

**IN THE HIGH COURT OF KIRIBATI
(BEFORE THE HON R LUSSICK C.J.)**

HCCrC 19/98

THE REPUBLIC

versus

SAM JONG KIM

Mr T Tabane for the Republic
Accused in person

Date of hearing: 22, 23, 24 February 1999

JUDGMENT

The accused is the captain of a fishing vessel named Jasmine 9 which is owned by Venus Marines Ltd, a Korean company. He is charged with one offence against section 5(1)(a) and one offence against section 5(1)(b) of the Fisheries Ordinance Cap. 33. The indictment also charges the owner with the same offences but the company makes no appearance, so that the present proceedings are against Sam Jong Kim only. He has pleaded not guilty to both charges

The accused is not legally represented. At different stages in the history of this case he has had the services of two lawyers, but both have withdrawn from the case. He was given ample opportunity to engage another lawyer before the commencement of the present hearing – for which an interpreter has been flown in from Australia – but has not done so. He has not sought a further adjournment and the hearing will proceed.

Section 5(1) provides as follows:

"5(1) No foreign fishing vessel shall –

- (a) enter within the fishery limits except for a purpose recognised by international law; or
- (b) fish or attempt to fish within the fishery limits; or
- (c) load, unload or tranship any fish within the fishery limits; or
- (d) load or unload any fuel or supplies within the fishery limits,

unless authorised to do so under a permit granted under this Ordinance".

The particulars are that, without the authority of a permit, the vessel entered the fishery limits on or about 9 May 1998 not for a purpose recognised by international law and fished within those limits.

On 22 June 1998 the vessel Jasmine 9 dropped anchor at the port in Betio to pick up some crew. It was boarded by a party of officials from the departments of Fisheries, Immigration, Customs and Health. After the ship's log was inspected, the ship was arrested and the present charges were laid.

The Republic called 4 witnesses to prove the charges. The accused cross-examined 3 of them, but not the first witness.

The first witness was Nei Tooti Tekinaiti, Acting Chief Fisheries Officer. Her office is responsible for monitoring the activities of ships within Kiribati's Exclusive Economic Zone (EEZ) and making sure they are licensed. The witness produced a printout of computerised records which showed that Jasmine 9 was a longliner sailing under the Honduras flag and owned by the company Venus (as abbreviated). The records also showed that the vessel had been issued with a licence on 23 June 1998, the day after it had arrived in Betio. The vessel had not previously held a licence and so, on the day in question – 9 May 1998 – it had not been authorised to enter or fish within the fishery limits.

The evidence of this witness was not disputed. Although I had explained to the accused his right to cross-examine, he declined to do so. Later on, in his own evidence, he admitted that he was aware that the vessel had not been licensed.

The next witness was Taitai Teororo who, at the time, was an officer in the licensing unit of the Fisheries Division. He was one of the party which boarded the vessel when it arrived in Betio on 22 June 1998.

The witness testified that he inspected the ship's log and saw that on the 9th May 1998 the vessel had been in a position which he suspected to be within the EEZ. The witness produced the log which shows that at 0800 hours that day the vessel was at position S0300 W17925 (latitude south 3 degrees 00 minutes, longitude west 179 degrees 25 minutes). From that position it commenced to stream its long lines on a course heading due north 00 degrees. At 1050 hours the vessel altered course to 270 degrees and travelled west on that course continuing to stream its long lines until 1342 hours, when it arrived at coordinates S0230 W17955. The log has only the following two entries after that.

"Finished with engine drift"

and

"1620 Comm'ced heaving up long lines".

The witness said that it was this second position which had aroused his suspicion. He jotted down the two positions. Back in his office he plotted the two positions on his computer. He used a programme supplied to Kiribati by the Forum Fisheries Agency, Honiara, Solomon Islands about 3 years ago. The programme can fix the position of a ship in relation to an EEZ. According to the witness, the FFA programme which is also used by other Pacific countries in the region, is highly trusted and he has never heard of any disputes about it. He said he had done two training courses on the programme in Honiara.

A computer and a big screen were set up in court and the witness demonstrated how he plotted the two positions of the vessel. He first clicked on the particular region and the computer showed lines representing the outer limits of various exclusive economic zones, including that of Kiribati. He then entered the latitude and longitude of the first position which came up on the computer as a blue dot outside the Kiribati EEZ. He then entered the latitude and longitude of the second position and this time the blue dot was clearly inside the EEZ.

The witness said that he next called his superior officer and plotted the two positions in his presence. He obtained the same result.

The witness said that the next step he took was to plot the two positions onto a chart which showed the EEZ of Kiribati. Again the same result was obtained.

The witness later went back to the ship with his superior officer and confronted the accused. The accused showed him a chart on which he had marked the two positions and the EEZ. Both positions appeared to be outside the EEZ. The witness said that he measured the 200 mile limit drawn by the accused and found that the accused had calculated the EEZ from the island of Nikunau, instead of from Arorae. In front of the accused the witness measured a distance of 200 nautical miles from the baseline of Arorae. This showed that the second bearing fell within the EEZ by a distance of 5.9 miles.

The third prosecution witness was Captain Miteti Abete, Director of the Marine Division of the Ministry of Information, Communications and Transport. He is a qualified Master (Foreign-Going) and captained a ship for 7 years.

His evidence was that he inspected the log of Jasmine 9 for 9 May 1998 and plotted the two positions shown therein onto a navigational chart. The witness produced that chart showing his plottings. He measured 200 nautical miles from the baseline of Arorae and found that the second position of the vessel was well within the 200 mile limit. He measured a distance of approximately 6 nautical miles inside the EEZ.

The fourth and last prosecution witness was Inspector Tokanibeia Tominiko of the Kiribati Police Force. He testified that he obtained a statement from the accused after first administering the usual caution. The interview was conducted with the assistance of an interpreter from the Peace Corps and in the presence of several

persons, including the accused's lawyer, two lawyers from the Attorney-General's office, a police witness, and the Acting Director of the Peace Corps. The accused gave a statement but when the witness started putting questions to the accused the interpreter had difficulty with the navigational and marine terms, so the interview was terminated. The statement was written in English and Korean. The Korean parts were signed by the accused and the interpreter. The present interpreter has read the Korean version and has supplied a translation into English of the passages signed by the accused.

The statement which the accused gave to the police is in these terms:

"At about 5 miles outside Exclusive Economic Zone, we let out the fishing gear and completed the fishing outside EEZ Kiribati. Approaching 2 miles inside EEZ Kiribati, we turned off the engine considering the winds and currents. The ship drifted for 3-4 hours. Due to the currents, the fishing gears were drifted into the spot where we completed the fishing. This is the usual practice taking fishing gears in. I was not aware that coming into EEZ is illegal. But I admit we came in approximately 2 miles. In future I would not come into inside EEZ Kiribati without a licence. But I will not let out fishing gears inside Kiribati EEZ".

I was satisfied that the statement was voluntary and admitted it in into evidence.

That was the close of the prosecution case. I found that there was a case to answer and informed the accused of the options open to him as set out in section 256 of the Criminal Procedure Code Cap. 17. The accused elected to give evidence on oath but did not call any witnesses.

The accused testified that he first went to sea in 1978 and has been a captain since 1989. In all that time he had never broken the law.

He denied entering the EEZ to fish.

He also claimed that the caution had not been translated accurately to him. He said that he did not think that the statement was that serious, or that he would be facing this kind of court hearing. He claimed that he was preoccupied with the surrounding situation at the time, so that when he was shown the statement he just roughly read the Korean translation and signed it.

He denied saying in his statement that he went inside the EEZ. He claimed that he had said that his ship was blown 2 miles towards the EEZ but did not enter it.

He claimed that the log book shows the longitude of the second position of his vessel to be W179-45, not W179-55, and that he had told this to the Fisheries officers who boarded the ship. It was not disputed that the former position would be outside the EEZ, while the latter position would be inside it.

When cross-examined, he agreed that he speaks a little English. He conceded that on 9 May 1998 his ship did not have a permit to fish in Kiribati. He admitted knowing that there was a 200 nautical mile fishing limit inside which he was not allowed to fish, but he thought that it was alright to sail inside the limit so long as he did not fish. He denied that he ever told Taitai Teororo (the second prosecution witness) that he had measured the EEZ from the baseline of Nikunau. He claimed that he had made the measurement from the baseline of Arorae.

That was the close of the case for the defence. I then heard an address by counsel for the Republic. The accused was informed of his right to address the court but he did not wish to say anything further.

Before considering the evidence I must direct myself that the burden of proof beyond reasonable doubt remains upon the prosecution from first to last. The prosecution must prove the charge and each element of the charge beyond a reasonable doubt and if it fails to do so then the accused is entitled to be acquitted. There is never any onus on the accused to prove his innocence.

To discharge that onus in respect of the first count, the prosecution must establish:

- (i) that Jasmine 9 was a foreign fishing vessel;
- (ii) that it entered the fishery limits not for a purpose recognised by international law; and
- (iii) that it did so without the authority of a permit granted under the Fisheries Ordinance.

In respect of the second count the prosecution must also prove that the vessel fished or attempted to fish within the fishery limits.

From the evidence of the first two prosecution witnesses and of the accused himself, there can be no doubt that the ship was a foreign fishing vessel and I am satisfied that that element of the charge has been proved to the required standard.

On the question of entry into the fishery limits, I accept the evidence of the prosecution witnesses. I find that the accused's contention that the log shows the second longitude position as W17945 has no foundation. The log distinctly shows the figures to be W17955. The person who made the entry – the second officer according to the accused – had an unusual way of making the figure 5. In the entry W17955, both 5s are made in the same way except that the first 5 has a much smaller curve in the tail. There are other figure 5s appearing in entries in the same hand on that page of the log. They are all similar. The figure disputed by the accused could not possibly be a 4 nor any other number except a 5. That is enough to decide the issue, but there is more. The entry for 9 May 1998 in a note book kept by the accused, the 2nd officer and the crewman responsible for bringing in the fishing lines was produced to the court. The note book gives details of fishing

activities including the directions in which the lines were streamed, the speed of the vessel and the number of revolutions per minute of the engine. The entry for the speed was 10.5 knots. The figure 5 in that entry was almost exactly the same as the disputed figure in the log book. The accused conceded in cross-examination that the speed shown in the notebook was indeed 10.5 knots and that the entry had also been made by the second officer.

Further, the third prosecution witness Captain Miteti testified that the information given in the note book matched exactly with the information in the log book and led to a second position of S0230 W17955. Based on my own observations and the evidence of the prosecution witnesses, which I accepted, I find as a fact that the coordinates shown in the log fixing the second position of the vessel were S0230 W17955.

I must say that I formed the view that the accused was deliberately not telling the truth on the issue of whether his ship entered into the fishery limits. The evidence of the witness Taitai Teororo was that he and his superior officer confronted the accused and explained to him why the second position of his vessel was inside the EEZ. He said that the accused explained in turn that he had measured the EEZ from Nikunau. The witness said that he told the accused that he should have measured it from the southernmost island of Arorae. According to the witness, that was the only explanation given by the accused. He did not claim that the longitude of the second position was W17945 and not W17955. I accepted the evidence of this witness. It is not plausible that he and Captain Miteti would have gone to the trouble of plotting a second EEZ measured from Nikunau if they had been told by the accused that he had measured the 200 mile limit from Arorae.

The remainder of the accused's evidence on the disputed log entry was quite equivocal. He stated that the second officer made the entry in the log just after he had woken up and could have been inaccurate. He also stated that on 5 June 1998 the ship anchored in Japan where some repairs had to be made to the navigational equipment, which had been making errors in the position of the ship. I took the first assertion to mean that there was a possibility that the second officer mistakenly wrote a 5 instead of a 4 in the second longitude position. The second assertion leaves open the possibility that the log entry itself was not incorrect. Neither proposition is consistent with his claim that the second longitude position is correctly shown in the log as W17945, not W17955.

I also did not believe the accused's evidence about his cautioned statement. His claim that the interpreter at the time did not translate his statement accurately cannot be justified in view of the fact that the present interpreter, against whom he had no complaints, came up with a very similar translation. Also, it was obvious that he understood some English, and he admitted as much. He was able to communicate with the people from Fisheries when they boarded the ship, and they spoke no Korean. I therefore do not accept that he was misquoted or that he signed his statement without understanding what it said. The statement does not mention anything about a disputed log entry. Instead, it is an admission that his ship drifted

2 miles into the EEZ and an assurance that it would not happen again. Even then, this fell far short of the truth. The information in the log showed that the vessel was still streaming its long lines up to the second bearing, which was about 6 miles inside the EEZ.

His evidence regarding the incorrect translation of the caution that was administered to him did not result in any injustice. He claims he was advised that he should not say anything. That was a much stronger caution than what was required to be given. In any event, having been given that advice, he still chose to make a statement.

The vessel's log shows that on 9 May 1998 the second position of the vessel, by latitude and longitude, was S0230 W17955. Plottings of that position onto a FFA computer programme and also onto a map show that the vessel was at the time within the EEZ of Kiribati. Section 2 of the Fisheries Ordinance, as amended by the Fisheries (Amendment) Act 1983 defines "fishery limits" as meaning "the exclusive economic zone of Kiribati or such part of that zone as is defined by the Minister for the purpose of Notice published in the Gazette". It appears that no relevant notice defining part of the zone has been published in the Gazette, so that the fishery limits extend throughout the whole of the EEZ.

Section 7 of the Marine Zones (Declaration) Act 1983 declares the EEZ of Kiribati to comprise those parts of the sea whose inner limits are the outer limits of the territorial sea and whose outer limits are a line drawn 200 nautical miles seaward from the outer limits of the inland waters of Kiribati.

There is thus no doubt that when the vessel was in the second position shown by the log book it was within the fishery limits of Kiribati. The accused does not in fact dispute the evidence of the prosecution that the position S0230 W17955 was within the EEZ. His argument, which I reject, was that that was not the position shown in the log book.

On the question of whether the vessel was fishing within the fishery limits there is the evidence of the ship's log, which shows that when the ship was at the second position it had its long lines in the water. There was also the sworn evidence of the accused that when the ship reached its second position that day it had its fishing lines out. The evidence of the second prosecution witness Taitai Teororo was that the accused told him that the two positions shown in the log book indicated both ends of his fishing line. The accused of course claimed that the second position was not inside the EEZ. His statement to the police contradicts his sworn evidence, which I have already indicated I do not accept.

Section 2 of the Ordinance as amended by the Fisheries (Amendment) Act 1984 defines "fishing" as meaning "the actual or attempted fishing, catching, taking, killing or harvesting of fish, and includes any other activity which may reasonably be expected to result in the fishing or attempted fishing or catching, taking, killing

or harvesting of fish, or any operations in support of or in preparation for any of the foregoing activity".

I am satisfied on the evidence beyond a doubt that when the ship was within the fishery limits it was fishing within the meaning of the Ordinance.

As mentioned earlier, there was undisputed evidence from the first prosecution witness that the vessel had not been authorised by permit to enter or fish within the fishery limits. The accused admitted as much in his own evidence.

The last matter to consider is the exception given in section 5(1)(a) to a foreign fishing vessel entering within the fishery limits for a purpose recognised by international law. As already mentioned, the evidence established that the vessel entered the fishery limits for the purpose of fishing. That is one of the activities expressly forbidden by the section, unless authorised under a permit. It follows that such a purpose could not possibly fall within the said exception, or any exception for that matter. Counsel for the Republic puts forward the further argument that the purposes recognised by international law are defined in Article 58 of the United Nations Law of the Sea Convention as navigation and overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea, such as those associated with the operation of ships, aircraft and submarine cables and pipelines. I agree that those principles do not encompass illegal fishing. I find that this element has also been proved to the required standard.

The prosecution having proved all of the elements required to be proved beyond a reasonable doubt, I find the accused guilty of both charges and he is convicted accordingly.

**THE HON R B LUSSICK
CHIEF JUSTICE
(01/03/99)**

SENTENCE

Offences of this nature are understandably viewed seriously by the Legislature, as the penalties provided by the Ordinance show. The Fisheries (Amendment) Act of 1997 provides a minimum fine in the case of a master contravening section 5(1) of \$20,000 to a maximum fine of \$100,000, in default imprisonment for 1 year. In the case of an owner or charterer, the minimum fine is \$100,000 to a maximum fine of \$500,000, in default imprisonment for 2 years.

The evidence established that on 9 May 1998 the Jasmine 9 was intentionally brought within the fishery limits of Kiribati for the purpose of fishing. It streamed its fishing lines to a distance of almost 6 miles inside the EEZ. The vessel was not apprehended until 22 June 1998, when no fish were found on board. In the meantime, the vessel would have had any number of opportunities to unload its

catch. On the evidence of the accused himself, the vessel had been in Japan earlier in the month of June 1998. It is of course not now possible to determine the quantity and value of the catch taken from the Kiribati fishery limits on the day in question.

The Kiribati Court of Appeal has laid down the principles to be considered by the court when sentencing for offences of this nature. "The loss caused to the Republic by illegal fishing within the fishery limits is likely to be great. Offences of this kind are difficult to detect, and warrant a severe penalty in the hope of deterring others from committing similar offences". (Golden Key Petroleum P/L & Anor v. Republic Cr.App. No. 1 of 1991). "Kiribati is a nation with few natural resources, and the fish within its exclusive economic zone form an important part of those resources. Moreover, Kiribati has only a limited ability to police the vast waters of its exclusive economic zone. It thus is necessary, when an offending vessel is caught systematically fishing in those waters for commercial purposes, that heavy penalties be imposed, in order to deter others from plundering the resources of Kiribati". (Byong Chol Im and Anor v. Republic Cr.App. No. 1 of 1990).

In the latter case, the Court of Appeal drew a distinction between the position of an owner and that of a master and decided that, at least in the circumstances of that particular case, the master ought to be treated much more leniently. That approach has, to a great extent, been precluded by the Fisheries (Amendment) Act 1997, in which Parliament has expressed an intention that masters of foreign fishing vessels fishing illegally are to be dealt with by the courts more severely than they have been in the past.

The message is now very clear, if it was not before, that all persons caught plundering the natural resources of Kiribati will face severe penalties.

The accused has told the court that he is aged 40, has been at sea since 1978 and has been a captain since 1989, in all of which time he had never broken the law. He also says that he has parents, a wife and 2 daughters, all of whom are totally dependent upon him. He says further that he has been in custody for 8 months. (Custody, incidentally, has been at the Betio Motel, not prison).

As regards his means, all the accused would say was that at the present time he had no idea how he could pay a fine. However, the accused said that if the Court were to impose the minimum fine he would contact people outside in an effort to pay it. Any hardship suffered by his family is to be regretted, but that is one price to be paid for committing a crime. It is not a mitigating factor. As regards the time spent in custody, the delay in bringing this case on for hearing was largely the fault of the accused.

A valuation estimates the total value of Jasmine 9 with gear at \$1,950,000. The ship had been arrested but has since escaped from arrest and sailed away. A search has been mounted but, up to the present time, has not been successful. There is no

evidence and no suggestion that the accused played any part in those events and it is not a factor which has been considered in arriving at an appropriate penalty.

In all the circumstances, the accused on each of the 2 charges is convicted and fined \$60,000 payable forthwith in default imprisonment for one (1) year, making a total fine of \$120,000 or 2 years' imprisonment in default. In addition, I order that the vessel Jasmine 9, together with its equipment, stores, cargo, fishing gear, instruments and appliances, be forfeited to the Republic. That is, if it is apprehended again.

For the information of the accused, under our law the imprisonment imposed in default of payment of a fine terminates whenever the fine is paid.

The accused is also advised that he has the right to appeal to the Court of Appeal within 30 days.

**THE HON R B LUSSICK
CHIEF JUSTICE
(01/03/99)**