

Polloi v. ROP, 9 ROP 57 (2002)
NGIRAILALS POLLOI,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 01-06
Criminal Case No. 00-378

Supreme Court, Appellate Division
Republic of Palau

Decided: February 27, 2002

[1] **Appeal and Error:** Record

Rules of Appellate Procedure require the appellant to designate the trial transcript portion it believes necessary for the record on appeal upon filing of a notice of appeal.

[2] **Appeal and Error:** Record

Generally, the Court would not permit an appellant to supplement the record after both parties had filed their briefs, but where the appellee agreed to expand the record, the time period for the appellee to complete or correct the record on appeal can be considered reset.

[3] **Criminal Law:** Defenses; Instructions

A refusal to give an instruction on the heat of passion defense must not only be erroneous but also, as a result of the error, the special judges' understanding of the issues must be seriously affected to the prejudice of the complaining party.

[4] **Criminal Law:** Instructions

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Prejudice to a party from the erroneous failure to give a heat of passion instruction is shown when considering all the instructions, the evidence, and the arguments, it appears that the special judges were misled or did not have a sufficient understanding of the issues and their duty to determine them.

[5] **Appeal and Error:** Record

Because the Appellate Division is required to examine all the evidence in order to determine whether the alleged error was prejudicial, the designation of the entire trial transcript as part of

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the record on appeal is necessary.

BEFORE: LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice; KATHLEEN M. SALII, Associate Justice.

The Republic of Palau has moved to designate the entire trial transcript of this criminal case as part of the record on appeal. In response, Ngirailals Polloi has moved to strike the Republic's request and has also moved for sanctions. For the foregoing reasons, we grant the Republic's motion and deny Polloi's motions.

After filing a notice of appeal in this case, Polloi timely designated the record on appeal, including portions of the trial transcript, pursuant to ROP Rules of Appellate Procedure 10(a) and (b). Polloi subsequently filed his opening brief, and the Republic filed its response. On January 30, 2002, even though the time for designating the record on appeal had expired and both parties had filed their briefs, Polloi "stipulated" that a transcription of his own testimony be added to the record on appeal. The Republic did not object to the "stipulation," but instead requested that the entire trial transcript be included because it thought such designation necessary. Polloi then filed the instant motions to strike the Republic's request for the entire transcript and for sanctions based on the request.

[1, 2] The posture of Polloi's motions is unusual. Under ROP Rule of Appellate Procedure 10(b), the appellant designates the trial transcript portions that it believes necessary for the record on appeal "[u]pon filing a notice of appeal." ROP R. App. Pro. 10(b). Generally, the Court would not permit the appellant to supplement the record at such a late date, particularly after both parties had filed their briefs. Nevertheless, it appears that the Republic agreed to expand the record to include the transcript of Polloi's testimony, and so the time period the Rules allow for the Republic to either complete or correct the record on appeal could be considered reset. Pursuant to ROP Rule of Appellate Procedure 10(c), if an appellant requests that only a portion of the trial transcript be introduced on appeal, the appellee may, if the appellee deems necessary and within twenty days of the appellant's designation, request that additional testimony be included in the record on appeal. *See* ROP R. App. Pro. 10(c). Accordingly, the Republic's request is both permissible and timely under Rule 10(c), and thus Polloi's motion to strike and motion for sanctions are denied.

Furthermore, we believe that for us to meaningfully review the case at hand, we must examine the whole trial court record, but not for the reason proffered by the Republic in its motion for designation. On appeal, Polloi mainly argues that the Trial Division erred in refusing to instruct the special judges that the Republic had the burden of proving the absence of heat of passion on sudden provocation. The Republic contends in its motion for designation that the entire transcript is necessary in order to determine **159** whether Polloi sufficiently raised a heat of passion defense to warrant the requested instruction. We note, however, that the entire transcript would not be necessary for us to review whether Polloi sufficiently raised a heat of passion defense at trial; if the issue was presented during the defendant's testimony, as claimed by Polloi, its existence cannot be negated by other portions of the trial transcript.

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[3-5] Regardless, the primary case which Polloi relies upon in his appeal, *Sadao v. ROP*, 5 ROP Intrm. 250, 254-55 (1996), requires Polloi to demonstrate not only that the trial court's refusal to give the "heat of passion" instruction was erroneous, but also that as a result of the alleged error, "the [special judges'] understanding of the issues was seriously affected to the prejudice of the complaining party." *Id.* (citations and internal quotations omitted). Prejudice is shown when "considering *all* the instructions, the evidence and the arguments that the [special judges] heard, it appears that [the special judges were] misled or did not have a sufficient understanding of the issues and [their] duty to determine them" *Id.* at 254 (citations and internal quotations omitted) (emphasis added). As the Court is to examine *all* the evidence in order to determine whether the alleged error was prejudicial, the designation of the entire trial transcript as part of the record on appeal is necessary. We therefore grant the Republic's Motion for Designation.