

**REPUBLIC OF PALAU**  
**v.**  
**KENNOSUKE A SUZUKY**

Criminal Case No. 14-096

Supreme Court, Trial Division  
 Republic of Palau

Decided: December 11, 2014

Counsel for Republic of Palau ..... John Bradley

Counsel for Defendant ..... Oldiais Ngiraikelau

[1] **Constitutional Law:** Double Jeopardy

**Criminal Procedure:** Double Jeopardy

The Double Jeopardy Clause of the Constitution protects against multiple punishments for the same offense at a single trial. When multiple concurrent offenses are alleged under a single statutory provision the Court must determine the legislatively intended “unit of prosecution” for purposes of the Double Jeopardy Clause.

[2] **Statutory Interpretation:** Rule of Lenity

The rule of lenity is clearly established in Palauan jurisprudence.

[3] **Criminal Procedure:** Double Jeopardy

The “unit of prosecution” for violations of 17 PNC § 3306(a) is the singular act of import and/or possession.

[4] **Criminal Procedure:** Bill of Particulars

For an information to be sufficient it must contain all of the essential elements of the offense charged and fairly inform the accused of the charges against him that he must defend. This is not a particularly high threshold, because an information is designed to put the Defendant on notice of the charges—not make the Republic’s entire case.

[5] **Criminal Procedure:** Bill of Particulars

The information is not considered in a vacuum; the supporting affidavit and any discovery provided by the Republic are also considered for purposes of ensuring that the Defendant is fairly apprised of what he is accused of.

## ORDER ON DEFENDANT'S PRETRIAL MOTIONS

The Honorable ARTHUR NGIRAKLSONG, Chief Justice:

Defendant Kennosuke Suzuki has been charged in a fourteen count indictment stemming from his alleged import and/or possession of a number of firearms and ammunition in a shipping container. Defendant now brings two motions, arguing that (1) the twelve counts of firearms possession contained in the information are unlawfully multiplicitous and violate the double jeopardy clause of our Constitution and that (2) the fourteenth count, for smuggling goods into the Republic, is unlawfully vague and fails to adequately apprise the Defendant so as to enable him to intelligently prepare a defense. For the following reasons, Defendant's Motion to Dismiss Multiplicitous Counts will be granted and his Motion for Bill of Particulars will be denied.

### BACKGROUND

Both of Defendant's motions concern the sufficiency of the charging document, not the truth of the allegations themselves, so the allegations at this time are considered not for their truth, but for their constitutional sufficiency. The Republic, by way of a criminal information and attached Affidavit of Probable Cause, signed and sworn under penalty of perjury by Officer Pelefoti Cooper, brings the following pertinent allegations:

On April 28, 2014, Defendant had a container of personal goods and/or effects shipped from Guam to Palau. That container arrived on May 2, 2014, at which time customs noted what it believed to be questionable value declarations for the declared contents of the container—vehicles and motorcycles. Customs met with the Defendant that day, and Defendant asserted that the only things he had to declare were vehicles and motorcycles. However, on May 7, 2014, Defendant contacted Customs and informed a Customs officer that his container contained firearms. Customs performed an inspection of the container on May 8 at which time customs officers located twelve firearms and various firearm ammunition within the contents of container along with the declared vehicles and motorcycles. Customs seized the firearms and ammunition and, following an advisement of his *Miranda*, Defendant eventually waived his right to silence and admitted to owning the guns and knowing they were in the shipping container.

Based on such evidence, Officer Cooper believes and alleges that Defendant committed twelve counts of Unlawful Possession of a Firearm, one count of Unlawful Possession of Ammunition, and one count of Smuggling Goods into the Republic. Defendant contends that the twelve counts for possession of firearms are unlawfully multiplicitous and that the smuggling count fails to provide him the information he requires to adequately prepare a defense.

## DISCUSSION

### I. Defendant’s Motion to Dismiss Multiplicitous Counts

[1] The Double Jeopardy clause of the Constitution “protects against (i) a second prosecution for the same offense after acquittal or conviction; and (ii) multiple punishments for the same offense at a single trial.” *Remengesau v. ROP*, 18 ROP 113, 125–26 (2011) (quoting *Kazuo v. ROP*, 3 ROP Intrm. 343, 346 (1993)). When multiple concurrent offenses are alleged under a single statutory provision the Court must determine what the legislatively intended “unit of prosecution” is. *Id.* As with all attempts to determine legislative intent, the first—and, if dispositive, only—thing the Court must look to is the plain text of the statute in question. *See Scott v. ROP*, 10 ROP 92, 96–97 (2003).

In *Scott v. Republic of Palau*, the Appellate Division considered a similar multiplicity challenge under Palau’s arson statute. *Id.* The statute stated that “[e]very person who shall unlawfully, willfully, and maliciously set fire to or burn any . . . building or shelter, crop, timber, or other property, shall be guilty of arson, and upon conviction shall be fined not more than \$1,000.00, or imprisoned not more than five years, or both.” *Id.* (quoting 17 PNC § 401 as it existed at the time). Scott had been convicted of four counts of arson stemming from one fire she set that had spread and eventually burned four separate structures. *Id.* at 94. The Court questioned whether the controlling unit of prosecution was established by the active verbs in the statute, “set fire to or burn,” such that the initial act itself constituted the unit of prosecution, or by the direct object of that action, “any structure,” such that each individual structure damaged in the fire would constitute a viable count of prosecution. *Id.* at 96–97. Taking guidance from United States law analyzing a similar arson statute, the Court held that the unit of prosecution in arson was the act of commission—that is, that the term “set fire to or burn” controlled, and not the damage to “any structure” of varying types—and vacated Scott’s additional arson convictions (stemming from the same act of setting fire) as multiplicitous. *Id.* at 97. The Court further noted that, even had it not held that the act of setting fire determined the unit of prosecution, “we could find at most that the statute is ambiguous on the point and resolve the matter according to the rule of lenity, that is, in favor of a single offense rather than multiple offenses.” *Id.* at 97 n. 5.

Looking at the plain linguistic structure of the statute charged here, 17 PNC § 3306(a), this Court must reach a similar conclusion. The act of commission for Unlawful Possession of a Firearm is “possession,” which in of itself is not criminal unless what a person possesses is prohibited, such as firearms and ammunition. *See* 17 PNC § 3306(a). Quite similarly, the act of setting fire determines the unit of prosecution, but the question of what is burned—a building, structure, or other covered premise—is part of what defines that act as arson. *See Scott*, 10 ROP at 97. The use of the singular term “firearm” in § 3306(a) is irrelevant, because the unit of prosecution is not defined by that which is possessed; the Appellate Division has already held that the unit of

prosecution is defined by the criminal action, as it must be given that the requirement of *actus reus* is a fundamental principle of criminal law.<sup>1</sup> See *Scott*, 10 ROP at 97; see also 21 Am. Jur. 2d. *Criminal Law* § 1 (“A crime is generally defined as *an act committed*, or omitted, in violation of a public law forbidding or commanding it.”) (emphasis added). The information and affidavit allege that the Defendant knowingly possessed twelve firearms on May 2, 2014; the allegation is one act of possession and the *quantity possessed* is twelve firearms.

- [2] However, in the alternative, even if the Court found that the statute was ambiguous as to the unit of prosecution, there exists no legal or factual basis for ignoring the rule of lenity. The rule of lenity is clearly established in Palauan jurisprudence, see, e.g., *Scott*, 10 ROP at 97 n. 5, and is a rule—not a discretionary guideline that the Court, as the Republic curiously suggests, should guard. Nor is it clear how prosecution under a single count would frustrate the purpose of the legislature and of the people in prohibiting possession of firearms. The Court acknowledges that a possession of multiple firearms poses a more grievous threat to the people and to the Republic than possession of a singular firearm, but prosecution in a single count does not make the existence of those additional firearms suddenly inadmissible as evidence or in any way unknown to the Court. Charging the concurrent possession of twelve firearms as twelve counts bears little more sense than charging an assault and battery as twelve counts if the assailant threw twelve punches.
- [3] The Court finds that, when considered in light of *Scott*, the statute is unambiguous as to multiplicity of charging: the unit of prosecution for violations of 17 PNC § 3306(a) is the singular act of import and/or possession, and as such only one such count may stand. No other construction is sensible; if a shipping container were to contain twelve hundred firearms instead of twelve, would the Court be tasked with managing an information comprised of twelve hundred counts? Would a jury be tasked with evaluating each of these counts individually? Clearly they would not; the question in such a case would be the same as it is in this case: did the Defendant unlawfully possess a firearm? The number of firearms possessed is not an element of the charge that the fact finder must determine to adjudicate guilt—it is a *sentencing* factor describing the severity of the offense which, if the Defendant is convicted, will be considered when assessing the nature and circumstances of the offense and the history and characteristics of the offender. Defendant’s Motion to Dismiss Counts Two through

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<sup>1</sup> The Republic’s intent to individually charge each “firearm” is also curious in that it has not attempted to separately charge each bullet allegedly possessed. While the Court acknowledges that “ammunition,” used in 17 PNC § 3306(b), is sometimes colloquially treated as a plural noun, it is in fact singular; the plural of ammunition is ammunitions. G&C Merriam. Co., *Websters Third New International Dictionary Unabridged* 71 (1981). Were the Republic’s argument correct, every bullet possessed would be individually chargeable as a separate count.

Twelve is granted, and the allegations contained therein shall be combined into Count One.

## II. Defendant's Motion for a Bill of Particulars

[4][5] Defendant also requests a bill of particulars for Count Fourteen, charging him with Smuggling Goods into the Republic, and argues that the count fails to adequately apprise him so that he may intelligently prepare a defense. For an information to be sufficient it must contain all of the essential elements of the offense charged and fairly inform the accused of the charges against him that he must defend. *ROP v. Kasiano*, 13 ROP 289, 290 (Tr. Div. 2006) (citing *Franz v. ROP*, 8 ROP Intrm. 52, 55 (1999)). This is not a particularly high threshold, because an information is designed to put the Defendant on notice of the charges—not make the Republic's entire case. Further, the information is not considered in a vacuum; the supporting affidavit and any discovery provided by the Republic are also considered for purposes of ensuring that the Defendant is fairly apprised of what he is accused of. *See id.* Because the record before the Court clearly demonstrates what contraband Defendant is accused of smuggling, and because Defendant's extremely detailed Motion to Dismiss Multiplicitous Counts *quite* clearly shows that he will not be surprised by the allegations at trial, the motion will be denied.

The Affidavit attached to the information lays out all the information Defendant has requested in a bill of particulars: it alleges that Defendant contracted to have a shipping container delivered from Guam to Palau bearing his personal possessions, that the container eventually was found to contain a number of firearms and ammunition, that Defendant failed to declare the firearms and ammunition and misrepresented the contents of the container on the Bill of Lading, and that Defendant in fact admitted to owning the firearms and knowing they were in the container. It is both common knowledge and expressly alleged in Counts One through Twelve of the Information that firearms and ammunition may not lawfully be imported in the Republic of Palau. Besides firearms and ammunition, the only other contents of the container even mentioned in the affidavit are vehicles, motorcycles, a brown box, and a black bag—none of which are contraband, and which the affidavit states Defendant in fact declared. Defendant, however, allegedly failed to report the presence of firearms and ammunition—which may not be brought into the Republic pursuant to 17 PNC § 3306, as discussed above—until May 7, 2014, five days after the initial declaration. The Court finds that the information and affidavit clearly spell out what Defendant is accused of smuggling: firearms and ammunition.

Further, Counsel for the Republic asserts that the Republic has turned over “virtually all the documents in its possession” to the Defendant in discovery, and the Defendant has not filed a reply in any way contesting this assertion. The Court takes the Assistant Attorney General, a sworn officer of the Court, at his word, and finds Defendant's request for a bill of particulars to be without merit. If the Republic intends to charge

smuggling of contraband beyond the firearms and ammunition, the Court expects the Republic will amend the information to put the Defendant on notice of what further charges he may face. But because the information and affidavit clearly articulate the enumerated existing charges, the motion for a bill of particulars is denied.

Accordingly,

1. Defendant's Motion to Dismiss Multiplicitous Counts is **GRANTED**; The allegations contained in Counts 2-12 shall be consolidated into Count 1, and Counts 2-12 shall be dismissed;
2. Defendant's Motion for a Bill of Particulars is **DENIED**.