Oiterong v. ROP, 9 ROP 195 (2002)
LALII OITERONG,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 01-03
Criminal Case No. 00-264

Supreme Court, Appellate Division
Republic of Palau

Decided: September 11, 2002[1]

[1] **Criminal Law:** Duty to Disclose; Informants

The question whether an informant's identity must be disclosed turns on whether the informer's testimony may be relevant and helpful to the accused's defense, that is, to permit the defendant to call the informant as a witness in an effort to rebut the government's case.

[2] **Criminal Law:** Informants

There is no right for the defendant to compel the government to call the informant as a ⊥196 witness.

[3] **Criminal Law:** Dismissal; Trial Procedure

Although a defendant is entitled to move for dismissal pursuant to Criminal Procedure Rule 29 at the close of the government's case, she is not entitled to advice from the court at the start of trial as to what evidence the government must present to convict.

[4] **Criminal Law:** Sufficiency of the Evidence

The Appellate Division's review of the sufficiency of the evidence to support a criminal conviction focuses only on the question whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

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[1]At 3:45 p.m. on the day before oral argument originally was scheduled the government made a request to file its brief out of time. The motion presents no excuse for the failure either to file a brief in a timely manner or to ask for an extension, except to blame "attorney turnover" in the Attorney General's Office. Attorney turnover is an inadequate justification which we will not excuse, and thus the motion is denied. Because Oiterong waived oral argument, we find the case appropriate for submission without argument pursuant to ROP R. App. Pro. 34(a).

[5] **Appeal and Error:** Clear Error; **Criminal Law:** Sufficiency of the Evidence

In assessing on appeal whether there was sufficient evidence to convict, the Appellate Division shall ascertain whether the conviction is clearly erroneous by giving deference to the Trial Division's opportunity to assess the credibility of the witnesses.

Counsel for Appellant: Raynold B. Oilouch

Counsel for Appellee: Scott D. Banker

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; KATHLEEN M. SALII, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable R. BARRIE MICHELSEN, Associate Justice, presiding.

MILLER, Justice:

Lalii Oiterong was convicted of trafficking methamphetamine in violation of 34 PNC § 3301, for which she was sentenced to 25 years in prison and a $25,000 fine. She now appeals, arguing that the Trial Division failed to conduct a fair and impartial trial, and that there was insufficient evidence to convict her. Because Oiterong has not demonstrated error with regard to either of her two contentions, we affirm.

Background

The prosecution presented the following facts at trial. On February 25, 2000, Narcotics Officers Dolyn Tell and Harline Stark enlisted a confidential informant ("CI") to execute a controlled buy of methamphetamine from Oiterong at a residence in Topside, Koror. According to the officers, on the day of the controlled buy their supervisor, Felix Francisco, supplied them with $200 of marked money, $100 of which was to be used by the CI to pay for the drugs obtained from Oiterong, with the remainder to be paid to the CI for her involvement in the transaction. Francisco then dropped Officers Tell and Stark at the house where the CI earlier had indicated that the controlled buy should take place. At the house, Officer Tell searched the CI to ensure that the CI had neither drugs or money on her person and, upon finding none, gave the CI $100 of the money that had been marked at the police station. Officer Tell next instructed the CI to call Oiterong and set up a meeting to purchase methamphetamine, and the CI complied. About ten to fifteen minutes after the CI made the phone call, the officers went into a bedroom with a view of the house's driveway and saw Oiterong in a white sedan pulling up ⊥197 to the residence.

After Oiterong parked the car next to the house, the officers saw her exit the vehicle, walk around towards the back of the car, and, upon the CI's approach to the vehicle (the CI apparently had left the house to greet Oiterong), return to the driver's seat on the right side of the

car. At this point, Officer Stark placed herself in front of Officer Tell, thereby blocking Officer Tell's view of the car. According to the officers, the distance from the bedroom window where they were positioned to Oiterong's car was only a few feet, and the view of the car from that spot was clear. After watching the CI arrive at where Oiterong was sitting, Officer Stark saw the CI and Oiterong talking, then viewed the CI giving Oiterong money, and finally saw Oiterong give some objects to the CI. Oiterong then drove away, and the CI went back into the house. Officer Stark saw the CI entering the front door and then intercepted her and obtained the objects that Oiterong had given the CI. Officer Tell again searched the CI's person, and again found nothing. The officers then returned to the police station where Officer Tell conducted a field test on the objects that Oiterong gave to the CI, which tested positive for methamphetamine. Consequently the methamphetamine was sent to Guam for more accurate scientific testing, which also confirmed that the substance was methamphetamine. The police arrested Oiterong for trafficking in methamphetamine on April 6, 2000.[2]

Before the trial, which was held on April 16, 2001, Oiterong moved to require the government to disclose the identity of the CI. Following its practice in prior cases, the Trial Division allowed Oiterong's counsel to interview the CI, with leave to renew the motion for full disclosure on the basis of the information gathered from that interview. On the eve of trial, Oiterong renewed her motion seeking to compel the CI's appearance at trial. The court at trial denied the motion again, stating that it believed there was a confession entered into evidence, and so the government could prove its case absent the testimony of the CI. Nevertheless, the trial court then explained that "if the government was not asserting that it was in possession of a confession in this case, I would say that . . . the government would have to decide either to produce the confidential informant as a witness or to dismiss the case." Trial Tr. at 6. Indeed, throughout the trial, the court appears to have been under the misapprehension that the government's case rested on Oiterong's confessing to the crime, [3] and so the court cut short Oiterong's cross-examination of Officers Tell and Stark regarding the CI. But, perhaps in hope of not closing off Oiterong's defense should the government's theory of prosecution turn out differently, the court granted Oiterong the right to cross-examine Officers Tell and Stark in the event the government did call the CI.

After the government rested its case, Oiterong moved to dismiss. The Trial Division denied the motion because the court believed that if it were a jury trial, the court ⊥198 would permit the case to go to the jury. Thus the court allowed Oiterong to put on her defense, and, notwithstanding that the government had not called the CI, specifically noted that it would allow her to recall Officers Tell and Stark to cross-examine them about the CI. *See* Trial Tr. at 112-13. In addition, following an overnight recess, the court indicated its willingness to revisit Oiterong's motion to compel the testimony of the CI, stating: "The government has a right not to disclose its informant and to keep their informant off the stand. But the defendant also has a right to call the confidential informant, when the informant is a percipient witness to the counts in question." *See*

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[2]At trial, Officer Francisco explained that they arrested Oiterong an unusually long amount of time after the controlled buy in February because, although normally the police wait for several controlled buys to occur before arresting a suspect, in this case, Oiterong did not sell any more methamphetamine to the CI.

[3]The "confession" turned out to be a post-arrest statement taken from Oiterong in which she acknowledges using and possessing methamphetamine, but does not admit to distributing the drug.

Trial Tr. at 115. Oiterong's counsel declined the offer. Trial Tr. at 116 ("I see no need to call the informant back to testify."). Oiterong testified on her own behalf, called the owner of the house where the controlled buy took place, and recalled the officers in order to cross examine them about the CI. She ultimately was convicted of the charge. The Trial Division denied Oiterong's request for a new trial, and this appeal followed.

Analysis

Oiterong raises two points on appeal, neither of which has merit. First, she argues that the Trial Division's "rulings" during trial were misleading, thus depriving her of the right to a fair trial as guaranteed by art. IV, § 7 of the Palau Constitution. Appellant's Br. at 2. To the extent that Oiterong means to raise a due process argument, *i.e.*, that she was denied due process because the trial court's rulings were unfair, we fail to see how she was prejudiced by the trial court's conduct during the trial. We begin by noting that much of the confusion about which Oiterong now complains arises from misconceptions about the rights of defendants with respect to confidential informants. At the start of trial, Oiterong's counsel sought either to compel the government to call its confidential informant or to have the court rule that no conviction could be obtained in the absence of such testimony. We are aware of no basis for either aspect of the relief sought.

[1, 2] The question whether an informant's identity must be disclosed turns on whether "the informer's testimony may be relevant and helpful to *the accused's defense*." *Roviaro v. United States*, 77 S. Ct. 623, 628 (1957) (emphasis added). When disclosure is warranted, [4] it is for the purpose of allowing the *defendant* to determine whether he wishes to call the informant as a witness in an effort to rebut the government's case. *See id.* at 629 ("The desirability of calling [the informant] as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide."); *see also id.* at 630 ("The informer was the only witness in a position to amplify or contradict the testimony of government witnesses."). There is no right for the defendant to compel the government to call the informant as a witness.[5]

[3] Moreover, although a defendant is entitled to move for dismissal pursuant to Rule 29 at the close of the government's case, we do not believe she is entitled to advice from the court at the start of trial as to what ⊥199 evidence the government must present to convict. As the experience of this trial shows, a request for such advice leaves the trial court in the difficult, if not impossible, position of assessing the evidence before it has had a chance to hear and see it.[6]

In any event, and notwithstanding any initial confusion, the trial court's subsequent

[4]The Appellate Division previously has not addressed the precise standard by which to decide such motions, and we have no occasion to do so here.

[5]In that light, the court's initial denial of defendant's motion to compel the CI's testimony was correct. As the court later noted, however, even where the government chooses not to call the CI as a witness, in an appropriate case, the defendant may have a right to do so.

[6]And as our conclusion that there was sufficient evidence to convict Oiterong makes clear, *see* pp. 199-200 *infra*, the premise of Oiterong's motion – that the testimony of the informant who participated in an alleged drug transaction is always necessary to convict a defendant of drug trafficking – is simply mistaken.

rulings and actions did not hinder, and in fact ensured, Oiterong's ability to present her defense. Granted, the trial court was not entirely consistent when it first stated that it would grant a motion to dismiss the charge if the government neither produced a confession nor the CI, and then later, when the government finished presenting its case, it denied Oiterong's motion to dismiss because it felt there was sufficient evidence of her guilt to go to a jury. Nonetheless, the court's denial of the motion to dismiss is clear, and there is nothing in the record to support Oiterong's misunderstanding that the motion would be granted at some later time. And with regard to the CI, not only did the trial court allow Oiterong's counsel to interview the CI before trial, but the court also granted Oiterong the ability to call the CI to testify. Oiterong cannot now complain about her counsel's tactical decision not to call the CI. Moreover, and contrary to her assertions on appeal, the trial court unequivocally granted Oiterong the ability to re-cross examine Officers Tell and Stark about the CI, and Oiterong took full advantage of this option. Finally, we do not accept Oiterong's interpretation that the trial court "ruled" when it stated that, without the CI or a confession, the government would not meet its burden of proof. The court actually said that, in the absence of a confession, "the *government* would have to decide either to produce the confidential informant as a witness or to dismiss the case," Trial Tr. at 6 (emphasis added), not that the *trial court* would dismiss the case in that situation. [7] Furthermore, the court clearly reconsidered that statement when it denied Oiterong's motion to dismiss and enabled her to recall the officers.

[4, 5] Oiterong's second argument contesting the sufficiency of the evidence also fails. This Court recently has held that "its review of the sufficiency of the evidence to support a conviction is very limited," and "focuses only on the question whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Kumangai v. ROP* , 9 ROP 79, 82 (2002) (citation and internal quotations omitted). Furthermore, in assessing on appeal whether there was sufficient evidence to convict, this Court "shall ascertain whether the conviction is clearly erroneous by . . . *giving deference to the Trial Division's opportunity to assess the credibility of witnesses* . . . ." *Id.* at 84 (citation omitted).

Here, under these standards not one of the ten alleged sources of error calls for upsetting Oiterong's conviction. Oiterong ⊥200 first points to the fact that all of the officers who testified at trial denied talking to the CI to set up the controlled buy. But when viewed in a light most favorable to the prosecution, this fact, at most, demonstrates that the person who set up the controlled buy was not one of the officers who witnessed the controlled buy, and certainly does not refute Officer Stark's observation of the transaction. Similarly, the asserted insufficiency of the affidavit of probable cause attached to the information for Oiterong, and that neither Officer Tell nor Stark knew whether the CI used drugs, do not belie the officers' testimony regarding the controlled buy. Likewise, Oiterong's fifth point, that the owner of the house where the controlled buy took place did not know about its occurrence, is irrelevant and without any bearing on the officers' truthfulness. *See, e.g.* , *Ngirarorou v. ROP* , 8 ROP Intrm. 136, 138 (2000) (irrelevant facts not grounds for reversal under clear error standard).

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[7]This is evident from the ensuing colloquy in which, in response to the government's query whether it could "reserve the ability to call the CI," the Court stated, "[i]t'll be *your* case and I'll let *you* decide how it's going." Trial Tr. at 6 (emphasis added).

Nor does Oiterong's sixth argument[8] regarding insufficiency of the evidence demonstrate clear error. Oiterong points to inconsistencies between Officer Tell's testimony and Officer Stark's account of the controlled buy. But these minor inconsistencies, generally relating to whether just Officer Tell initially saw the white sedan drive up to the house or whether both officers saw the approach, do not demonstrate clear error with regard to the most important evidence that the officers provided: that Officer Stark clearly witnessed the controlled buy from a short distance. *See id.*; *see also, Kumangai*, 9 ROP at 84 (Although "the Trial Division may have had adequate grounds to decide that the testimony of the witnesses . . . was not credible . . . those witnesses substantially corroborated each other on the most salient points in the case."). Oiterong's points of error seven through nine suggesting alternate possibilities of facts based on the testimony presented at trial are rife with conjecture. As stated before, this Court's review of the lower court's decision is extremely limited. With this deference in mind, the possibility that another set of inferences are possible from the facts presented at trial is not enough to reverse Oiterong's conviction.

Oiterong's final point, although more substantial than the above contentions, still does not lead to a conclusion that reversal is warranted. She contends that absent the CI's testimony (the CI being the sole person involved in the transaction) there was not sufficient evidence to convict. Looking to the standard of review, however, we believe that even without the CI's appearance at trial, there is enough evidence in the record to conclude that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 82. Specifically, Officer Stark's testimony that she witnessed first hand the transaction between Oiterong and the CI, Officer Tell's testimony that she searched the CI before and immediately after the transaction, and the officers' joint testimony that they recovered two bags which later tested positive for methamphetamine, all support the Trial Division's conclusion that Oiterong did traffic in methamphetamine on the day of the controlled buy. Accordingly, the conviction must stand.

Conclusion

For the foregoing reasons, we affirm ⊥201 the Trial Division's conviction of Oiterong.

[8]Oiterong erroneously labels this issue as her fifth claim of insufficiency of the evidence, even though she already cites a fifth point. Accordingly, we have renumbered the remaining points.