

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,	)	CRIMINAL CASE NO. 2014-503
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
KAZUHIRO KIMURA (Captain) and	)	
OHKURA GYOGYO CO. LTD. (Owner),	)	
	)	
Defendants.	)	
	)	

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ORDER

Beauleen Carl-Worswick  
Associate Justice

Hearing: November 25, 2014  
Decided: November 28, 2014

APPEARANCES:

For the Plaintiff: April Dawn Skilling, Esq.  
Attorney General  
Caroline A. Rugero, Esq.  
Assistant Attorney General  
FSM Department of Justice  
P.O. Box PS-105  
Palikir, Pohnpei FM 96941

For the Defendants: Kasio Mida, Jr., Esq.  
Ramp & Mida Law Firm  
P.O. Box 1480  
Kolonia, Pohnpei FM 96941

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HEADNOTES

Criminal Law and Procedure – Information

Under FSM Criminal Rule 7(d), the court has the authority to strike a surplusage from the information. FSM v. Kimura, 19 FSM R. 617, 619 (Pon. 2014).

Civil Procedure – Parties; Criminal Law and Procedure; Jurisdiction – In Rem

Criminal cases are in personam proceedings, and brought against a person rather than property. Only civil actions may be brought in rem, or "against a thing." FSM v. Kimura, 19 FSM R. 617, 619 n.1 (Pon. 2014).

Criminal Law and Procedure; Marine Resources

Title 24 imposes criminal liability on any person who commits an act prohibited by that title. A person is defined as any natural person or business enterprise or similar entity. It does not include a vessel in rem. By statute, a person specifically includes a corporation, partnership, cooperative, association, or government entity. Although not an actual, living person, the law treats a company as a person for the purposes of liability. FSM v. Kimura, 19 FSM R. 617, 619 n.1 (Pon. 2014).

Criminal Law and Procedure – Right to Counsel – Joint Representation

When the court raised the issue of a potential conflict of interest in having one attorney representing both defendants. After a brief discussion, the defendants expressly waived the right to separate counsel in court. The court agrees that at this time that no conflict of interest is apparent, however, recognizes that a Rule 44 hearing might be necessary at a later date. FSM v. Kimura, 19 FSM R. 617, 619 (Pon. 2014).

Criminal Law and Procedure – Right to Counsel – Joint Representation

Although joint representation of a defendant in a criminal case is possible, the risk of error is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements are met. FSM v. Kimura, 19 FSM R. 617, 619 n.2 (Pon. 2014).

Criminal Law and Procedure – Preliminary Hearing

In situations where an arrest is not made pursuant to an arrest warrant, the arrested individual is nonetheless entitled to a judicial determination as to whether there is probable cause to detain the accused and normally the accused has the right to a probable cause hearing within twenty four hours or be released without condition. FSM v. Kimura, 19 FSM R. 617, 620 n.4 (Pon. 2014).

Criminal Law and Procedure – Preliminary Hearing

The right to a prompt probable cause hearing is constitutional requirement for any significant pretrial restraint of liberty but is only necessary if detention, bail, or condition for release is placed on the defendant. FSM v. Kimura, 19 FSM R. 617, 620 n.5 (Pon. 2014).

Admiralty – Ships; Criminal Law and Procedure

When a vessel has been arrested in rem in a parallel civil proceeding but is not restrained in the criminal matter, the government's request that the vessel be seized as evidence in the criminal case, and not for forfeiture, is an unnecessary restriction to establish that the vessel was as an instrumentality used in a crime. FSM v. Kimura, 19 FSM R. 617, 620 (Pon. 2014).

Admiralty – Ships

Under the Supplemental Rules for Certain Admiralty and Maritime Claims, a prompt post seizure hearing may be requested by "any person" claiming an interest in the vessel. At this hearing the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with the rules, and the property must be released upon giving of a security and, if the parties are unable to stipulate to the amount and nature of the security, the court shall fix the principal sum. FSM v. Kimura, 19 FSM R. 617, 620 n.8 (Pon. 2014).

COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

On November 25, 2014, the court held an initial appearance for the defendants in this case. Attorney General April Dawn Skilling and Assistant Attorney General Caroline Rugero represented the FSM Department of Justice (Government) and attorney Kembo Mida (Mida) represented both defendants, Kazuhiro Kimura (Captain) and Ohkura Gyogyo Co. Ltd. (Ohkura). Present on behalf of Ohkura was Sumitomo Kasai, an officer of the company.

Pursuant to FSM Criminal Rule 7(d), the court has the authority to strike a "surplusage from the information." As a preliminary matter, the court raised a question regarding the defendants listed in the caption *sua sponte*. The defendants then moved, without objection from the government, to strike the "Tokiwa Maru 28, purse-seine fishing vessel" as a defendant in this criminal case.<sup>1</sup> As a second preliminary matter, the government requested that all translations be made in both Japanese and English, to ensure competency, and preserved the right to object to translations if necessary at a later date.

Pursuant to FSM Criminal Rule 5(c), the court then read the rights to the defendants including: 1) the right to an attorney; 2) the right to be silent; and 3) the right to be informed. When informing the defendants of their rights, the court raised the issue of a potential conflict of interest in having one attorney representing both defendants.<sup>2</sup> After a brief discussion, the defendants expressly waived the right to separate counsel in court. The court agrees that at this time that no conflict of interest is apparent, however, recognizes that a Rule 44 hearing might be necessary at a later date.<sup>3</sup> Second, the defendants expressly waived the right to have the information and affidavits read to them, representing that they had already been translated and read to them in Mida's law office. They further represented that they understood the charges contained therein. Finally, the court set release conditions on the two

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<sup>1</sup> Criminal cases are in personam proceedings, and "brought against a person rather than property." BLACK'S LAW DICTIONARY 807 (8th ed. 2004). Only civil actions may be brought in rem, or "against a thing." *Id.* at 809. Title 24 imposes criminal liability on "any person who commits an act prohibited by this title." 24 F.S.M.C. 902. A person is defined as "any natural person or business enterprise or similar entity." 24 F.S.M.C. 102(5). It does not include a vessel in rem." FSM v. Kana Maru No. 1, 17 FSM Intrm. 399, 405 (Chk. 2011) (citation omitted). By statute, a person specifically includes "a corporation, partnership, cooperative, association" or government entity. 24 F.S.M.C. 102(50). Although not "an actual, living person, the law treats the company as a person for the purposes of liability." FSM v. Cheng Chai-W (II), 7 FSM Intrm. 205, 212 (Pon. 1995) (citation omitted).

<sup>2</sup> Although joint representation of a defendant in a criminal case is possible, the risk of error "is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met." FSM MRPC R. 1.7 cmt. (conflicts in litigation). In this case, Mida represents both the Captain and Ohkura.

<sup>3</sup> "Whenever two or more defendants have been jointly charged pursuant to Rule 8(b), or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel." FSM Crim. R. 44(c); *see* Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 480-83 (App. 1996).

defendants after hearing recommendations from both parties. Both parties agreed that the defendants were to be released on their own recognizance, with no restrictions of any kind, except that they would be present for all future proceedings.

The Government then asked the court for a continuance on the probable cause hearing. The Government represented that several of the key witnesses were off-island at this time, including the Northern Oceanic Resource Management Authority (NORMA) observer Arthur Segal and FSM National Police officer Baron Mendiola, who is the acting Commander of the FSS *Independence* in the Maritime Surveillance Division. The Government represented that those witnesses would be available by Friday next week. The defense objected to any further delay indicating that the defendants had already been restrained for 21 days, without a warrant, and without showing probable cause.<sup>4</sup> After consideration the court granted the motion to enlarge based on the fact that no restrictions were placed on the defendants.<sup>5</sup> The court notes that the *Tokiwa Maru 28*, the vessel, has been arrested in rem in the parallel civil proceeding, Civil Action No. 2014-045, but is not restrained in this criminal matter.<sup>6</sup> Even though the Government requested that the *Tokiwa Maru 28*, the vessel, be seized as evidence in this case, and not for forfeiture, the court finds this restriction is unnecessary to establish that the vessel was used as an instrumentality in a crime.<sup>7</sup> Therefore, all matters regarding the vessel itself shall be separately dealt with in the civil proceeding.<sup>8</sup>

ACCORDINGLY, the probable cause hearing is set for Friday, December 5, 2014, at 9:30AM in the Supreme Court, Palikir. All parties are required to be present in person and prepared to address probable cause supporting the allegations raised in the Information, and those counts that cannot stand

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<sup>4</sup> On November 6, 2014, at 05:50 hours, the *Tokiwa Maru 28* was boarded about 180 nautical miles south of Pulusuk atoll after having been asked to alter course in the high seas at 02:33 hours. "In situations where an arrest is not made pursuant to an arrest warrant . . . the arrested individual is nonetheless entitled to a judicial determination as to whether there is probable cause to detain the accused." FSM v. Zhong Yuan Yu No. 621, 6 FSM Intrm. 584, 589 (Pon. 1994). Pursuant to 12 F.S.M.C. 218(5), when a criminal defendant has been arrested without a warrant the defendant normally has the right to a probable cause hearing within twenty four hours or be released without condition. In this case, it is unclear whether the captain and crew were so released.

<sup>5</sup> The right to a prompt probable cause hearing is constitutional requirement "for any significant pretrial restraint of liberty" but is only necessary if detention, bail, or condition for release is placed on the defendant. FSM v. Wainit, 10 FSM Intrm. 618, 622 (Chk. 2002).

<sup>6</sup> "Although the civil forfeiture claim is predicated upon the violation alleged in the criminal information, the criminal case is a separate proceeding." FSM v. Zhong Yuan Yu No. 621, 6 FSM Intrm. 584, 586 n.1 (Pon. 1994). As such, it follows slightly different rules of procedure. *See id.* at 589 n.6.

<sup>7</sup> "While not as serious as the detention of a person, the seizure and retention of valuable property nonetheless constitute[s] a substantial intrusion upon the privacy of the individual whose . . . property is affected and for which probable cause must be established." Zhong Yuan Yu No. 621, 6 FSM Intrm. at 589 (citation omitted) (quotation omitted).

<sup>8</sup> Pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims, a prompt post seizure hearing may be requested by "any person" claiming an interest in the vessel. FSM Mar. R. E(5)(f). At this hearing "the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules." *Id.* Furthermore, the property shall be released upon "giving of a security. If the parties are unable to stipulate to the amount and nature of the security, the court shall fix the principal sum . . . ." FSM Mar. R. E(6).

are subject to dismissal pursuant to FSM Criminal Rule 12 (b)(1) and (2). It is:

ORDERED, pursuant to FSM Criminal Rule 46(a)(1) that the defendants Captain and Ohkura are released pending trial on their own personal recognizance, and subject only to their presence at all future criminal proceedings;

ORDERED, pursuant to FSM Criminal Rule 28, that the parties to confer, subpoena if necessary, and file with the court the names of qualified candidates as interpreters prior to the hearing. If the parties cannot agree to an interpreter by stipulation, the court may appoint one of its own selection, based on the most competent alternative available.

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FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,	)	CIVIL ACTION NO. 2014-045
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
TOKIWA MARU NO. 28, a purse-seine	)	
fishing vessel, KAZUHIRO KIMURA (Captain),	)	
and OHKURA GYOGYO CO. LTD. (Owner),	)	
	)	
Defendants.	)	
_____	)	

ORDER

Beauleen Carl-Worswick  
Associate Justice

Hearing: December 2, 2014  
Decided: December 4, 2014

APPEARANCES:

For the Plaintiff: Caroline A. Rugero, Esq.  
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