REPUBLIC OF PALAU
Plaintiff,

v.

MARY GRACE BACONGA, JERYL BLAS a.k.a. MAMAMSANG, TEMMY SHMULL, and HARUO ESANG ,
Defendants.

Criminal Case No. 13-165

Supreme Court, Trial Division
Republic of Palau

Decided: April 15, 2014

[1] **Criminal Procedure**: Joinder and Severence

Generally, there is a preference for the joint trial of defendants who are charged together.

[2] **Criminal Procedure**: Joinder and Severence

Severance of the trials of coedefendants is appropriate if the risk of prejudice to the government or the defendants outweighs the public interest in joint trial.

[3] **Criminal Procedure**: Joinder and Severence

The primary consideration in determining prejudice in cases involving multiple defendants is whether or not a jury would be able to distinguish each individual defendant and the charges against him from that of the group.

Counsel for Plaintiff: Pro Se
Counsel for Baconga: Rachel Dimitruk
Counsel for Blas: Siegfried Nakamura
Counsel for Shmull & Esang: Oldias Ngiraikelau

The Honorable R. ASHBY PATE, Associate Justice:

Before the Court is Defendants Shmull and Esang's motion for severance, and the Republic's response. The Court held oral argument on April 11, 2014 at 9:00 a.m.

In their motion, as well as during the oral argument, Defendants Shmull and Esang ask the Court to sever their trial from the trial of their co-defendants, Mary Grace Baconga and Jeryl Blas, because, among other things, the offenses with which Shmull and Esang have been charged are non-jury trial offenses. That is, Defendants Shmull and Esang argue that the significant delay, financial burden, and disparity between the severity of the crimes with which they are charged as contrasted with the crimes with which their co-defendants are charged would unfairly prejudice their case. Defendants Shmull and Esang request a bench trial, which can be set on an expedited basis and which has fewer procedural hurdles with which to contend than a jury trial. For the reasons outlined below, Defendants' motion is denied.

CONTROLLING LAW

It is well settled that the joinder of offenses and defendants in the same information may be proper under Rule 8 of the Rules of Criminal Procedure. Conversely, the Court possesses the discretion, under Rule 14 of the Rules of Criminal Procedure, to order

separate trials of counts, sever the defendants' trials, or provide any other appropriate relief if the joinder of offenses or defendants appears to prejudice a defendant or the government. *See* ROP R. Crim. P. 8 & 14.

Because there is scant decisional law in the Republic on this issue of severance in criminal cases, the Court looks to the law of other jurisdictions for guidance. *Kazuo v. Republic of Palau*, 1 ROP Intrm. 154, 172 (1984); *see also Mesubed v. Urebau Clan*, 20 ROP 166, 167 & n.1 (2013) (citing 1 PNC § 303, which requires that "[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Republic in applicable cases . . . .").

Moreover, the Republic's Rules of Criminal Procedure are similar to those of the United States. This similarity lends support to the notion that the Court should now look to United States case law for assistance in developing its own jurisprudence on the issues of joinder and severability. *See Kazuo v. ROP*, 3 ROP Intrm. 343, 346 (1993) (relying on United States case law for guidance where the Palauan constitutional provision was similar to the United States constitution); *Blailes and Wasisang v. ROP*, 5 ROP Intrm. 36, 39 (1994) (finding United States cases helpful in interpreting Palauan statute that is substantially similar to United States' statute).

[1][2] In the United States, "[t]here is a preference in the federal system for joint trials of defendants who are indicted together." *Zafiro v. U.S.*, 506 U.S. 534, 537, (1993); 5 Am. Jur. *Indictments & Informations* §197. However, Federal Rule of Criminal Procedure 14, like the ROP Rule of Criminal Procedure, recognizes that joinder, even when proper, may prejudice either the defendant or the government. *Zafiro*, 506 U.S. at 538. Ultimately, the United States' rule on severance leaves the determination of risk of prejudice and any remedy that may be necessary to the sound discretion of the trial court. *Id.* at 541; *U.S. v. Ginyard*, 65 F. App'x 837, 838 (3d Cir. 2003); 5 Am. Jur. *Indictments and Informations* §215.

[3] In deciding whether to grant a severance motion, "the trial court should balance the public interest in a joint trial against the possibility of prejudice inherent in the joinder of defendants." *U.S. v. Eufrasio*, 935 F.2d 553, 568 (3d Cir. 1991) (*citing U.S. v. De Peri*, 778 F.2d 963, 984 (3d Cir. 1985)). The primary consideration in determining prejudice in cases involving multiple defendants is whether or not a jury would be able to distinguish each individual defendant and the charges against him from that of the group. *See U.S. v. Escalante*, 637 F.2d 1197, 1201 (9th Cir. 1980), *cert. denied*, 449 U.S. 856 (1980); *U.S. v. De Larosa*, 450 F.2d 1057, 1065 (3d Cir. 1971).

ANALYSIS

Each of the eighteen counts against the four defendants in the Information here stems from what the Republic alleges is part of a common scheme or plan to carry on a business in the Republic designed, at least in part, to profit from people trafficking and prostitution. Each of the alleged crimes charged in the Information took place at the same establishment over a period of about one year. These charges are of a similar character and are based on the same acts and transactions comprising this common scheme. Thus, the Court finds that joinder of the offenses and

defendants here was appropriate under ROP R. Crim. P. 8.

When joinder is appropriate, there is a strong preference for trying defendants who are indicted together in the same trial in order to achieve the underlying goals of joinder—trial efficiency and the conservation of judicial resources. *U.S. v. Martin*, 567 F.2d 849 (9th Cir. 1977). Joint trials also serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability. *Richardson v. Marsh*, 481 U.S. 200, 210 (1987).

Here, Defendants Baconga and Blas are charged with the same misdemeanor counts of unlawful employee restrictions as is Defendant Esang. And Defendant Esang is the owner of the establishment where Defendants Baconga and Blas are charged with carrying on the scheme alleged by the Republic. Defendant Shmull is alleged to be a regular patron of the establishment owned by Defendant Esang and operated by Defendants Baconga and Blas. Four of the primary witnesses, at least according to the Republic, are the same for all charges and all defendants. They are Maria Lolita Ramirez, Maria Theresa Serapion, Winnielyn Marcelino, and Ellen Amante. These witnesses are currently off-island and, if the Court severed the trial, the witnesses would be required to fly back to the Republic at least two separate times, if not more. Moreover, because all of the offenses arise from the same alleged common scheme at the same establishment, if the Court ordered two, three, or even four separate trials, the Republic would be forced to present—and the Court would be forced to hear—the same or similar evidence from the same or similar witnesses relative, at least in the case of the unlawful employee restrictions, to some of the same or similar charges numerous times. This would not be an efficient use of judicial resources or the resources of the Republic.

Although joinder is proper under the facts of this case, and a single trial is the best way to conserve judicial resources and streamline the process, the Court must also carefully consider the competing interest of potential prejudice to Defendants. *Zafiro*, 506 U.S. at 538; *Eufrasio* 935 F.2d at 568. It is true that the counts in the Information charge all four of the defendants with offenses of varying degrees of culpability, which is a factor that favors Defendants Shmull and Esang's severance argument. *See U.S. v. Balter*, 91 F.3d 427, 432–33 (3d Cir. 1996) (*citing Zafiro*, 506 U.S. at 539) (a 'complex case' involving 'many defendants' with 'markedly different degrees of culpability,' may prejudice defendants). Defendants Baconga and Blas are charged with some of the most severe felonies involving people trafficking, which trigger their right to a jury trial under 4 PNC § 602(a), while Defendant Shmull is charged with one felony count of prostitution, and Defendant Esang is charged with two misdemeanor counts of unlawful employee restrictions and aiding and abetting a violation of the requirement of obtaining a foreign investment certificate. As noted above, Defendants Baconga and Blas are also charged with the misdemeanor counts.

Accordingly, Defendants Shmull and Esang make two arguments that merit consideration. First, because Defendants Baconga and Blas are charged with the crimes that carry the most severe punishments and social opprobrium, Defendants Shmull and Esang argue that the "spillover effect," may prejudice the fact-finder against them. Second, they argue that, because there is only one courtroom in Koror equipped to handle a jury trial (and numerous jury trials are already

scheduled in that courtroom), their right to a speedy trial will be impaired if the Court orders that their trial be joined with the jury trial for Defendants Baconga and Blas, which trial may not be set until the end of this year.

Addressing their arguments in order, the Court first notes that differing levels of culpability do not alone justify severance. *United States v. Chang An-Lo*, 851 F.2d 547, 556-57 (2d Cir. 1988), *cert. denied*, 488 U.S. 966 (1988). "Differing levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials." *United States v. Carson*, 702 F.2d 351, 366-67 (2d. Cir. 1983). Furthermore, Defendants Shmull and Esang are not charged with numerous or complex crimes; so, the risk of jury confusion or incurable "spillover effect" is low. And, while Defendants Baconga and Blas are charged with numerous crimes, the crimes with which they are charged are not unduly complex.

Turning to Defendants' speedy trial concerns, the Court concludes that those concerns are outweighed by other considerations. To limit the inconvenience to off-island witnesses, to minimize the possibility of inconsistent verdicts (which could lead to a miscarriage of justice and erode the public trust), to conserve judicial resources, and to avoid the burden of conducting two or more trials based on a events occurring at the same establishment with the same players in an alleged common scheme, the Court finds that the ends of justice are best served by continuing the matter to the extent necessary to accommodate a single, joint trial. Moreover, there is another jury-equipped courtroom in the Republic in the Capitol complex in Melekeok, and the Court will schedule the jury trial in that location at the earliest possible date if necessary to avoid excessive delay.

In balancing the public interest in joint trials against the potential prejudice to Defendants Shmull and Esang, the Court in its discretion determines that the best solution, given the particular circumstances of this case, is to deny Defendants Shmull and Esang's motion and proceed with a joint trial. The Court finds that the primary consideration in cases involving multiple defendants—that is, whether or a jury would be able to distinguish each individual defendant and the charges against him from that of the group—suggests that the potential for prejudice with a joint trial is not significant in this case. *Escalante*, 637 F.2d at 1201; *De Larosa*, 450 F.2d at 1065. Defendants Shmull and Esang's motion for severance is denied.