IERE MUAGUTU POTEA AND ANOTHER v. POLICE

SUPREME COURT. Apia. 1969: 21, March; 7, May. SPRING C.J.

Criminal law - motion for severance of trial of accused jointly charged with murder - discretion of Court - interests of justice.

The Court has a discretionary power to order separate trials if the ends of justice so require; such discretion to be exercised judicially.

R. v. Grondkowski and Malinowski [1946] K.B. 369 and R. v. Ross [1948] N.Z.L.R. 167; [1947] G.L.R. 494 referred to.

Where the actions of the accused are so intermingled, and where the prosecution cases against them are so closely related and interwoven, it is in the interests of justice that they be tried jointly.

R. v. Webb and Thompson [1953] N.Z.L.R. 595; and R. v. Reynolds and Peterson (1911) 30 N.Z.L.R. 801 distinguished.

Application declined.

MOTION for severence of trial.

Phillips, for Iere Muagutu Potea.
Clarke, for Mia Muagutu Potea.
Slade, for Police.

Cur. adv. vult.

SPRING C.J.: Iere Muagutu Potea and Mia Muagutu Potea are jointly charged with the murder of Meapusi Faamausili Levi on the 6th November 1968.

Counsel for each accused have applied for separate trialsand the application is opposed by the Police. I have to determine this matter on the information that is before me which consists of copies of statements made by witnesses to the Police and a post mortem report by Dr Taulapapa Anesi Malaefou. Copies of these statements and the post mortem report have also been supplied to Counsel for the accused.

There is no procedure in Western Samoa for the taking of depositions in the Magistrate's Court in Supreme Court Criminal trials so I must decide the matter on the information available to me and of course the special circumstances of this particular case.

It is undersirable that I should at this stage deal in detail with the evidence that is to be presented to the Supreme Court. The Police allege that the two accused attacked the deceased Meapusi with bush knives. It is apparent from the post mortem report that the deceased received serious injuries from which he died.

The Court has a discretionary power to order separate trials if the ends of Justice so require and it is well settled that this discretion must be exercised judicially i.e. not capriciously. I refer to R. v. Grondkowski and Malinowski [1946] K.B. 369 where Lord Goddard C.J., in the judgment of the Court said:

> "The law is, and always has been, that this is a matter of discretion for the Judge at the trial . . . The discretion, no doubt, must be exercised judicially, that is, not capriciously. The Judge must consider the interests of justice as well as the

interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of prisoners. If once it were taken as settled that every time it appears that one prisoner as part of his defence means to attack another, a separate trial must be ordered, it is obvious there is no room for discretion and a rule of law is substituted for it (ibid., 372)."

This case was referred to by the Court of Appeal of New Zealand in R. v. Ross [1948] N.Z.L.R. 167; [1947] G.L.R. 494, where Smith J., in referring to the English cases, said:

"The Court pointed out that 'the interests of justice' did not means only 'the interests of the prisoner', and said that, prima facie where the evidence of the case was that prisoners were engaged in a common enterprise, it was obviously right and proper that they should be jointly indicted and jointly tried, and that in some cases it would be as much in the interests of the accused persons as of the prosecution that they should be (ibid., 181; 500)."

I cannot escape from the view that in this matter the cases against the two accused are so closely related and interwoven that it would be contrary to the interests of justice that an order of severance should be made. I have carefully considered the submissions and arguments advanced by learned counsel for the two accused and the cases cited by them. Reliance was placed upon the decision of R. v. Webb and Thompson [1953] N.Z.L.R. 595 in which F.B. Adams J. granted severance of the trials. At p. 596: the learned Judge dealing with the facts of that case said:

"There is so great a volume of evidence admissible against one of the accused and not against the other that I think it would be well nigh impossible for a jury, having heard the whole of the evidence, to perform the difficult mental task of determining guilt or innocence by reference only to the evidence admissible against each of the accused respectively. I have myself found it difficult to make such an analysis with the evidence before me in the form of depositions."

In my view this case is clearly distinguishable on the facts from the instant case.

In R. v. Reynolds and Peterson (1911) 30 N.Z.L.R. 801 an order for severance was made and Counsel relied on this decision also in support of their application for severance. This case is in my view also clearly distinguishable on the facts as appears from the judgment of WilliamsJ. in delivering the judgment of the Court of Appeal at p. 810 -

"The accused Reynolds is charged practically as an accessory before the fact, according to the case for the Crown. His connection with the affair ceased when he brought the girl to Mrs Peterson's. If the actual crime was committed by Mrs Peterson it was committed after Reynolds had ceased to take an active part in the affair. The actions of the prisoners, therefore, are not so intermingled that the case for the Crown would be prejudiced by trying them separately. That of itself would not be a reason for trying them separately, but if otherwise there is a good reason for trying them separately the fact that the Crown will not be prejudiced by separate trials is an additional reason why they should be tried separately. Whether there should be a separate trial in any case must depend upon the special circumstances of the case."

In the instant case I take the view that the actions of the accused are so intermingled that in the interests of justice they should be tried jointly. It was argued that the accused if jointly charged may be prejudiced in their defence if evidence against one was admitted which was not admissible against the other. It is not uncommon to meet with this position in a joint

trial and I agree that the trial Judge will be obliged to direct the assessors in his summing up so that they are not adversely influenced against either of the accused by the reception of evidence which is admissible only against one of the accused, but, as Lord Porter said in Youth v. The King [1945] W.N. 27, "the practice in this country had always been in a joint trial to admit such evidence, leaving it to the presiding Judge to warn the jury that the evidence must not be used to strengthen the case against, or lead to the conviction of, a prisoner against whom it was not admissible."

It was also submitted that Assessors in Western Samoa are not sufficiently well educated to analyse the evidence and to perform the task of determining guilt or innocence by reference to evidence admissible against one accused and not admissible against the other. It was also suggested that the Assessors will not be able to fully appreciate the defences of provocation and/or self defence and other defences which may be raised in respect of one or both of the accused.

The situation in Western Samoa is that trials for murder are required to be heard before a Judge and Assessors. If counsel genuinely believe that Assessors are so ill equipped to deal with the issues that may arise in joint trials such as this they should place their submissions before the Legislature with a view to trial by Judge and Assessors being abandoned in favour of trials by Judge alone. I do not believe that I should order severance of the trials on this ground where the interests of justice so clearly indicate that the accused should be tried jointly.

I have also considered the decisions of R. v. Gillies and Jorgenson (1964) N.Z.L.R. 520 and also the Court of Appeal decision in R. v. Gillies and Jorgenson (1964) N.Z.L.R. 709.

I must determine this application for severance on the special circumstances of the case and I cannot escape from the conclusion that the ends of Justice require that the trial of Iere Muagutu Potea and Mia Muagutu Potea for the murder of Meapusi Faamausili Levi should proceed as a joint trial and I so order. The application for severance is declined.