

King v. ROP, 5 ROP Intrm. 131 (1995)
EMERSON KING,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 2-95
Criminal Case No. 35-94

Supreme Court, Appellate Division
Republic of Palau

Order on appellant's motion for release pending appeal
Decided: September 22, 1995

Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: Jon Hinck, Acting Attorney General

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; and JEFFREY L. BEATTIE, Associate Justice.

NGIRAKLSONG, Chief Justice:

Before the Court is Appellant's Motion for Stay of Execution of Sentence Pending Appeal, made pursuant to ROP Rule of Appellate Procedure 9. Appellant was tried and convicted of possession of a firearm and possession of ammunition. He is currently incarcerated and now asks this Court to release him while his appeal of the conviction is pending. For the reasons stated below, the Court denies the motion.

¶132 The issues have been fully briefed and neither party has requested oral argument. After reviewing the briefs submitted by the parties and the record as a whole, we conclude that oral argument would not materially assist the Court in ruling on the motion. Accordingly, pursuant to Rule of Appellate Procedure 34(a), this motion is ordered submitted on the briefs without oral argument. *See Diberdii Lineage v. Iyar*, 5 ROP Intrm. 61 (1995).

I. FACTS

For the purpose of this motion, the record reflects that at about 2:30 a.m. on the morning of November 27, 1993, appellant was driving a car in downtown Koror with two passengers. National Public Safety officers in a patrol car saw appellant's car and pulled it over based on the officers' suspicion that the occupants of the car were violating the Koror State curfew statute. The police searched the car and found a gun under the driver's seat. The police also found

bullets on appellant's person.

II. DISCUSSION

Appellant asked the trial court to release him pending his appeal pursuant to Appellate Rule 9. The trial court denied the request and appellant filed a motion with this Court pursuant to Rule 9(b). Appellant argues that he presents two issues in the appeal that warrant his release. First, appellant contends that the Koror curfew law is unconstitutional, and that therefore the evidence that resulted from the search conducted appellant was stopped on suspicion of violating that law should be suppressed. Appellant also contends that the evidence of his possessing a firearm was insufficient to support his conviction on that charge.

A. Rule 9 Standards

Under Appellate Rule 9(b), release pending appeal is proper only where (1) the appellant is not likely to flee or pose a danger to the safety of any person or the community if released, and (2) the appeal raises a substantial question of law or fact which is sufficiently important to the merits that a contrary appellate ruling is likely to require the person's release or a new trial.

In its written order entered pursuant to Rule 9(a), the trial court made no findings concerning the risk that appellant would flee or the danger that his release would pose to any person or the community. Rather, the trial court concluded that, although the **¶133** issues raised in the appeal are "non-frivolous and novel," they are not substantial questions of law or fact which, if resolved in appellant's favor, would likely result in his release. Accordingly, the trial court denied appellant's request.

A "substantial question" is a question which the Court, without having had an opportunity to consider the parties' appellate briefs or review the record, could resolve in appellant's favor as easily as in appellee's favor. To be substantial within the meaning of Rule 9(b)(2), the question must be a "toss-up or nearly so." *Minor v. ROP*, 4 ROP Intrm. 143, 143-44 (1994). To justify release pending appeal, the question presented on appeal must also be sufficiently important to the merits that a contrary appellate ruling is likely to require the person's release or a new trial. Thus, although a question may be "substantial" because it is a close call, if its ultimate resolution in appellant's favor is not likely to require the release of appellant from incarceration, release pending appeal is not proper.

B. Questions of Law and Fact Raised by Appellant

1. Unconstitutionality of the Curfew Statute

Appellant argues here, as he did below, that the police discovered the weapon and ammunition as the result of an illegal search, and that the evidence should have been excluded from trial. Specifically, he contends that the search was conducted only because the police suspected that appellant had violated the Koror State curfew statute, that the curfew statute is unconstitutional and that, accordingly, the evidence found during the search should have been

suppressed.

Although appellant's challenge of the constitutionality of the curfew statute is a significant one in the abstract, it is not a "substantial question" in the context of this case. Nor is the challenge "sufficiently important to the merits" of this case to warrant release pending appeal. There are simply too many hurdles for appellant to clear for the Court to characterize his challenge to the constitutionality of the curfew statute a "toss-up" or "too close to call." For example, the Court will presume that the legislature intended to pass a valid act and construe the statute "to sustain its constitutionality" if possible. *Yalap v. ROP*, 3 ROP Intrm. 61, 66 (1992). Appellant comes before this Court with a difficult task in challenging the constitutionality of the curfew statute. Likewise, it is far from clear that, even if appellant **1134** could establish that the curfew statute was unconstitutional, the result should be suppression of the evidence and the reversal of his conviction. *See Michigan v. DeFillippo*, 99 S.Ct. 2627, 2633 (1979).

Although appellant may succeed on appeal, the issues he points to here concerning the admissibility of the weapon and bullets are not substantial questions of law or fact sufficiently important to the merits to require release pending appeal.

2. Insufficiency of the Evidence

Appellant also contends that the evidence that he possessed the gun was insufficient to warrant his conviction. There are two reasons that appellant's argument does not justify his release pending appeal. First, it goes only to the conviction for possessing a firearm. It does not address his conviction for possessing ammunition. Appellant was sentenced to five years imprisonment for the ammunition charge, to run concurrently with the fifteen years he was sentenced for possession of the firearm. Even if appellant is successful in having reversed the trial court's finding that he possessed a firearm, he must still complete the term for possession of ammunition. Thus, the issue he raises as to the firearm charge is not sufficiently important to the merits that a contrary appellate ruling is likely to require appellant's release or a new trial. Second, the trial court's findings of fact are given great deference by the Appellate Division. *See Omelau v. ROP*, 3 ROP Intrm. 258, 260-61 (1993).

Although appellant may succeed on the merits after the panel has had the opportunity to evaluate parties' briefs and the designated record, nothing in appellant's moving papers here establish that there is a substantial question of law or fact.

For these reasons, the Court denies the request.¹

¹ Because the Court finds that appellant failed to make a showing under Rule 9(b)(2), this Court, like the trial court, need not address appellant's claim that he presents no flight risk or danger under Rule 9(b)(1).