our task is to determine whether the legislature intended Aggravated Assault and Use of a Firearm to constitute different offenses, separately punishable, or “merely variant formulations of the same wrong designed to afford prosecutors alternate approaches” *U.S. v. Cedar*, 437 F.2d 1033, 1036 (9th Cir. 1971).

The starting point in determining whether the legislature intended the two statutory provisions to create two separate offenses is the test set down in *Blockburger v. U.S.*, 284 U.S. 299, 52 S.Ct. 180 (1932). There the defendant was charged with sale of a narcotic drug not made from the original stamped package and the same sale of the same drug not made pursuant to the written order of the purchaser. The Court held that the L347 applicable rule is that two separate offenses are committed if each of the offenses requires proof of a different statutory element. Although both offenses grew out of the same sale of the same drug, two separately punishable offenses were committed.² Subsequent to *Blockburger*, the United States Supreme Court has consistently held that a single criminal act can be cumulatively punished if the act constituted two separate offenses under the *Blockburger* test. *See, United States v. Woodward*, 469 U.S. 105,

² Five years before *Blockburger*, Justice Brandeis, writing for the Court, recognized that possession of liquor and sale of the same liquor were separately punishable offenses because a person can possess a thing without selling it and can sell a thing without possessing it, although no specific test was articulated. *See, Albrecht v. U.S.*, 273 U.S. 1, 47 S.Ct. 250 (1927).

Kazuo v. ROP, 3 ROP Intrm. 343 (1993)
105 S.Ct. 611 (1985) (holding that since it is possible to violate each currency reporting statute without also violating the other, there is no evidence that the legislature did not intend separate punishment where each statute was violated by a single criminal act); *Albernaz v. U.S.*, 450 U.S. 333, 101 S.Ct. 1137 (1981); *see also, Grady v. Corbin*, 110 S.Ct. at 2091, n. 8.

The statutory elements of Aggravated Assault are (1) an unlawful assault; (2) with a dangerous weapon; (3) with the intent to kill, rape, rob, inflict grievous bodily harm, or to commit any other felony against the person of another. 17 PNC § 502. The statutory elements of Use of a Firearm are the (1) knowing (2) use of a gun or other device defined as a firearm in the Firearms Control Act. Applying the *Blockburger* test, it is clear that Aggravated Assault and Use of a Firearm are two different offenses, separately punishable. Unlawful assault is an element of Aggravated Assault but not an element of Use of a Firearm. The use of a firearm is an element of the offense of Use of a Firearm, but not an element of Aggravated Assault. In other words, it is possible to commit the offense of Aggravated Assault without committing the offense of Use of a Firearm, and it is possible to commit the offense of Use of a Firearm without committing the offense of Aggravated Assault. We adopt the *Blockburger* test as a guide to statutory construction to determine if the legislature intended that two separate offenses are committed when the same act violates two distinct statutory provisions. Where, as here, each statutory provision requires proof of **§ 1348** an element that the other does not, the assumption is that the legislature intended to create two different offenses and that multiple punishments may be imposed. Where the test is not met, the assumption is that only one offense was created and that the legislature did not intend to punish the same act under the two different statutes, in the absence of a clear indication of contrary legislative intent. *Missouri v. Hunter, supra*.

We cannot close our discussion of legislative intent without mention of Article XIII, Section 13 of the Palau Constitution, which required the legislature to enact laws establishing a minimum term of imprisonment of fifteen years for violation of any law regarding use of a firearm. The enactment of the Firearms Control Act to fulfill this constitutional mandate is strong evidence that the legislature intended that, where a gun is used to commit a crime not covered by the Firearms Control Act, that crime and the firearms violation may be cumulatively punished. Otherwise, the person who shoots a human and is convicted of Aggravated Assault and Use of a Firearm would face no greater sentence than the person who shoots a beer can on a tree stump and is convicted of only Use of a Firearm. The legislature could not have intended such an absurd result.

Kazuo argues that under our holding in *Ngiraboi, supra*, the Aggravated Assault offense must merge with Use of a Firearm because the same evidence was used to establish the “dangerous weapon” element of the Aggravated Assault charge as was used to establish Use of a Firearm--the “dangerous weapon” was the firearm. That is, in the circumstances of this case, the government had to prove Use of a Firearm in order to establish Aggravated Assault. In *Ngiraboi* we held that Attempted Murder in the Second Degree merged with Use of a Firearm because, in that case, the same evidence was required to establish each of those offenses. However, “the *Blockburger* test has nothing to do with the *evidence* presented at trial. It is concerned solely with the statutory elements of the offenses charged.” *Grady v. Corbin, supra*. 110 S.Ct. at 2093,

n. 12.³ Accordingly, to the 1349 extent that *Ngiraboi* is inconsistent with our holding here, it is rejected.⁴

V

Notwithstanding the above, Kazuo argued, and the government agreed at oral argument, that *Ngiraboi* should control the result in this case and that, under *Ngiraboi*, the Aggravated Assault conviction and the Use of a Firearm conviction may not be cumulatively punished. Given that concession and as a matter of fairness, we will not apply our decision here retroactively. Under our holding today and in future cases, the trial court would be upheld in its cumulative sentencing for Aggravated Assault and Use of a Firearm. However, applying *Ngiraboi* to this case, we vacate Kazuo's sentence on the Aggravated Assault 1350 conviction. In all other respects, including the fifteen year sentence for Use of a Firearm, the judgment is affirmed.

³ Where the question is whether the Double Jeopardy Clause prevents a subsequent prosecution following an acquittal or conviction, it has been held that the subsequent prosecution must survive more than the *Blockburger* test. In addition, the subsequent prosecution will be barred if, in order to establish any element of an offense charged in that prosecution, the government "will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady v. Corbin*, 110 S.Ct. at 2093. This is because successive prosecutions raise concerns beyond the chance of an enhanced sentence--the power and resources of the government should not be used for repeated attempts to convict, the unfairness of using multiple prosecutions to give the government a chance to rehearse its case, etc. *Grady v. Corbin, supra*.

⁴ We leave to another day a determination of how our holding here would apply to the offenses at issue in *Ngiraboi*.