CHUUK STATE SUPREME COURT TRIAL DIVISION

CHUUK STATE, Plaintiff, vs. OSHIRO BILLIMON, Defendant.	CSSC-CRIMINAL CASE NO. 126-2008

ORDER DISMISSING DEFENDANT'S POST-CONVICTION MOTION FOR RELEASE OF PASSPORT

Repeat R. Samuel
Associate Justice

Hearing: December 13, 2010
Decided: December 16, 2010

APPEARANCES:

For the Plaintiff: Charleston Bravo
Assistant Attorney General
Office of the Chuuk Attorney General
P.O. Box 1050
Weno, Chuuk FM 96942

For the Defendant: Johnny Meippen, Esq.
P.O. Box 705
Weno, Chuuk FM 96942

* * * *

HEADNOTES

Appellate Review – Stay – Criminal Cases; Contempt

The relevant subsections of Chuuk State Law No. 190-08, § 27 provide that upon appeal, punishments of imprisonment for contempt will automatically be stayed unless the court finds cause to the contrary and renders its findings in writing. Chuuk v. Billimon, 17 FSM Intrm. 313, 315 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases; Contempt

Since the defendant is entitled to those procedural rights normally accorded other criminal defendants, defendants in the vast majority of criminal contempt cases are given substantially those procedural rights normally accorded to defendants in other criminal cases. Criminal contempt convictions are not a special category of crime deserving of or requiring alternative considerations other than those specified under Chk. S.L. No. 190-08, § 27, Chk. Crim. R. 42, and case law. Chuuk v. Billimon, 17 FSM Intrm. 313, 315-16 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases; Bail; Criminal Law and Procedure

Subsection 46(c) provides for release pending sentence and for release pending appeal. It states that a person who has been convicted of an offense and is either awaiting sentence or has filed an appeal will be treated in accordance with the provisions of Rule 46(a)(1) through (6), which provide for conditions of pre-trial release and address the nature of information supporting orders issued under the rule. Criminal Rule 46(c) does not apply to a person who has been sentenced to imprisonment and has filed a notice of appeal; it applies to the release of a defendant who has been found guilty – "convicted" – but not yet sentenced. Rule 46 applies generally to release on bail. Chuuk v. Billimon, 17 FSM Intrm. 313, 316 (Chk. S. Ct. Tr. 2010).

Criminal Law and Procedure

The court should not have to instruct attorneys that the court rules mean what they say. An attorney practicing before the court is expected to know the rules and abide by them. Chuuk v. Billimon, 17 FSM Intrm. 313, 316 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases

In criminal matters where a judgment of conviction imposes a sentence of imprisonment, the controlling rules for a stay are Chuuk Criminal Procedure Rule 38(a)(2) and Chuuk Appellate Rule 9 (b)-(c). An order issued pursuant to these rules would constitute one in aid of appeal. Chuuk v. Billimon, 17 FSM Intrm. 313, 316 (Chk. S. Ct. Tr. 2010).

Appellate Review – Notice of Appeal; Appellate Review – Stay – Criminal Cases

As a general rule, a properly filed notice of appeal transfers jurisdiction from the trial court to the appellate court, but a specific provision in the rules will control rather than a general rule to the extent that they conflict. Thus an application for release after a judgment of conviction must be made in the first instance in the court appealed from and thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review may be made to the Chuuk State Supreme Court appellate division or to a justice thereof. So that when the defendant brought an earlier motion for stay pending appeal which was granted, he should have argued the release of his passport at that time when the issue was properly before the trial court, since the considerations a court is required to undertake when granting a release pending appeal involve contemplation and possible imposition of conditions for release. Chuuk v. Billimon, 17 FSM Intrm. 313, 317 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases

To grant a release pending appeal, the court first must conclude that one or more release conditions will reasonably assure that the appellant will not flee or pose a danger to another person or the community. Chuuk v. Billimon, 17 FSM Intrm. 313, 317 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases; Criminal Law and Procedure

Chuuk Appellate Rule 9(b) makes no provision for reconsideration of a decision on a motion to stay made by the court appealed from in the first instance and specifically provides for the appellate division's review of such a determination. Were the trial court to consider a defendant's second motion as one made pursuant to Chuuk Criminal Rule 38(a)(2), it would do so in contravention of the Appellate Rules of Procedure. Chuuk v. Billimon, 17 FSM Intrm. 313, 317 (Chk. S. Ct. Tr. 2010).

Criminal Law and Procedure – Motions

A moving party's failure to file the memorandum of points and authorities is deemed the moving party's waiver of the motion. Chuuk v. Billimon, 17 FSM Intrm. 313, 317 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases; Criminal Law and Procedure

When a defendant has been convicted of a crime and that conviction still stands; when his sentence for the conviction, though stayed pending appeal, also remains intact; and when his release pending appeal is subject to conditions, to view him as a "free man with all his rights intact," as he now weathers the consequences of being a convicted criminal, is to take flight into fantasy. The stay of his sentence does not also serve to exonerate him. Chuuk v. Billimon, 17 FSM Intrm. 313, 317 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases; Criminal Law and Procedure

If the court were authorized to rule on a defendant's motion to release his passport while his conviction is on appeal, it would be hard pressed to see how he is less likely to flee the jurisdiction now than when the conditions of his release were first imposed since the weight of the evidence adduced at trial has demonstrated his guilt beyond reasonable doubt and since now he faces re-instatement of a six-month term of imprisonment. Chuuk v. Billimon, 17 FSM Intrm. 313, 318 (Chk. S. Ct. Tr. 2010).

* * * *

COURT'S OPINION

REPEAT R. SAMUEL, Associate Justice:

On September 9, 2010, defendant filed a motion for release of his passport, which was ordered surrendered pursuant to conditions of his release on January 18, 2010. Associate Justice Samuel, sitting as a Trial Division Justice, disposes of it although the case is pending review in the Appellate Division of this Court. The State's concern with Trial Division's jurisdiction to hear this matter is prudent and addressed below. Its motion in opposition was filed on September 14, 2010 and defendant responded on September 29, 2010. Oral arguments from trial counselor Charleston Bravo, representing the State, and attorney Johnny Meippen, for defendant Billimon, were heard on December 13, 2010.

The procedural background relevant to defendant's motion is as follows. On April 14, 2010, pursuant to Rule 42 of the Rules of Criminal Procedure for the Trial Division of the Chuuk State Supreme Court, defendant was found guilty of criminal contempt in the matter captioned above, contrary to Section 27 of Chuuk State Law 190-08, the Chuuk State Judiciary Act, as amended. On April 21, 2010, he was sentenced to six months imprisonment for that conviction. The same day he filed both a notice of appeal and a motion for stay of imprisonment pending appeal, pursuant to Rule 38(a)(2), Chuuk Rules of Criminal Procedure. The motion for release was granted.

During oral argument, plaintiff made somewhat vague contentions that criminal contempt is a special category of conviction and should be viewed, if the Court understands him properly, as a crime undeserving of a release condition requiring passport surrender. He referenced no authority in support of this line of argument aside from the plain language of Chk. S.L. No. 190-08, § 27. Rule 42, Chuuk Rules of Criminal Procedure, provides for the prosecution of criminal contempt matters. The relevant subsections of Chuuk State Law No. 190-08, § 27 provide that upon appeal, punishments of imprisonment for contempt shall be stayed automatically unless the court finds cause to the contrary and renders its findings in writing. *See* FSM v. Petewon, 14 FSM Intrm. 320, 324 (Chk. 2006) (release pending appeal is not automatic upon filing both a motion for stay and notice of appeal and is at the Court's discretion.)

But "[i]n the vast majority of criminal contempt cases, the defendant is given substantially those procedural rights normally accorded to defendants in other criminal cases." In re Contempt of Skilling,

8 FSM Intrm. 419, 424 (App. 1998). *See also* In re Iriarte (II), "[t]he defendant of a criminal contempt charge is entitled to those procedural rights normally accorded other criminal defendants." 1 FSM Intrm, 255, 260 (Pon. 1983). The Court agrees with the State on this point and finds no authority suggesting that criminal contempt convictions are a special category of crime deserving of or requiring alternative considerations other than those specified under Chk. S.L. No. 190-08, § 27, Chk. Crim. R. 42, and case law.

Plaintiff presents his motion pursuant to Rules 41(e) and 46. Rule 41 concerns itself generally with issues of search and seizure while subsection 41(e) specifically provides for the return of property to persons aggrieved of unlawful search and seizure that are lawfully entitled to it. Rule 46 addresses release from custody. To the extent that the Court can make sense of this second stated basis for defendant's motion, it looks specifically to subsection 46(c), which provides for release pending sentence and for release pending appeal. In relevant part, it states that "[a] person who has been convicted of an offense and is *either* awaiting sentence *or* has filed an appeal shall be treated in accordance with the provisions of Rule 46(a)(1) through (6) above . . . . " (emphasis added). Subsections 1-5 of Rule 46(a) provide for conditions of pre-trial release and subsection 6 addresses the nature of information supporting Orders issued pursuant to the rule.

Defendant was ordered released prior to trial subject to conditions in accordance with Rule 46 on January 18, 2010. Nothing in the record indicates that defendant's voluntary surrender of his passport pursuant to the Court's lawful Order somehow amounts to an unlawful seizure. The record establishes that defendant was duly noticed and afforded an opportunity to be heard prior to the imposition of conditions for his release. Nor is there any indication that this issue was ever alluded to, much less raised, at any point during the proceedings. In his response to the State, defendant himself claims that he is not appealing the imposition of bond conditions by the Court. Finding no factual or legal basis to analyze defendant's motion in the context of an unlawful seizure, the Court disregards that purported basis of the motion as misguided and wholly unsupported. But even if such facts and points of law could now be marshaled, the time for their entertainment by this Court has long since passed.

And the logic of Rule 46(c) is plain. A convicted person is to be treated according Rule 46(a)(1) through (6) if one of two mutually exclusive conditions obtains: *either* that he is awaiting sentence, *or* that he has filed an appeal. The Rule makes no provision for a person that has both been sentenced and filed an appeal. Defendant was sentenced on April 21, 2010 and filed notice of appeal on the same day. Under those facts he does not meet either of the two separate and distinct preconditions which otherwise trigger application of the rule.

This interpretation is supported by case law. "Criminal Rule 46(c) does not apply to a person who has been sentenced to imprisonment and has filed a notice of appeal . . . it applies to the release of a defendant who has been found guilty – 'convicted' – but not yet sentenced . . . Rule 46 applies generally to release on bail." FSM v. Petewon, 14 FSM Intrm. 463, 467-68 (Chk. 2006). "The court should not have to instruct attorneys that the court rules mean what they say. An attorney practicing before the court is expected to know the rules and abide by them." Chuuk v. Davis, 13 FSM Intrm. 178, 183 (App. 2005). The second basis of defendant's motion is as groundless as the first.

Defendant makes mention of the Court's jurisdiction to render Orders in aid of appeal, variously citing Walter v. Meippen, 7 FSM Intrm. 515, 517 (Chk. 1996), Bank of Guam v. O'Sonis, 9 FSM Intrm. 197, 198-99 (Chk. 1999), and Department of Treasury v. FSM Telecomm Corp., 9 FSM Intrm. 465, 467 (App. 2000). These civil cases inform the argument but are not dispositive of the issue. In criminal matters where a judgment of conviction imposes a sentence of imprisonment, the controlling Rules are Chk. Crim. R. 38(a)(2) and Chk. App. R. 9(b)-(c). Petewon, 14 FSM Intrm. at 468. An order

issued pursuant to these rules would constitute one in aid of appeal.

The State, citing FSM v. Akapito, argues that as a general rule, a properly filed notice of appeal transfers jurisdiction from the trial court to the appellate court, and that in light of this, our Court is divested of jurisdiction. 11 FSM Intrm. 194, 196 (Chk. 2002). The Court agrees that this is a proper statement of the general rule. *See also* Department of the Treasury v. FSM Telecomm. Corp., 9 FSM Intrm. 465, 467 (App. 2000) and FSM Dev. Bank v. Louis Family, Inc., 10 FSM Intrm. 636, 638 (Chk. 2002), respectively stating that a notice of appeal divests the trial court of jurisdiction, except to take action in aid of the appeal. But "[a] specific provision in the rules will control rather than a general rule to the extent that they conflict." Petewon, 14 FSM Intrm. at 467. Taken together as required, Rules 38(a)(2) Chk. Crim. R. and 9(b)-(c) Chk. R. App. P. would normally specifically provide for a trial court's jurisdiction under our facts.

Defendant's original motion erroneously relies upon Chuuk Criminal Rules 41 and 46(c). This defect is marginally rehabilitated in his response to the State where he claims that the Order sought is "clearly" characterized as one in aid of appeal and cites related authority to that effect in the context of civil cases. But defendant brought an earlier motion for stay pending appeal which was granted. He should have argued the release of his passport at that time when the issue was properly before the Court, since the considerations a court is required to undertake when granting a release pending appeal involve contemplation and possible imposition of conditions for release. "To grant a release pending appeal, the court first must conclude that *one or more release conditions will reasonably assure that the appellant will not flee* or pose a danger to another person or the community . . . ." FSM v. Moses, 12 FSM Intrm. 509, 511 (Chk. 2004) (emphasis added). *See also* FSM v. Petewon, 14 FSM Intrm. 320, 324 (Chk. 2006) (stating that if a court determines that *adequate and proper release conditions can be set*, it must then make two further determinations regarding the substantive quality of the appeal and its likely outcomes (emphasis added)).

Chuuk Appellate Rule 9(b) provides, in relevant part, that

> "[a]pplication for release after a judgment of conviction shall be made in the *first instance* in the court appealed from . . . . [*t*]*hereafter*, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review may be made to the State Court Appellate Division or to a justice thereof,"

(emphasis added). The rule makes no provision for reconsideration of a decision on the motion made by the court appealed from in the first instance and specifically provides for review of such a determination by the Appellate Division. Were this Court to consider defendant's second motion as one made pursuant to Chk. Crim. R. 38(a)(2), it would do so in contravention of the Appellate Rules of Procedure. That aside, neither defendant's motion or response included a memorandum of points and authorities. Chuuk Criminal Rule 45 provides, in relevant part, that "[f]ailure by the moving party to file the memorandum of points and authorities shall be deemed a waiver by the moving party of the motion."

Defendant claims that while his sentence has been stayed pending appeal he is a "free man, with all his rights under the law intact, including the right to migrate freely, until and unless the stay of imprisonment is lifted pursuant to law." Motion at 2 (Sept. 9, 2010). The Court disagrees. Defendant has been convicted of a crime and that conviction still stands. He is subject to the jurisdiction of the Appellate Division pending the outcome of his appeal. The sentence for his conviction, though stayed pending appeal, also remains intact. His release pending appeal is subject to conditions. To view him as a "free man with all his rights intact," as he now weathers the consequences of being a convicted criminal, is to take flight into fantasy. The staying of his sentence by this Court does not also serve

to exonerate him. Whether or not the conviction shall be overturned, this Court cannot say. But it is manifestly clear to all that that day has yet to come.

If the Court were authorized to rule on defendant's motion, it would be hard pressed to see how he is less likely to flee the jurisdiction now that the weight of the evidence adduced at trial has demonstrated his guilt beyond reasonable doubt, and now that he faces re-instatement of a six month term of imprisonment, than he was when the conditions of his release were imposed. But the Court finds that it is no longer the proper forum to decide upon the appropriateness or necessity of the conditions of defendant's release pending appeal. The motion is dismissed.

IT IS SO ORDERED.

* * * *

FSM SUPREME COURT TRIAL DIVISION

FSM DEVELOPMENT BANK, Plaintiff, vs. DONALD JONAH and DORINDA JONAH, Defendants.	)	CIVIL ACTION NO. 2002-2000

ORDER AND MEMORANDUM GRANTING REQUEST FOR SALE

Martin G. Yinug
Acting Chief Justice

Hearing: September 17, 2010
Decided: January 6, 2011

APPEARANCES:

For the Plaintiff: Nora Sigrah, Esq.
P.O. Box M
Kolonia, Pohnpei FM 96941

For the Defendants: Sasaki L. George, Esq.
Micronesian Legal Services Corporation
P.O. Box 38
Tofol, Kosrae FM 96944

* * * *