ROP v. Tmetuchl, 1 ROP Intrm. 301 (1986)

REPUBLIC OF PALAU,
Plaintiff/Appellee

v.

MELWERT TMETUCHL, LESLIE NISSANG a/k/a LESLIE TEWID, and ANGHENIO SABINO a/k/a ANGHENIO BEKEBEKMAD
Defendants/Appellants.

CRIMINAL APPEAL 2-86
Criminal Case No. 388-82

Supreme Court, Appellate Division
Republic of Palau

Order on plaintiff/appellee's motion for clarification and petition for rehearing
Decided: June 19, 1986

Counsel for Appellants: F. Randall Cunliffe, John S. Tarkong, James H. Grizzard, and David G. Richenthal
Counsel for Appellee: Philip Isaac, AAG

BEFORE: ROBERT WARREN GIBSON, Associate Justice; LOREN A. SUTTON, Associate Justice; PAUL J. ABBATE, Part-Time Associate Justice.

This matter is properly before the Appellate Division of the Court under the Notice of Appeal filed April 7, 1986, appealing convictions of Murder and Conspiracy handed down April 7, 1986.

On like date of April 7, 1986, Appellants moved for Release on Bail Pending Appeal.

Hearing was had upon the latter Motion on April 10 and April 11, 1986. At the conclusion of said hearing Appellants were admitted to Bail upon terms and conditions fixed by the Court.

Appellee, Republic of Palau, now moves for Clarification and Rehearing alleging that this Court misapprehended its duty in granting bail. The thrust of its argument is that before Admitting to Bail the Appellate Court must articulate with specificity, responsive findings "as to one or more specific contentions" offered by Appellants seeking admissions to bail, which raise "fairly debatable issues", any one of which sets forth more than a negligible likelihood that the Defendants are not likely to flee nor pose a danger to the community to the extent that imposed conditions will minimize if not eliminate, such likelihood and danger.

For the following reasons this Court does <u>not</u> accept this contention.

⊥302 ADDRESSING FIRST THE MOTION
FOR CLARIFICATION

Our reading of the Motions fails to disclose that which Appellee wishes to clarify. We find nothing amiss or remiss in the Orders of the Court and absent any articulation of directives deemed to be sufficiently vague and ambiguous so as to warrant our addressing same with particularity, there appears nothing to clarify. The Order clearly speaks for itself in plain language.

The Motion to Clarify is DENIED.

THE NEED FOR FINDINGS BY THE APPELLATE COURT

Appellee's argument in this regard is incapsulated on page 2 of his petition. We accept as a basic statement of the law that issues raised on Appeal must be of sufficient merit to lead the Court to conclude, in the exercise of its discretion, that there is some chance that the Appeal may be successful. We do not agree however with the negative application which Appellee places upon the exercise of such discretion.

Appellee focuses on "a substantial question of law" as being the guiding light for the finding of "fairly debatable issues." Contrary to what Appellee would have us believe, this syllogism does not apply in its ordinary connotation to matters having to do with Release from Custody and Admission to Bail. The "substantial question of law" postulate is found only at ROP R. App. Pro. 8(a) wherein it is said "in the absence of unusual circumstances, a showing that the Appeal raises a substantial question of law shall be sufficient cause for granting a stay upon reasonable terms". (Emphasis supplied)

A reading of that section in toto clearly exhibits the intent that the aphorism apply only to Civil matters. This conclusion is cemented by ROP R. App. Pro 8(c) which directs us to the Rules of Criminal Procedure, Rule 38(a) for advice as to Stays in Criminal matters. Rule 38(a) makes no reference whatsoever to "substantial question of law." Rather does it make a stay mandatory upon the taking of an Appeal if the Defendant is released.

We are controlled here by ROP R. App. Pro. 9(b). It requires written reasons (sic: findings) only in the event Release Pending Appeal is not granted, and then, only in the trial Court.

The Appellate Court is Directed to act "promptly" and to make its determination "upon such papers, affidavits, and portions of the record as the parties shall present . . . [.]"

⊥303 It is thus palpable that no written findings are required and that the Court must of necessity as well as by direction act upon the record then before it. The suggestion of Appellee that the Court must await citations, documented Assignments of Error and supporting legal argument is specious. It defeats the very purpose of release and the granting of Bail; most assuredly it is contrary to the mandate of a "prompt" hearing.

Appellee makes no reference to the above cited Rules. In such absence we can only presume him to be acquainted with them. In so doing we assume his reference to "frivolous" and "purposes of delay" is derived from ROP R. Cr. Pro. 46(c). If written findings (or reasons) are not required of the Appellate Court as a condition of Release on Bail, are such necessary in Order that the Court may determine whether or not the Appeal is frivolous per the criteria of ROP R. Cr. Pro. 46(c)? We think not!

We commence with the basic premise that at this stage of a proceeding for Release and Admission to Bail (the conclusion of Trial, the rendition of Verdict, and the filing of Notice of Appeal) what is "frivolous" or "taken for delay" is a subjective determination commanding the exercise of the Court's discretion.

> "The language of 18 U.S.C. § 3148 makes it clear that whether a convicted person is released on Bail rests in the trial court's discretion, *U.S. v. Baca*, 444 F.2d 1292 (10th CA) (1971).

In the exercise of this discretion we turn to finding the meaning of "frivolous:"

> A "frivolous appeal" is one presenting no justiciable question or one so readily recognizable as devoid of merit on the face of the record that there is little if any prospect that it can ever succeed. *Clifford v. Eastern Mortgage & Security Co.*, 166 So. 562, 123 Fla. 180.

To the same effect, see *City of Cape Girardeau v. Robertson*, 615 S.W.2d 526 (Mo.)

We then subjectively examine the parties' "papers, affidavits, & portions of the record" to determine, in our discretion, whether or not the Appeal presents one or more "justiciable questions" or is so "devoid of merit" as to lead ⊥304 us to conclude that it can never succeed. Not possibly not succeed; or even not probably not succeed--but rather, under no circumstances will, or can it, succeed. To reach this conclusion short of a full review Appellate Panel, we need more foresight than we can possibly hope to possess. The grant of release simply recognizes our prescient limitations whereas a denial usurps the function of Appellate review.

It suffices that this Court has read and considered the Eighteen (18) separate Assignments of Error set out in Appellants' Notice of Appeal and does not find them all so "devoid of merit" that we can say with reasonable certainty that this or some other tribunal could not find favor in one or more of such Assignments. Neither do we find them at this stage of the proceedings at least, to lack appropriate specificity to the extent alleged by Appellee.

What the Appellee advocates is a return to the pre-1956 United States position regarding Release and Admission to Bail. Mr. Justice Frankfurter in *Ward v. United States*, 76 S.Ct. 1063 at p. 1065, has this to say about the modern practice of release in the Federal Courts:

> It is common ground that the amended Rule 46 has made a decided change in the

> outlook or granting bail after conviction. The Government, as I have already indicated, accepts the statement in my memorandum of July 13, 1956, that the old Rule 46(a)(2) has by the amendment "been greatly liberalized." Putting to one side its qualifications, I think the Government is right in saying that the granting of bail is called for more readily under the new standard than it was under the old concept of "substantial question." It is also right in indicating that the new Rule effectuates a shift from putting the burden on the convicted defendant to establish eligibility for bail, to requiring the Government to persuade the trial judge that the minimum standards for allowing bail have not been met.

Appellee is also critical of the alleged failure of this Court to make "specific findings that Defendants are not so likely to flee, nor pose such danger to the community that certain conditions will minimize, if not eliminate such likelihood and danger."

⊥305 We commend to Appellee a closer reading of our Order of April 11, 1986. It sets forth some 8 conditions to be continuously observed and kept by Appellants and Law Enforcement Personnel. Implicit in those Orders is the finding that with the imposition of the stated terms and conditions the Court in its discretion, has concluded, that the chance of Appellants fleeing or becoming a "danger to the community" has been minimized to the maximum possible extent in keeping with the underlying theory of Release Pending Appeal.

> Bail is a device which exists to insure society's interest in having the accused answer to criminal prosecution without unduly restricting his liberty and without ignoring the accused right to be presumed innocent. *State v. Shumate*, 319 N.W.2d 834, 107 Wis.2d 460; 5 W & P. p.p. *Yanish v. Barber*, 73 S.Ct. 1105.

Appellee may disagree with our conclusions as to "flight" and "threat" but until and unless the conditions of Release are violated by Appellants, Appellee is no more right than is the Court. We direct Appellee's attention to the annotation on "Danger to Community" found at 26 A.L.R. Fed. 970.

From our examination of the record we find nothing to justify a conclusion that the imposed conditions are not a reasonable deterrent to contumacious conduct, nor has Appellee given us reasons other than to argue the conviction.

The Petition for Re-Hearing is DENIED.