

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,)	CIVIL ACTION NO. 2021-016
)	
Plaintiff,)	
)	
vs.)	
)	
TAIYO CHUUK, a purse seiner fishing vessel, with)	
her fishing gear, furniture, appurtenances, stores,)	
cargo, and catch, KAZUAKI NISHIMURA (operator)	
of fishing vessel), TAIYO MICRONESIA)	
CORPORATION (permit holder and the company),)	
)	
Defendants.)	
)	

ORDER CONCERNING PROBABLE CAUSE

Larry Wentworth
Associate Justice

Hearing: June 22-23, 2021
Decided: June 30, 2021

APPEARANCES:

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HEADNOTES

Civil Procedure – Affidavits

An averment that is a declaration made under the pains and penalty of perjury does not qualify as an affidavit under FSM law. FSM v. Taiyo Chuuk, 23 FSM R. 342, 345 (Pon. 2021).

Evidence – Hearsay; Search and Seizure – Probable Cause

Probable cause may be established through hearsay evidence. FSM v. Taiyo Chuuk, 23 FSM R. 342, 345 (Pon. 2021).

Search and Seizure – Probable Cause

For a court to find probable cause, the government must show that there was a reasonable ground for suspicion, sufficiently strong to warrant a cautious person to believe that a violation of law has been committed and that the item to be seized has been used in committing that violation. FSM v. Taiyo Chuuk, 23 FSM R. 342, 345 (Pon. 2021).

Search and Seizure – Probable Cause

If a witness’s “Statement of Fact” had been notarized, the court would be satisfied that the affiant had been properly identified and was who he said he was and that he was swearing that the statement’s contents were true and accurate and that there was probable cause for the vessel’s arrest. Or, if the investigating officer had contacted the witness and confirmed from him that the “Statement of Fact” was the witness’s and was accurate and true and based on the witness’s first-hand knowledge and included that in his affidavit of probable cause, the court would be satisfied that it could find probable cause, even though it was established by hearsay. FSM v. Taiyo Chuuk, 23 FSM R. 342, 346 (Pon. 2021).

Evidence – Hearsay; Search and Seizure – Probable Cause

Hearsay provided by other law enforcement officers is often reliable without requiring any additional showing because ultimately, hearsay from the police, or other government agencies involved in law enforcement, should not be treated the same as hearsay from an unknown informant or an anonymous tip. Who the informant is affects how the court weighs credibility behind the allegations supporting probable cause since hearsay can be used to support a probable cause finding, if it has the indicia of reliability. FSM v. Taiyo Chuuk, 23 FSM R. 342, 346 (Pon. 2021).

Evidence – Hearsay; Search and Seizure – Probable Cause

Assessments on the reliability of hearsay should include a consideration for the integrity, training, and the experience of police officers, or other law enforcement agents, from whom it comes, and, if, after a reasonable investigation under the circumstances, which includes the knowledge of the source, this hearsay is corroborated, it should be considered by the court and weighed accordingly. Balanced against that is the principle that, although procedural and evidentiary rules are relaxed at a probable cause hearing, a prosecutor may not rely solely on hearsay evidence when other, more competent testimony is available. FSM v. Taiyo Chuuk, 23 FSM R. 342, 346 (Pon. 2021).

Search and Seizure – Probable Cause

When, considering the large value of the seized vessel and the lack of any exigent circumstances, as well as the FSM’s jurisdiction over the vessel as the flag state, the better view is that, since more competent evidence of probable cause does not appear to have been difficult to obtain with a little more effort, that tips the scales, ever so slightly, in finding that the FSM has fallen just short of establishing probable cause. The FSM should not be in the habit of trying to produce just the bare minimum needed to show probable cause because sometimes it will fall just short. FSM v. Taiyo Chuuk, 23 FSM R. 342, 346 (Pon. 2021).

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COURT’S OPINION

LARRY WENTWORTH, Associate Justice:

On June 22 and 23, 2021, this came before the court to determine whether the plaintiff had established probable cause for the arrest of the FSM-flagged purse seiner *Taiyo Chuuk*, currently detained in Pohnpei harbor. The defendants seek the vessel’s release because, in their view, the Federated States of Micronesia failed to establish probable cause for the vessel’s arrest.

The complaint alleges that the vessel and the other defendants violated the foreign fishing agreement applicable to the purse seiner *Taiyo Chuuk* and FSM statutory law by:

- 1) on April 9, 2020, while in FSM waters, hindering and obstructing an on-board fishery observer by not allowing him to sample the vessel's catch;
- 2) on April 11, 2020, inaccurately entering in the required fishing log, the large yellowfin tuna caught that day in FSM waters as small yellowfin tuna;
- 3) on April 18, 2020, while in FSM waters, knowingly setting their nets on and encircling three false killer whales swimming with a school of tuna;
- 4) on April 19, 2020, while in FSM waters, inaccurately recording juvenile yellowfin tuna as large yellowfin tuna;
- 5) on April 19, 2020, while in FSM waters, failing to record retained bigeye tuna on the catch log; and
- 6) on April 23, 2020, while in FSM waters, failing to record discarded skipjack tuna in the log forms.

Among the civil penalties that the FSM seeks in this action is the forfeiture of the *Taiyo Chuuk*. The *Taiyo Chuuk* is valued, according to the government, at about \$12 million and with the equipment on board, close to \$17 million. It is an FSM-flagged vessel, was not in port at the time, and was not in great danger of fleeing the jurisdiction when the affidavit of probable cause was executed two business days after the investigating officer was assigned the case. No exigent circumstances existed or were alleged.

To show that it had probable cause for the *Taiyo Chuuk*'s arrest, the FSM called two witnesses – Tosio Irons, Jr., a fishery observer debriefer employed by the National Oceanic Resources Management Authority (“NORMA”), and Charles Otoko, an investigator for the FSM National Police and the affiant on the application for the warrant to arrest the purse seiner *Taiyo Chuuk*. Although Otoko was an investigator with thirteen years' police experience, the last five with the FSM National Police and the previous eight years with the Pohnpei State Police, this was his first fisheries case.

Otoko based his affidavit of probable cause on his review of various documents:

- 1) an October 28, 2020 Statement of Fact from the Papua New Guinea fishery observer, Richard Betania, who had been stationed aboard the purse seiner *Taiyo Chuuk* throughout April 2020, and who had first-hand knowledge of the alleged violations in FSM waters as well as a couple in Marshallese waters;
- 2) observer's daily fish log for April 17-18, 2020;
- 3) observer's daily fish log for April 22-23, 2020;
- 4) SPC/FFA purse seiner *Taiyo Chuuk*'s log sheet with handwritten notation that the vessel failed to record the large yellowfin tuna catch and “combin[ed] retention of yellowfin as juvenile”;
- 5) the *Taiyo Chuuk*'s set details log sheet for April 12-20, 2020, that did not show any discarded catch;
- 6) the *Taiyo Chuuk*'s set details log sheet for April 5-12, 2020; and
- 7) *Taiyo Chuuk*'s set details log sheet for April 21-29, 2020.

Testimony also established that the purse seiner *Taiyo Chuuk*'s alleged violations of FSM statute and its applicable fishery agreement were first brought to the FSM's attention through a January 5, 2020 letter from Acting Managing Director Noan Pakop of the Papua New Guinea National Fisheries Authority to Eugene Pangelinan, NORMA Chief Executive Officer.

None of these documents were authenticated in court or, apparently, by Officer Otoko during his investigation. Neither witness testified about their provenance. Observer Richard Betania's "Statement of Fact" was not notarized, although his signature on that document did appear under an averment that he

solemnly declare[d] that the information I have given is true and correct to the best of my knowledge and belief. I make it knowing that if it is tended [sic] in evidence I will be liable to prosecution if I have knowingly stated anything that is false or misleading in any particulars.

This averment may, or may not, be declaration made under the pains and penalty of perjury and suffice as an affidavit under Papua New Guinea law. It does not qualify as an affidavit under FSM law. See Pt. Alorinda Shipping v. Alorinda 251, 21 FSM R. 318, 322 (Yap 2017); People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 18 FSM R. 297, 300 & n.1 (Yap 2012). It also does nothing to prove the declarant's identity.

The parties do not dispute that Richard Betania was the fisheries observer on the *Taiyo Chuuk* during the relevant time period and that he is a person with first-hand personal knowledge of the allegations in this case. His "Statement of Fact" is hearsay because it was made out-of-court and is now offered in court for the truth of the matter therein. Probable cause may be established through hearsay evidence. In re Wrecked/Damaged Helicopter, 22 FSM R. 447, 456 (Pon. 2020) (well-established that hearsay may be used to establish probable cause and that the finding may be based upon hearsay evidence in whole or in part); FSM v. Ezra, 19 FSM R. 497, 515 (Pon. 2014) (finding of probable cause may be based upon hearsay evidence in whole or in part; general rule is that a police officer may consider virtually any evidence in determining whether probable cause exists); In re Anzures, 18 FSM R. 316, 324 n.12 (Kos. 2012) (probable cause finding may be based upon hearsay evidence in whole or in part); FSM v. Esefan, 17 FSM R. 389, 395 (Chk. 2011) (same); FSM v. Wainit, 10 FSM R. 618, 621 (Chk. 2002). Hearsay evidence may be used to establish probable cause for a vessel's arrest. FSM v. Yue Yuan Yu No. 708, 7 FSM R. 300, 303 (Kos. 1995) (court may rely on hearsay evidence for the purpose of finding probable cause at a post-seizure hearing).

For a court to find probable cause, the government must show that there was a reasonable ground for suspicion, sufficiently strong to warrant a cautious person to believe that a violation of law has been committed and that the item to be seized has been used in committing that violation. Ishizawa v. Pohnpei, 2 FSM R. 67, 76 (Pon. 1985).

If Officer Otoko had obtained the information in his affidavit of probable cause directly from Betania or if Otoko had directly contacted Betania and had Betania confirm the accuracy of the "Statement of Fact" and Otoko had then averred to that confirmation in his affidavit of probable cause, the court would be satisfied that there was sufficient evidence to warrant a cautious person to believe that the *Taiyo Chuuk* had committed the violations alleged. The other documents reviewed by Otoko are not as reliable. The letter apparently received from the Papua New Guinea National Fisheries Authority's Acting Managing Director was not, of course, based on first-hand knowledge. The other documents referred to by Officer Otoko are documents that support the allegations in Betania's "Statement of Fact," but there are handwritten notations on them that draw attention to matters allegedly omitted from the *Taiyo Chuuk* log sheets, that were required to be included, thus constituting violations. Otoko testified that without those handwritten annotations, which were made by an unknown person (most likely either a Papua New Guinea fisheries compliance officer or maybe Betania), he would not have known that fisheries violations had occurred.

If Betania's "Statement of Fact" had been notarized, the court would be satisfied that the affiant had been properly identified and was who he said he was and that he was swearing that the statement's contents were true and accurate and that there was probable cause for the vessel's arrest. Or, if Officer Otoko had contacted Observer Betania and confirmed from him that the "Statement of Fact" was Betania's and was accurate and true and based on Betania's first-hand knowledge and included that in his affidavit of probable cause, the court would be satisfied that it could find probable cause for the *Taiyo Chuuk's* arrest, even though it was established by hearsay. But neither of these steps were taken.

Alternatively, if Betania's Statement of Fact had been notarized and transmitted as an attachment to the Papua New Guinea National Fisheries Authority's January 5, 2021 letter to NORMA, even though that would have added an extra layer of hearsay, the court likely would find that reliable enough to satisfy probable cause as there would have been a reliable chain of custody for Betania's affidavit.

Hearsay provided by other law enforcement officers is often reliable without requiring any additional showing because ultimately, hearsay from the police, or other government agencies involved in law enforcement, should not be treated the same as hearsay from an unknown informant or an anonymous tip. *FSM v. Kimura*, 19 FSM R. 630, 636 (Pon. 2015). Who the informant is affects how the court weighs credibility behind the allegations supporting probable cause. *Id.* Hearsay can be used to support a probable cause finding, if it has the indicia of reliability. *Id.* at 638. Assessments on the reliability of hearsay should include a consideration for the integrity, training, and the experience of police officers, or other law enforcement agents, from whom it comes, and, if, after a reasonable investigation under the circumstances, which includes the knowledge of the source, this hearsay is corroborated, it should be considered by the court and weighed accordingly. *Id.* Balanced against *Kimura* considerations is the principle that, although procedural and evidentiary rules are relaxed at a probable cause hearing, a prosecutor may not rely solely on hearsay evidence when other, more competent testimony is available. *Yue Yuan Yu No. 708*, 7 FSM R. at 304.

Thus, this is a close case. Which way it goes depends on which principle is given more weight given the surrounding circumstances. But, considering the large value of the seized vessel and the lack of any exigent circumstances (the FSM had several more days before the *Taiyo Chuuk* made port in Pohnpei), as well as the FSM's jurisdiction over the vessel as the flag state, the court feels that the better view in this case is that, since more competent evidence of probable cause does not appear to have been difficult to obtain with a little more effort,¹ tips the scales, ever so slightly, in finding that the FSM has fallen just short of establishing probable cause for the *Taiyo Chuuk's* arrest. The FSM should not be in the habit of trying to produce the bare minimum needed to show probable cause because sometimes it will fall just short.

Accordingly, the court vacates the arrest warrant for the *Taiyo Chuuk*. The *Taiyo Chuuk* is released. This, however, does not mean that the FSM is precluded from obtaining more evidence with which it could establish probable cause and could, since the *Taiyo Chuuk* is an FSM-flagged vessel and thus a vessel over which the FSM has jurisdiction regardless of where it is in the world, obtain another warrant for the *Taiyo Chuuk's* arrest.

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¹ The court realizes, that as a fisheries observer, Betania may be (or have been) at sea on another extended voyage, but that would not be known unless Otoko, or someone else, tried to contact him. Otoko testified that he did not try to contact and interview Betania or anyone else.