ROP v. Ngiraingas, 2 ROP Intrm. 78 (1990)

REPUBLIC OF PALAU,
Appellee,
v.

JACKSON NGIRAINGAS,
Appellant.

CRIMINAL APPEAL NO. 4-89
Criminal Case No. 25-89

Supreme Court, Appellate Division
Republic of Palau

Appellate decision
Decided: June 22, 1990

Counsel for Appellee: Yosiharu Ueda, T.C.

Counsel for Appellant: Johnson Toribiong

BEFORE: LOREN A. SUTTON, Associate Justice; ARTHUR NGIRAKLSONG, Associate Justice; ROBERT A. HEFNER, Associate Justice.

PER CURIAM:

FACTS

Defendant/Appellant was convicted of the offense of grand larceny.

The uncontroverted facts are that the Defendant/Appellant owns a bar in Peleliu called Omesangel. At some time between August 12, 1988, and August 19, 1988, Defendant/Appellant caused a radio announcement to be made over Palau's radio station (WSZB), directed to his employees in Peleliu, that they were to pick up a shipment of beer for Omesangel at the Peleliu dock. Defendant/Appellant's employee, Jamaica Merep, learned of a shipment of beer on August 19, 1988, from passengers on the Peleliu Princess who, upon arrival in Peleliu, informed him that ⊥79 he was to pick up a shipment for Omesangel at the dock. Merep went to the dock and was told by crew members of the Princess that Omesangel's beers were there. The cargo manifest of the Princess for August 19, 1988 reflects "Box-52" for Omesangel. Plaintiff's Exh. No. 1. Merep picked up fifty (50) cases of beer and transported them to Omesangel where they were subsequently sold. Merep was told of the radio announcement by an unknown person after he was informed that beer for Omesangel had arrived on the Princess. Later, Keibo Ridep, a small store owner in Peleliu, claimed the beer as his and Defendant/Appellant was subsequently charged, as an aider and abetter to Merep, with the offense of grand larceny.

The people's theory was that Defendant/Appellant encouraged and counseled his

employee to unlawfully take and carry away the beer, knowing that it belonged to another and with the intent to deprive the owner of possession thereof and to convert it to his own use and profit. The people contended that Defendant/Appellant was an aider and abetter of the offense of grand larceny and that he was, pursuant to 17 PNC § 102, chargeable as a principal with that crime.

The trial court heard testimony and admitted several invoices and other documents relating to beer purchases and shipments to Omesangel and found ultimately that Defendant/Appellant ordered and received only one shipment of beer in August 1988, on August 12, not August 19, and that therefore he must have known that the August 19 shipment was not his.

⊥80 The trial court also considered two statements attributed to Defendant/Appellant which were, at various times during the trial, objected to on grounds of hearsay. One was the order over WSZB to pick up the August 19 beer shipment and the other was a verbal instruction, after August 19, to Merep (his employee) that: "If anyone asks you who own the beers, you say they are Jackson's beers".

The trial judge also made a specific finding that Defendant/Appellant's testimony was not credible.

Defendant appeals and makes the following assignments of error:

1. No evidence was produced at trial from which the trier of fact could Find that Defendant/Appellant harbored the requisite mental state (i.e. the intent to unlawfully take away the property of another).

2. Keibo was only the consignee of the beer shipment and not the owner at the moment it was picked up by Merep at the Peleliu dock. The owner was either Franco's, WCTC or the captain and crew of the Peleliu Princess or Peleliu State. The acquiescence of the captain and crew of the Princess to Merep's taking of the beer constituted permission by the owner and the essential element of an unlawful taking was absent.

3. The statements of Defendant/Appellant were hearsay and inadmissible pursuant to *Bruton v. U.S.*, 88 S. Ct. 1620 (1968), and ROP R. Evid. Sec. 801, *et seq*.

⊥81 ANALYSIS

An Appellate court may not set aside findings of fact of a trial court unless such findings are clearly erroneous. 14 PNC § 604(b), ROP R. Civ. Pro. 52(a). See also: *Ngirausui, et al., v. Nishizono, et al.*, 1 ROP Intrm. 330, 331 (App. Div. May 1986), *State of Truk v. Aten*, 8 TTR 631, 641 (H.C.T.T. App. Div. September 1988), *Anderson v. City of Bessemer*, 105 S.Ct. 1504, 1511.

"If the evidence, in a criminal case, which goes to the finder of fact is sufficient to support a conclusion of guilt beyond a reasonable doubt, taking the view most favorable to the

prosecution case, such finding will not be disturbed on appeal." *ROP v. Kikuo* , 1 ROP Intrm. 254, 257 (App. Div. August 1985).

Upon review of the entire record we cannot find that the evidence before the trial court was sufficient to support the conclusion that Defendant/Appellant was guilty beyond a reasonable doubt.

At best, the Prosecution proved that Defendant/Appellant ordered one shipment of beer in August 1988, and that his employee picked up one shipment of beer on August 19, which was, according to the evidence introduced by the prosecution, consigned on the vessel's cargo manifest to Omesangel. No evidence was introduced to show that Defendant/Appellant's August 12, 1988, order was in fact delivered by the Peleliu Princess and picked up by Defendant/Appellant or his employee on August 12. The trial court's finding that Defendant/Appellant knew that the ⊥82 beer shipment on August 19 was not his is unsupported by evidence sufficient to render such a finding beyond a reasonable doubt.

We find, therefore, that the necessary and requisite mental state required to convict Defendant/Appellant of the offense of grand larceny, i.e. the intent to unlawfully take and carry away the property of another, was unsupported by the evidence and that such evidence as was before the Court on this issue was insufficient as a matter of law to support the finding.

Although unnecessary to our conclusion, we also note that according to the evidence there was no connection between Defendant/Appellant's announcement over the radio to his employee and the employee's action of picking up the beer. To find guilt on a theory of aiding and abetting, Defendant/Appellant must have been found to have encouraged or counseled the act of unlawful taking. Defendant/Appellant's employee, Merep, testified that he picked up the beer, not on the basis of Defendant/Appellant's radio instruction which he only learned of later, but rather, because he was informed by third persons that a consignment for Omesangel was on the dock. Transcript of Evidence, Criminal Case No. 25-89, pgs 123, 124.

We need not consider Defendant/Appellant's additional assignments of error on the basis of our findings above.

We reverse the lower court judgement of guilt and remand this matter with the direction that a judgement of acquittal be entered by the Trial Division.