

*ROP v. M/V Aesarea*, 1 ROP Intrm. 244 (Tr. Div. 1985)  
**REPUBLIC OF PALAU,**  
**Plaintiff,**

v.

**M/V AESAREA,**  
**Defendant.**

CIVIL ACTION NO. 20-85

Supreme Court, Trial Division  
Republic of Palau

Judgment

Decided: August 2, 1985

Counsel for Government: Philip D. Isaac

Counsel for Defendant: Douglas F. Cushnie

BEFORE: MAMORU NAKAMURA, Chief Justice.

This action in libel was commenced by the Attorney General of the Republic of Palau following a judgment in Civil Action No. 1-85, *Republic of Palau v. M/V Aesarea, et al.*, ordering the seizure and forfeiture of the Motor Vessel Aesarea, a ship registered in Panama and owned by Superluck Enterprises, Inc., a Panamanian corporation (hereinafter referred to as Superluck). The judgment in Civil Action No. 1-85 was issued on February 12, 1985, when defendants failed to respond to a Stipulation and Order issued on January 18, 1985, requiring the Defendant and its crew to either depart from the Republic by 4:30 p.m., February 11, 1985, or to present to the court satisfactory proof that the vessel was no longer subject to provisions of Title 53 of the Trust Territory Code.

A Status Conference on this matter was held on May 10, 1985. Attending the said conference were Assistant Attorney General, Philip D. Isaac; John O. Ngiraked, Trial Assistant and Douglas F. Cushnie, Esq. At the conference, Mr. Cushnie stated that, pending further confirmation, he would be appearing as counsel on behalf of the vessel owner, Superluck. On May 28, 1985, the Court approved the substitution of Mr. Cushnie as Attorney of Record in the place and stead of Mr. Ngiraked.

On June 11, 1985, Defendant filed a Motion to Dismiss and Quash Arrest Warrant, along with a Memorandum of Points and Authorities. A Memorandum in Opposition to Motion to Dismiss and Quash was filed by the Attorney General's Office on June 14, 1985. Defendant's motion was heard on June 18 and 19, 1985, and it was denied. Immediately thereafter, trial ensued.

**1245** FACTUAL BACKGROUND

On November 1, 1984, the Division of Immigration, Ministry of Justice, Republic of Palau, issued a single-entry permit to allow the Motor Vessel Aesarea to enter Malakal Harbor, Koror State, Republic of Palau, said permit to expire on December 7, 1984. The permit allowing entry was for the sole purpose of inspection by Palau Sunrise Development Corporation, a Palauan corporation, (hereinafter referred to as Sunrise) that was interested in conducting a feasibility study to convert the said vessel into a floating restaurant.

The application for permission to enter the harbor was signed by Mr. Ngiraked, a shareholder and managing director of Sunrise. Mr. William S. S. Wong is the managing director of Superluck, the corporate owner of the vessel Aesarea. Mr. Wong also served as managing director of Virtue Shipping and Enterprises Ltd., the Hong Kong agent for Superluck, which does the hiring for the captain and crew for the vessel.

On or about November 11, 1984, the Aesarea entered the port of Malakal Harbor and, since that time, Sunrise permitted the sale and consumption of alcoholic beverages and operated a bar and nightclub without first obtaining a permit as required by law. *See* Palau District Code § 306(a). The bar was operated by Francisco Ngirailemesang. Mr. Ngiraked stated that all the proceeds from the sale of liquor went to Mr. Ngirailemesang and that Mr. Ngiraked did not know whether Mr. Ngirailemesang had valid license to sell liquor. Mr. Ngiraked further testified that Sunrise did not have a license to operate a nightclub or bar but that it did not receive any profits from the operation of the nightclub and that the operation of the nightclub was on a trial basis. Defendant also caused or allowed the disposal of raw human sewage and other wastes to be disposed into Malakal Harbor.

After initial permission to enter and remain in Malakal Harbor, Mr. Ngiraked informed the Chief of Immigration that a permit for only thirty (30) days would be insufficient. According to Mr. Ngiraked, the Chief of Immigration stated that extension of the permit would be “routinely granted.” On December 27, 1984, twenty (20) days after the expiration of the entry permit, Mr. Eusevio N. Termeteet, President of Sunrise, wrote a letter to Mr. Russel E. Weller, Attorney General for the Republic of Palau, informing him that Sunrise was resubmitting its application to extend the permit until January 30, 1985. The second application, if ever submitted, was never approved. Shortly thereafter, in a telephone conversation, the Chief of Division of Immigration informed Mr. Ngiraked that the 1246 Attorney General had instructed the Division not to issue a new permit due to some pending legal problems. Subsequently, Mr. Ngiraked met with Assistant Attorney General Isaac who stated that approval from higher level would be required before issuance of a permit extension.

On December 31, 1984, the Division of Immigration notified Sunrise that the vessel was to leave Malakal Harbor by January 1, 1985. The Aesarea remained in Malakal Harbor and, on January 2, 1985, the Attorney General notified Sunrise that, by remaining in the harbor without a valid permit, the vessel was in violation of 19 TTC § 102. The vessel was again directed to depart by 8:00 a.m., January 4, 1985.

On January 7, 1985, with the vessel Aesarea still being docked in Malakal Harbor, the

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Attorney General filed an Application for Order of Deportation, pursuant to 53 TTC § 102. On January 8, this Court issued an Order to Show Cause and Temporary Restraining Order enjoining the Defendant, Sunrise and its agents, from selling or dispensing alcoholic beverages, from operating a bar and nightclub, from disposing wastes into Malakal Harbor, and from carrying on any activity, commercial or otherwise, not absolutely necessary for maintaining the seaworthiness of the vessel or for the care and feeding of the crew.

The Application for Deportation Order, Order to Show Cause and Temporary Restraining Order were served on the captain and crew of the Aesarea, and Mr. Ngiraked on January 9, 1985.

Mr. Ngiraked and Mr. Wong testified that Mr. Wong had been present in Palau twice during the month of January. At least one of Mr. Wong's trips to Palau occurred after the filing of the Deportation Order and the issuance of the Order to Show Cause and Temporary Restraining Order. However, both Mr. Ngiraked and Mr. Wong testified that Mr. Wong did not know that the entry permit had expired or that the vessel was in violation of any other laws of the Republic. Mr. Ngiraked testified that he did not want to tell Mr. Wong of the legal problems "for business reasons."

Mr. Ngiraked also testified that he met with Assistant Attorney General Isaac on at least three or four occasions. During a meeting in early January, Mr. Isaac indicated to Mr. Ngiraked that approval would be granted if the agreement between Sunrise and Superluck, which had since expired, was extended. Shortly thereafter, on January 12, Mr. Ngiraked and several members of the board of directors of Sunrise flew to L247 Hong Kong to meet with Mr. Wong to secure an extension of the agreement. Mr. Ngiraked returned to Koror January 16, 1985, with an extended agreement to expire on February 11, 1985, one day before the effectiveness of the court order that required the departure of the vessel, captain and the crew of the Aesarea. When Mr. Ngiraked presented the newly extended agreement to Assistant Attorney General Isaac, Mr. Isaac informed Mr. Ngiraked that the Minister of Justice was planning to file a libel and deportation proceeding. Subsequently, Mr. Ngiraked and other board members of Sunrise met with the Minister of Justice who told them that he was concerned about the pollution problem and that an outhouse or "benjo" was needed. Mr. Ngiraked testified that they proceeded to construct an outhouse when, in the midst of construction, they were served with the Warrant of Arrest and the vessel was seized and subjected to forfeiture. Shortly thereafter, on February 27, 1985, the captain and crew were repatriated.

The vessel Aesarea was at all times commanded by and under the control of employees or agents of Superluck. Since the vessel's initial entry into Malakal Harbor, the ship was under the command of three different captains from Hong Kong who were under the employ of Mr. Wong. The first captain, Mr. Shing Pak Wong who first brought the Aesarea into Malakal Harbor, returned to Hong Kong sometime before Christmas due to illness. Captain Lam arrived some four to five days later to serve as Captain Wong's replacement. Captain Lam was later replaced sometime around the end of January or the beginning of February by Captain Lee. Mr. Wong testified that he conversed with Captain Wong when Captain Wong returned to Hong Kong but that the captain did not inform him of any legal problems the vessel had encountered in Palau. Mr. Wong testified that he learned of the violation only after the Warrant of Arrest and seizure

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was effected when the third captain, Captain Lee, telephoned him in Hong Kong.

### CONCLUSION OF LAW

The basic issue in this case is whether a foreign vessel's unlawful remaining within the territorial waters of the Republic constitutes sufficient grounds for the forfeiture of the vessel.

Title 19 TTC § 102 states:

Except for innocent passage, stress of weather or force majeure, it shall be unlawful for any unlicensed vessel to enter or remain within the territorial waters of **1248** the Trust Territory without first receiving permission therefor from the High Commissioner or a district administrator . . . .

The penalty for violations of 19 TTC § 102 is set forth in 19 TTC §107:

[(2)] Any vessel involved in the commission of unlawful acts, together with her tackle, apparel, furniture, and equipment shall be subject to seizure and forfeiture to the Trust Territory as provided in Chapter 3 of this title.

Defendant argues that before forfeiture proceedings can ensue, Defendant must be charged and convicted of one of the criminal acts described in 19 TTC § 106.

Section 106 states:

It shall be unlawful for any vessel to engage within the territorial waters of the Trust Territory in fishing, the harvesting of trochus, the removal of scrap iron, or animal, vegetable, marine, or mineral resources without authorization by an officer or agent of the government of the Trust Territory.

Since all the previous forfeiture cases before this Court were incident to criminal conviction pursuant to 19 TTC § 106, this case, involving forfeiture of overstaying within territorial waters, is one of first impression in this Republic.

Defendant cites various cases involving forfeiture of vessels due to crimes of illegal fishing, *T.T. v. Kaneshima*, 4 TTR 340 (Tr. Div. 1966) and *T.T. v. Kyoshin Maru No. 23*, 4 TTR 452 (Tr. Div. 1969); *C.J. Henry Co. v. Moore*, 318 U.S. 132, 63 S.Ct. 499, 87 L.Ed. 663 (1943); illegal clamming, *Smith v. Maryland*, 59 (18 How.) 71, 15 L.Ed. 269 (1855); piracy, *U.S. v. The Brig Malek Adhel*, 2 How. (U.S.), 233, 11 L.Ed. 209; and breach of revenue laws, *Maul v. U.S.*, 274 U.S. 501, 47 S.Ct. 735, 71 L.Ed. 1171 (1922). None of these cases, however, are helpful in resolving the more narrow question before us. In short, none of the above-cited cases deny forfeiture in cases of overstaying.

The general rule on the subject is stated in 2 Am. Jur. 2d § 176:

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¶249 A libel for forfeiture because of breach of revenue, navigation or other laws of the U.S. is usually referred to as “libel of information” or a “libel in the nature of an information.” Such a libel need not conform to the requirements of an indictment in a criminal case. It is sufficient if it plainly described the offense. (Emphasis added) 2 Am. Jur. 2d, Admiralty § 176 (1962).

In *The Palmyra*, 12 Wheat. (U.S.) 1, 6 L.Ed. 531 (1827), the court stated:

The strict rules of the common law as to criminal prosecutions, have never been supposed by this court to be required in informations of seizure in the admiralty for forfeitures, which are deemed to be civil proceedings in rem . . . [.] Many cases exist where the forfeiture for acts done attached solely in rem and there is no accompanying penalty in personam . . . [.] But the practice has been, and so this court understand the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam. *See also U.S. v. Ruth Mildred*, 286 U.S. 67, 52 S.Ct. 473, 76 L.Ed. 981 (1932).

The case cited by Defendant, *Compton v. U.S.*, 377 F.2d 408 (8th Cir. 1967), is clearly distinguishable from the case at bar. In *Compton*, the court found that evidence obtained in violation of defendant’s constitutional rights, and thus excludable from a criminal proceeding, could not be used to effect a forfeiture of an automobile in a civil proceeding. The case at hand involves a violation of statute and presents no question of illegally obtained evidence of the kind described in *Compton*.

Defendant also argues that 19 TTC § 107 should be construed to be applicable only to those specific acts contained in 19 TTC § 106. To do so would be an erroneous interpretation of this statute since it would render 19 TTC § 102 meaningless and without statutory sanction. The reference within 19 TTC §107 to “unlawful acts” must, therefore, be construed to include the provision contained in § 102 which makes it unlawful to remain within territorial waters without a valid license.

¶250 Defendant’s next argument is that an in rem proceeding requires the existence of a maritime lien as a basis. Defendant’s sole authority for this proposition is *The Galena Dubuque, Dunleith & Minnesota Packet Co., v. Rock Island Railroad Bridge*, 73 U.S. (6 Wall) 213, 18 L.Ed. 753 (1901).

Recent authority on the subject states a contrary rule:

A libel or information for a forfeiture being deemed a civil proceeding in rem, it does not require the technical precision of an indictment at common law; if the allegations described the offense, that is all that is necessary, and if the libel or information is founded upon a statute, it is generally sufficient if it pursues the words of the law. (Emphasis added). 36 Am. Jur. 2d Forfeitures and Penalties § 39 (1968).

In light of the above authority, this Court concludes that the statute is facially clear in its

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intent to impose a sanction of forfeiture for the overstaying of a foreign vessel within the waters of Republic of Palau.

Defendant next cites *Kodang v. T.T.*, 5 TTR 581 (Tr. Div. 1971) and contends that the vessel Aesarea was under charter to Sunrise and, by virtue of that charter, the vessel was lawfully within the Trust Territory and, therefore, not subject to forfeiture.

Defendant's argument must fail for two reasons. In the first instance, the agreement between Superluck and Sunrise does not meet the legal requirements of a charter. As the Court in *Kodang* noted, in order for a charter to exist, the charterer must accede to possession, command and control of navigation. *See also, U.S. v. Shea*, 152 U.S. 178, 14 S.Ct. 519, 38 L.Ed. 403 (1893); *New Orleans - Belize Royal Mail & CAS Co., v. U.S.*, 239 U.S. 202, 36 S.Ct. 76, 60 L.Ed. 227 (1915); *U.S. v. Hvoslef*, 237 U.S. 1, 35 S.Ct. 459, 59 L.Ed. 813 (1915). The undisputed facts indicate that Mr. Wong at all times retained possession, command and control of the Aesarea through his employ of the ship's captain and crew. Notably, each time a captain returned to Hong Kong, Mr. Wong arranged for another captain to replace him in Palau. This Court, therefore, concludes that no charter existed between the owner of the vessel and Sunrise.

Second, even assuming the existence of a charter, that, in itself, would not be sufficient to confer upon the **1251** foreign vessel the legal right to remain within the Republic. In *Kodang*, there existed a valid charter as well as a license to operate within the Trust Territory. To construe that a charter alone, without a license duly issued by the Republic, gives the Aesarea the legal right to remain within the waters of the Republic would be tantamount to a delegation to private individuals and corporations powers otherwise reserved to the Republic. *See* Article IX, Section 5(13), Constitution of the Republic of Palau.

Defendant's final argument is that the owner of the vessel Aesarea was unaware of any violation of which the vessel could have been involved and that pursuant to 19 TTC § 156, the vessel should be returned to the owner.

Title 19 TTC, § 156 provides, in part:

If the claimant is the owner or the person otherwise entitled to immediate possession of the vessel, he shall have the burden of proof to show that the violation occurred without his knowledge or without any negligence on his part . . . .

As the facts indicate, the Application for Deportation, the Order to Show Cause and Temporary Restraining Order were served on the captain of the vessel Aesarea on January 9, 1985. Notice served on the captain is deemed to be notice served on the owner, since it is a well established rule that knowledge to the master of a vessel is knowledge to the owner. *T.T. v. Kyoshin Maru No. 23*, 4 TTR 452, 457 (1969).

Further authority states that it is the duty of the owner of a vessel to acquaint himself with port regulations before sending his vessel on a voyage. *The Merrimac*, 14 Wall. (U.S.) 199, 20



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L.Ed. 873, 874 (1874). He cannot defend himself under asserted ignorance or erroneous information on the subject. *Howland v. Greenway*, 22 How. (U.S.) 491, 16 L.Ed. 391, 394 (1860).

This Court has no hesitancy in imposing upon Mr. Wong the duty, as described in *The Merrimac*, *supra*, and *Howland v. Greenway*, *supra*, to be informed about the limitations upon which the vessel Aesarea was permitted to stay within the Republic of Palau. Mr. Wong had a duty to know that the initial entry permit was for a period of only thirty (30) days. Once the permit expired, Mr. Wong can be excused only by proving that the violation occurred without his knowledge and without any negligence on his part.

**¶252** Mr. Wong, the owner, is an educated person, schooled in England in engineering and marine science, and has over thirty (30) years of practical experience in the shipping industry. Further, Mr. Wong is not a newcomer to this Republic. He has maintained various business contacts with the Republic and participated in negotiations for the establishment of a floating restaurant since 1983.

Mr. Wong had numerous conversations with Mr. Ngiraked, and during these conversations had adequate opportunity to discover any violations that the vessel Aesarea might have incurred. This Court finds the testimony of Mr. Wong stating that he was not aware of any violation until he received a telex from the Attorney General notifying him of the arrest and seizure of the vessel, unconvincing in light of the fact that Mr. Wong's captain was served with due notice of the Application for Deportation at least one month prior to the seizure of the vessel. In short, Mr. Wong had a period of at least one month to protect his interests. This Court further finds that, since Mr. Wong was physically present in Palau after the Application for Deportation was served, Mr. Wong knew or should have known that his vessel was illegally within the Republic.

It should be emphasized here that the violation in question is not merely a one or two-day overstay as inferred by counsel for the Defendant. The vessel remained in Malakal Harbor for over two months despite numerous attempts by the Division of Immigration and the Attorney General's Office to enforce the provisions of 19 TTC § 102 that required that the vessel depart.

Defendant argues that the penalty of forfeiture is excessively harsh in relation to violation of overstaying. But, as indicated above, this case is not one of a limited overstaying. Moreover, this Court, however, is bound to adhere to the clear provisions of law specified in 19 TTC § 107. It is beyond both the authority and function of this Court to create an alternative remedy, given the clear language of the statute.

Accordingly, it is:

#### JUDGMENT

Ordered, Adjudged and Decreed that the vessel Aesarea (322 feet in length; 53 feet and 2 inches in breadth; and 13 feet and 7 inches in depth; and weighing 3,992 tons) be and the same

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is, hereby condemned and forfeited, together with her tackle, apparel, furniture and equipment to the Government of the Republic of Palau.

**1253** That no liens having been shown to exist against the vessel, no provision is made for payment of liens.

Each party shall bear its own costs.