

DEC 10 2007

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REPUBLIC OF MARSHALL ISLANDS

S.Ct. Appeal No. 2007-008  
H.Ct. Crim. Case No. 2005-046

**ORDER ON RULE 9  
MOTION FOR RELEASE  
PENDING APPEAL**

**TO ALL PARTIES THROUGH THEIR COUNSEL:**

## I. PROCEDURAL BACKGROUND.

On or about November 16, 2007, Kijiner filed a request to stay execution of the jail sentence with the High Court. The Republic filed a written opposition on or about November 19, 2007. Kijiner's request was denied by the High Court on November 19, 2007. The propriety of the High Court's ruling on Defendant's motion is not before this Court as it appears the High Court was never asked to address the criteria set forth by S.Ct. Rule 9 for release pending appeal.<sup>1</sup>

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Kijiner then filed a "Motion for Release Pending Review" with the Supreme Court on November 20, 2007. I entered a single judge order that day releasing Kijiner from jail pending determination of Kijiner's motion.

The Republic has filed an opposition to Kijiner's motion. The Republic essentially argues that Kijiner has failed to demonstrate that his appeal has merit. The Republic cites a number of U.S. decisions which have held that a defendant should be denied release pending appeal if unable to meet its burden of demonstrating that the appeal has merit. Kijiner has filed a Reply pointing out that Rule 9(c) does not require a showing of merit of the appeal and that the criteria for release pending appeal are met by Kijiner's declaration.

## **II. DISCUSSION.**

I do not believe a lengthy dissertation is necessary to decide this motion. Rule 9(c) deals with the criteria for release pending appeal and allocates the burden of proof to the defendant. Rule 9(c) provides:

**( c ) Criteria for Release.** The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

Under the "plain language" of Rule 9(c) the defendant must establish only that (1) he is not a flight risk and (2) that he will not pose a danger to any person or the community to justify release pending appeal..

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were not presented to the High Court. See "Response of the Republic in Opposition to Defendant-Appellant Motion for Release Pending Appeal," p. 5. Ordinarily, Rule 9(b) contemplates that the motion for release pending appeal be addressed in the first instance to the court that rendered the judgment of conviction. A procedure apparently not followed in this case.

I am satisfied that the record establishes that Kijiner is neither a flight risk nor a danger to any person or the community.

The Republic concedes that Kijiner is not a flight risk and that bail conditions can secure his future appearances.<sup>2</sup> There is no evidence that Kijiner has failed to appear at any court appearance in the past. The short duration of the sentence imposed is unlikely to motivate a reasonable person to flee the Republic to avoid execution of the sentence. To assure that Kijiner does not flee, he is ordered to surrender his passport to the Clerk of Court and maintain his bail of \$800 as posted pending ultimate determination of his appeal.

I am satisfied from the declaration of Thomas Kijiner, Jr. that he does not present a danger to any person or the community. Kijiner has no prior criminal convictions and has no pending criminal charges. Kijiner presently stands convicted of a single misdemeanor count of "negligent driving." While "negligent driving" is a serious misdemeanor it is not the sort of offense which can be characterized as a violent crime or the sort of offense which by its very nature would justify detention while this appeal is decided. The danger Kijiner may pose to the community by future negligent driving has been adequately addressed by the probation conditions imposed by Judge Hickson in his "Order of Conviction and Sentence" dated October 17, 2007. These probation conditions shall also serve as his bail conditions pending resolution of his appeal.

I will comment briefly on the Republic's opposition although much could be written.

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<sup>2</sup> See "Response of the Republic," *id.* p. 5. ("...the Republic does not wish to contest that the defendant-appellant does not pose flight risk.")

The Republic argues that release should be denied because Kijiner has not shown that his appeal has merit. The Republic has cited a number of U.S. cases in support of its argument. Those cases, however, deal with FRAP 9(c) which is substantially different from RMI S.Ct. Rule 9(c). To the extent those cases are relied upon as authority for imposing a requirement not contained in RMI's rule, those cases are inapposite and are not instructive.

FRAP 9(c) provides:

**Criteria for release.** The court must make its decision regarding release in accordance with the provisions of 18 USC 3142, 3143 and 3145(c).

FRAP 9(c)'s requirement that the defendant prove that his appeal has merit or "raises a substantial question of law or fact likely to result in reversal or in an order for a new trial" was imposed by the U.S. Congress. That requirement was not part of the original Rule adopted by the Federal Appellate Courts.<sup>3</sup> Unlike the federal rule, the Nitijela has not imposed any requirement that a defendant prove that his appeal has merit or "raises a substantial question of fact or law" before release can be granted. Although that requirement may serve a laudable purpose, I do not believe such a requirement can be fairly implied into RMI S.Ct. Rule 9(c).

### **III. CONCLUSION AND ORDER.**

Rule 9(c) is clear on its face. Kijiner has met the criteria for release imposed by the Rule. I conclude that he is entitled to be released pending resolution of his appeal.

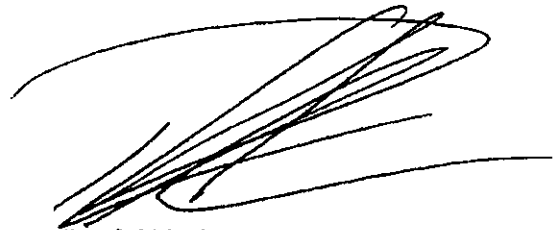
IT IS THEREFORE ORDERED that Defendant-Appellant be released and execution of his sentence of imprisonment be stayed pending resolution of his appeal.

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<sup>3</sup> A history of the Rule can be found at 54 Fordham Law Review 1081 (1986).

**IT IS FURTHER ORDERED** that (1) the Defendant-Appellant surrender his passport to the Clerk of Court within 10 (ten) days of the date of this Order; (2). the terms of probation as set forth in the High Court's Order of Conviction and Sentence dated October 17, 2007 shall serve as conditions of release; and (3) bail of \$800 shall continue until further order of this Court

Dated this 8<sup>th</sup> day of December, 2007 (AST).



**Daniel N. Cadra**  
**Chief Justice, Supreme Court**

