

LONE LINO, Appellant
v.
TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee
Criminal Appeal No. 43
(Marshall Islands Criminal Case No. 65)
Appellate Division of the High Court

June 16, 1972

Petition for stay of judgment pending appeal. The Appellate Division of the High Court, Harold W. Burnett, Chief Justice, denied the petition for failure of counsel to show a substantial question of law was involved.

1. Appeal and Error—Bail Pending Review—When Granted

Whether bail should be granted pending appeal depends upon whether there is a substantial question which should be determined by the appellate court. (12 T.T.C. § 252)

2. Judgments—Stay of Execution—When Granted

Petition for stay of execution of judgment pending appeal would be denied where counsel failed to accompany request with a statement clearly indicating that there was a substantial question of law. (Rules of Criminal Procedure, Rule 32e)

For the Appellant:

BENJAMIN M. ABRAMS

For the Appellee:

RUSSELL W. WALKER

BURNETT, Chief Justice

Defendant, on May 26, 1972, was convicted in the Trial Division of the High Court for the Marshall Islands sitting in Ebeye of two counts of assault and battery with a dangerous weapon. Thereafter he was sentenced to serve six months imprisonment on each count, sentences to run consecutively, with all but the first two months to be suspended upon stated conditions. He immediately filed notice of appeal, asserting "substantial errors of law."

On May 30 request for stay of execution of sentence was made to the trial court, and denied. On May 31, by dispatch, counsel requested that I grant a stay of "judgment

pending appeal pursuant to Rule 32e", and on the 1st of June I granted a temporary stay for ten days, so that I might consider the full application.

"After conviction bail may be allowed only if a stay of execution of sentence has been granted, and only in the exercise of discretion by a court authorized to order a stay or by a judge thereof." 12 T.T.C. 252.

Under Rule 32e, Rules of Criminal Procedure :

"Any request for stay of execution of the judgment, order or sentence pending appeal shall ordinarily be made in the first instance to the trial judge. If he denies the request, the matter may be taken up directly with any other judge authorized to be assigned by the Chief Justice to sit in the Appellate Division of the High Court. If the record has not yet been certified, the appellant shall accompany his request to any judge, other than the trial judge, by a statement under oath, setting forth sufficient details to clearly indicate what questions of law are involved and how these arise. In the absence of unusual circumstances, a showing that the appeal raises a substantial question of law shall be sufficient cause for granting a stay upon reasonable terms."

The notice of appeal filed with the trial court in support of the initial application for stay of execution stated only that the judgment "contained substantial errors of law upon which the judgment was based, which constitute the grounds upon which this appeal is now taken."

The written petition for stay of judgment pending appeal stated, "that substantial errors of law, procedure, custom and prejudice occurred at the trial below and appellant-petitioner should not be imprisoned until appellate review determines the propriety of the proceedings below."

Thereafter I informed counsel by radio dispatch, that Rule 31e requires the appeal raise "a substantial question of law", and advised that the claimed specification of error be supplemented in order to identify the question of law involved.

I have since received a "supplement to notice of appeal", which specifies errors in seven numbered paragraphs. Unfortunately, however, in no instance does counsel identify a question of law but, rather, relies upon the allegation that the court committed reversible error in a wide variety of generalized areas. In no instance is a question of law identified which could be characterized as substantial.

There is no question that under the law and under the Rules of Criminal Procedure in the Trust Territory, that I have the authority to grant a stay of execution and release petitioner on bail; in an appropriate situation I would not hesitate to do so, in spite of the deference which I feel I must accord the trial court, which is necessarily given the first opportunity to rule upon the question.

The words of Mr. Justice Douglas, sitting as Circuit Justice of the United States Court of Appeals for the Ninth Circuit, are particularly appropriate:

"The question of the guilt or innocence of an appellant is not an issue on application for bail. It has long been a principle of federal law that bail after conviction and pending appeal is a remedy normally available to a prisoner. See *Hudson v. Parker*, 156 U.S. 277, 285 S.Ct. 450, 39 L.Ed. 424. The existence of power to grant bail is, indeed, essential for the protection of the right to appeal. Otherwise a short sentence might be served before the appellate court could set aside the judgment of conviction for infirmities in the trial. An effective right to appeal would then be lost."

D'Aquino v. United States, 180 F.2d 271.

The foregoing had to do with a case brought under former Rule 46(a)(2), Federal Rules of Criminal Procedure, essentially the same as our Rule 32e.

[1] In *D'Aquino*, Justice Douglas described the test:

"The question is whether 'the case involves a substantial question which should be determined by the appellate court.' The question may be 'substantial' even though the judge or justice hearing the application for bail would affirm on the merits of the appeal. The question may be new and novel. It may present unique facts

not plainly covered by the controlling precedents. It may involve important questions concerning the scope and meaning of decisions of the Supreme Court. The application of well-settled principles to the facts of the instant case may raise issues that are fairly debatable. An appellant, though guilty beyond question, may have been denied the kind of a trial that even a traitor to our country is entitled to under the Constitution and laws. Those are situations where bail pending appeal should be granted."

In *D'Aquino* the question presented involved application of principles established by decisions of the Supreme Court to "confessions obtained during or immediately following a prolonged confinement of the accused by the military authorities." Thus a "substantial question of law" was presented; Mr. Justice Douglas granted a stay, notwithstanding prior adverse determinations by both the trial court and the Court of Appeals. Nothing comparable is presented for my consideration here.

[2] Consequently, while I hold the view expressed by Justice Douglas, that an effective right of appeal might well be lost should stay not be granted, I defer to the determination made by the trial judge and share his reluctance to find a question which counsel has not identified.

Petition for stay of sentence is denied.