

**REPUBLIC OF PALAU,
Plaintiff,**

v.

**ELSON KATOSANG,
Defendant.**

CRIMINAL CASE NO. 09-162

Supreme Court, Trial Division
Republic of Palau

Decided: December 15, 2009

[1] **Criminal Law:** Competency to Stand Trial

If the court ascertains by preponderance of medical or other evidence that the defendant is so insane at the time of trial so as to be unable to understand the nature and consequences of the proceedings against him or properly assist in his own defense, it shall adjourn the trial and may order the defendant detained. *See* 18 PNC 901, 902.

[2] **Civil Commitment; Criminal Law:** Competency to Stand Trial

The court may hold one hearing to determine whether the defendant is insane at the time of trial under 18 PNC §§ 901, 902, and if so, whether the defendant should be restrained under Palau's civil commitment statute, 34 PNC § 531.

[3] **Civil Commitment**

The court may order a defendant civilly committed under 34 PNC § 531 upon a finding of clear and convincing evidence that

he is suffering from a mental illness that requires his commitment to the extent necessary for his own safety and that of the public.

[4] **Civil Commitment**

Periodic reporting is a logical and necessary extension to civil commitment to ensure that the defendant remains properly civilly committed according to the court's order.

ALEXANDRA F. FOSTER, Associate Justice:

PROCEDURAL BACKGROUND

On August 28, 2009, Senior Judge Rudimch issued an arrest warrant against Defendant Elson Katosang for an assault which occurred on August 26, 2009. Defendant was arraigned on September 1, 2009. As part of his release conditions, Defendant was ordered to "receive a mental health examination within two weeks (or not later than September 14, 2009)." Defendant was seen by Dr. Sylvia Wally on September 8, 2009,¹ and again by Dr. Jardine R. Davies Torno on October 21, 2009.² Dr. Wally concluded her report with the finding that Defendant "is manifesting symptoms of Anti-Social Personality Disorder vs. Borderline Personality Disorder and Prodromal Symptoms to Schizophrenia."³ A month and

¹ Dr. Wally's report was admitted into evidence as Republic Exh. 1a.

² Dr. Torno's report was admitted into evidence as Republic Exh. 1b.

³ Although not specifically noted in the report, Dr. Wally testified at the hearing on

a half later, Dr. Torno reported that the Defendant "is still not competent to go to trial," but "[p]atients [such as Defendant] who are maintained on medications have a good chance of going back to [their] usual level of functioning."

Based on these evaluations and reports, the Republic filed a motion for re-assignment to the Trial Division for a "commitment hearing." That same day, Senior Judge Rudimch signed a reassignment order. Upon the agreement of both parties, this matter was scheduled before this Court on November 23, 2009, for a commitment hearing. In preparation for the hearing, the Republic filed "Hearing Brief 34 PNC § 531" on November 17, 2009, and attached both doctors' reports. In the hearing brief, Defendant concedes that Defendant was found incompetent pursuant to 18 PNC § 902, and requests a hearing pursuant to 34 PNC § 531. On November 23, 2009, the Court heard from Katherine Masang and Drs. Torno and Wally.

The Court concludes that the law in Palau allows a court to hold one hearing to determine both whether a Defendant is competent to stand trial and whether a Defendant should be civilly committed. The Court will accede to the Republic's request to hold just one hearing, but reaches separate conclusions based on separate standards for first, finding Defendant incompetent to stand trial and second, civilly committing Defendant.

HEARING TESTIMONY

November 23, 2009, that Defendant was not competent to stand trial at the time she interviewed him.

The witnesses' testimony at the hearing was uncontested. The Court therefore adopts the testimony as its findings of fact.

Katherine Masang testified that on August 26, 2009, Defendant kicked Ms. Masang in the stomach as she was leaning over to pull out a flip-flop which was stuck in the front door of Dr. Roberts' Clinic. The kick was hard enough that it sent her backwards onto her back, and caused her to bang her head on the floor. The assault was unprovoked. She had not seen or heard Defendant before he kicked her. When she sat up, she saw Defendant running away and heard him swear at her. Ms. Masang's teenage son, who was at Ms. Masang's car in the parking lot of the Clinic, recognized him, and called out after him, but Defendant ran away and did not respond. Ms. Masang remembered last seeing Defendant about a year before this incident, when he came to her house with his parents. He came to apologize to Ms. Masang's brother for having hit her brother in the face with a rock.

After the assault, Ms. Masang's back was in pain, and she had a bump on her head from hitting her head on the hard floor. Her doctor diagnosed a "sprained spine." Ms. Masang also testified that she is now afraid and "apprehensive." She always looks over her shoulder. She always locks her car doors. And she is concerned for the safety of her children. Her eldest son's father lives not far from Defendant's parents in Idid.

From the date of the incident until today, Defendant has not bothered the victim or her family. Similarly, from the date of the assault on her brother to the assault on her,

Defendant had done nothing to bother her or her family.

Dr. Torno testified that he has seen Defendant once every two weeks since he drafted his October report. Dr. Torno could not assess whether Defendant was insane at the time of the offense, but he could opine that Defendant remains incompetent to stand trial, because he does not understand the charges against him, does not understand how to behave in court, and would be unable to understand court proceedings. Defendant also has significant problems with impulse control when he is off his medications. He suffers from delusions,⁴ and can harm others based on those delusions. Further, these delusions can only be treated with medication. The medication must be continued throughout Defendant's lifetime. If he stays on his medication, then the likelihood of a violent recurrence is minimal. Conversely, if he goes off his medications, the likelihood of a violent recurrence is "high." Also, if Defendant ingests non-prescribed drugs or alcohol, the likelihood of a violent recurrence increases significantly.

During his most recent meeting with Defendant, Dr. Torno noted that Defendant appeared to be in control of his impulses and was able to respond to his questions. When asked whether Defendant should be committed, Dr. Torno stated that Defendant is currently living with his family in a stable controlled situation, where his family closely supervises him and gives him his medication

⁴ Dr. Torno explained delusions to mean a fixed false belief, which is firmly held. Defendant will cleave to that belief no matter what, and attempting to challenge the belief is futile.

every night.⁵ Dr. Torno opined that this situation was best for Defendant. The next step, according to Dr. Torno, is for the Defendant to develop “insight,” an understanding of why he needs to take this medication.

Dr. Wally testified last. Although she saw Defendant first, in September 2009, it appears that Dr. Torno has taken over Defendant’s care.⁶ She confirmed that a pill could control Defendant’s irrational violence, and reiterated that, to avoid a recurrence, it was essential to maintain the medication in a stable, well-supervised environment. She agreed with Dr. Torno that Defendant should stay with his family, instead of being committed to the hospital. She noted that, in fact, the hospital did not have facilities to accommodate someone like Defendant. They would have nowhere to put Defendant if the Court did commit him to the hospital’s care.

In the hearing brief and again in closing, the Republic argued that Defendant posed a danger to the community, so the Court should find him insane and have him committed to the hospital or some other confined space. The Republic is concerned

that Defendant—who suffers from a lifelong mental health condition—would stop taking his pill and/or that family supervision might become lax leading Defendant to assault someone again.

Defendant argued that the Court should find Defendant insane and dismiss the criminal charges against him under 17 PNC § 105.⁷ Defendant’s counsel further urged the Court to maintain the *status quo*. Defendant is now living with his aunt and her husband in Ngerbeched. He moved from his parents’ house in Idid, because they lived near Katherine Masang’s ex-husband’s house, where Ms. Masang’s son would visit regularly. Defendant’s aunt and her husband, who live in Ngerbeched, supervise him closely, and he lives a very structured life. They ensure that he takes his pill nightly. At the time of the hearing, he was not attending Palau Community College, but he intended to resume his studies next semester.

LEGAL DISCUSSION

In their arguments, the parties conflate: (1) a finding that Defendant was insane at the time of the offense, which implicates the traditional rule in *M’Naghton*,⁸ along with 17

⁵ His medication consists of one pill, to be ingested nightly.

⁶ Actually, Dr. Wally testified that she had first seen Defendant in 2005 when his parents brought him to the hospital because Defendant had been suffering from sleeplessness along with agitation and irritability. It is unclear whether she prescribed medication to Defendant at that time., but it is clear that Defendant has not returned to the Behavioral Health Division of the Ministry of Health from 2005 until this incident in August, 2009.

⁷ 17 PNC § 105 is titled “Insanity as defense” and reads: “No person judged by competent medical authority to be insane can be convicted of any crime because of the presumption that such person cannot have criminal intent.”

⁸ *M’Naghten’s Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843). Although the Republic argued that *M’Naghten* applies in this jurisdiction, this Court reaches no conclusion on that issue, except to point out that 18 PNC § 901 adopts a

PNC § 105 and 18 PNC § 901, with (2) competency at the time of trial, which implicates 18 PNC § 902, and (3) civil commitment, which implicates 34 PNC § 531. These are three different decisions, with three different standards, which require three different findings from the Court.

Besides brief references to *M'Naghton* and 17 PNC § 105 by counsel in opening and closing, neither side submitted evidence concerning Defendant's sanity or insanity at the time of the offense. In fact, the only evidence elicited on this issue came from Dr. Torno, who stated that he could render no opinion on Defendant's sanity at the time of the offense. Accordingly, the Court makes no decision as to whether Defendant was insane at the time of the offense and declines to dismiss the case on those grounds.

[1] As to insanity at the time of trial, the Republic presented sufficient evidence for the Court to find by a preponderance of the evidence⁹ that Defendant is not currently competent to stand trial. In other words, the Court finds that 18 PNC § 902 is triggered

similar standard.

⁹ The Court has found no case law in Palau on competency to stand trial. Accordingly, the Court turns to United States treatises and law. *See* 1 PNC § 303. Under 18 USC § 4241, the court should hold a hearing to determine by a preponderance of the evidence "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or properly assist in his own defense."

because "the accused is insane at the time of trial."¹⁰

¹⁰ 18 PNC § 902 reads: "Insanity at time of trial. If the court ascertains that the accused is insane at the time of trial, the court shall adjourn the trial and order the accused to be detained as in section 901 of this chapter."

[2] What happens next?¹¹ Section 902 refers the reader to 18 PNC § 901, which reads, “[i]f it is ascertained by the court upon

¹¹ In the United States what would happen next is further competency hearings. The United States federal system maintains a much lengthier competency process, which cannot be merged with civil commitment proceedings. *See* 18 USC §§ 4241-4247. The process requires an initial competency determination, to include a psychiatric or psychological examination and report, followed by a competency hearing. 18 USC §§ 4241, 4247. If defendant is found incompetent after the hearing, the prosecution would have him committed for not longer than four months “to determine whether there is a substantial probability that in the foreseeable future” defendant will become competent to stand trial. *Id.* § 4241(d). Thereafter, the court would receive a report concerning the probability of defendant’s gaining competency, and if the court determined that there was a substantial probability that the defendant would attain competency then he would remain hospitalized for a reasonable time to gain competency and then stand trial. *Id.* § 4241(d). The general rule underlying this structure is that defendant may be committed until competent to stand trial only if the doctors opine that the defendant stands a strong chance of attaining competency. If the court cannot make such a finding (based on the doctors’ opinion), it must either release the defendant or the state must institute separate civil commitment proceedings under 18 USC § 4246. Detaining defendant without a finding of foreseeable competency or civil commitment proceedings violates due process. *Jackson v. Indiana*, 406 U.S. 715 (1972).

Here, the Republic asks the Court to jump directly to civil commitment without seeking additional testing to determine the likelihood of Defendant attaining competent. As discussed further above, it appears that under Palau’s statutory scheme such a leap is possible.

competent medical or other evidence that the accused at the time of committing the offense with which he is charged was so insane as not to know the nature and quality of his act, the court shall record a finding of such a fact and may make an order pursuant to section 531 of Title 34 of this Code.” 34 PNC § 531 is entitled “Commitment authorized; procedure” and explains that:

(a) The Trial Division of the Supreme Court . . . may, after hearing, commit an insane person within its jurisdiction to any hospital in the Republic for the care and keeping of the insane, or if the court deems best, to a member of the insane person’s family lineage or clan, who may thereafter restrain the insane person to the extent necessary for his or her own safety and that of the public

34 PNC § 531 is Palau’s civil commitment statute.¹² The Court is aware of motions for civil commitment in Palau. *See*,

¹² Civil commitment under the United States federal system requires the hospital facility’s director to certify that defendant is suffering from a mental illness such that “his release would create substantial risk of bodily injury to another person or serious damage to property of another.” *See* 18 USC § 4246. After a hearing, the court would determine, by clear and convincing evidence, whether defendant presents such a risk. *Id.* The defendant would remain hospitalized until the hospital certified that defendant no longer presented such a risk, and then the court would determine whether, and upon what terms, defendant should be released. *Id.*

e.g., In the Matter of Ngirutrong Gorey Kingya, Civ. Act. No. 08-282; *In the Matter of Pablo Max*, Civ. Act. No. 05-194; *In the Matter of Marcellino Ulechong*, Civ. Act. Nos. 99-149, 99-156. It appears, however, that all of those cases were resolved short of actual commitment. The Court is unaware of a situation such as this one where the Republic asks the Court to find Defendant incompetent to stand trial and, at the same time, civilly commit the Defendant.¹³ It appears that 18 PNC §§ 901 and 902, along with 34 PNC § 531, allow the Court to conflate a finding that a criminal defendant is not competent to stand trial with a civil commitment, without holding separate hearings. (As discussed in footnotes 11 and 12, this procedure differs from its United States counterpart, where a finding of competency to stand trial is separate from civil commitment, and require separate hearings with different requirements and different standards.)

[3] The Court finds that the Republic has shown by clear and convincing evidence¹⁴ that Defendant is suffering from a mental illness that requires his commitment “to a member of [his] family lineage or clan, who may

¹³ Because the Republic is moving for commitment under 34 PNC § 531 in its brief, and spoke of civilly committing Defendant under 34 PNC § 531 both in opening and closing in this criminal case, the Court presumes that the Republic seeks to dismiss its criminal case, and move for civil commitment. The prosecution can only seek civil commitment *after* dismissing the criminal matter. The Court will proceed accordingly.

¹⁴ Since the standard is undefined in Palau, the Court again borrows the United States’ standard set out in 18 USC § 4246.

thereafter restrain the insane person to the extent necessary for his or her own safety and that of the public” under 34 PNC § 531(a). The Republic asks that Defendant be committed to the hospital. The Court finds that commitment to the hospital is neither legally mandated, nor administratively feasible. In the United States, most states require that a state consider the least restrictive alternatives to meet the individual’s needs and protect public safety before ordering involuntary in-patient commitment. 53 Am. Jur. 2d *Mentally Impaired Persons* § 20. It is unrefuted that Defendant has comported himself properly since the August 2009 incident. He has not approached or harassed Ms. Masang or her family; he has met regularly with a therapist, who is satisfied with his progress; he has ingested the necessary medication; his family has created a structured environment; and he has functioned within that environment. Both doctors testified that Defendant’s condition, although chronic, can be controlled by a nightly pill and a structured environment, and that Defendant would be best served in the care of his family. Also, practically-speaking, the Republic has nowhere to put the Defendant even if the Court ordered that he be committed to a hospital.

[4] In the United States, civil commitment requires regular reporting. 18 USC § 4247(e); *see also* 53 Am. Jur. 2d *Mentally Impaired Persons* § 25 (a defendant who is civilly committed is typically entitled to periodic reviews). Such a reporting requirement, although not specifically stated in Palau’s statute, is a logical and necessary extension to civil commitment to ensure that Defendant remains properly civilly committed according to this Order. Therefore, Defendant’s treating

physician at the Behavioral Health Division of the Ministry of Health will file an annual report with this Court, and provide a copy of the report to the Attorney General's Office and Defendant's counsel. The physician is to file his or her first report on November 1, 2010, and on the first of November each year, as long as Defendant is civilly committed.¹⁵

Further, the treating therapist should notify the Attorney General's Office if the therapist suspects that Defendant is no longer abiding by the requirements of civil commitment. In other words, if Defendant starts to display behavior which causes Defendant's treating therapist to believe that there is an increased likelihood of a violent recurrence, the therapist should notify the Attorney General's Office. The Attorney General's office, in turn, will decide whether to move to amend the terms of the civil commitment order.

Finally, under the United States scheme, civil commitment comes to an end upon a report of the director of the mental health facility that defendant no longer presents a risk of substantial bodily harm or serious property damage, and a court's determination whether and upon what terms to release the defendant. 18 USC § 4246. Palau's scheme provides for the court amending or terminating the civil commitment upon petition from Defendant's family member, notice to the Director of Behavioral Health Services and a hearing, 34 PNC §

¹⁵ If the first of November falls on a weekend or holiday the physician's report is due on the first work day after the first of November.

534,¹⁶ or "the doctor in charge of any hospital for the insane in the Republic" can terminate the commitment. 34 PNC § 535.¹⁷

CONCLUSION

The Court makes no finding concerning Defendant's sanity at the time the offense occurred, but the Court does find that Defendant is not competent to stand trial. The Court also finds that Defendant is suffering from a mental illness that requires his civil commitment "to a member of [his] family lineage or clan, who may thereafter restrain the insane person to the extent necessary for his or her own safety and that of the public." As part of civil commitment, the Court hereby dismisses the underlying assault and battery charge against Defendant in Criminal Action No. 09-162, but maintains the case to oversee Defendant's civil commitment.

¹⁶ If a family member petitions the Court to amend or terminate the commitment, the Court must notify the Behavioral Health Division and hold a hearing. 34 PNC § 534. Thereafter, the Court can "make such order for the release of the patient or his parole under limited supervision or under specific conditions if any, as it deems appropriate." *Id.*

¹⁷ Specifically, "the doctor in charge of any hospital for the insane in the Republic may discharge or parole on such conditions as he deems best any patient" upon a filing with the Clerk of Courts that the patient is (a) recovered, (b) in remission and not dangerous to himself or others and not likely to become a public charge or (c) being transferred to another mental health facility outside Palau. 34 PNC § 535.

While Defendant is civilly committed, Defendant may not harass Ms. Katherine Masang or her family. Defendant must meet regularly with a therapist from the Behavioral Health Division of the Bureau of Health, and comply with all of his therapist's directives (including ingestion of medication). Defendant's family is to create a structured environment for the Defendant, so that his potential for relapse remains low.

Further, Defendant's therapist at the Behavioral Health Division of the Bureau of Health will file annual reports, beginning November 1, 2010, which set out the Defendant's treatment, Defendant's compliance (or non-compliance) with the treatment, and whether, in the therapist's opinion, Defendant remains insane.

Finally, a family member can petition the Court to amend or terminate the commitment, or "the doctor in charge of any hospital of the insane"¹⁸ can discharge Defendant upon proper filing with the Clerk of Courts.

¹⁸ The Court reads this term to mean the head of the Behavioral Health Division.