

3. Sebrongel holds in trust in accordance with Palauan land law custom equivalent land to the above numbered lots for the benefit of her sister's children, Sofia and Limei, and that any disposition Sebrongel cares to make of any of her lands shall be in accordance with Palauan custom and that consent of all strong members of the Ngeesusem Clan is first obtained.

4. The defendant is awarded his costs in accordance with law upon a claim filed.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Libelant

v.

KYOSHIN MARU NO. 23, Libelee

Civil Action No. 443

Trial Division of the High Court

Palau District

December 12, 1969

Libel action for condemnation and forfeiture to Trust Territory Government. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that in order for owner to obtain release of seized vessel he must demonstrate by convincing evidence that he did not know the destination of the seized vessel and if he did know, or should have known, he could not recover the vessel.

1. Criminal Law-Forfeiture and Penalty-Recovery of Property

Forfeiture is the rule and release therefrom the exception, so that the burden of proof is upon the claimant of the property seized to establish his right to it under statutory conditions. (T.T.C., Sec. 883)

2. Criminal Law-Forfeiture and Penalty-Recovery of Property

Claimant did not demonstrate by convincing proof that he did not know the destination of seized vessel and, if in fact he did not know, the evidence was such he should have known and that he was at fault in failing to learn its destination after it had been decided.

3. Agency-Generally

The captain or master of a vessel is the agent of the owner and the knowledge of the master is the knowledge of the owner.

4. Criminal Law-Forfeiture and Penalty-Recovery of Property

Where evidence demonstrated that claimant knew or should have known the unlawful destination of his vessel, it followed he was wilfully negligent in failing to stop the voyage and that negligence offset the claimant's right to recover the seized vessel. (T.T.C., Sec. 883)

5. Agency-Liability of Principal

The liability of a principal is dependent upon the knowledge of an agent concerning a matter upon which it is his duty to give the principal information.

6. Agency-Liability of Principal

A master of a vessel owes a fiduciary duty or relationship of trust to the owner, and the owner is liable for the faithful and proper performance of every duty undertaken by the master within his actual or apparent authority.

7. Agency-Liability of Principal

Owners of vessels appoint the master and employ the crew and, consequently, the owners are held responsible for the conduct of the master and crew in the management of the vessel.

8. Criminal Law-Forfeiture and Penalty-Recovery of Property

Under the Trust Territory seizure and condemnation statute, the owner or person entitled to possession is relieved of responsibility for the unlawful use of a vessel if he did not know of the intended use or was not wilfully negligent in failing to prevent the intended use. (T.T.C., Sec. 883)

Assessor:
Interpreter:
Reporter:
Counsel for Libelant:

Counsel for Libelee:

JUDGE PABLO RINGANG
KAZUMOTO H. RENGULBAI
NANCY K. HATTORI
DOUGLAS F. CUSHNIE, ESQ.,
District Attorney, and
E. TERMETEET, *District
Prosecutor*
SEIEI NAGAHAMA, ESQ.
NAHA, OKINAWA, assisted
by ROMAN TMETUCHI as
Co-counsel and *Inter-
preter*, and WILLIAM E.
NORRIS, ESQ., *Assistant
Public Defender, Advisor*

TURNER, *Associate Justice*

This was a libel action for condemnation and forfeiture to the Trust Territory Government in accordance with Section 883, Trust Territory Code, of the Okinawan fishing vessel, the Kyoshin Maru No. 23. The civil libel action is a sequel to the criminal prosecution and conviction of the vessel's captain for illegal entry into Trust Territory waters and unlawful removal of marine resources therefrom. *Trust Territory v. Yushin Kaneshima*, 4 T.T.R. 340.

The vessel was seized by the Palau District Sheriff within Trust Territory waters off Ulong Reef. The cargo confiscated as result of the criminal prosecution consisted of approximately four tons of tridacna clam muscles and 214 sea turtle shells, all obtained from Trust Territory waters at Helen Reef in Palau District.

The record shows Yoko Keda was the owner of the vessel and that it was chartered by him to Seiko Ishado who prosecuted the claim for recovery as the person "entitled to immediate possession of the vessel" in accordance with Section 883(f), Trust Territory Code. The claimant is a resident of Okinawa.

There was no dispute that the vessel at the time of its seizure was and had been in violation of Chapter 14, C, of the Code. The sole issue tried was whether or not the claimant was entitled to recover the vessel upon his "satisfactory proof that the violation occurred without his knowledge or any wilful negligence on his part."

The statute requires the claimant affirmatively prove by preponderance of the evidence that he did not know or should have known of the intended unlawful voyage into forbidden Trust Territory waters and that, being without knowledge, he was not wilfully negligent in failing to prevent the unlawful entry and violation of the Trust Territory laws protecting its marine resources.

[1] The rule imposing the affirmative burden of proof upon the person seeking to avoid the statutory penalty of seizure and forfeiture is discussed in 36 Am. Jur. 2d, Forfeiture and Penalties, § 40, where it is said:-

"... forfeiture is the rule, and release therefrom the exception, so that the burden of proof is upon the claimant of the property seized to establish his right to it under statutory conditions."

Also see: *U.S. v. Andrade*, 181 F.2d 42.

The United States Supreme Court requires that the claimant's proof shall "leave no reasonable doubt of his innocence." In the *Brig Struggle v. U.S.*, 3 L.Ed. 660, decided in 1815, the court said : -

"Although mere suspicion, not resting upon strong circumstances unexplained, should not be permitted to outweigh positive testimony in giving effect to a penal statute; yet it cannot be regarded as an oppressive rule to require of a party who has violated it to make out the *vis major* under which he shelters himself, so as to leave no reasonable doubt of his innocence; and if in the course of such vindication he shall pass in silence, or leave unexplained circumstances which militate strongly against the integrity of the transaction, he cannot complain if the courts shall lay hold of these circumstances as reason for adjudging him in delicto."

Proof of what is in an individual's mind is difficult, if not impossible, except by reasonable inference from objective circumstances. In this case the claimant says he didn't know the vessel was sailing for Trust Territory waters, that he thought it was going to the South China Sea. This subjective statement is overwhelmed by objective manifestations which the claimant "passed in silence" or left unexplained.

The claimant had hired the vessel's crew, through his friend and agent, Uchima Tatsuo, the vessel's bosun, from the same small islands in the Miyako area of the Ryukyus on which he lived. The newly hired captain, a replacement of the former captain, met the crew two days before the

vessel sailed from Miyako, and at this meeting it was decided to go to Helen Reef. In his testimony Captain Kaneshima said:-

"Q: And did you at that time select where you would go fishing?

"A: No, I didn't select the area. I mentioned that how about going to Shinna Junto area but the crew mentioned that how's about going to Helen's Reef area because there are a lots of those scallops and so we decided to go.

"Q: To Helen Reef area?

"A: Yes, so the majority wanted to go so if the majority says that, I will follow."

At the time of sailing from Miyako the claimant was present and spoke to the captain and the crew. This was after the meeting at which it was decided the voyage would be to Helen Reef. It is incredible that no one-crew members whom the claimant personally knew or the captain-mentioned the intended destination. The claimant's statement that he didn't know the destination is not convincing.

There were other objective matters which the parties dwelt upon in trial, such as the absence of a departure permit contrary to Okinawan law and the failure to substitute the name of the new captain for the former who had left the vessel after issuance of the fishing license. Under Okinawan civil law a Ryukuan vessel is required to obtain a departure permit which, among other things, shows the destination. A departure permit in this instance would have made the vessel's destination a matter of official record. Whether it was the captain's obligation or the claimant's to obtain this permit is not material. Either one or both could have done it, and it was the claimant's ultimate responsibility. It was negligence for him not to obtain the permit or see to it that it was obtained.

Also, there was a most significant admission by the claimant which casts some doubt on his repeated statements

he told the captain to go to the South China Sea to fish. The claimant was asked and answered:-

"Q: Have you ever sent this ship, the Kyoshin Maru No. 23, on fishing trips other than the fishing trip to Helen Reef?

"A: Yes, I sent this ship away once before but I didn't make enough money.

"Q: Where did you go that time?

"A: South China Seas."

[2] All things considered the claimant did not demonstrate by convincing proof that he did not know the destination of the vessel. If, in fact, he did not know, the evidence is such he should have known and that he was at fault in failing to learn the destination after it had been decided.

There is, however, a far more cogent reason than the evidence that demonstrates the claimant's failure to bring himself within the exception to the rule of forfeiture for illegal use and operation. This is the maritime law applicable to the evidence.

[3] It is the law of all maritime nations and has been for literally hundreds of years that the captain or master of a vessel is the agent of the owner-or, as in this case, the person entitled to "immediate possession". Knowledge of the master is the knowledge of the owner. Restatement of the Law, Agency, Sees. 9 and 272.

[4] Since the evidence demonstrates the claimant knew or should have known the unlawful destination of his vessel, it necessarily follows he was wilfully negligent in failing to stop the voyage. This negligence offsets the claimant's right to recover the seized vessel, even assuming he had no actual knowledge the crew and the captain had decided to go to Helen Reef in the Trust Territory.

[5,6] Section 272 of the Restatement of Agency teaches that the liability of a principal, in the law of agency, is dependant upon the knowledge of an agent concerning a matter upon which it is his duty to give the principal in-

formation. A master owes a fiduciary duty or relationship of trust to the owner, and the owner is liable for the faithful and proper performance of every duty undertaken by the master within his actual or apparent authority.

[7] The United States Supreme Court expressed the applicable principle of law in the case, *Creevy v. Eclipse Tow-Boat Co.*, 81 U.S. 199, 20 L.Ed. 873:-

"Owners appoint the master and employ the crew and, consequently, the owners are held responsible for the conduct of the master and crew in the management of the vessel."

[8] Under the Trust Territory seizure and condemnation statute, the owner or person entitled to possession is relieved of responsibility for the unlawful use of a vessel if he did not know of the intended use or was not wilfully negligent in failing to prevent the intended use.

Here the evidence is not convincing that the claimant did not know or should have known of the intended use. Having actual knowledge or the readily available means of obtaining knowledge, it was within the claimant's power to prevent the unlawful use, even by the perhaps extreme means of cancelling the intended voyage. The claimant was wilfully negligent in having failed to stop the proposed unlawful use.

The claimant's plea that:-

"A: I do not think I should have to be blamed, for this is entirely the captain's fault, it is not my fault."

is not in accordance with maritime law.

Accordingly, it is:-

JUDGMENT

Ordered, adjudged, and decreed:-

1. That the diesel powered fishing vessel, *Kyoshin Maru* No. 23, being of 39.9 gross tons burthen, 19.9 meters length, 4.42 meters breadth, 2.05 meters depth, home port Hirara Miyako, Okinawa, registration number MFR 3-572 by the

Government of the Ryukyu Islands, be and the same hereby is condemned and forfeited, together with her tackle, apparel, furniture, and equipment to the High Commissioner of the Trust Territory of the Pacific Islands for the use and benefit of the Trust Territory.

2. That no liens having been shown to exist against the vessel no provision is made for payment of liens.

3. That no costs are assessed.

4. That the claimant, Seiko Ishado, shall be granted an additional thirty-day period for appeal and that he shall have sixty days from date of entry of judgment within which to perfect any appeal, unless said time is further extended by order of this court upon application for extension prior to expiration of the time herein provided.

KEBLIIL era KEDAM, or YOULKEDIDAI by
RISONG RECHETMOL, Plaintiff

v.

MUKUI UCHERREMASCH, IDERRECH, and
DIRREMASCH OCHEBIR, Defendants

Civil Action No. 406

Trial Division of the High Court

Palau District

December 22, 1969

Review of summary judgment of Palau District Court upholding appointment of principal male title holder of Kedam or Youlkedidai Clan of Angaur Municipality, Palau District. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, affirmed District Court's judgment holding that by traditional custom authority of senior *ochel* member of clan is greater than all others and her exercise of that authority, when approved, is not to be set aside.

1. Palau Custom-Clans-"Ochel"

Under Palauan custom true *ochel* descendants are the strongest members of a clan followed in order of authority by *ulechel* members, by adoptive