IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

REPUBLIC OF THE MARSHALL ISLANDS,	)	CRIMINAL CASE NO. 2010-020
v.	)	
LANG, ET AL.,	)	**ORDER DENYING SUPPRESSION MOTION**
Defendant.	)	

TO: Assistant Attorney-General Jack Jorbon, counsel for the Republic
Assistant Public Defender Karotu Tiba, counsel for defendant

I. INTRODUCTION

On February 1, 2012, the Court heard argument on the defendant's April 29, 2011 Motion to Suppress Defendant's Confession. The defendant claimed that his confession was obtained in violation of his rights under Article II, Section 4(8) of the Constitution. That is, he was subjected to coercive interrogation, his confession was involuntary, and the confession was extracted from him without informing him of his rights in violation of Section 4(8). Section 4(8) provides (1) that no person shall be subjected to coercive interrogation; and (2) that a criminal conviction cannot be supported by (a) any involuntary confession, (b) involuntary guilty plea or (c) any confession extracted from someone who has not been informed of his rights to silence and legal assistance and of the fact that what he says may be used against him.

Section 4(8) reads as follows:

> No person shall be subjected to coercive interrogation, nor may any involuntary confession or involuntary guilty plea, or any confession extracted from someone who has not been informed of his rights to silence and legal assistance and of the fact that what he says may be used against him, be used to support a criminal conviction.

However, because the coercive acts of which the defendant complains were allegedly committed by private persons, and not the state or private persons acting on behalf of the state, the defendant's Section 4(8) rights were not violated. Also, the Court finds that the defendant's confession was not involuntary. For these reasons, the Court denies the defendant's Motion to Suppress.

II. FACTUAL CONTEXT

The confession at issue is the defendant's March 6, 2010 Sworn Statement.[1] In his Sworn Statement, the defendant confesses to the theft of goods (e.g., cases of corned beef, tuna, and coffee) from the warehouse of his then employer, the Payless Supermarket. Payless Supermarket personnel investigating thefts from the store, not the police or other state actors, obtained the defendant's statement. After taking the defendant's statement, Payless personnel referred the Sworn Statement to the Government, which in turn used the defendant's statement, and the statements of others, to support its case against the defendant. The defendant did not establish that Payless Supermarket personnel were acting for, or with the encouragement of, the National Police or any other state actors.

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[1]Exhibit No. 1 to the Republic's June 3, 2011 Opposition to Motion to Suppress Defendant's Confession.

III. ANALYSIS

A. Whether the defendant's confession, his Sworn Statement, was taken in violation of Article II, Section 4(8) of the Constitution.

Article II, Section 4(8) of the Constitution protects criminal defendants from coercive practices by state actors, not private parties, and the acts of which the defendant complains were allegedly committed by private persons, not the state.

This Court should not, and need not, interpret Section 4(8) protections to cover confessions obtained by private parties, as opposed to state parties, for two reasons. First , such an interpretation is contrary to United States decisional law, which pursuant to the Marshall Islands Constitution this Court is to look to in interpreting and applying similar provisions in the Marshall Islands Constitution. Second, such an interpretation would be inconsistent with the text of Section 4.

1. United States decision law, interpreting and applying language similar to Section 4's subsections, is directed at the acts of the state, not the acts of private parties.

Under United States decisional law, provisions of the United States Constitution that are similar to subsections of Article II, Section 4, are interpreted to protect against the acts of the state, not private persons.

For example, Article II, Section 4(1) provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." The Marshall Islands due process clause reads the same as the due process clauses found in the Fifth Amendment and Fourteenth Amendment of the United States Constitution. Given this similarity, the Court is instructed by the Marshall

Islands Constitution to look to, without bound by, United States decisional law when interpreting and applying the Marshall Islands due process clause. Const. Art. I, Sec. 3(1).[2]

Under United States decisional law, it is well settled that the protections of the due process clause can only be invoked when the action complained of constitutions state, not private, action. See 16C C.J.S. Constitutional Law § 1462. In *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 521, 93 L. Ed. 2d 473 (1986), the United States Supreme Court held that coercive *police activity* "is a necessary predicate to a finding that a confession is not voluntary within the meaning of the Due Process Clause of the Fourteen Amendment." *Id.*, at 167. Even "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." *Id.*, at 166.

Considering United States decisional law, and in the absence of any Marshall Islands law to the contrary, this Court can, and does, conclude that the Marshall Islands due process clause, Subsection 4(1), only protects persons against confessions obtained by state action, not the acts of private parties.

Similarly, under United States decisional law, the Fifth Amendment forbids the state to compel self-incriminating answers. *See Lefkowitz v. Turley*, 414 U.S. 70, 84, 94 S. Ct. 316, 325, 38 L. Ed. 2d 274 (1973). "[T]he privilege [against compelled self-incrimination] is against compulsion by the government, and does not bar evidence obtained from the accused by compulsion exercised by a third person." 22A C.J.S. Criminal Law § 903. Accordingly, looking

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[2]Article I, Section 3(1) of the Constitution provides: "In interpreting and applying this Constitution, a court shall look to the decisions of the courts of other countries having constitutions similar, in the relevant respect, to the Constitution of the Republic of the Marshall Islands, but shall not be bound thereby; . . . ."

to United States decisional law, as instructed by the Constitution, this Court concludes that the Section 4(7) privilege against self-incrimination protects the accused against confessions obtained by the state but not by person parties.

In addition to analogies the Court can draw to relevant United States decisional law, the text of Subsections (2) through (7) and (9) of Section 4 limits the subsections' protections to acts by the state.

2. The text of Section 4 is directed at state action, not the acts of private parties.

The Subsections (2) through (7) and (9) grant criminal defendants pre-trial and trial rights and protections in criminal proceedings, [3] criminal proceedings that are conducted by the Marshall Islands Judiciary and instituted by the Attorney-General. Under the Constitution (Const. Art. VI, Sec. 1) and the Judiciary Act 1983 (27 MIRC Chp. 2), the Judiciary conducts criminal trials. Under the Constitution (Const. Art. VII, Sec. 3(3)), the Attorney-General, not a private person, is "responsible for instituting, conducting or discontinuing any proceedings for an

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[3]Subsection (2), the presumption of innocence until proven guilty beyond a reasonable doubt.

Subsection (3), the right to bail.

Subsection (4), rights in all criminal prosecutions (e.g., to be informed of charges, to a preliminary hearing, to a speedy and public trial, etc.).

Subsection (5), to trial by jury.

Subsection (6), to a charging document (e.g. an indictment or a criminal information).

Subsection (7), to the privilege against compelled self-incrimination in a criminal case.

Subsection (9), to protection against double jeopardy.

offense alleged to have been committed." That is, the pre-trial and trial rights and protections set forth in Subsections (2) through (7) and (9) of Section 4 are only directed at actions that can be taken by state actors, the Judiciary and the Attorney-General.

Subsection 4(10) is different from the first 9 subsections in that it relates to civil, not criminal, proceedings. Subsection (10) requires that those incarcerated outside of criminal process can only be incarcerated pursuant to *Act*, subject to fair procedures, and upon a clear showing that the person's release would gravely endanger his health and safety or the health, safety, or property of others. Hence, Subsection 4(10) can only be read as governing those acting under authority of the state, i.e., a state statute.

3. Similarly, Subsection 4(8)'s protections only apply to confessions obtained by the state.

Although there is no provision like Subsection 4(8) in the United States Constitution, Section 4(8) finds its antecedents in the United States Constitution and United States decisional law.

First, Section 4(8)'s prohibition against the use of coerced confessions is analogous to the prohibitions against the use of coerced or compelled confession under United States Constitution's Fifth Amendment and Fourteenth Amendment due process clauses and Fifth Amendment privilege against compelled self-incrimination. As noted above, these provisions afford protection against confession obtained by the state, not by private person.

Second, Section 4(8)'s prohibition against the use of involuntary confessions and confessions extracted without constitutional warnings is analogous to, and appears to be

patterned after, the United States Supreme Court's Fifth Amendment *Miranda*[4] warnings. In the *Miranda* case, the United States Supreme Court defined interrogation as "questioning initiated by law enforcement officers." Since the *Miranda* decision, United States courts have consistently held that *Miranda* warnings do not apply to non-government store detectives, and the like. 2 Crim. Proc. § 6.10(b) (3d ed.).

Accordingly, as Section 4(8)'s prohibitions find their antecedents in United States law and as such law is directed at confessions obtained by state action, this Court can, and does, conclude that Section 4(8)'s prohibitions apply to confessions coerced or extracted by state actors, not private parties. For this reason, the Court denies the defendant's Motion to Suppress.

V. Voluntariness

Not only is the defendant's Sworn Statement not subject to Section 4(8)'s prohibitions against involuntary confessions, but also the Court concludes that the defendant's confession, the Sworn Statement, was voluntary.

For purposes of testing the voluntariness of the defendant's Sworn Statement, the Court adopts the legal standard set out in the following United States cases that interpreting relevant constitutional provision that are the same as, or are substantially similar to, those of the Marshall Islands: *Townsend v. Sain*, 372 US 293, 307 (1963)[5]; *Blackburn v. State of Alabama*, 361 US

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[4]*Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 694 (1966).

[5]In *Sain*, the court stated, "If an individual's 'will is overborne' or if his confessions was not 'the product of a rational intellect and free will' his confession is inadmissible because coerced. These standards are applicable whether a confession is the product of physical intimidation or psychological pressure . . . ." *Sain*, 372 US 293, 307.

199, 211 (1960)[6]; and *Ziang Sung Wan v. United States*, 266 US 1, 14 (1924)[7]. This standard, requires that the will of the defendant not be overborne and that the statements be the product of rational intellect and free will.[8]

With respect to voluntariness, the facts offered by the parties are as follows.

The defendant, in his April 29, 2011 Affidavit in Support of Motion to Suppress Defendant's Confession claimed the following: on March 6, 2010, Payless Supermarket General Manager Ray Bandy called the defendant to his office, asked about alleged thefts by others, got mad at the defendant, told the defendant others had said that he (the defendant) had stolen things from the store, claimed to have evidence against the defendant for thefts from the warehouse, got

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[6]In *Blackburn*, the court found that "the evidence clearly established that the confession was most probably not the product of any meaningful act of volition." *Blackburn*, 361 US 199, 211. At the time of the alleged confession, defendant was insane and incompetent, had been subjected to eight to nine hours of sustained interrogation in a tiny room filled with police officers, and had with him no friends, relatives or legal counsel. *Blackburn* is clearly distinguishable from the case before this Court.

[7]In *Ziang*, the court held, "In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to any examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in judicial proceeding or otherwise." In *Ziang*, the defendant's character and condition contributed greatly to the "compulsion" he was under. The defendant, a racial minority, was seriously ill and in great pain (suffering for spastic colitis, i.e., contractions of the colon), exhausted, emaciated, subjected to seven days of interrogation, sleep deprived, and denied access to relatives. Under such circumstances, which find no parallel in the present case, the court held the confession must be excluded.

[8]"The ultimate test . . . [is] voluntariness. Is the confession the product of any essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Culombe v. Connecticut*, 367 US 568, 602 (1961).

mad when the defendant asked for the names of his accusers, told the defendant that if he did not tell him anything "there will be 15 years in jail," told the defendant that if he cooperated that he, Bandy, would not put the defendant in jail, and told the defendant that he would not charge him if he confessed and provided information about thefts by others.

The defendant claims that Ray Bandy scared him and that the defendant then started giving Bandy the name of others involved in stealing. At this time, Bandy called Paterno Fernando to come, saying "Paterno, come we got them." Bandy's alleged statement does not reflect that the defendant had, as yet, incriminated himself. More important, the defendant did not in his affidavit claim that he made incriminating statements prior to the arrival of Fernando.

The defendant further claims he made up stories because he was afraid of going to prison for 15 years, was not advised of his rights, and signed the paper (presumably the Sworn Statement) because Bandy told him to do so and because he was scared.

However, the defendant's story is inconsistent with the June 2, 2010 affidavits of Payless Security Manager Paterno O. Fernando and Payless Acting Front End Manager Jaime Temporada, as well as the defendant's own Sworn Statement.

Fernando stated, among other things, the following: that he took the written statement of the defendant (the Sworn Statement) during the defendant's interview with Bandy; that he, Fernando, advised the defendant of his rights and that his statement should be given on a voluntary basis; that the defendant understood his rights and voluntarily waived his rights; that during the interview the defendant at all times appeared to be calm and was not coerced by Bandy; that Bandy never raised his voice; that Fernando did not hear Bandy tell the defendant that if he cooperated with him, Bandy would not put him in jail; that Bandy did not force the

defendant to sign his Sworn Statement; and that the defendant signed his statement after his rights were read to him.

According to Fernando, the defendant gave and signed his Sworn Statement voluntarily. Paterno's affidavit is consistent with the text of the Sworn Statement, which shows the defendant was advised of his rights, prior to his making incriminating statements.

In his affidavit, Temporada stated, among other things, the following: that Fernando had asked him to witness the defendant sign his Sworn Statement, as Jaime was the defendant's immediate supervisor; that Bandy was not present at the signing; that before the defendant signed the Sworn Statement Temporada went over it with the defendant, question-by-question; that Temporada asked the defendant if his statement were true and the defendant said, "Yes"; that Temporada then asked the defendant to sign the statement, and the defendant did; and that Fernando and Temporada then signed the statement. This review of the statement and the absence of Bandy contradict the defendant's claim that Bandy scared him into signing the Sworn Statement.

Considering the Court's file and, in particular the three above-mentioned affidavits and the defendant's Sworn Statement, the Court finds by a preponderance of the evidence that the defendant gave and signed his Sworn Statement voluntarily. The affidavits of Fernando and Temporada are more credible than the defendant's. Their affidavits are consistent with the defendant's Sworn Statement, which in turn is consistent with the sworn statements of other Payless Supermarket employees, including the following: Thomas Tamashiro (Exhibit 4 to the original criminal information (OCI); Rodney Jitiam (Exhibit No. 6 to the OCI); and Jude Teico (Exhibit No. 7 to the OCI).

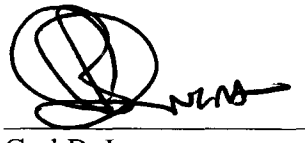
Evidence of Bandy's alleged threat of jail time (which he could not control), promise of no prosecution (which he could not delivery), or raised voice (which Fernando disputes) was not compelling. The evidence presented did not establish that the defendant's will was overborne by threats, psychological coercion, or promises. There is no evidence that the defendant was subjected to physical mistreatment through the withholding of adequate facilities, food, rest, relief, medication, or otherwise. There is no evidence that the defendant was deceived or tricked. There is no evidence that the defendant's mental or physical condition or capacity made him more susceptible to coercion or suggestion. Specially, there is no evidence that the defendant was mentally ill or suffering from emotional instability; that the defendant was of subnormal intelligence; that the defendant was physically incapacitated or had suffered physical harm; that the defendant was a minor, dependant senior, or disfavored minority; or that the defendant was under the influence of drugs or alcohol.

For the above reasons, the Court concludes that the defendant's Sworn Statement was given voluntarily. And in this connection, the Court further concludes that probative value of the defendant's Sworn Statement is not outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. In fact, the probative value of the statement is high, and there is no evidence of unfair prejudice (i.e., the statement does not suggest decision on an improper basis) or other grounds for exclusion under Rule 403 of the Marshall Islands Rules of Evidence.

IV. CONCLUSION

For the above reasons, this Court denies the defendant's Motion to Suppress.

Date: February 10, 2012.



Carl B. Ingram
Chief Justice