Orrukem v. ROP, 6 ROP Intrm. 95 (1997)

MILONG ORRUKEM,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 5-95
Criminal Case No. 220-94

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: March 19, 1997

Counsel for Appellant: Mariano W. Carlos

Counsel for Appellee: Carin S. Duryee

BEFORE: LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice; JANET HEALY WEEKS, Part-Time Associate Justice

MILLER, Justice:

After a trial before the trial court and two special judges, appellant Milong Orrukem was convicted of the kidnapping and first -degree murder of Nerry Mongami, of two counts of conspiracy to commit each of those crimes, and of an aggravated assault on Charles Mohr, Jr. Orrukem filed this appeal and now seeks a new trial contending that the trial court erroneously admitted into evidence post mortem photographs of the murder victim.[1] We affirm.

Orrukem's appeal relies upon Rule 403 of the ROP Rules of Evidence:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger ⊥96 of unfair prejudice, confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Two key principles guide our analysis. First, the language of the rule favors admissibility in that relevant evidence is to be excluded only if the "danger of unfair prejudice" substantially outweighs its probative value. Second, courts that have interpreted the U.S. rule on which ours is based have recognized that the balancing called for by the rule requires an exercise of discretion

[1] It is unclear whether Orrukem seeks to challenge all of the convictions or solely the murder conviction. Our analysis of his arguments remains the same in either event.

that is better performed by trial judges than by appellate courts. "Thus, even where reasonable men [and women] may disagree over a ruling of admissibility, the trial judge's discretion is upheld in all but rare cases of egregious abuse." J.W. Moore, H.I. Bendix, *Moore's Federal Practice* ¶ 403.02[3] (1983).[2]

Although the photographs at issue, taken after the victim's body was exhumed for the purpose of performing an autopsy, are undoubtedly unpleasant, we do not believe that the trial court abused its discretion in concluding that any prejudice their admission might cause did not substantially outweigh their probative value. The photographs were admitted into evidence during the testimony of Dr. Aurelio Espinola who performed the autopsy. Viewed in the context of that testimony, the photographs were illustrative and corroborative of his observations as to the injuries inflicted upon the victim and his opinion as to the cause of death. In addition, the photographs, and Dr. Espinola's testimony as a whole, served to corroborate the eyewitness testimony -- mainly from other culpable individuals who had agreed to cooperate with the prosecution -- describing the attack on the victim.

⊥97 We do not agree with Orrukem's assertion that the photographs were needlessly cumulative of Dr. Espinola's testimony. As the government's trial counsel pointed out at the time and as its appellate counsel now urges, there had been no stipulation as to the cause of death and the government had no advance notice of what contrary evidence the defense might offer. Thus, the prosecution was entitled and obligated to establish thoroughly each and every element of its case.

Nor are we inclined to graft onto Rule 403, as one U.S. state court has done, a special rule limiting the admissibility of such photographs only where the information they convey "cannot readily be provided to the jury by less potentially prejudicial means." *State v. Cloud*, 722 P.2d 750, 752 (Utah 1986). While the adage that "one picture is worth a thousand words" is not a rule of law, it is no more than common sense to note that a photograph, in many instances, will convey more information -- and do so more effectively -- than oral testimony about the same subject. We are therefore reluctant to establish a rule that might hinder the introduction of potentially useful evidence. We are confident, instead, that the general strictures of Rule 403, conscientiously applied by trial judges, obviate any need for special restrictions in this area.[3]

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[2] It has been held that this aspect of Rule 403 "has no logical application to bench trials":

> Rule 403 assumes a trial judge is able to discern and weigh the improper inferences that a jury might draw from certain evidence, and then balance those improprieties against probative value and necessity. Certainly, in a bench trial, the same judge can also exclude those improper inferences from his mind in reaching a decision.

Gulf States Utilities Co. v. Ecodyne Corp., 635 F.2d 517, 519 (5th Cir. 1981). Thus, this issue is unlikely to recur in this Court except, as here, on appeal from a murder trial involving special judges.

[3] Citing the substantial eyewitness testimony in the record detailing appellant's actions in connection with these crimes, the government has argued that any error in admitting the

The judgment of the trial court is accordingly AFFIRMED.[4]

photographs was harmless in any event. In light of our conclusion that no error was made, we need not address this contention.

[4] We thank appellant's appointed counsel for his diligent efforts on appellant's behalf.