

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN
MARIANA ISLANDS,

Plaintiff,

v.

LU XUE CUI, aka YOKO,
XIAO LAN WANG, aka LIOKO,
GUI QIN MAO, aka MOMO,

Defendants.

CRIMINAL CASE NOS. 97-191,
97-192, 97-197

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS**

I. INTRODUCTION

This matter came before the Court on July 8, 1998 at 1:30 p.m. in Courtroom A on Defendant's motion to dismiss. Assistant Attorney General Robert J. Steinborn appeared on behalf of Plaintiff. Mr. Joseph Horey, Esq. appeared on behalf of Defendants Lu Xue Cui and Xiao Lan Wang. Mr. Bruce Berline, Esq. appeared on behalf of Defendant Gui Qin Mao. This Court, after having reviewed the memoranda, declarations, and exhibits, and having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its written decision.

[p. 2]

II. FACTS AND PROCEDURAL BACKGROUND

In June 1997, Defendants Lu Xue Cui, Xiao Lan Wang, and Gui Qin Mao (hereinafter referred to as "Defendants") were charged with prostitution in violation of 6 CMC § 1343 as a

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result of information detectives received about prostitution-related activities conducted at Linda House Karaoke and Gift Shop in Garapan.

On July 8, 1998, Defendants¹ moved the Court to dismiss their cases on a gender-based claim of selective prosecution, to wit, that no men have ever been prosecuted for violating Public Law 8-14.

III. ISSUES

1. Whether Defendants have met their burden of proving a case of selective prosecution?

IV. ANALYSIS

A. Selective Prosecution

Defendants assert that their case must be dismissed on grounds of selective prosecution because the government routinely discriminates on the basis of gender in bringing prosecutions under Public Law 8-14. The Court disagrees.

1. Showing that others similarly situated have not been prosecuted

Although the government has great discretion in the prosecutorial decision, the exercise of this discretion cannot violate the Constitution's equal protection guarantee. Wayte v. United States, 470 U.S. 598, 608, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985). As such, selective prosecution claims are judged on ordinary equal protection standards. Id. In order to prevail on a claim of selective prosecution, the Defendants must demonstrate two facts. First, they must provide evidence that persons similarly situated have not been prosecuted. Second, they must show that the decision to prosecute was made on the basis of an unjustifiable standard such as race, or that the prosecution was [p. 3] intended to prevent her exercise of a fundamental right. United States v. Aguilar, 871 F.2d 1436, 1474 (9th Cir.1989), *cert. denied*, 111 S.Ct. 751 (1991); United States v. Schoolcraft, 879 F.2d 64, 68 (3rd Cir.1989). The Defendants have the burden of proof for both factors. Schoolcraft,

¹ On June 30, 1998, Defendant Gui Qin Mao joined Defendants Lu Xue Cui and Xiao Lan Wang in their motion to dismiss. See CNMI v. Gui Qin Mao, Criminal Case No. 97-192.

In response to Defendants' motion to dismiss, the government filed a motion to issue a bench warrant and stay proceedings as to Defendant Xiao Lan Wang. In April 1998, Defendant Wang was given permission by the Court to travel to China with the understanding that she would return on May 20, 1998. Defendant Wang has not returned. At the hearing on July 8, 1998, the Court granted the motion to stay proceedings as to Ms. Wang and issued a bench warrant for her arrest.

supra. If the court finds that the Defendants have failed to make a prima facie case as to the first element, it need not address the second one. United States v. Pleasant, 730 F.2d 657, 663 (11th Cir.1984).

In the instant case, Defendants assert that the government regularly discriminates on the basis of gender in bringing prosecutions under Public Law 8-14. However, Public Law 8-14 is comprised of several statutes which make illegal the act of prostitution as well as other prostitution-related offenses such as promoting prostitution.² Defendants have only been charged with the violation of one statute under Public Law 8-14, to wit, 6 CMC § 1343 which prohibits the act of prostitution. The Court is not persuaded by the Defendant's attempt to bootstrap their selective prosecution argument by noting, for example, that Mr. Changda Liu has not been charged with promoting prostitution.³ An individual charged with committing the act of prostitution is not similarly situated to an individual charged with promoting prostitution. As such, the Court finds that the Defendants have no standing to assert any selective prosecution claims based on other statutes under Public Law 8-14 with which they have not been charged. See CNMI v. Liarta, Criminal Case Nos. 93-133, et al., Decision and Order On [sic] Defendant's Motion to Dismiss Information, at 16 (Com.Super.Ct., January 29, [p. 4] 1994)(Defendant found to have no standing to attack, on grounds of vagueness, any of the prostitution-related criminal statutes which did not apply to her).

Aside from their lack of standing, Defendants have failed to meet the burden of proof that others similarly situated (i.e. "men") have not been prosecuted. The Defendants rely on two main

² Public Law 8-14 is codified in 6 CMC, Div. 1, Article 3. "Prostitution"(6 CMC §§ 1341-1348). The individual statutes are as follows: §1341 "Definitions"; § 1342 "Prohibition"; § 1343 "Prostitution"; § 1344 "Promoting Prostitution"; § 1345 "Permitting Prostitution"; § 1346 "Penalties"; § 1347 "Promoting or Permitting Prostitution"; § 1348 "Enforcement". Prostitution is defined under 6 CMC § 1343 as follows:

A person is guilty of prostitution if such person engages or agrees or offers to engage in sexual conduct with another person for a fee. In any prosecution for prostitution, the sex of the two parties or prospective parties to the sexual conduct engaged in, contemplated, or solicited is immaterial, and it is no defense that such persons were of the same sex or the person who received, agreed to receive, or solicited a fee was a male and the person who paid or agreed or offered to pay such a fee was a female; provided, however, this section shall not apply to any member of the Department of Public Safety acting in the course and scope of duties. (PL 8-14 § 4).

³ See page 3, footnote 2 to Defendants' Memorandum in Support of Motion to Dismiss for Selective Prosecution.

points to support their argument of selective prosecution: (1) that seven male customers present inside Linda House Karaoke at the time of the execution of the warrant were not arrested or charged with prostitution; and (2), that the government obtained evidence pursuant to the execution of the warrant including addresses, phone numbers, and checks from male customers, yet failed to investigate these individuals. As to the presence of the seven male customers, Defendants have not offered any facts to justify an investigation of these individuals who happened to be present in a licensed karaoke bar at the time the warrant was executed. Mere presence in this establishment, without more, means very little without some evidence to support criminal wrongdoing.

In regard to the addresses, phone numbers, and checks from male patrons, this too fails to prove that these individuals were somehow involved in prostitution. The Court does agree with Defendants to the extent that the government could have made some attempt to investigate these individuals to find out the nature of their business with Linda House Karaoke. Nevertheless, it is highly unlikely that the government would have received confessions or other information from these individuals to suggest they were involved in prostitution. Albeit, the checks are more significant than the address books in that they were written for amounts which appear to correspond with the amounts the Defendants allegedly charged for prostitution. Once again, however, even if the government had followed up in contacting the check endorsers, it is unlikely that such investigation would have been fruitful or that the endorsers would have admitted to any wrongdoing. As such, Defendant's proof falls short of demonstrating a pattern of unequal administration of the law.

2. Decision to prosecute made on the basis of an unjustifiable standard

The second element in proving a case of selective prosecution is to show that the decision to prosecute was made on the basis of an unjustifiable standard such as race or gender, or that the prosecution was intended to prevent the exercise of a fundamental right. United States v. Aguilar, supra. [p. 5] The Defendant's evidence must overcome the presumption that the prosecution was undertaken in good faith and in a non-discriminatory fashion. United States v. Christopher, 700 F.2d 1258 (9th Cir.1983). Even if the effect of the prosecution can be viewed as discriminatory, it must be shown that the prosecution intended that result. Wayte v. United States, supra, at 610. The

prosecution must have had a discriminatory motive. American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045 (9th Cir.1997). The mere exercise of selectivity is not enough. United States v. Washington, 705 F.2d 489, 494 (C.A.D.C. 1983).

Here, Defendants have failed to prove that the decision-makers in their case acted with discriminatory purpose. They offer no evidence specific to their case that would support an inference that gender considerations played a part in their prosecutions. As noted by Plaintiff, the facts supporting the underlying investigation was brought out through testimony by Investigator Anthony Mareham in the case of CNMI v. Wang Min⁴. Mr. Mareham testified that he became aware of the this matter when he was contacted by an official at the Division of Labor who had been conducting intake procedures on a labor complaint filed by Mr. Changda Liu. Since Mr. Liu's complaint entailed prostitution activities, the Attorney General's Investigation Unit was notified and Investigator Mareham subsequently interviewed Mr. Liu. The information supplied by Mr. Liu, in turn, provided the basis for Mr. Mareham to investigate the activities at Linda House Karaoke. This scenario fails to suggest any intent by the government to prosecute Defendants on the basis of gender.

Defendants also rely on the decision in Liarta, supra, which observed that the evidence proffered by the defendants in that case suggested unbalanced enforcement trends in bringing prosecutions under Public Law 8-14.⁵ However, the Liarta decision was based on the constitutionality and enforcement of [p. 6] Public Law 8-14 as a whole, not just prosecutions for prostitution under 6 CMC § 1343.⁶ If this Court is to accept Defendant's argument via Liarta that enforcement of Public Law 8-14 as a whole continues to be enforced disproportionately, then the

⁴ Criminal Case No. 97-187, AGIU Case No. 97-029, Hearing on Motion to Controvert, December 17, 1997.

⁵ Liarta, supra, at 24-25. As an exhibit to their motion to dismiss, the Liarta defendants submitted a list of all prosecutions under Public Law 8-14 as of December 1993. Of the sixteen defendants, fifteen were female. On the contrary, there has been no such offer of similar evidence here.

⁶ The Liarta decision discussed the constitutionality of several provisions of Public Law 8-14, including Prostitution (§ 4), Promoting Prostitution (§5), and Permitting Prostitution (§6).

Court need look no further than to the ongoing criminal matter of CNMI v. Jun Guo-Dong⁷ which involves a male defendant being prosecuted for violating a section of Public Law 8-14. It should be noted that this Court is in agreement with the Liarta decision to the extent that unbalanced enforcement trends should not be condoned over the long term without legitimate reasons for doing so. However, even if such disproportionate trends are shown, the two-part test for proving selective prosecution must still be satisfied.⁸ Despite evidence of such trends, the Liarta court failed to find a gender-based case of selective prosecution. This Court fails to find such a case either.

V. CONCLUSION

For all of the reasons stated above, Defendants' Motion to Dismiss is **DENIED**.

So ORDERED this 9 day of August, 1998.

/s/ Timothy H. Bellas
TIMOTHY H. BELLAS, Associate Judge

⁷ CNMI v. Jun-Guo Dong, Criminal Case No. 93-121. This case involves a male defendant charged with promoting prostitution in violation of 6 CMC § 1344 (PL 8-14, § 5).

⁸ As a secondary argument to support their selective prosecution claim, Defendants assert that DPS has an adequate number of female officers to act as decoys to secure male defendants in prostitution cases, yet fail to do so. However, the mere fact of having female officers available does not automatically lead to meaningful prosecutions of males for prostitution. As such, the Court is not persuaded by Defendant's argument without advancing some additional criteria to support a case of discriminatory intent other than simply referring to an increase in the number of available female officers.