IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION) **CR NO's 63-64/2023**

POLICE

v

ANAU-NOO-MATAORA-ITE-MEDEBARA TEATUANUI

Hearing:	4 December 2023
Appearances:	L Rishworth and J Crawford for the Crown N George and M Tangimama for defendant
Judgment:	4 December 2023

JUDGMENT OF GRICE, J (discharging jury)

Jury panel less than 11

[1] The jury empanelled on Friday 1 December comprised 11 members. I have determined that this is not a properly constituted jury for the purposes of a jury trial. I indicated my conclusion following hearing from counsel and discharged the jury this morning. These are my reasons for the decision to discharge the jury.

[2] There had been no further jurors left in the jury pool who had answered their summons. Three jurors of the 12 empanelled had been discharged due to associations with the complainant or the crown's witnesses. The empanelling had continued to fill their places from the balance of the pool. However only a further 2 were called before the jury pool was exhausted. Those left had been challenged by the Crown and the defence and included the two that had been stood aside by me. Counsel indicated for the reasons that they had been stood aside indicated they should not be put on the jury. The Crown had two challenges (peremptory) left and the defence had none but of course the challenges for cause remained.

[3] I indicated to counsel on Friday that the options were to adjourn and see what could be done to gather up some more jurors who had been summonsed, to recall the two that had been stood aside, or to discharge those who attended and empanel a new jury next week. A further pool of jurors had been summonsed for the trial next week.

[4] As only one replacement could be empanelled from the balance of the pool, the jury number sat at eleven. As I advised counsel the two prospective jurors who had been stood aside were, in the case of one a close family member of defence counsel, Mr George, and the second was a young woman who had her child with her at Court. She had indicated that she had a sick father to look after as well as the child and no one to assist her because her family members had gone to New Zealand. She indicated she had tried getting assistance but had been unable do so which was why she had the child with her.

[5] Mr George said that he did not wish to see the two that had been stood aside on the jury, as they had been stood aside for good reason. He indicated his client's wish was to proceed with the 11 jurors. He pointed out that the legislation allowed for a jury of 11 to proceed and indeed allowed for a ¾ majority verdict in certain circumstances. The Crown supported this application in the circumstances and in view of the defendant's strong preference to proceed.

[6] In view of the application to proceed with 11 jurors and the waiver of the right to a jury of 12 as well as the Crown's indication of waiver, I indicated the trial could proceed and I would issue a considered minute later.

[7] I have now reviewed the position and heard further from counsel. The defendant strongly wishes to proceed with a jury of 11. He submitted that it was a matter of common sense that if you could discharge a juror and more by consent under the Juries Act 1968 you should also be able to start with 11 jurors by consent. The Crown indicated that while it supported the defendant's application to proceed with 11 jurors that was on a pragmatic basis in the circumstances of having insufficient numbers in the jury pool to empanel a 12 person jury. Ms Rishworth indicated that she had been unable to unearth any authority however that would support an 11 person jury being a legally constituted jury in the Cook Islands.

[8] I have concluded that while there are arguments, particularly based on pragmatism, in support of an 11 juror jury in the circumstances, a jury can only be constituted properly under Cook Islands law if it comprises 12. I take the view that while it is possible in certain circumstances to proceed with 11 jurors, or with less, with consent of both parties, that is after a jury of 12 is empanelled. It is a different situation to never constitute a jury of 12 at the outset before the case has opened and the defendant has been put in the charge of the jury.

Arguments in support of trial by a lesser number of jurors than 12

[9] The first argument is that in the Cook Islands the jury trial process is not an integral part of the constitutional framework of government but rather a right of a defendant.

[10] It is right of a defendant to elect trial by jury for any offence punishable by imprisonment exceeding 6 months.[1] As it is equally the defendant's right to waive trial by jury, so he must be able to similarly waive being tried by a jury of 12.

[11] The United States Supreme Court in *Patton v United States*[2] ruled that continuing with a jury of 11 after a juror was discharged due to illness was constitutionally sound, despite the guarantee to trial by jury in the United States Constitution. It held there was no difference in substance between a complete waiver of a jury trial and consent to be tried by a jury less than 12.[3] It held that this was consistent with the constitutional provisions to allow a defendant to waive the trial by a jury of 12 and consent to a court without a jury. So a defendant could not consent to a jury trial continuing with a lesser number than 12 jurors. The Court reasoned that the voluntary reduction of the jury from 12 to 11 was permissible as the constitutional provisions in respect of trial by jury were not a part of the frame of government but rather were to guarantee to the accused the right to such trial.[4] It reasoned that an accused was not required to be tried by jury if they desired to plead guilty.[5] Similarly an accused could waive confronting witnesses and consent to the use of dispositions or to consent to go to trial without the assistance of counsel, having waived the constitutional right to representation.[6]

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1 s 293 of the Cook Islands Act 1915.
2 *Pattern v United States* 281 U.S. 276 (1930).
3 At 290.
4 At 293.
5 At 295.
6 At 295.

[12] The Court noted that there was no strong public policy reason preventing such a waiver, and the public interest in the preservation of the accused's rights could be met by the government also waiving the right.[7] The Court explored the public policy reasons behind requiring a trial by jury to include 12 jurors and no less, and concluded that it was related to the preservation of liberties and lives, not allowing them to be taken away "without due process of law".[8] It noted that the relevant public policy embodies "a doctrine of variable quality". In the circumstances constitutional or statutory provisions, should be accepted as governing a judicial determination, if at all, only with the utmost circumspection. It noted that the public policy of one generation may not, in changed circumstances, be the public policy of another. The Supreme Court (US) noted that the relevant provisions in the Constitution and statutes are designed for the protection of the accused and may be waived, according to earlier authority, but that was subject to the trial court's discretion.

[13] In the Cook Islands a trial by jury may continue with 11, without the consent of either party, in certain circumstances. Section 28 of the Juries Act 1968 provides that if:

> "…any juror becomes in the opinion of the court incapable of continuing to perform his duty, or it becomes known to the Court that he is disqualified or that his wife or a member of his family is ill or has died, the Court may, in its discretion, discharge the jury and direct that a new jury be empanelled during the sitting of the Court, or postpone the trial, or proceed with the remaining jurors and take their verdict:
>
> Provided that the Court shall not proceed with less than 11 jurors unless the prosecutor and the accused both consent."

[14] It is arguable that the rationale for discharging a juror, permits a trial to commence only 11 jurors if that is the full number able to be provided by ballot and not challenged or set aside.[9] In this case, as there were no further jurors the 11 jurors constitute the "full number of jurors as drawn" and not set aside challenged. Therefore they were the jury for the case.[10]

[15] If that argument were to succeed, by analogy with *Patton*, the Crown as the representative of the State which has an interest in maintaining the rights of an accused, must also waive a jury of 12. The judge must in addition to the consent of the defendant and the waiver of the Crown, also sanction proceeding with a jury of 12 in the exercise of the trial

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7 At 306.
8 At 302.
9 s 15.
10 s 19.

judge's discretion. The Supreme Court (US) in *Patton* noted that the relevant provisions in the Constitution and statutes are designed for the protection of the accused and may be waived, according to earlier authority, but that was always subject to the trial court's discretion.

[16] Such an interpretation is supported by the provision that where a jury continues with 11 or less jurors, "their verdict shall have the same effect as the verdict of the whole number".[11]

[17] Section 25 of the act allows a verdict of three fourths in cases where any jury empanelled has retired to consider its verdict for a period of at least 3 hours and notifies the judge presiding that the jury has considered its verdicts and there is no probability of such jury being unanimous.

[18] These permissive provisions allowing for circumstances where less than 12 jurors may continue to deliver a verdict suggest that a liberal and ambulatory interpretation of s 28 might justify allowing a jury to commence as a jury of 11 in view of modern circumstances. The circumstances are that reducing population in Rarotonga has seen greater difficulty in obtaining a jury pool sufficiently large to deal with not only six peremptory challenges by each the defence and prosecution but challenges for cause.

[19] The Acts Interpretation Act 1924, provides that every act shall be "considered as always speaking, and whenever any matter or thing is expressed in the present tense the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof according to its spirit, true intent, and meaning".[12] In addition every Act is "deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, … and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning and spirit".[13]

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11 s 28(5) of the Juries Act 1968.
12 s 5(d).
13 s 5(j).

[20] The Constitution also deems every enactment be remedial in the same terms as the Acts Interpretation Act and confirms that legislation shall be interpreted in a "fair, large, and liberal construction and interpretation is best will ensure the attainment [of the object] of the enactment … according to its true intent, meaning and spirit".[14]

[21] Therefore as the remaining two jurors in the pool were disqualified by virtue in the case of one, a close association with defence counsel and in the case of the second, a young child and a sick family member. No useful purpose would be served by calling each of those jurors. They would either be ineligible or fall within the category of having to be discharged because of association or family care requirements.

[22] In those circumstances given the forceful submission by the Mr George to proceed with 11 jurors rather than taking any other options and the express consent by counsel for the Crown it is arguable that it a judge may allow the trial to continue with only 11 jurors empanelled.

[23] The reason for the suggested exercise of the discretion in favour of continuing in this trial would include fact of consent by the defendant and waiver by the Crown. This trial has already been delayed a week because of the failure to serve the summons on the panel so the jury was not able to be empanelled on the set date. The events giving rise to the charges are almost two years old. The evidence indicates that the accused and the complainant are close family members and there has been a rapprochement between them which has led the defendant to asking the Crown not proceed with the charges. The complainant has come over from Mangaia with his wife, as has the defendant. A number of witnesses have also come over from Mangaia. In fairness to the defendant and the community the trial it is arguable that the trail should continue with the presently constituted jury of 11 to determine the matter in a timely manner.

[24] In addition verdicts are not affected by formalities or by reason of any "error, omission or anything or with respect to any jury panel, nor by reason any person not qualified nor not reliable to serve on any jury, served on such a jury".[15]

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14 At 65(2).
15 s 37.

[25] Bearing in mind that s 28 allows the discharge of one or more jurors in certain circumstances so the Court may proceed with less than 11 jurors without consent and less that if the prosecutor and accused both consent, it is arguable there is no difference in starting with only 11 jurors.[16] It is not lawful for any court to review the exercise of any discretion section.[17] When the Court proceeds with less than 12 jurors their verdict shall have the same as the verdict of the whole number.

[26] However, the stronger arguments are that a jury comprising only 11 members is not a lawful jury in the Cook Islands.

[27] First, the Juries Act provides that the Act is to make provision for the adoption of a system of trial by jury trial in certain criminal cases. It expressly provides that certain criminal cases are to be tried by a judge and jury of 12 persons whose names appear on the jury list.[18] The registrar in open court draws out the names corresponding to the number of jurors required to constitute jury.[19] The full number of jurors so that is drawn and appearing not set aside challenge the jury to try the case.[20] The full number is 12.[21]

[28] A verdict must be unanimous unless special circumstances exist, including the jury having been out for at least three hours. Then a verdict of a three quarters majority may be taken.[22] This does not support the argument that the jury may commence with less than 12 jurors. Only that ¾ of those left (having started with a properly constituted jury) may deliver a majority verdict in certain circumstances.

[29] The ability to take less than a unanimous verdict was adopted in the Cook Islands long before it was adopted in New Zealand. In my view the provisions relating to the ability to discharge a juror in the circumstances and take unanimous verdicts are a reflection of adopting as a matter of policy the doctrine in *Patton*.

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16 s 28(3).
17 s 28(4).
18 s 6 of the Juries Act 1968.
19 At 15.
20 s 19.
21 s 6.
22 s 25.

[30] The position of continuing with less than 11 due to circumstances which cannot be avoided once the trial has begun and a panel of 12 jurors is in place, is entirely different to constituting a jury of only 11 from the outset. A body of 11 as a jury has no lawful authority under Cook Islands law. The accused has an election of a judge alone or jury but not any variation between those options. While one can readily see the policy reasons behind allowing an accused to elect to proceed with less than full complement, the public policy reason in starting with less than jurors is not so apparent. An accused is not entitled to tailor the tribunal before which he is to appear. To allow that may lead to difficulties in the administration of justice. In addition it must be for Parliament to change the numbers of jurors which make up a jury, given the jury trial has been established by legislation as a jury of 12. The statute is express as to when numbers of jurors may fall below 12 and the relevant circumstances all relate to after a jury has been properly constituted in the first place.

[31] The Supreme Court (US) without determining it, said that the position had been dealt with differently where the jury was never empanelled as a jury of 12.[23] In those cases a lesser number than 12 members in a jury were held to be unlawful.

[32] In view of the express statutory provisions surrounding the composition of the jury and the manner of empanelling a jury of 12 and the circumstances where a trail may continue to verdict with 11 or less jurors, I do not consider that a trial judge has the power to sanction a jury of only 11.

[33] Accordingly I determined the jury of 11 could not continue and the jury of 11 was discharged.

[34] I note Crown counsel expressly sought the consent of the Solicitor-General to proceeding with a jury of 11 on the basis any appeal was waived if the jury convicted and he indicated he would not grant that consent. Mr George had offered a waiver of appeal in the event of a guilty verdict. For public policy reasons in any event I would have accepted that waiver. The right of the defendant to an appeal against conviction is established under law and counsel were unable to refer me to any provisions allowing such a waiver in these circumstances.

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23 At 294.

[35] I note that the Crown indicated it would offer no evidence in the new trial when the matter was called. I discharged the defendant under s 111 of the Criminal Procedure Act as I have recorded in a subsequent minute. Mr George indicated no order as to costs would be sought.