Ngirengkoi v. ROP, 8 ROP Intrm. 41 (1999)

RHODAS NGIRENGKOI,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 2-97
Criminal Case No. 131-96

Supreme Court, Appellate Division
Republic of Palau

Argued: August 16, 1999
Decided: September 27, 1999

Counsel for Appellant: Marvin Hamilton

Counsel for Appellee: John Rice, Assistant Attorney General

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

MICHELSEN, Justice:

In this criminal appeal, Appellant Ngirengkoi is challenging 17 PNC Section 2806, Palau's indecent assault statute, as unconstitutionally vague. The Trial Court rejected his vagueness argument below. We affirm.

I. BACKGROUND

Ngirengkoi, a forty-three year old man, was charged by information with three counts each of child abuse, assault and battery, and indecent assault. At the time of trial, the charges had been reduced to two counts of indecent assault.

The government presented evidence at trial that would permit the following factual findings. The victim, a twelve-year old student at Koror Elementary School (hereinafter "the student"), knew Ngirengkoi because he lived next to her grandmother's house. In late March 1996, Ngirengkoi drove his taxicab up to the school during lunchtime and waved at the student to come over. She went to the taxi, got in, and he took her to the SDA church parking lot. When they stopped there, he adjusted the car seat so that it was leaning back and then touched her breasts and her vagina outside of her clothes. She pushed his hands away and asked to be taken back to school. Ngirengkoi dropped her off at school and gave her pocket change totaling roughly one dollar.

Again on April 15, 1996, Ngirengkoi drove his taxi to the school and motioned for the student to come to the cab and get in. She complied and Ngirengkoi drove her to the old dental clinic parking office near the school. There he kissed her face and, as before, touched her breasts and vagina outside of her clothes. Afterward, he gave her a few dollars and allowed her to leave the car.

On these facts, the Trial Division convicted Ngirengkoi of two counts of indecent assault under 17 PNC Section 2806, which provides that:

> Whoever takes indecent and improper liberties with the person of a child under the age of 14 years without committing or intending to commit the crime of rape or carnal knowledge shall be imprisoned for not more than five years.

⊥42 The Trial Division denied Ngirengkoi's motion to dismiss on vagueness grounds. Ngirengkoi argues here that this ruling was in error.

II. ANALYSIS

The single issue on appeal is whether, as a matter of law, the challenged statute is unconstitutional. Ngirengkoi claims that the term "indecent and improper liberties" in the statute is vague and thereby violates the Due Process Clause of Article IV, Section 6 of the Constitution and his right to be informed of the nature of the accusation against him guaranteed in Article IV, Section 7.

We note initially that a legislature is presumed to intend to pass a valid act, and that a law should be construed to sustain its constitutionality whenever possible. *Yalap & Maidesil v. ROP*, 3 ROP Intrm. 61, 66 (1992). Nonetheless, vagueness may make a criminal statute unconstitutional if it fails to "adequately inform[ ] potential offenders of the proscribed conduct." *Ngemaes v. ROP*, 4 ROP Intrm. 240, 255 (1994). This is the same standard used in the United States.

> It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.

Giaccio v. Pennsylvania , 86 S. Ct. 518, 520-521 (1966). However, this principle does not invalidate every statute that a reviewing court believes could have been drafted with greater precision. *Rose v. Locke* , 96 S. Ct. 243 (1975). "Many statutes will have some inherent vagueness . . . and even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid." *Id.* at 244.

The expression "indecent and improper liberties" is a common statutory term found in

state statutes in the United States. This Court has said that "where the courts of Palau face an issue of first impression, it is wholly proper, and indeed prudent, to tap the analytical resources that are available in the bodies of law developed elsewhere." *Ngiraked v. ROP* , 5 ROP Intrm. 159, 169 (1996); *see also Blailes and Wasiang v. ROP* , 5 ROP Intrm. 36, 39 (1994); *Intercontinental Trading Co. v. Johnsrud* , 1 ROP Intrm. 569, 571 (1989); *Ramon v. Umedib* , 1 ROP Intrm. 564, 565 (1989); and *Akiwo v. Supreme Court*, 1 ROP Intrm. 96, 99 (1984).

Several American cases have considered the constitutionality of statutes criminalizing the taking of "indecent liberties" with children, and none have concluded that the term is vague. [1] *See Sorensen v. State*, 604 P.2d 1031 (Wyo. 1979); *Commonwealth v. Smith,* 324 A.2d 483 (Pa.Super. 1974); *State v. Roberts* , 421 P.2d 1014 (Wash. 1966); *State v. Hoffman* , 2 N.W.2d 707 (Wis. 1942); *State v. Macmillan* , 145 P. 833 (Utah 1915); and ⊥43 *Delekt v. People* , 99 P. 330 (Colo. 1908). Similarly, one court has upheld a statute criminalizing "indecent handling or touching" of children, finding that the term is sufficiently precise when measured by common understanding to give adequate warning of the denounced conduct and to meet constitutional standards of certainty. *State v. Minns*, 454 P.2d 355 (N.M. App. 1969). We find these authorities persuasive, and hold that 17 PNC § 2806 is not unconstitutionally vague.

We reach the same result using Palau's rules of statutory construction. Statutory terms are to be "interpreted according to the common and approved usage of the English language." 1 PNC § 202. Turning to Webster's Dictionary, we note that taking liberties is defined as "unwarranted or impertinent freedom in action or speech." *Webster's College Dictionary* , 781 (Random House 1996). Improper is defined as "not in accordance with propriety," *id.* 677, and indecent as "offending standards of morality or propriety." *Id.* 682. Admittedly these definitions, taken together, can apply to a wide range of specific acts. However, this is not fatal. Many crimes, such as aiding and abetting, attempt, conspiracy, contempt, cheating by false pretenses, misconduct in public office, and maintaining a nuisance (to name some of the more obvious examples) cover a wide range of acts. The statutory language of such crimes need not be considered unconstitutionally vague if it is possible to determine what particular acts are prohibited.

Most importantly as it relates to this case, vagueness challenges to statutes not involving free speech issues must be examined in light of the facts of the case at hand. *United States v. Mazurie*, 95 S. Ct. 710 (1975). "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Hoffman Estate v. Flipside, Hoffman Estates, Inc.,* 102 S. Ct. 1186, 1191 (1982). We have no trouble concluding that Ngirengkoi's conduct is proscribed as "indecent and improper liberties." Ngirengkoi twice took a twelve-year old girl in his taxi, parked the car, touched her breasts and vagina and paid her a small amount of money afterward. These facts, and the challenged statute, are nearly identical to those in *Sorensen*, 604 P.2d at 1035, where the court concluded that a person of ordinary intelligence would have known that

[1] The United States Supreme Court has not reviewed the issue; however, it has upheld statutes criminalizing "crimes against nature." *See Rose v. Locke*, 96 S.Ct. 243 (1975); *Wainwright v. Stone*, 94 S.Ct. 190 (1973).

rubbing a twelve-year old girl's breasts on the outside of her clothes and attempting to unbutton her shirt were both acts of indecent liberties. We find the same.

Ngirengkoi cites only one case that invalidates an "indecent liberties" statute. In *State v. Conley*, 531 P.2d 36 (Kan. 1975), the court struck down a statute that defined "indecent liberties" with a child under the age of sixteen as "[a]ny fondling or touching of the person of either the child or the offender done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender or both." The *Conley* court held that this definition was unconstitutionally vague. It did not hold, as Ngirengkoi urges, that the term "indecent liberties" was vague. To the contrary, the court strongly suggested that if that term had been made part of the definition of the crime, ⊥44 and not merely the name of the offense, [2] the vagueness problem would have been cured. *See* 531 P.2d at 39 ("The point is, the particular name or label of an offense cannot logically be used to bootstrap a statutory definition otherwise lacking in specificity"). Thus, *Conley* has no application here.

Accordingly, we hold that the statute is not unconstitutionally vague and hereby affirm Appellant's convictions.

[2] Reading the statute in the context of the state's new criminal code, the court found that "'indecent liberties with a child' is simply the name or the label given by the statute to the conduct sought to be prohibited." *Id.* at 536. It noted that while "[t]he elements of each crime are spelled out after mention of the particular name or label," the "terms 'indecent' or 'indecent liberties' are not mentioned in the definition of the offense under scrutiny here." *Id.*