Omelau v. ROP, 3 ROP Intrm. 258 (1993)
NORMA OMELAU,
Plaintiff/Appellant,

v.

REPUBLIC OF PALAU,
Defendant/Appellee.

CRIMINAL APPEAL NO. 2-93
CRIMINAL CASE NO. 108-92

Supreme Court, Appellate Division
Republic of Palau

Decision and order
Decided: May 6, 1993

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice

Pursuant to ROP App. Pro. 9(b), appellant Norma Omelau has moved this Court for a stay of execution of sentence during the pendency of her appeal. Appellant's request for the same relief in the Trial Division was denied in a thorough opinion by Chief Justice Ngiraklsong, who tried the case and rendered the judgment from which she appeals. For the reasons set forth below, the motion is denied.

Although the matter is not free from doubt, the only two instances of which this panel is aware in which a stay of execution of sentence has been granted by the Appellate Division were based on findings that the underlying appeal "raised[d] substantial questions of law". *ROP v. Decherong*, ROP ⊥259 Intrm. 438 (1988); *ROP v. Tmetuchl*, 1 ROP Intrm. 296, 297, (1986).[1] As the Chief Justice's opinion explains, the "substantial question" test requires the Court to determine whether the question raises a substantial doubt or is a "close" question. As one court has put it, the issue is whether "the appeal could readily go either way, that it is a toss-up or nearly so". *U.S. v. Greenberg*, 772 F.2d 340, 341 (7th Cir. 1985).

Applying this test to the instant appeal, the Court finds that the requested stay should be

[1] *But see ROP v. Tmetuchl*, 1 ROP Intrm. at 302-04 (Order on Plaintiff/Appellee's Motion for Clarification and Petition for Rehearing). There, the same panel that granted a stay on the basis that a "substantial question of law" had been raised, suggested in what was arguably dicta that that standard applied only to civil appeals, *id.* at 302, and that criminal defendants need only show that their appeal was not "frivolous". *Id.* at 303-04. The confusion appears to stem from the fact that Fed. R. Crim. P. 46(c), on which Palau's correlative rule is based, draws its meaning from a U.S. statute which has no Palauan correlative and which has been substantially revised since Palau's rules were initially adopted. While it may be worthwhile for the full Court to consider whether this rule should be revisited and perhaps revised to provide greater clarity, this panel has determined to abide by the standard previously applied.

denied. Appellant's principal basis for appeal rests on the alleged insufficiency of the evidence upon which she was convicted and focuses in particular on the credibility of the key witnesses against her.[2] But as this Court has noted repeatedly, "[i]t is not ⊥260 the role of an appellate court to reweigh the evidence, test the credibility of witnesses, or draw inferences from the evidence. "*ROP v. Ngiraboi* , 2 ROP Intrm. 257 (1991). Rather, when faced with a challenge to the sufficiency of evidence, "the relevant question is whether after reviewing 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." *ROP v. Tuscano* , 2 ROP Intrm. 179, 180 (1990), quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979).

We do not question appellant's contention that there are extraordinary cases in which, even applying this very restrictive standard, the proper role of an appellate court is to reverse the trial court's credibility determinations and findings of fact. *See, e.g., ROP v. Tmetuchl* , 2 ROP Intrm. 443 (1988) (reversing convictions after finding that key prosecution witness was incredible as a matter of law). Nor do we foreclose the possibility that after a review of the full record, the appellate panel may conclude that this is indeed such a case. But while the appellant may be entitled to a "second look" at the evidence on appeal, that "second look" will be quite limited given the standard of review discussed above, and must of necessity be even more limited in the present posture where the full record is not yet before us.

In such circumstances, we are constrained to give great deference to the findings of the trial judge, including the Chief Justice's determination that the sufficiency vel non of the evidence against appellant does not raise a substantial ⊥261 question. *Cf. Gaag v. ROP* , 2 ROP Intrm. 197, 198 (1991) (role of appellate panel on motion for stay is "to review the findings of the trial court"); *Gaag v. ROP*, 2 ROP Intrm. 199, 200 (1991) (findings of trial judge on motion for stay binding unless "unreasonable or clearly erroneous"). That deference is not absolute, but on this motion we find that it is sufficient to deny appellant's motion. The affidavit submitted by appellant's trial counsel establishes, if anything, that the evidence at trial was conflicting and that the trial judge's determination depended on an assessment of that conflicting evidence. But it does not establish that the Chief Justice's decision to resolve that conflict against appellant was erroneous, much less that no rational factfinder could have done so. The issue is a legitimate one for appeal, but given the exacting standard that appellant must satisfy in order to prevail, it can hardly be called a "toss-up". [3] Appellant's motion for a stay of execution of sentence is accordingly denied.

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[2] In addition to arguing that the trial court's verdict was contrary to the weight of the evidence, appellant argues that the facts, even as found by the trial court, do not constitute voluntary manslaughter as a matter of law. This latter contention, while it may be pressed on the merits of appellant's appeal, was not presented to the trial court on appellant's motion for stay of execution and accordingly will not be considered on this appeal from the denial of that motion.

[3] Once again we emphasize that our decision is made without the benefit of a record for the purposes of this motion alone and is not intended in any way to foreclose a different result when the record is reviewed by a full panel on the merits of appellant's appeal.