ROP v. Sakuma, 2 ROP Intrm. 23 (1990)

REPUBLIC OF PALAU,
Appellee,

v.

TADASHI SAKUMA, ET AL.,
Appellants.

CRIMINAL APPEAL NO. 3-88
Criminal Case No. 388-89

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: January 30, 1990

Attorney for Appellee: Gerald G. Marugg, III, Assistant Attorney General

Attorney for Appellant Sakuma: Kevin N. Kirk

Attorney for Appellant Joel Toribiong: Randall F. Cunliffe

Attorney for Appellant Joel Toribiong: Johnson Toribiong

Attorney for Appellant Paul Ueki: John S. Tarkong

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BEFORE: LOREN A. SUTTON, Associate Justice; ROBERT A. HEFNER,[1] Part-Time Associate Justice; ALEX R. MUNSON,[2] Part-Time Associate Justice.

PER CURIAM:

I. BACKGROUND

At approximately 11:00 p.m. on September 5, 1987, several gunshots were directed at the residence of Speaker Santos Olikong in Medalaii, Koror. The Office of the Attorney General issued an Information on November 29, 1987, charging all defendants with one count of attempted murder in the first degree, one count of aggravated assault, one count of possession and use of a firearm, one count of possession and use of ammunition, one count of riot, and also charging defendants Toribiong and Ueki with one count of being accessories after the fact.

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[1]The Honorable Robert A. Hefner, Presiding Judge, Superior Court for the Commonwealth of the Northern Mariana Islands, sitting by designation.

[2]The Honorable Alex R. Munson, Presiding Judge, United States District Court for the Northern Mariana Islands, sitting by designation.

On December 12, 1987, the trial court denied defendant Sakuma's motion for the appointment of special judges.

On December 14, 1987, the Office of the Attorney General amended its information with respect to defendants Toribiong and Ueki to add: one count of accessory after the fact to attempted murder, one count of accessory after the fact to aggravated assault, one count of accessory after the fact to possession and use of a firearm, and one count of accessory after the fact to possession and use of ammunition.

⊥25 On January 14, 1988, the trial court considered defendant Toribiong's "Motion to Compel Election" in Count 2 between an "intent to kill" and an "intent to inflict grievous bodily harm" in the Amended Information. The trial court ordered Count 2 of the Amended Information to read "with intent to kill and inflict grievous bodily harm . . . ." in place of "with intent to kill or inflict grievous bodily harm." (Emphasis added).

On January 25, 1988, the trial court denied defendants' Motion to Dismiss. Defendants had argued that only the Special Prosecutor had legal authority in Palau to prosecute government officers and employees.

On January 26, 1988, the Appellate Division of the Palau Supreme Court, consisting of Chief Justice Mamoru Nakamura, Associate Justice Loren Sutton, and Associate Justice Arthur Ngiraklsong, denied defendants' Application for Writ of Mandamus or Writ of Prohibition based on the same argument, that the Attorney General's Office did not have authority to prosecute.

On January 27, 1988, the trial court denied defendants' Motion for a Mistrial and Dismissal of the Information. Defendants had argued because the prosecution could not produce 36 photographs of the scene of the crime, taken by one of its witnesses, that defendants' Motion should be granted. The trial court, in its denial, noted that there was no evidence of wrongdoing or negligence on the part of the prosecution, that the photographs were in any case unimportant, ⊥26 since the crime scene had, according to witnesses, changed little since the date of the crime, and since defendants were free to take as many photographs of the scene as they wished. "Ruling on the Motion for a Mistrial and to Dismiss," p.3, January 27, 1988. The trial court sanctioned the witness who lost the photographs in the amount of $50.00.

On February 3, 1988, the trial court found the following for all three defendants: not guilty of Count I, Attempted Murder in the First Degree; not guilty of Count 2, Aggravated Assault; guilty of Count 3, Unlawful Use and Possession of a Firearm; guilty of Count 4, Unlawful Use and Possession of Ammunition; and guilty of Riot, Count 9. The court had earlier granted a Motion for Judgment of Acquittal for Count 5, Accessory After the Fact to Attempted Murder (Toribiong and Ueki); Count 6, Accessory After the Fact to Aggravated Assault (Toribiong and Ueki); Count 7, Accessory After the Fact to Unlawful Use and Possession of a Firearm (Toribiong and Ueki); and Count 8, Accessory After the Fact to Unlawful Use and Possession of Ammunition (Toribiong and Ueki).

The trial court issued its "Analysis, Findings of Fact and Conclusions of Law" on

February 12, 1988.

On February 26, 1988, the trial court sentenced all three defendants to: 15 years of imprisonment for Count 3, Unlawful Use of a Firearm; 5 years of imprisonment for Count 4, Unlawful Use of Ammunition; and 6 months imprisonment for Count 9, Riot. All sentences were ordered to run concurrently.

All defendants appealed their convictions on February 26, 1988.

⊥27 II. QUESTIONS PRESENTED

1. Did the trial court err in finding that the Office of the Attorney General had legal authority to prosecute the instant case?

2. Was the evidence insufficient so that the trial court could not reasonably have found the appellants guilty of: 1) Unlawful Use of a Firearm; 2) Unlawful Use of Ammunition; 3) Riot?

a. Did the trial court err in finding that the objects removed from the wall and vicinity of Santos Olikong's residence were bullets?

b. Did the trial court err in finding that the veracity of appellant Sakuma's oral testimony was put in doubt by his first raising his eyebrows in response to the prosecution's question?

3. Did the trial court err in rejecting appellants' arguments that the sentencing provision of 17 PNC § 3306(a) is invalid?

a. Is the sentence mandated by 17 PNC § 3306(a) so disproportionate that it violates the ban against cruel and unusual punishment in the Republic of Palau's Constitution, the Trust Territory Bill of Rights, and the Trusteeship Agreement?

b. Does the lack of a maximum term to the sentence, where a 15 year minimum is mandated, violate appellants' due process rights, the Trust Territory Bill of Rights, and the Trusteeship Agreement?

4. Did the trial court, and does this Appellate Court, have the authority to suspend all or part of the sentences imposed on appellants?

We do not find any error by the trial court that would justify reversing any of the guilty verdicts, or modifying the sentences imposed. The verdicts and sentences of the trial court as to all of the appellants named herein are therefore hereby AFFIRMED.

⊥28 III. LEGAL ANALYSIS

1. The trial court did not err in holding that the Office of the Attorney General had legal authority to prosecute the instant case.

Appellants argue that the trial court erred in denying their pretrial motion to dismiss. Appellants claim that the Office of the Attorney General did not have legal authority to prosecute them. They contend that 2 PNC § 503(a)(1) grants exclusive authority to the Special Prosecutor to prosecute violations of laws by elected officials and government employees, and divests the Office of the Attorney General of this power.

The trial court ruled that the Office of the Special Prosecutor was created to prosecute elected officials and government officials when the Office of the Attorney General could not do so because of conflicts of interest or other ethical considerations.

Appellants' arguments are based strictly on statutory interpretation and grammatical construction.

Similar arguments were raised by the same counsel, Kevin N. Kirk, Esq., in the case of *Republic of Palau v. Hideo Termeteet* , Criminal Case No. 6-89 (Tr. Div. 1989). In that case, the Honorable Chief Justice Mamoru Nakamura rejected the arguments in his "Order Denying Defendant's Motion to Dismiss", March 9, 1989. As Chief Justice Nakamura pointed out:

> The law which created the Office of the Special Prosecutor, RPPL 2-7 (codified as 2 PNC sec 501, et seq.), came into effect on ⊥29 August 2, 1985. At the time of its enactment, the Office of the Attorney General had been in existence for some time and [had] been performing its functions, including the prosecution of elected officials, pursuant to its powers prescribed in the above cited laws. [2 PNC §§ 105 and 503]. The defendant, however, argues that the creation of the Office of the Special Prosecutor divested the Office of the Attorney General of the power to prosecute <u>any elected or appointed officials</u> (emphasis added) and employees of the . . . governments . . . I conclude that the Office of the Attorney General and Office of the Special Prosecutor have <u>concurrent powers</u> to prosecute . . . The only limitation the Office of the Attorney General may have is the restriction stated in 2 PNC sec. 503(a)(2). (Emphasis in original).
>
> *Republic of Palau v. Hideo Termeteet* , Criminal Case No. 6-89, "Order Denying Defendant's Motion to Dismiss."

The only restriction that Chief Justice Nakamura referred to was apparent conflict of interest or ethical conflict.

We hold that the Office of the Attorney General and the Office of the Special Prosecutor have concurrent powers to prosecute elected officials and government employees. When there are conflicts of interest or ethical problems making it inadvisable for the Office of the Attorney General to prosecute, it is the function of the Office of the Special Prosecutor to take such cases.

2. The evidence was not insufficient so that the trial court could not reasonably have found the appellants guilty of: 1) Unlawful Use of a Firearm; 2) Unlawful Use of Ammunition;

3) Riot.

In the trial court's "Analysis, Findings of Fact and Conclusions of Law," *Republic of Palau v. Toribiong, Ueki, and* ⊥*30* *Sakuma*, Criminal Case No. 388-87, the trial court evaluated the following evidentiary points, herein summarized:

1. Time sequence of the shots matched time frame of defendants' presence in the car.

2. Description of car matched car driven by defendants.

3. Witnesses described sound of shots fired at matching time sequence.

4. Witness described flash of gun.

5. Witnesses described what sounded like bullets striking house.

6. Witnesses described bullet holes.

7. Witnesses described spent bullets.

8. Exhibit of alleged bullet hole.

9. Witnesses saw the three defendants in the suspect car just before and after the shots were fired.

10. Prosecution showed, by process of elimination, that the defendants' car was the only car from which shots could have come.

11. Witnesses described the position of each defendant in the car just before and just after the shots were fired.

12. Inconsistency in defendant Sakuma's testimony.

13. Incredibility in defendant Sakuma's testimony.

14. Actions that showed, to the trial court, apparent consciousness of guilt on the part of defendants Sakuma and Toribiong.

⊥31 15. Testimony of witnesses as to fear and danger created by defendants' actions.

Based on the above, it appears that although the evidence was circumstantial, the trial court could reasonably have found the appellants guilty of the above felonies. "The trial judge is the fact finder for all purposes, and his analysis and consideration will not be disturbed on appeal unless clearly erroneous." (Emphasis added). *Chief Uoruyos Udui and Uodelchad Irorow v. Dirrecheteet, et al.* , 1 ROP Intrm. 114, 115 (App. Div. Feb. 1984) citing *Sato v. Bedul* , 7 TTR

600, 602 (App. Div. 1978).

An appellate court should not reweigh the evidence but only determine "whether there was any reasonable evidence to support the judgment." *ROP v. Kikuo* , 1 ROP Intrm. 254, 257 (App. Div. Aug. 1985). "Circumstantial evidence is, in law, necessarily of no greater or lesser import than direct evidence." *Id.* at 255.

As the driver of the car, Mr. Ueki could easily be found guilty of aiding and abetting the perpetrator. *See*, 17 PNC § 102. An accessory (before the fact) "is equally guilty with the person who has committed the crime and should receive the same punishment as if he were a principal." *Ropon v. Trust Territory* , 2 TTR 313, 315 (High Ct. Tr. Div. 1962). "No distinction is made between a principal and what has heretofore been called an accessory before the fact." 17 PNC § 102.

⊥32 As to Mr. Toribiong: he was in the car, he made no attempt to leave the car; he went to the police station with Mr. Sakuma, and if the trier of fact is given the benefit the law demands, there was sufficient evidence at the trial level to convict him, as well.

Even if one interprets an act as in itself innocent, the trier of fact may still be justified, based on the quality of the testimony and the totality of the circumstantial evidence, in finding a defendant guilty. *See*, 21A Am.Jur.2d, *Criminal Law* at § 956: "The judge and jury are enabled to obtain the elusive and incommunicable evidence of a witness' [sic] deportment while testifying. . . ."

With the foregoing as background, we turn to two areas of testimony to which appellants take particular exception.

a. The trial court did not err in finding that the objects removed from the wall and vicinity of Santos Olikong's house were bullets.

The trial court excluded the objects themselves because of its finding that there had been a substantial break in the chain of custody. Trial transcript at 872. The trial court admitted the testimony of police officers who had retrieved the objects, also of others who had possessed them temporarily, as well as testimony of Susan Curtis, an FBI firearms instructor who had temporary possession of the objects. Testimony of these witnesses led the court to believe that the objects were (spent) bullets.

Counsel for defense points out that those witnesses who ⊥33 testified at trial, regarding whether the objects were bullets, were never formally offered as experts, and that therefore the trial court abused its discretion in admitting the testimony or that, in the alternative, the testimony as to the nature of the objects was not credible. Brief of Appellant Tadashi Sakuma, pp. 13-15, May 1, 1989.

Taking the last contention first, the trial court judge, acting in lieu of a jury as fact finder, is entitled to wide discretion. Only if the appellate court finds that he could not reasonably have

reached his conclusions can it reverse his findings of fact. *ROP v. Kikuo*, 1 ROP Intrm. 254, 257 (App. Div. Aug. 1985); *Mereb v. Orrenges and Bank of Hawaii* , 8 TTR 123, 126 (High Ct. App. Div. 1980). There is no reason why the trial court could not have found that the testimony relating to the objects, later found to be bullets, was credible testimony.

Although the trial court did not explicitly admit Ms. Curtis as an expert witness, appellants' counsel did not object at the time her FBI firearms instructor qualifications and testimony were elicited. Trial transcript at 286-292. *See*, 31 Am.Jur.2d, *Expert and Opinion Evidence* § 130; *Hadley v. State*, 212 P. 458, 462 (Ariz. 1923).

It is for the trial court to determine whether a witness has appropriate qualifications to testify about a subject, expert or not, and absent a showing of abuse of discretion, an appellate court will not overturn that decision. *Babauta v. Trust Territory* , 8 TTR 196, 200-201 (High Ct. App. ⊥34 Div., July, 1981); *People v. Deluna* , 515 P.2d 459, 460 (Colo. 1973). Even if an opinion may require more expertise than a particular witness has, that goes to the weight of the testimony, not to its admission, so long as the trial court has (reasonably) decided to admit it. *State v. Hess* , 449 P.2d 46, 50 (Ariz. 1969). We find that the admission of testimony regarding these objects was proper, and that the later finding, that they were bullets, was reasonable.

b. The trial court did not err in finding that the veracity of appellant Sakuma's testimony was cast into doubt by his first raising his eyebrows.

When appellant Sakuma testified at the trial level, he was asked whether he was in a car that passed by the Olikong residence on the morning of September 6, 1987, and also whether he had fired at the Speaker's house from the car. In response, first he raised his eyebrows, then paused, and then said, "no." *ROP v. Toribiong, Ueki, and Sakuma* , Criminal Case No. 388-87, "Analysis, Findings of Fact and Conclusions of Law," p.7, February 12, 1988.

The trial court stated that raising the eyebrows was the standard Palauan affirmative gesture, and partly because of this the court tended to disbelieve appellant's subsequent oral denial. The appellant states that he is entitled to "reversal and entry of acquittal on this issue alone since it is clear that this so called non-verbal response weighed heavily in the court's verdict." Brief of Appellant Sakuma at 22, May 1, 1989.

A threshold question is whether appellant's gesture is ⊥35 "custom," as defined in prior cases. We hold it is not. Custom is defined as, "a law established by long usage and . . . by common consent and uniform practice so that it becomes the law of the place, or of subject matter, to which it relates." *Ngirmekur v. Municipality of Airai* , 7 TTR 479, 483 (High Ct. Tr. Div. Pal. 1976), citing *Lalou v. Aliang*, 1 TTR 94 (Tr. Div. Pal. 1954). Therefore, judicial notice of the gesture on the basis of custom was not required, and the appointment of a master was not required. *See, Lajutok v. Kabua*, 3 TTR 630, 634 (High Ct. App. Div. 1968).

The trial court, as finder of fact, may use its ordinary experience in Palau to evaluate gestures that pertain to a witness's veracity. *See*, ROP R. Civ. Pro. 52(a); see also, *Dworkis v. Dworkis*, 111 So.2d 70, 72 A.L.R.2d 1189 (1959), on reh 111 So.2d 75 (Fla. App. 1959), 72

A.L.R.2d 1196: "The effect of a trial judge's observation of a party's manner and demeanor in the courtroom should be limited to its bearing on the credibility to be accorded to the party's testimony." Here, of course, the court is sitting as a trier of fact, and is entitled to use its general experience that is in common with the majority of humanity, to find fact as well as credibility. *See also*, 81 Am.Jur.2d, *Witnesses*, § 662, 75 Am.Jur.2d, *Trial*, § 901.

In the instant case the trial court judge did not speak his observation aloud, did not influence a jury by it, and, as far as can be seen from his findings of fact, merely used the gesture to cast suspicion on the witness's credibility, much as a juror might do. In this he was within proper bounds. *See* ⊥36 *Trust Territory v. Minor*, 4 TTR 324, 328 (High Ct. Tr. Div. 1969).

Although at one point in the trial court's "Analysis, Findings of Fact and Conclusions of Law," at 7, the gesture is labeled an "admission," it is clear from reading the entire document that the trial court in fact used it primarily for impeachment purposes, in that it was only one of the many factors the trial court weighed and evaluated. Furthermore, even if this appellate court were to exclude the trial court's finding on this issue, there is nevertheless enough substantial evidence remaining in the record to justify the trial court's finding of guilty. *See, ROP v. Toribiong, Ueki, and Sakuma* , Criminal Case No. 388-87, "Analysis, Findings of Fact and Conclusions of Law," February 12, 1989. Mislabeling this incident as an "admission" is not, under these circumstances, reversible error.

1. The trial court did not err in rejecting appellants' arguments that the sentencing provision of 17 PNC § 3306(a) is invalid.

a. The sentence is not so disproportionate that it violates the ban against cruel and unusual punishment in the Republic of Palau's Constitution, the Trust Territory Bill of Rights and the Trusteeship Agreement.

Kazuo v. ROP and *Yano v. ROP* , 1 ROP Intrm. 154 (App. Div. November, 1984), found that the 8th Amendment to the U.S. Constitution applied to Palau through the Trusteeship Agreement, and that, therefore, the same minimum standards and ⊥37 guarantees that apply to U.S. citizens apply to Palauans, at least until the final and complete independence of the Republic of Palau.

The *Kazuo/Yano* court then applied the three-part test used in *Solem v. Helm* , 103 S.Ct. 3001, 3010 (1983), to determine whether a particular prison sentence violates the ban on cruel and unusual punishment. (The Republic of Palau's Constitution also forbids cruel and unusual punishment, but standards in the two legal systems may differ). The *Kazuo/Yano* court found that 17 PNC § 3306(a) did constitute cruel and unusual punishment for the crime of possession of a gun, in terms of the minimum rights guaranteed by the U.S. Constitution, operating in Palau through the Trust Territory Bill of Rights and the U.N. Trusteeship Agreement.

The nexus of the Republic of Palau to the United States and the United Nations is not open to question. It does not, however, necessarily follow that a term of imprisonment which is grossly disproportionate in the U.S. (and therefore an 8th Amendment violation in the U.S.) is also grossly disproportionate in Palau.

ROP v. Sakuma, 2 ROP Intrm. 23 (1990)

In *ROP v. Singeo* , Criminal Appeal No. 2-87 (Criminal Case No. 370-86), this court affirmed the trial court's verdict and sentence of 15 years minimum imprisonment for the use of a gun, holding that 15 years minimum imprisonment for the use of a gun was not in itself cruel and unusual punishment. *ROP v. Singeo* , Criminal Appeal No. 2-87, Opinion at 10 (App. Div. Jan. 1989). (Appellants' attorneys have not mentioned the *Singeo* ⊥38 case in their pleadings and are reminded of an attorney's obligation to bring cases on point to the attention of the court, even if they are unfavorable to their cause). *Singeo, id.*, represents the least culpable form of gun use. The defendant in that case did not fire at property, at an occupied dwelling, or at a person. Yet, appellants in the instant case argue for more favorable treatment than Mr. Singeo received.

Nevertheless, cases of gun use, as well as cases of gun possession, are also subject to the 8th Amendment analysis of *Kazuo/Yano* and *Solem v. Helm*.

Applying the first step of the *Kazuo/Yano* and *Solem v. Helm* analysis, "a court should compare the gravity of the offense with the harshness of the penalty." *Kazuo v. ROP* ; *Yano v. ROP*, 1 ROP Intrm. at 166; *Solem v. Helm*, 103 S.Ct. at 3010.

In the instant case, appellants were found guilty of shooting at an occupied dwelling structure and adjacent areas. It is only coincidental that no one was hurt or killed. The gravity of the offense argues for a very substantial punishment, and 17 PNC § 3306(a), expressing the will of the people, provides a very substantial punishment: a minimum of 15 years of imprisonment. In view of the gravity of the offense, this sentence does not "shock the conscience" of this court, nor is it in itself disproportionate.

Part 2 of the test is to "examine the sentences for other crimes imposed in the same jurisdiction." *Kazuo v. ROP* ; *Yano v. ROP* , 1 ROP Intrm. at 166; *Solem v. Helm* , 103 S.Ct. at 3010, 3011.

⊥39 Crimes of equal or greater violence than those in the instant case are often punished less harshly in Palau. *See, Kazuo v. ROP; Yano v. ROP*, 1 ROP Intrm. at 168-169.

Part 3 of the test is an examination of "the punishment imposed in other jurisdictions for the same crime." *Kazuo v. ROP; Yano v. ROP*, 1 ROP Intrm. at 169; *Solem v. Helm*, 103 S.Ct. at 3010.

Kazuo/Yano compared the 15 year minimum sentence for gun possession to sentences in other Micronesian and in some U.S. jurisdictions, and found that the sentence for possession of a gun in Palau was so disproportionate as to be cruel and unusual. *Kazuo v. ROP; Yano v. ROP* , 1 ROP Intrm. at 169-170.

In order to determine whether the 15 year minimum sentence for use of a gun is disproportionate to other jurisdictions, we should compare this jurisdiction to jurisdictions that have "identical or similar constitutional provision[s]." 21 Am.Jur.2d, *Criminal Law* , § 626 (Supp. March, 1989), citing *People v. Gayther*, 110 Cal.App.3d 79 (1980).

Few, if any jurisdictions in the U.S., have sentences as severe as 15 years imprisonment for the (possession or) use of guns, undoubtedly because of the Second Amendment to the U.S. Constitution. However, even in the United States, increased prison terms for the use of a firearm during the commission of certain crimes are common and have been held constitutional. *See, e.g., Banner v. Davis*, 886 F.2d 777 (6th Cir. 1989).

This court has authority to determine foreign law without resorting to expert testimony. ROP R. Civ. Pro. 44.1. By ⊥40 arguing to extend the 8th Amendment analysis accepted in *Kazuo v. ROP; Yano v. ROP* ; 1 ROP Intrm. at 169, to the use of a gun, appellants have raised issues of foreign law, that is, the law of other jurisdictions for comparison of sentences. *Kazuo v. ROP; Yano v. ROP* , 1 ROP Intrm. at 169-170; *Solem v. Helm* , 103 S.Ct. at 3010. (This comparison is the third part of the three-part test in those cases).

Japan is a jurisdiction that, like Palau, has no constitutional guarantee of the right to bear arms. There, mere possession of a handgun is punishable by a prison sentence of up to 10 years and a fine of up to three million yen, equal to approximately $18,000 at the date of this opinion. Gun and Sword Control Act of 1958 , P.L. No. 6, Chap. 5, Articles 31-37 (March 10, 1958) [3]. Hence, tests 1 and 3 of the *Kazuo/Yano* and *Solem v. Helm* analyses indicate that the 15 year minimum sentence of 17 PNC § 3306(a) is not "cruel and unusual punishment," although test 2 indicates that it might be so.

Irrespective of test 2, we hold that, "[t]he tests [in *Solem v. Helm*] are not to be applied mechanically, and even if the latter two tests indicate punishment to be disproportionate to the crime, the first test is dispositive " (Emphasis added). *People v. Gayther* ,167 Cal.Rptr.3d 700, 706 (1980).

We further hold that the crime for which these appellants have been convicted is so fraught with peril to the safety of the Republic's citizens, and to the safety of the Republic of Palau itself, and the legislative intent is so clear, that the 15 year minimum sentence does not constitute ⊥41 cruel and unusual punishment, irrespective of whether the sentence is longer than the sentence for other more violent crimes in Palau, and irrespective of comparisons with foreign jurisdictions. *See, People v. Gayther*, 167 Cal.Rptr. at 706.

b. The lack of a maximum sentence, where a minimum sentence of 15 years imprisonment is mandated, does not violate appellants' due process rights, the Trust Territory Bill of Rights, or the Trusteeship Agreement.

"Cruel and unusual punishment is not imposed . . . by statutes . . . which fix [a] minimum but no maximum punishment for an offense." 21 AmJur2d, *Criminal Law* § 629. "Sentence of 25 years of imprisonment for robbery, under statute authorizing punishment for robbery by imprisonment in penitentiary for not less than 10 years, or as otherwise specified by law, was not cruel and unusual punishment on ground that statute lacked maximum annual time limit of imprisonment." (Emphasis added). 21 AmJur2d, *Criminal Law*, § 629 n.69, citing *Trone v. State*

[3] Courtesy of Professor Yasuhei Taniguchi, Faculty of Law, Kyoto University.

(Ala. App.) 366 So.2d 379. *See also* , 21 AmJur2d, *Criminal Law* , § 629 n.69, citing *Commonwealth v. Jackson*, 369 Mass. 904.

4. Did the trial court, and does this appellate court, have the legal authority to suspend all or part of the sentences imposed on appellants?

Appellants have been convicted of the use of a gun, in violation of 17 PNC § 3306(a), which requires a sentence of 15 years of imprisonment.

This was not "mere" use of a gun. Appellants fired shots at an occupied dwelling. It is only fortuitous that no one was hurt or killed.

⊥42 We do not, therefore, reach appellants' contention that this court has authority to suspend part or all of the sentence. Appellants' crime justifies the imposition of the 15 year sentence, and this Court would not suspend any portion of that sentence, even if it found it had the power to do so. That question, therefore, we leave for a different controversy and another day.

The findings, verdicts, and sentences of the trial court with respect to all of the appellants herein are hereby AFFIRMED. We are authorized to state that Judge Munson concurs in this result but reserves the right to file a concurring opinion.