

FILED

IN THE SUPREME COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

JUN 03 2008


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REPUBLIC OF MARSHALL ISLANDS

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| SUN FU, |) | S.Ct. Criminal Appeal No.: 2008-004 |
| Appellant, |) | H.Ct. Criminal Case No.: 2006-098 |
| |) | |
| vs. |) | ORDER DENYING APPLICATION |
| |) | FOR RELEASE PENDING APPEAL |
| REPUBLIC OF THE MARSHALL |) | WITHOUT PREJUDICE |
| ISLANDS, |) | |
| Appellee. |) | |
| |) | |

BEFORE CADRA, C.J., KURREN, A.J., and WALLACE, A.J.:

Appellant, Sun Fu, seeks a stay of sentence and release pending appeal pursuant to Supreme Court Rule 9(b) and (c). We DENY the application without prejudice.

Procedural background:

On April 9, 2008, appellant was found guilty after trial by jury of two counts of violation of RMI's immigration laws: (1) "Contravention of Terms of Visa" [overstaying] in violation of 43 MIRC 116 and 147(1)(i), and (2) "Contravention of Terms of Visa" [working in violation of visa] in violation of 43 MIRC 117 and 147(1)(i).

On April 25, 2008, the High Court held a sentencing hearing, entered a judgment of conviction and sentenced appellant to imprisonment in the Majuro Jail for a period of three (3) years commencing April 25, 2008 and ending April 24, 2011. A fine of \$500.00 was imposed on each count. The fine and term of imprisonment were to run concurrently on both counts.

Notice of Appeal of the High Court's "Order of Conviction and Sentencing" was timely filed on May 2, 2008. On May 6, 2008, appellant filed the instant motion for stay and release pending appeal with the Supreme Court under Supreme Court Rule 9(b) and (c). The Republic did not file an opposition or response. Nevertheless, we are constrained to follow the Rules

unless a departure therefrom can be justified.

Discussion:

Supreme Court Rule 9(b) provides:

(b) Release Pending Appeal from a Judgment of Conviction. Application for release after a judgment of conviction *shall be made in the first instance in the court that rendered the judgment*. If the court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending a review, may be made to the Supreme Court....

(Emphasis added.) Rule 9(b), on its face, requires that an application for release pending appeal be made "in the first instance" to the court that rendered the judgment before resort is made to the Supreme Court. The reason for this requirement is that the trial court is in a superior position to make bail determinations after conviction than is the appellate court. The requirement that the trial court set forth its reasons in writing if release is denied is to enable the appellate court to provide meaningful review.

RMI Supreme Court Rule 9 is identical to (former) Federal Rule of Appellate Procedure (FRAP) Rule 9 as it existed prior to the Bail Reform Act. Federal decisional authority interpreting (former) FRAP Rule 9 is, therefore, instructive. The court in *United States v. Stanley*, 469 F.2d 576 (D.C. Cir. 1972) explained the history and purpose underlying Rule 9(b):

[I]nitial resolution of an application for release pending appeal is a function historically committed to trial judges. . . . The trial court is not only the traditional but also the superior tribunal for the kind of information gathering which a sound foundation for a bail ruling almost inevitably requires. For it is there that, at a hearing, the judge can come face-to-face with the primary informational sources, and probe for what is obscure, trap what is elusive, and settle what is controversial. It is there, too, that the judge has at his disposal "the judicial machinery necessary to marshal the facts typically relevant to the release inquiry." Indeed, "as a practical matter only the District Court can conduct the 'scrupulous inquiry' and make the findings contemplated. . . ." . . . Moreover, the trial judge's familiarity with the case ordinarily enables ready association of the relevant facts in appropriate relationships with the criteria governing release from custody. The judge's role in evolving trial evidence and his observation of the accused's trial demeanor often

imparts to those facts a significance not discernable from the paper record upon which bail decisions in appellate courts must be achieved. . . . So, even prior to the Bail Reform Act, our settled practice called for submission of applications for release pending appeal to the District Court for decision in the first instance. . . . More recently, Rule 9(b) of the Federal Rules of Appellate Procedure has explicated that "[a]pplication for release after a judgment of conviction shall be made in the first instance in the district court," and that "only "[t]hereafter" could "a motion for release . . . pending review . . . be made to the court of appeals or to a judge thereof."

Id. at 581-83 (internal citations omitted). The court went on to explain the Rule's requirement that the trial judge set forth his reasons for denial of release in writing:

Appellate Rule 9(b) couples a second requirement to the one that release pending appeal be first sought in the trial court. It is that the trial judge state in writing his reasons in the event that release is either denied or conditioned. . . . Without the settling effect of a reasoned treatment of the relevant information by the judge, we are apt to confront "a welter of assertion and counter-assertion [by the parties] . . . from which we have no adequate means of emerging." Without elucidation of the bases for the judge's action, we cannot fairly evaluate the merits of either the application or the judge's decision thereon. As we have had occasion to point out, "[t]he District Judge's reasoning must be delineated both out of fairness to the appellant and as an aid to this court in its role in bail administration." We read the twin specifications of Rule 9(b) - that applications for release pending appeal be first adjudicated in district courts and that district judges supply their reasons for dispositions other than unconditional release - as a mandate that circuit judges give those reasons respectful consideration in arriving at their own decisions on bail.

Id. at 583-84 (internal citations omitted; emphasis added).


In the case at bar, appellant did not make application for release pending appeal to the trial court as required by Rule 9(b). As a consequence, we are not afforded a description of the insights available only to the trial judge in making an informed bail/release decision. Since application was never made to the trial court, we have no written decision to review. Instead, we have only a statement by counsel, unsupported by affidavit or other evidence, that appellant does not present a flight risk or danger to any other person or the community. We have no means of verifying the factual information set forth by counsel and do not have the benefit of having observed the appellant to assess his demeanor, character and myriad other considerations

available to the trial judge in making a release decision. We are unable to make those findings required by Rule 9(c) on which the appellant bears the burden of proof.

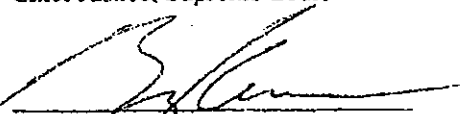
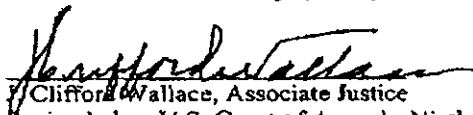
We hold that the present record is insufficient to rule on appellant's application. There has been no showing why an application for release pending appeal cannot be made to the High Court or, if made, why such an application would be futile.

We, therefore, DENY appellant's application for release pending appeal without prejudice to appellant making proper application to the trial judge of the High Court who entered the judgment and sentence from which Sun Fu appeals.

Dated this 2 day of June, 2008.


Daniel N. Cadra
Chief Justice, Supreme Court

Dated this ____ day of June, 2008.


Barry Kurrep, Associate Justice
U.S. District Court Magistrate Judge,
District of Hawaii (sitting by designation)
Clifford Wallace, Associate Justice
Senior Judge, U.S. Court of Appeals, Ninth
Circuit (sitting by designation)