



SUPREME COURT OF NAURU
YAREN
CRIMINAL JURISDICTION

Miscellaneous Application No: 07 of 2021
for the consolidation of Criminal Case Nos
03 of 2021 and 06 of 2021.

BETWEEN

REPUBLIC

Applicant

AND

(1) JESHUA AGEGE
(2) UAM MAU

Defendants

Before : Fatiaki CJ.

Dates of Hearing : 23 April & 23 September 2021
Date of Delivery : 07 October 2021

CITATION : Republic v Agege and Mau

CATCHWORDS: “consolidation of informations”; “joinder of offenders”; “severance of defendants in one information”; “commencement of trial”; “joint trial of two separate informations”.

LEGISLATION : ss. 92(1)(d), 92(3), 93(a)(v) & 190 Criminal Procedure Act 1972 ; s. 32 Crimes Act 2016 ; s.55A Crimes (Amendment) Act 2020 ; s.67B Motor Traffic (Amendment) Act 2016.

CASES REFERRED TO : Republic v Agege [2021] NRSC 16 ; R v Cole (1965) 49 Cr App R 199 ; R v Kray [1970] 1 QB 125 ; Ludlow v Metropolitan Police Commissioner [1971] AC 29 ; R v Notte and Tsiode [2021] NRSC 20 ; Crane v DPP [1921] 2 AC 299 ; R v Dennis and Parker [1924] 1 KB 867.

APPEARANCES:

Counsel for the Prosecution: F. Puleiwai (ODPP)
Counsel for Jeshua Agege: R. Tagivakatini (PLD)
Counsel for Uam Mau: V. Clodumar (Pleader)

REASONS FOR DECISIONS

INTRODUCTION

1. This is an application by the office of the DPP to consolidate two (2) separate and discreet Informations filed against two (2) individual defendants on different occasions and charging each defendant with a similar and different offence(s).
2. The application is brought by way of Notice of Motion dated 14 September 2021 and supported by two (2) affidavits of a paralegal in the DPP's office.
3. The application purports to invoke the provisions of section 92(1)(d) of the Criminal Procedure Act ('CPA') on the following deposed basis :
 - (a) *"...the two (2) cases are interrelated and have factual nexus in terms of evidence and witnesses"* ;
 - (b) *the two (2) defendants were allegedly in the same vehicle at the time of the collision with the victim ;*
 - (c) *"...the (unidentified) evidential documents relied on the Prosecution Is similar in nature and the list of witnesses is common in both cases"* ;
 - (d) *".... It would be beneficial to consolidate (the 2 cases) in order to save time and resources rather than recalling the common witnesses again for a separate hearing"* ;
 - (e) *"...(the defendants) will not be prejudiced by the matters being consolidated since we have the same witnesses and evidence for both cases which will be called once"*.
4. On 23 September 2021 in the absence of any application for an adjournment from either defence counsel , for time to consider and respond in writing to the prosecution's written submissions which had only been served on defence counsels' minutes before the hearing commenced , the Court proceeded to hear the application.
5. After hearing the prosecutor in support and defence counsel in opposition, the Court orally refused the application to consolidate the two (2) Informations for reasons which I now provide.

BACKGROUND FACTS

6. In this regard I have taken the liberty of paraphrasing the prosecution's affidavit as follows: On the evening of 8 February 2021 the defendants and a group of youths were drinking at a private residence at Meneñg District when a grey Toyota station wagon with registration number "TT 1192 ("**the rented vehicle**") arrived and took the defendants and other youths to another spot called "*black soil*" at Rehab area in Buada District where the drinking continuing.
7. When the drinks were about to finish the rented vehicle returned the drinking groups back to Meneñg and a smaller group including the two (2) defendants left in the rented vehicle for Uam Mau's ("**UM**") residence to have something to eat. After the meal the group decided to resume drinking and headed for Jeshua Agege's ("**JA**") residence to get some money.

8. On the way to JA's residence UM was driving the rented vehicle with JA in the front passenger seat and two (2) other youths in the back seat. The rented vehicle headed up to the Correctional Services prison at Topside area where it encountered a motorcycle being driven by the victim on the gravel road.
9. The rented vehicle accelerated and collided violently with the rear of the motorcycle causing it to fall onto the road with the victim sustaining leg, head and bodily injuries which necessitated his evacuation to Australia for specialist medical treatment.
10. UM got out of the rented vehicle and drove the victim's motorcycle to the "black soil" drinking spot while JA followed in the rented vehicle. The victim's bike was ditched at "black soil" and UM got back into the rented vehicle which was now being driven by JA.
11. As the rented vehicle headed down the hill away from "black soil" and out of the Topside area, it was stopped by a police patrol. So much for the brief facts.
12. Assuming the accuracy of the event's and especially, the occupants of the rented vehicle, and their relative positions in the vehicle after they left UM's residence at Meneñg and at the time of the collision with the victim's motor cycle, there can be no possible objection to the joinder of the two (2) defendants in the same charge whether for the same offence(s) or not. Unfortunately, that did not happen and prosecuting counsel was under some difficulty trying to explain the serious lapse.

TRANSFERRALS & INFORMATIONS

13. On 26 February, 2021 UM appeared before the District Court and was referred to the Supreme Court for trial on a charge of Attempt to Murder.
14. On 9th March, 2021 JA appeared before the District Court and was transferred to the Supreme Court for trial on a charge of Attempt to Murder and three (3) other offences.
15. On 22 March 2021 JA was charged alone in an Information containing four (4) separate offences, two (2) primary or principal offences namely Counts 1 and 2 and two (2) lesser alternative offences, one for each primary Count. The Count numberings are unnecessarily confusing and certainly non-compliant with the clear terms of Section 93(v) of the CPA.
16. For brevity sake, it is only necessary to refer to the primary offence charged in Count 1 which reads as follows:

Statement of Offence

Attempt to Murder : Contrary to Section 55A of the Crimes Act 2016

Particulars of Offence

"Jeshua Agege on 9th February 2021, in Nauru aided or procured the driver of Vehicle Registration Number TT 1192 namely Uam Mau to drive the said vehicle and hit the motorcycle that was driven by Rajesh Kumar Ragagopa an act which was capable of or likely to endanger human life."

17. In respect of this offence (as charged) , this Court in Republic v Agege [2021] NRSC 16 said (at para 16) :
- “.....it is not an offence to procure or aid a principal offender to attempt to commit an offence. It is only legally possible to aid or procure the commission of a complete or full offence which , if unsuccessful or incomplete , constitutes an attempt on the part of the principal offender.”*
- The Court’s ruling was delivered on 16 April 2021 refusing JA’s original application for bail. It was clear then that JA was charged with a non-existent offence and would be acquitted if the charge was tried.
18. On 26 March 2021 UM was indicted on an Information that charged him with two (2) offences a principal offence of Attempted Murder (Count 1) and an alternative offence (Count 2) of Dangerous Driving Occasioning Grievous Bodily Harm contrary to section 67B(1)(b) and (2) of the Motor Traffic (Amendment) Act 2016.
19. The particulars of the Attempted Murder reads :
- “Uam Mau on the 9th February 2021, in Nauru , drove motor vehicle Registration Number TT 1192 and hit the motorcycle that was driven by RAJESHKUMAR RAGAGOPA an act which was or likely to endanger human life”.*
20. Notable by its absence in the particulars , is any mention of JA being a co-offender or an accomplice in any way , shape , or form in the commission of the offence by UM as might be expected. In other words , on the face of the charge , UM committed the offences alone and indeed , should be tried and convicted alone.
21. Having said that , two (2) months later , on 9 June 2021 the DPP filed an Amended Information charging JA with a single offence of Attempt to Murder the particulars of which reads :
- “Jeshua Agege on 9th February 2021 , in Nauru , attempted to kill Rajesh Kumar Ragagopa by an act which was capable of or likely to endanger the life of Rajesh Kumar Ragagopa.”*
22. In this instance JA’s culpable “act” is not identified or described as it was in his earlier Information nor is there any reference to the provisions of ss 29, 30, 32 or 34 of the Crimes Act 2016 in the Statement of Offence as might be expected.
23. Even more problematic is the ignoring of the disjunctive “or” in the definition of the offence of Attempt to Murder under s 55A of the Crimes (Amendment) Act 2020 which clearly differentiates between **[limb (a)]** : “attempt to kill another person” and **[limb (b)]** : “does an act which is capable of or likely to endanger human life or kill another person”.
24. In other words , the particulars (as charged) confusingly combines the two (2) separate limbs as if they are a single limb without any difference whereas they are not. Limb (a) refers to an “attempt” as defined in section 34 and limb (b) is a stand-alone manner of committing the offence.

25. In the Court's view , there is no need in a charge of Attempt to Murder, to go further than to say "...*attempted to kill...*", and additionally , describe the probable or likely consequence of the attempt. Such a description is only necessary where the particulars describes the "*act*" alleged to have been committed by the offender *eg.* by the use of a weapon or by stabbing the victim in the heart.
26. Again , although UM's Information omits any mention of JA and JA's Amended Information does not mention UM as having any role in the commission of the offence charged against JA , both Informations have a "*common victim*". However that factor is not listed in Section 92(1) CPA as being a sufficient basis on its own (if at all) , for the joinder of two or more defendants in one Information.
27. What is clear beyond doubt from the above sequence of District Court transferrals , is that the prosecution had at least two (2) weeks before the filing of the above Informations in which to decide whether to join the defendants in one Information on the basis of the evidence and if they considered it appropriate in the "*interests of justice*". Plainly , the DPP elected not to do so for reason(s) best *known* to himself.
28. In the result , this Court was confronted with two (2) separate Informations charging each defendant alone with an offence of Attempt to Murder involving the same victim.

UM's PLEAS

29. On 9 April 2021, UM pleaded "*not guilty*" to Attempt to Murder (Count 1) and "*guilty*" to Dangerous Driving Causing Harm (Count 2). The DPP wished however to continue with the trial of Count 1 in spite of UM's plea to the lesser alternative Count 2. Against defence counsel's objections to the proposed course , written submissions were ordered and filed.
30. Defence counsel's submissions are predicated on the premise that the drafting and laying of charges in an Information is the exclusive prerogative of the DPP who has chosen to charge the lesser offence of Dangerous Driving Causing Harm as an alternative (not as an additional) Count in the Information against UM.
31. This choice counsel submits , is a voluntary intentional exercise of the DPP's prerogative and constitutes an unconditional offer or indication to UM that the alternative Count was properly charged and available to be accepted by plea. As such , counsel submits the DPP's offer is binding on him to accept a plea to the alternative Count 2 and not to proceed thereafter with the more serious Count 1.
32. In support of his submission defence counsel points to the Court's mandatory ("*shall*") duties under Section 190 CPA. In this regard I note however that subsection (3) permits the Court to change a defendant's guilty plea if he denies or challenges a material fact of the offence and before a conviction has been entered.
33. DPP counters that the alternative Count 2 is not directed at the defendant but rather , at the Court , in the event , it finds Count 1 unproven then , that does not mean UM will go "*scott-free*". Instead , the Court is still required to consider whether Count 2 is proven

(even after a guilty plea has been entered) and , if satisfied beyond a reasonable doubt , then it may return a guilty verdict on Count 2.

34. Furthermore, a guilty plea to Count 2 does not prevent the DPP from continuing with the prosecution on Count 1. UM's plea is left on the file and will be dealt with after Count 1 has been disposed of and if there is a conviction on Count 1 then the DPP may decide not to proceed on UM's guilty plea on Count 2. In these circumstances , there can be no prejudice to UM nor would a plea of "*autrefois*" be available to him in the event of the prosecution proceeding under Count 1.
35. After considering the competing submissions and noting defence counsels' reference to the two (2) inapplicable Sections 194 and 273 of the CPA and his reliance on a Namibian case The State v Tjipetekera which deals with quite different provisions , I was unpersuaded by the defence submissions. Conversely , I am satisfied that the DPP's submissions are the correct common law position in the absence of any directly relevant provision in the CPA.
36. In this latter regard the decision of the Court of Criminal Appeal in R v Cole (1965) 49 Cr App R 199 is on all fours with the present case where it states in the headnote :
*" A plea of Guilty when recorded does not rank as a conviction until the offender is sentenced.
Where a prisoner pleads Guilty to a count in an indictment charging a lesser offence and Not Guilty to a count charging a more serious offence , the judge has in certain circumstances a discretion whether to allow the plea of Guilty to be accepted (SOANES (1948) 32 Cr,App.R. 136 followed). In ordinary circumstances the judge should allow the plea of Guilty to stand. The prisoner will then be put in charge of the jury only on the more serious charge. If he is acquitted on that charge , he will then be sentenced on the count to which he has pleaded Guilty. If , on the other hand , he is convicted on the more serious charge , the proper course is for the judge to allow the count to which he has pleaded Guilty to remain on the file and not to proceed to sentence him on that count."*
37. For the foregoing reasons , the application by defence counsel to proceed with UM's guilty plea on the alternative Count 2 is dismissed and adjourned until after Count 1 of Attempted Murder has been dealt with.

JA's PLEA

38. On 30 June 21 JA pleaded "*not guilty*" to Counts 2, 3 and 4 of the original Information dated 23 March 2021. Count 1 of Attempted Murder (as drafted) was not put to JA for plea as the Court had earlier ruled on 16 April 21 , that the Count did not charge an offence known to the law. Earlier on 09 June 2021 JA was granted conditional bail after having been in custody for exactly three (3) months.
39. Returning to the consolidation application. On 15 September 2021 DPP filed an amended Information charging a solitary offence of Aiding and Abetting : contrary to section 29(1)(a)(b)(c)(i) of the Crimes Act 2016 without any reference to a substantive offence in the Statement of offence as there should have been.

40. Be that as it may , on 16 September 2021 the DPP filed an application : *“To consolidate the two (2) Supreme Court Criminal Cases No 06 of 2021 and Criminal Case 03 of 2021 which involved the above named respondents.”*
41. As already mentioned , prosecuting counsel in the application and written submissions purported to invoke section 92 of the CPA. In particular subsection 1(d) which provides :
- “(1) The following persons may be joined in one charge or information and may be tried together , namely :*
- (d) persons accused of different offences committed in the course of the same transaction.”*

REFUSAL OF CONSOLIDATION

42. Despite extensive discussions with the Court , prosecuting counsel pressed the application in reliance on s 92(1)(d) of the CPA and several English cases including R v Kray [1970] 1 QB 125 and Ludlow v Metropolitan Police Commissioner [1971] AC 29. Counsel also submitted that *“... there is a sufficient nexus in the evidence for both cases to show that the different offences were committed in the course of the same transaction and interests of justice that the two (2) cases be consolidated and determined together.”* Counsel was unable to explain however , why the defendants were not jointly charged in the same information from the outset.
43. This Court reiterates that it has no difficulty with the meaning , effect , and application of section 92 of the CPA. Where the Court differs with prosecuting counsel is in the application of the Section to the present circumstances which prosecuting counsel submits can occur at any time of the proceedings. I disagree.
44. Admittedly , the section does not contain an expressed time limit or event by when it must be invoked , nevertheless , subsection (2) which deals with the severance of jointly charged offenders may occur *“..before trial...”*. On that basis , joinder of accused persons under subsection (1) can occur before a trial begins.
45. Having said that , the heading of the section is : ***“Joinder of two or more accused in one charge or information”***. Plainly the section deals with the joinder of accused persons and not with the joinder of Informations which is what is being sought in the present application. Furthermore, the joinder (of accuseds) must occur *“in one charge or information”* and *may be tried together”*. The heading clearly contemplates the existence of only *“one charge or information”* and **not** *“two (2) informations”* , accordingly , the joinder (of accuseds) must occur at the time that the *“one”* information is being drafted and not otherwise.
46. Needless to say subsection (2) deals with the severance or separation of accused persons and that can only occur after they have been jointly indicted. Subsection (2) has no application at the time of or in the decision to join the accused persons in the *“one”* information which joinder must occur before their trial commences.

47. Defence counsels are unanimous in their opposition to the application on the simple basis that Section 92 has no application whatsoever to the joinder of Informations rather , it is solely concerned with the joinder of accused persons in “*one*” Information.
48. In the present case DPP elected to charge the defendants separately in two (2) different Informations not “*one*” , and it is at that point in time , that section 92 expired and was no longer available to be invoked. Furthermore , no reason(s) have been deposed in the affidavits to explain or justify the course adopted by the DPP in the drafting and filing of the separate informations against the defendants at a time when all factors deposed in support of the application (at para 3 above) were known at that time.
49. Defence counsels also relied on the obiter observations of this Court in R v Notte and Tsiode [2021] NRSC 20 which referred to the judgments of the House of Lords in Crane v DPP [1921] 2 AC 299 and the Court of Criminal Appeal in R v Dennis and Parker [1924] 1 KB 867 which collectively lays down the principle that a trial Court has no jurisdiction to try together two (2) separate Informations in the same trial even if consented to by the defendants , and such trial is a nullity and “*void ab initio*”.
50. In this latter regard , prosecuting counsel sought to distinguish the Crane decision on the basis that in that case the trial of the defendants had been completed before the error was discovered on appeal whereas here , the trial of the defendants has not yet commenced, certainly there has been no opening and no evidence has been led or called in the trial.
51. Accepting the force of counsel’s efforts to distinguish the present case from Crane’s case on the facts , I cannot accept that such a distinction can be drawn or is relevant when the basis of the court’s determination in Cranes’ case is one of jurisdiction.
52. Accordingly and for the foregoing reasons the application to consolidate the two (2) Informations and to try them together in the one trial was refused.

DATED this 7th day of October, 2021.



D.V. Fatiaki
CHIEF JUSTICE

