Kumangai v. ROP, 9 ROP 79 (2002)
MARIUR KUMANGAI,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 00-03
Criminal Case No. 99-258

Supreme Court, Appellate Division
Republic of Palau

Argued: March 22, 2002
Decided: April 3, 2002

[1] **Criminal Law:** Sufficiency of the Evidence

The Appellate Division reviews the sufficiency of the evidence to determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements on the crime beyond a reasonable doubt.

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

Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous, even if the appellate judges believe that they would have decided the case differently had they been the finders of fact.

[3] **Appeal and Error:** Standard of Review; **Evidence:** Appeal

A trial court's decisions concerning the admission of evidence are reviewed for abuse of discretion.

[4] **Evidence:** Chain of Custody
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Gaps in the chain of custody of an item go to the weight it ought to be accorded once in evidence, not its admissibility, so long as the trial judge is satisfied that there is a reasonable probability that the item to be introduced has not been altered in any material respect.

[5] **Evidence:** Chain of Custody

Even where tampering is alleged, the proponent need only show that reasonable efforts were taken against the risk of alteration, contamination, or adulteration of the item being offered into evidence.

[6] **Constitutional Law:** Due Process

In determining whether a criminal defendant's due process rights have been violated by the government's failure to disclose impeachment evidence, the Appellate Division must ask whether, but for the failure to disclose, the outcome of the proceeding below would have been different.

[7] **Evidence:** Admissibility

For the purposes of identifying drugs at trial, absolute metaphysical certainty is not the requisite standard, but rather whether there is enough evidence in the record to support the conclusion.

[8] **Evidence:** Reliability

GCMS and FTIR are recognized as reliable by the scientific community and by courts in the United States for the purposes of determining whether a substance is methamphetamine.

[9] **Evidence:** Admissibility

Where Appellant's theory that evidence was tampered with or is not the same evidence taken from the defendant is based on nothing more than conjecture and argument, and where there is extensive evidence concerning the chain of custody, the record is perfectly capable of supporting trial court's decision to admit the evidence.

[10] **Appeal and Error:** Clear Error; Standard of Review

The Appellate Division gives deference to the Trial Division's opportunity to assess the credibility of witnesses.

[11] **Constitutional Law:** Due Process

A due process violation occurs only where the withheld evidence is material to the issue of a defendant's guilt or punishment.

[12] **Constitutional Law:** Due Process

Evidence is material only if there is a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome, that had the evidence been disclosed to the defense, the result of the proceeding would have been different.

[13] **Appeal and Error:** Standard of Review; **Criminal Law:** Duty to Disclose; Informants

To reverse a trial court's decision on the type of remedy to be imposed for a violation of the duty

to disclose, the Appellate Division requires a clear showing of prejudicial abuse of discretion.

[14] **Constitutional Law:** Due Process; **Criminal Law**: Duty to Disclose, Informants

Government's failure to disclose confidential informant's counterfeiting activities not a due ⊥81 process violation where defendant was already in possession of significant impeachment material about the confidential informant.

Counsel for Appellant: Yukiwo Dengokl

Counsel for Appellee: C. Quay Polloi at oral argument; Steven Carrara on the brief

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; J. UDUCH SENIOR, Associate Justice Pro Tem.

Appeal from the Supreme Court, Trial Division, the Honorable R. BARRIE MICHELSEN, Associate Justice, presiding.

SENIOR, Justice:

Mariur Kumangai (hereinafter "Appellant") appeals from his methamphetamine trafficking conviction and his sentence of 25 years' imprisonment and a $50,000 fine. Specifically, he argues that there was insufficient evidence to convict him, that the government failed to demonstrate an adequate chain of custody over a crucial piece of evidence to warrant its admissibility, and that his constitutional and statutory rights were violated by the government's failure to disclose potential evidence to him. Although we are concerned by some of the police and prosecutorial practices on display in this case, for the reasons stated below, we affirm.

BACKGROUND

On August 30, 1999, using the assistance of a confidential informant, identified at trial as Rihart Rechirei (hereinafter "Rechirei" or "the CI"), Narcotics Officers Felix Francisco and Harline Stark made a controlled buy of methamphetamine from Appellant. According to Rechirei's trial testimony, he had made several calls to Appellant about the purchase of methamphetamine prior to that date, and Appellant called him back on August 30, 1999, to inform the CI that he (Appellant) had the drugs. The CI, who had previously been arrested for trafficking methamphetamine and who had cut a deal with Appellee to act as an informant to avoid further adverse personal consequences, then informed Detective Francisco of Appellant's statements. Detective Francisco subsequently met with Rechirei and gave him $600 to execute the drug buy and a micro-cassette recorder to tape the transaction. The CI then called Appellant to arrange a meeting, which took place at the CI's workplace, known as Klubed.

At Klubed, the CI gave the $600 to Appellant and was told that Appellant would deliver the methamphetamine to the CI at the CI's residence. This conversation was captured on the tape

recorder the police had given the CI.[1] The CI, followed by the officers, then went to his house to await Appellant. At some point later, Appellant arrived, the CI (after being woken up by the officers' throwing rocks on his roof) came out, the two spoke, and the officers observed Appellant hand something to the CI. Upon searching the CI, the officers found that the object was a red lighter, with the initials MK on it, affixed by tape to a straw containing a ⊥82 white, crystal-like substance. At trial, Rechirei testified that this was indeed what Appellant had given him. The officers took the package back to the Narcotics Office, weighed it, and field tested it. The test indicated that the substance in the straw was methamphetamine. There was significant confusion at trial, however, over the quantity of methamphetamine contained in the straw. Testimony and documentary evidence revealed that, at various points, the weight of the substance was recorded as 1.9, 1.5, 1.3 and 1.0461 grams. That last weight reading was taken in Guam, where the substance was sent for more accurate scientific testing. There, Guam Police Department Officer Monica Ada conducted a Marquis Reagent color test, which indicated a presumptive positive result for amphetamine. Ada then performed a Gas Chromatograph Mass Spectrometer (hereinafter "GCMS") and a Fourier Transform Infrared Spectrometer (hereinafter "FTIR") test, each of which confirmed that the substance was indeed methamphetamine hydrochloride.

After learning of the results of the Guam tests, police in Palau obtained a search warrant for Appellant's house and car. The execution of that warrant turned up glass pipes used to smoke methamphetamine in both locations, as well as various paraphernalia consistent with the packaging of methamphetamine for sale (small scissors, straws, a propane tank). Appellant was tried thereafter, and was convicted on May 3, 2000. This appeal followed.

STANDARD OF REVIEW

[1, 2] The Appellate Division's review of the sufficiency of the evidence to support a conviction is very limited. It focuses only on "the question whether, after viewing 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." *Ngiraked v. ROP* , 5 ROP Intrm. 159, 173 (1996). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *ROP v. Chisato* , 2 ROP Intrm. 227, 239 (1991) (citations omitted). So long as two such interpretations are permissible, reversal is inappropriate even if the appellate judges believe that they would have decided the case differently had they been the finders of fact. *Minor v. ROP*, 5 ROP Intrm. 1, 3 (1994).

[3-5] A trial court's decisions concerning the admission of evidence are reviewed for abuse of discretion. *Ngiraked*, 5 ROP Intrm. at 167; *see also United States v. Harrington* , 923 F.2d 1371, 1374 (9th Cir. 1991) (citing *United States v. Black* , 767 F.2d 1334, 1342 (9th Cir. 1985)). Gaps in the chain of custody of an item go to the weight it ought to be accorded once in evidence, not

[1]The tape was apparently misplaced by the government prior to trial and neither the tape nor any transcript was provided to Appellant. At trial, and over Appellant's objections, the CI and law enforcement officers who had listened to the tape testified about its contents. After trial and after this appeal was filed, the tape was found in a desk drawer in the Narcotics Office during an inventory that was conducted after a break-in there.

its admissibility, so long as the trial judge is satisfied that there is a reasonable probability that the item to be introduced has not been altered in any material respect. *See King v. ROP*, 6 ROP Intrm. 131, 140 (1997); *United States v. Gelzer* , 50 F.3d 1133, 1140-41 (2d Cir. 1995); *United States v. Robinson*, 967 F.2d 287, 291-92 (9th Cir. 1992). Even where tampering is alleged, the proponent need only show "that reasonable efforts were taken against the risk of alteration, contamination or adulteration" of the item being offered into evidence. *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1155 (5th Cir. 1981).

[6] In determining whether a criminal defendant's due process rights have been violated by the government's failure to disclose impeachment evidence, the Appellate Division must ask whether, but for the failure to disclose, the outcome of the proceeding ⊥83 below would have been different. *Ngiraked*, 5 ROP Intrm. at 172 and n.9.

ANALYSIS

I. The Sufficiency of the Evidence

Appellant points to three purported shortcomings in support of his claim that the evidence adduced at trial was legally insufficient to support his conviction: a) that the alleged controlled substance was not established beyond a reasonable doubt to be methamphetamine; b) that the government failed to prove that the substance admitted into evidence against Appellant was the same substance that Appellant delivered to the CI; and c) that the testimony of Appellee's witnesses was so riddled with inconsistencies and internal contradictions as to be wholly incredible. But none of these arguments – singly or together – holds water.

[7, 8] Appellant makes much of the fact that his counsel elicited from Monica Ada (the officer who conducted the drug testing in Guam) that there were other scientific tests that she could have conducted to determine the chemical composition of the substance. Appellant also argues that Ada's testimony indicates that she only determined that the substance was similar but not necessarily identical to methamphetamine. But absolute metaphysical certainty is not the requisite standard. *See, e.g.* , *United States v. Hicks* , 103 F.3d 837, 846 (9th Cir. 1996). The relevant question, rather, is whether there is enough evidence in the record to support the conclusion that the substance was indeed methamphetamine. A full review of Ada's testimony is sufficient to answer this question in the affirmative. Moreover, the tests Ada performed are recognized as reliable by the scientific community and courts in the United States. *See, e.g.* , *United States v. Bynum* , 3 F.3d 769, 773 (4th Cir. 1993) (GCMS reliable); *United States v. McCaskey*, 9 F.3d 368, 379-80 (5th Cir. 1993) (FTIR reliable). The Trial Court's conclusion to this effect, therefore, cannot be clearly erroneous. *See Ngirarorou v. ROP* , 8 Intrm. 136, 139 (2000).

The Trial Court's finding that the methamphetamine introduced against Appellant at trial, which was marked as Exhibit 1, was the same methamphetamine that Appellant delivered to the CI is similarly justifiable. Appellant points to two problems with Exhibit 1. First, he argues that various discrepancies in the recorded weight of the substance undermine the Trial Court's ability to have confidence in the provenance of the exhibit. Second, Appellant points out that when the

substance given by Appellant to the CI was sent to Guam for scientific testing, it was included with other suspected methamphetamine samples, one of which had the same weight – 1.9 grams – as that which was originally recorded for the substance that Appellant delivered to the CI on August 30, 1999. Appellant suggests that this latter fact indicates that the substance Appellant delivered to the CI somehow got switched, and that Exhibit 1 is not connected to Appellant. Consequently, Appellant argues, there are such significant doubts about the identity of the substance as to preclude the Trial Court, as a matter of law, from properly concluding that Exhibit 1 was the same item that Appellant delivered to the CI on August 30, 1999.

[9] Given the inconsistencies in the recorded weights and the sometimes uncertain or contradictory testimony of various witnesses, Appellant's theory is not a patently implausible one. Nevertheless, there is extensive evidence in the record concerning the chain of custody over the methamphetamine from the time it was ⊥84 delivered by Appellant to the CI until it was introduced at trial. Moreover, Appellant ultimately presents nothing beyond conjecture and the argument of counsel to suggest that Exhibit 1 was tampered with or is otherwise not the same controlled substance delivered by Appellant to the CI. The record is therefore perfectly capable of supporting the conclusion reached by the Trial Judge.

[10] Appellant also argues that the inconsistencies in the trial testimonies of witnesses Francisco, Stark and Rechirei, and the obvious motive Rechirei had to lie (to save his own hide, as Appellant puts it), render their testimony so unreliable as to be uncreditable. But this kind of reweighing is precisely what it is *not* the job of the Appellate Division to do. As the *Chisato* Court stated:

> [W]hen the Appellate Division determines a challenge to the sufficiency of the evidence in a criminal case, is [sic] shall ascertain whether the conviction is clearly erroneous by viewing the evidence of record in the light most favorable to the prosecution, *giving deference to the Trial Division's opportunity to assess the credibility of the witnesses* . . . .

Chisato, 2 ROP Intrm. at 240 (emphasis added). While the Trial Division may have had adequate grounds to decide that the testimony of the witnesses identified by Appellant was not credible, the record reflects that those witnesses substantially corroborated each other on the most salient points in the case. Thus the trial court's reliance on the testimony of these witnesses in its conviction of Appellant cannot be said to have been clearly erroneous.

II. The Chain of Custody

Appellant argues that the trial court erred by admitting Exhibit 1 into evidence in light of Appellee's failure to demonstrate an adequate chain of custody over it. Generally, as noted above, gaps in the chain of custody go to the weight to be given a piece of evidence rather than its admissibility. *Davidson Oil Country Supply, Inc. v. Klockner, Inc.* , 908 F.2d 1238, 1247 (5th Cir. 1990). Moreover, so long as the proponent of an exhibit can show that reasonable precautions have been taken against the alteration of or tampering with an item, then even concerns about actual alteration/tampering go to the weight rather than the admissibility of the

evidence. *Ballou*, 656 F.2d at 1155. Appellant points to the discrepancies in the reported weight of Exhibit 1 as indicative that the exhibit was tampered with or is otherwise not the substance given by Appellant to the CI on August 30, 1999, and should therefore not have been admitted. But at the trial, witnesses Ada, Francisco, Stark and former officer Gabriel Anastacio together described an unbroken chain of custody, one in which reasonable precautions were taken to secure the item introduced as Exhibit 1 from the time Appellant made his delivery to the CI to the time Exhibit 1 was introduced into evidence. Consequently, the trial court did not err in admitting Exhibit 1.

III. The Loss of the CI Tape

[11, 12] Appellant argues that reversal is also required by virtue of Appellee's failure to disclose the CI's tape prior to trial on the ground that this failure violated his due process rights. Appellant does not make clear exactly *how* this failure violated his due ⊥85 process rights, but we read his argument as making a claim under the principles of *Brady v. Maryland* , 83 S. Ct. 1194 (1963), the central holding of which was adopted by the Appellate Division of this Court in *Ngiraked v. ROP*, 5 ROP Intrm. at 172. Fundamental to *Brady* is the principle that a due process violation occurs only where the withheld evidence is "material" to the issue of a defendant's guilt or punishment. *Id.* (citing *Brady*, 83 S. Ct. at 1196-97). As the United States Supreme Court has explained, evidence is "material" in the *Brady* context only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 105 S. Ct. 3375, 3383 (1985); *see also Ngiraked*, 5 ROP Intrm. at 172. Appellant has failed to demonstrate the existence of such a reasonable probability, and thus his due process rights were not violated by Appellee's non-disclosure.

[13] Although not clearly articulated, Appellant also appears to argue that reversal is warranted because the trial court abused its discretion by failing to order either a mistrial or the striking of the CI's testimony as a remedy for Appellee's violation of ROP Rule Criminal Procedure 26.2. But Appellant is wrong. As Appellant concedes in his brief, the trial court found that Officer Francisco negligently lost the tape. Appellant contends that this holding is in error given the fact that the tape turned up in a desk in the Narcotics Division of the Bureau of Public Safety. Either Appellee's agents failed to conduct a good-faith effort to locate the tape, Appellant reasons, or they intentionally suppressed it. But Appellant's suppositions to the contrary, nothing in the record before this panel rises to the level of "a clear showing of prejudicial abuse of discretion" – the standard laid down by the Appellate Division for reversing a Trial Judge's decision on the type of remedy (if any) to be imposed for a Rule 26.2 violation. *See Ngiraked*, 5 ROP Intrm. at 169.

IV. Appellee's Failure to Disclose Impeachment Information

[14] Appellant makes a second *Brady* argument. He contends that Appellee's untimely disclosure of the CI's counterfeiting activities in December of 1999 materially prejudiced him because he lacked access to other impeachment evidence going directly to a witness's dishonesty. In this way, Appellant attempts to distinguish his case from *Ngiraked*, in which the Appellate

Court rejected a similar due process claim on the ground that the appellant had access to ample other impeachment material. *Ngiraked*, 5 ROP Intrm. at 172. But Appellant's efforts here are unsuccessful, as he glosses over the fact that at the time of trial he was already in possession of significant impeachment material about the CI, not least that the CI had been arrested for methamphetamine trafficking and was cooperating with the government in order to obtain leniency for himself. Appellant has therefore again failed to show that there is a reasonable probability that, but for the failure to disclose, the outcome of the proceeding below would have been different.

CONCLUSION

We are troubled by the Bureau of Public Safety's apparent sloppiness which resulted in wildly divergent weights being recorded for the methamphetamine Appellant delivered to the CI. And we are particularly perturbed by the apparently casual approach to discovery taken by the Attorney General's Office that led to its failure timely to locate ⊥86 the tape and to disclose the CI's counterfeiting activities. Nevertheless, for the foregoing reasons, Appellant's conviction of May 3, 2000, is hereby AFFIRMED.