ROP v. Sisior, 4 ROP Intrm. 152 (1994)
REPUBLIC OF PALAU
Plaintiff/Appellee,

v.

WAKAKORO SISIOR, and DEMEI TEMOL,
Defendants/Appellants

CRIMINAL APPEAL NO. 4-92
Criminal Case No. 337-91

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: March 8, 1994

Attorney for Appellant Sisior: Oldiais Ngiraikelau

Attorney for Appellant Temol: Johnson Toribiong

Attorney for Appellee: Nicolas Mansfield, Acting Attorney General

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

HOFFMAN, Justice:

Appellants Wakakoro Sisior and Demei Temol are appealing their July 27, 1992 conviction for fishing with explosives, in violation of 24 PNC § 1302(c). They raise three contentions on appeal: the insufficiency of the evidence to support their convictions, the denial of their right to a speedy trial, and the improper appointment of the Interim Special Prosecutor. We find no merit to these claims and accordingly affirm the judgment.

FACTUAL BACKGROUND

The fishing incident in question took place in the afternoon of December 24, 1989. Three police officers were on a police patrol boat near the small island of Metukerchewas in the vicinity ⊥153 of Macharchar Island in the Rock Islands, searching for someone they suspected of using a rifle to kill pigeons on the previous day. They noticed a boat that was stopped ("suspect boat"), later identified to be the one with appellants. The officers then observed the boat of the suspected pigeon hunter and gave chase, eventually catching up with him at the nearby island of Ngerchong. The officers searched the boat, found an air gun, and let him go.

The police then returned to the area of the suspect boat because they were suspicious of

its presence there. They approached to within twenty-five to fifty feet of the boat, which was now seventy-five yards from where they had first spotted it ten minutes earlier. They asked appellants what they were doing, and the latter responded that they were just watching birds. The officers left the area.

After the police had gone to the other side of the island, one of the officers informed his fellow officers that he had observed fish floating on the surface of the water near the suspect boat. They returned three to five minutes later to the area of the dead fish. The suspect boat was no longer in the area, but they did notice a boat speeding away, leaving a wake that led back to the area where the fish were found.

The police stopped and anchored their boat. They observed more than a hundred fish, including dead fish on the surface and others wounded and swimming erratically. The water was cloudy. Not having mask and fins, they went to borrow equipment from a nearby dive boat. The officers returned ten minutes later and ⊥154 proceeded to collect dead and dying fish, some floating and others submerged. The fish were fresh, with blood exuding from the gills. There were also recently cracked rocks or coral on the bottom. They noticed that the water started to clarify some fifteen to twenty-five minutes later. They placed the fish in a cooler and returned to Koror.

The fish were subsequently examined by Dr. Yuzi Mesubed at the MacDonald Memorial Hospital in Palau and by Guam's Department of Agriculture, Division of Aquatic and Wildlife Resources. Dr. Yuzi testified that the fish may have been killed by explosives, and the Guam agency found no evidence of dynamiting, but indicated that the cause of death is often difficult to determine if the explosive charge is small or distant from the fish.

PROCEDURAL HISTORY

The incident leading to the conviction in this case occurred on December 24, 1989. Appellants were arrested on January 2, 1989 and released, after signing a statement. On October 1, 1991, approximately twenty-one months later, the Interim Special Prosecutor filed an information charging them with fishing with explosives in violation of 24 PNC § 1302(c).

Appellants filed three pretrial motions to dismiss. The first two were for lack of speedy trial, in violation of Article IV, Section 7 of the Constitution, and for unnecessary delay in filing an information, in violation of ROP Crim. Pro. 48(b). The third was to dismiss the information because the Prosecutor had been improperly appointed, and to disqualify him from any further ⊥155 action. The court denied the first two motions on October 22, and the third on December 23, 1991. Appellants sought relief from these rulings by filing a petition for a writ of mandamus on January 15, 1992. The petition was denied on January 31.

On October 23, 1991 the court vacated its initial trial date of October 28, 1991, with a new date to be set upon the court's decision on the motions. The court's order stated: "Counsel are to submit suggested dates for trial to the court." Appellants did not submit a suggested date. The Prosecutor filed a motion requesting a trial date on February 12, 1992. At a hearing on

February 21, all parties agreed to proceed to trial on April 16, 1992. The trial took place as scheduled, and appellants were convicted on the same day.

Appellant Sisior was sentenced on July 27, 1992 to two years probation and a $2,000 fine. The execution of all but the fine was subsequently stayed pending appeal. Appellant Temol was sentenced on August 12 to two years imprisonment, with all but the first six months suspended, and was fined $2,000. Temol's sentence was stayed as to the imprisonment pending appeal.

DISCUSSION

I. Sufficiency of the Evidence

Appellants challenge the sufficiency of the evidence to convict them, emphasizing the circumstantial nature of the evidence. They point out that no explosive devices or fragments were found; no explosion was heard nor tremor felt; the police did not notice any illegal, improper, or unusual activity the first two ⊥156 times they saw appellants' boat; and that the cause of the death of the fish was never established.

It is axiomatic that this Court will not set aside findings of fact by a trial court unless they are clearly erroneous. 14 PNC § 604(b); *ROP v. Chisato* , 2 ROP Intrm. 227, 237-38 (1991). *Chisato* articulated four factors for reviewing attacks upon the sufficiency of the evidence resulting in a conviction in criminal cases: (1) the evidence is to be viewed in the light most favorable to the prosecution; (2) the conviction must be supported by sufficient competent evidence (i.e., whether any rational trier of fact, after viewing the evidence in the light most favorable to the prosecution, could have found the essential elements of the crime beyond a reasonable doubt); (3) direct and circumstantial evidence are equally valid (a crime may be proved beyond a reasonable doubt by purely circumstantial evidence, which may be as satisfactory as direct evidence and even outweigh it); and (4) deference should be given to the court's opportunity to hear witnesses and observe their demeanor. Id. at 239-40.

Appellant Sisior cites a previous case, *ROP v. Kikuo* , 1 ROP Intrm. 254 (1985), for the proposition regarding circumstantial evidence that "if more than one reasonable inference may be drawn from the proved facts, and one points to guilt and the other to innocence, the latter must be accepted." Id. at 256. We reject the implication that this language creates a different standard of review for this Court. On appeal the issue regarding findings of fact is always whether they are clearly erroneous, regardless of ⊥157 whether they are based on direct or circumstantial evidence. As the Court in *Kikuo* noted, "Where the verdict in a criminal case is based solely upon circumstantial evidence and the finder of fact has, by its judgment, rejected any inferences pointing to innocence, if such exist, and evidence is present pointing to guilt, the Appellate Court is bound by such findings." Id. at 257.

In the instant case, it is clear that the evidence is sufficient to sustain the conviction. Appellants were the only ones near the location where the dead fish were found. The concentration of dead and dying fish, the recently-cracked coral underneath, and the cloudiness

of the water and subsequent clearing show that an explosion had recently taken place and implicate the appellants as the ones who caused that explosion.

Appellants concede that the facts are consistent with the Government's theory and that the hasty flight from the scene is a further indicium of guilt. Appellants' denials of guilt at trial were obviously not credited by the trial judge, who had an opportunity to listen to their testimony and observe their demeanor. While much of the evidence is admittedly circumstantial, *Chisato* makes clear that such evidence is as valid as direct evidence, a general principle which gains all the more force in a case such as this where the evidence points so unequivocally to appellants' guilt and is so inconsistent with any other theory. We hold that the court's findings of fact leading to the conviction in this case were not clearly erroneous.

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II. Speedy Trial

Appellants were arrested and released on January 2, 1990; charged in an information twenty-one months later on October 1, 1991; and tried six and a half months later on April 16, 1992. They argue that they were denied their right to a speedy trial under Article IV, Section 7 of the Palau Constitution; 18 PNC § 802; and ROP Crim. Pro. 48(b). The statute and Rule of Criminal Procedure provide that if there is unnecessary delay in bringing a defendant to trial, the court "may" dismiss the information or complaint. A motion for dismissal made pursuant to these provisions, absent a constitutional violation, is addressed to the discretion of the trial court, and unless it is shown that the court abused this discretion, the court's determination will not be disturbed on appeal. It follows, therefore, that the brunt of appellants' argument must be borne by the constitutional argument.

This Court has explicated the right to a speedy trial in *ROP v. Decherong*, 2 ROP Intrm. 152, 163-66 (1990). In that case we recognized that the right is an important safeguard, but also noted that the right is relative to the circumstances of the case and permits certain delays. Id. at 164. We also embraced the four-part balancing test developed by the United States Supreme Court in *Barker v. Wingo*, 92 S.Ct. 2182, 2186-95 (1972); the components to be considered are the length of the delay, the reasons for the delay, the defendant's assertion of his right to a speedy trial, and the prejudice to the defendant. *Decherong*, 1 ROP Intrm. at 164.

⊥159 The first issue that we must address in the instant case is when the right to a speedy trial attaches. Six months prior to *Barker*; the Supreme Court of the United States stated that "it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." *United States v. Marion*, 92 S.Ct. 455, 463 (1971).

In the present case, however, the appellants were arrested and then released without the imposition of either further restraints on their liberty or formal charges being filed against them; an information was not filed until twenty-one months later. Inasmuch as appellants were released promptly after their arrest and were not subjected to any further restraint, we hold that their right to a speedy trial was not triggered until the information was filed against them. [1]

[1] Appellants did not raise, and we consequently need not decide, the issue of when a

Accord, *United States v. Stead*, 745 F.2d 1170, 1172 (8th Cir. 1984),[2] and cases cited therein; see also *United States v. MacDonald*, 102 S.Ct. 1497, 1501-02 (1982).

We now turn our attention to the six and a half month delay ⊥160 between the filing of the information and the trial. Under the *Barker* analysis adopted by the *Decherong* Court, "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." 92 S.Ct. at 2192. In *Decherong*, the Court held a seventeen-month delay not to be violative of the defendant's right to a speedy trial. 2 ROP Intrm. at 163-66.

We find that the six and a half month delay between the filing of the information and the trial in the present case is not presumptively prejudicial. We hold, therefore, that there was no violation of appellants' constitutional right to a speedy trial, and the trial court did not abuse its discretion by denying their motions to dismiss under 18 PNC § 802 and ROP Civ. Pro. 48(b).

III. Appointment of the Interim Special Prosecutor

Appellants contend that the appointment of the Interim Special Prosecutor by the Assistant Secretary for Territorial Affairs violated Article VIII, Section 7, Subsection 3 of the Palau Constitution and 2 PNC § 501. They argue that, as a consequence of this violation, the Interim Special Prosecutor should have been disqualified and the case dismissed. The constitutional section that Appellants rely upon grants the President of Palau the power to appoint national officers. Title 2, Section 501 of the Palau National Code creates the Office of the Special Prosecutor for the Republic of Palau, to be filled by the President or, in specified circumstances, the Olbiil Era Kelulau.

⊥161 David Webster, the Interim Special Prosecutor in this case, was not appointed by the President or the OEK, but rather by Stella Guerra, Assistant Secretary of the United States Department of Interior for Territorial and International Affairs, pursuant to Section 4 of Secretarial Order 3142, which provides: "The Assistant Secretary may assist the government of Palau in locating a special prosecutor and a public auditor, as needed, and in the event of a vacancy may appoint a special prosecutor or public auditor, as the case may be, on an interim basis."

Appellant's constitutional challenge to this appointment fails to recognize that any potential conflict between our Constitution and Secretarial Orders has been averted by Article XV, Section 10 of the Constitution: "Any provision of this Constitution or a law enacted pursuant to it which is in conflict with the Trusteeship Agreement between the United States of America

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delay in filing an information can be so oppressive as to constitute a violation of due process of law under ROP Constitution, Article IV, Section 6. See *United States v. Lovasco*, 97 S.Ct. 2044, 2048-52 (1977). In the instant case, we note that there is no evidence in the record of either actual prejudice or improper reasons for the delay.

[2] The *Stead* case was decided on the basis of the Speedy Trial Act, 18 U.S.C. §§ 3161-74. However, the Court considered the Sixth Amendment to be relevant to its analysis because the Act was enacted to give meaning to the constitutional right. 745 F.2d at 1171.

and the United Nations Security Council shall not become effective until the date of termination of such Trusteeship Agreement." See *In the Matter of the Application of Won and Song* , 1 ROP Intrm. 311, 314 (Tr. Div. 1986) (finding Palau still subject to the administrative authority of the United States). Article III of the Trusteeship Agreement vests the United States with "full powers of administration, legislation, and jurisdiction over the territory." Sections 1 and 2 of United States Executive Order No. 11021 delegate the power to administer the Trust Territories to the Secretary of the Interior or such other Interior Department officers and employees that the Secretary may designate. It is clear, then, that the Assistant ⊥162 Secretary, in her capacity as administrator of the Trusteeship Agreement, had the authority to appoint an Interim Special Prosecutor without running afoul of the Constitution or the special prosecutor statute enacted pursuant to it.

CONCLUSION

There is substantial evidence to support the conviction. Appellants were not denied a speedy trial because the delay was not triggered for constitutional purposes until the filing of the information, and the subsequent delay was not presumptively prejudicial. Finally, the Interim Special Prosecutor was lawfully appointed by the Assistant Secretary of the Interior. The judgment of the Trial Division is hereby AFFIRMED.