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J. Byrne:

PAPUA NEW GUINEA

IN THE NATIONAL)
)
COURT OF JUSTICE)

CORAM: SALDANHA, J.

Wednesday,
21st April, 1974.

STATE v. ELIAS SUBANG otherwise known as SALIA WANGI of RABAUL

Criminal Law - manslaughter - application under Criminal Code s.570 to quash indictment - indictment containing two counts of unlawful killing alleged to have been caused by accused's unlawful driving on the same occasion - joinder alleged defective under Criminal Code s.543 - English practice of no assistance - cases under Criminal Code (Queensland, adopted) s.567 and Tasmanian Criminal Code s.311(2) and (3) applied - joinder held permissible under s.543.

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INTERLOCUTORY JUDGMENT

1976
April 14, 21
WAIGANI, NATIONAL CAPITAL DISTRICT

SALDANHA, J.

The indictment contains two counts. Each charges the accused with unlawful killing or manslaughter. It is not in dispute that these charges arose as a result of the accused's driving of a motor vehicle and that the two deaths occurred in one and the same accident.

Counsel for the Defence has made an application under s.570 of the Criminal Code to quash the indictment on the ground that it is formally defective. He relies upon s.543 which provides:-

> " Except as hereinafter stated, an indictment must charge one offence only, and not two or more offences.
>
> Provided that when several distinct indictable offences are alleged to be constituted by the same acts or omissions, or by a series of acts done or omitted to be done in the prosecution of a single purpose, charges of such distinct offences may be joined in the same indictment against the same person.
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> In any such case the several statements of the offences may be made in the same form as in other cases, without any allegation of connexion between the offences.
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> But, if in any such case it appears to the court that the accused person is

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likely to be prejudiced by such joinder, the court may require the prosecutor to elect upon which of the several charges he will proceed, or may direct that the trial of the accused person upon each or any of the charges shall be had separately.

This section does not authorize the joinder of a charge of wilful murder, murder, or manslaughter, with a charge of any other offence."

Counsel for the Defence contends that a charge of wilful murder, murder or manslaughter may not be joined with any other charge whatsoever but must stand alone. Counsel for the State argues that if an accused person is charged, say, with wilful murder the charge of wilful murder may not be joined with a charge of any offence other than wilful murder but may be joined with a charge of wilful murder. He says the same considerations apply to the joinder of charges of murder and manslaughter with charges of other offences. In other words, both counsel agree that a charge of wilful murder, murder or manslaughter may not be joined with a charge of an offence other than wilful murder, murder or manslaughter, as the case may be, but, whereas counsel for the Defence contends that such a charge must appear on the indictment as a single count counsel for the State contends that two or more charges of wilful murder, or two or more charges of murder, or two or more charges of manslaughter can be included in the same indictment. The short point is: how are the last three words "any other offence" to be construed.

The practice in England before 1915 was governed by English Common Law. There was only one rule that prevented the Crown from including as many crimes as possible in one indictment. This was the rule that forbade the inclusion of both felonies and misdemeanours. The objection was purely formal and owing to the fact that the right

of challenge and the form of oath administered to jurors was different in felonies and misdemeanours. At this time indictments tended to be lengthy and cumbersome and, a prisoner, who frequently had to defend himself, would find it difficult to understand the indictment. The prisoner was not provided with a copy of the depositions. Therefore, in order to mitigate the rigour of the law, and prevent oppression and injustice, in the case of felony the judges laid down a rule of practice which forbade the inclusion of more than one felony in any indictment, and, if more than one felony was included in an indictment, in the exercise of his discretion a judge would quash the indictment or require the prosecutor to elect upon which charge he would proceed.

But the rule against the joinder of felonies was found to be too rigid and in the second part of the 19th century the English Parliament enacted a number of statutes which exempted certain crimes from the operation of the rule. In 1915 the Indictments Act was enacted. Its relevant provisions are as follows:-

> "S.4 Subject to the provisions of the rules under this Act, charges for more than one felony or for more than one misdemeanour, and charges for both felonies and misdemeanours, may be joined in the same indictment, but where a felony is tried together with any misdemeanour, the jury shall be sworn and the person accused shall have the same right of challenging jurors as if all the offences charged in the indictment were felonies."
>
> Rule 3 provided:-
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> "Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts or form or are a part of a series of offences of the same or a similar character."

In The King v. Jones (1) the Court of Criminal

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(1) (1918) 1 K.B. 416

Appeal said that in a case of murder the indictment ought not to include a count of such a character as robbery with violence. Lawrence, J., giving the judgment of the Court, said:-

> "The charge of murder is too serious a matter to be complicated by having alternative counts inserted in the indictment. In the opinion of the Court the Indictments Act, 1915, did not contemplate the joinder of counts of this kind. The proper course in a case like this is to have two indictments so that the second charge may be subsequently tried if the charge of murder fails and it is thought desirable to proceed upon the second charge."

In R. v. Davis (2) the Court of Criminal Appeal held that although the joinder of two murders in one indictment was undesirable the fact that there were two counts did not, in the circumstances, invalidate the conviction.

In The King v. Stringer (3) the Court of Criminal Appeal said that it was undesirable that a charge of dangerous driving should be made a count in an indictment for manslaughter and that where the prosecution desire to prefer both charges they ought to do so in two separate indictments.

In R. v. Large (4) the appellant was charged on the first count with the manslaughter of her foster child and on the second count with having wilfully ill-treated him in a manner likely to cause him unnecessary suffering, or injury to his health. Humphreys, J., delivering the judgment of the Court of Criminal Appeal,said at p.759:-

> "We think it right to add that this present case appears to illustrate the difficulty which arises from an unnecessary multiplication of counts in an indictment for manslaughter. There is authority

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(2) (1937) 3 All E.R. 537 (4) (1939) 1 All E.R. 753
(3) (1933) 1 K.B. 704

> in R. v. Stringer a judgment of this count, delivered by Avory, J., to the effect that it is unusual, and a course which ought not to be followed, to add any other count to an indictment for manslaughter..... In future, we think that it is better that no other count should be added to an indictment for manslaughter. That has always been the practice in murder cases. It was formerly the practice in manslaughter cases, and this court repeats now that it should be the practice in the future."

The present practice in England is governed by the decision of the House of Lords in Connelly v. Director of Public Prosecutions (5). Lord Reid at p. 1296 said:-

> "The difficulty in this case arises from the practice, based on Rex v. Jones, that a second charge is never combined in one indictment with a charge of murder. I would think that the Indictments Act, 1915, was designed to ensure that all charges arising out of the same facts are combined in one indictment and thus to prevent there being a series of indictments and trials on substantially the same facts. I have had an opportunity of reading the speeches of my noble and learned friends, Lord Devlin and Lord Pearce, and I agree with them. I think that the present practice is inconvenient and ought to be changed. I realise that there are cases where, for one reason or another, it would be unfair to the accused to combine certain charges in one indictment. So the general rule must be that the prosecutor should combine in one indictment all the charges which he intends to prefer. But in a case where it would have been improper to combine the charges in that way, or where the accused has accepted without demur the prosecutor's failure so to combine the charges, a second indictment is allowable. That will avoid any general question

(5) (1964) A.C. 1254

> as to the extent of the discretion of the court to prevent a trial from taking place. But I think there must always be a residual discretion to prevent anything which savours of abuse of process."

I find that the English practice is of no assitance to us. Before 1915 it was based upon the English Common Law which is irrelevant to the consideration of what ought to be the practice here based as it is on statute. The practice established by Connelly v. Director of Public Prosecutions (supra) (6) is obviously the right one. It is in accordance with the plain and natural meaning of the language used in the relevant provisions of the Indictments Act, 1915. It will be noticed that the English courts have not been consistent. The King v. Jones (supra) (7) set the pattern. While the Indictments Act, 1915, clearly allowed the joinder of other charges to a charge of murder based upon the same facts the Court of Criminal Appeal held that the Indictments Act did not contemplate such a joinder. In The King v. Davis (supra) (8) the Court of Criminal Appeal held that although the joinder of two charges of murder was undesirable it was not forbidden by the Indictments Act. Gradually the practice arose of not including any other count in an indictment charging murder or manslaughter - the crime of wilful murder being unknown to English law - although, as has been pointed out by the House of Lords in Connelly's case (supra) (9), the Indictments Act was designed to ensure that all crimes arising out of the same facts are combined in one indictment. Whatever the English practice may have been at one time and now is, it is based upon the provisions of the Indictments Act which are different to the provisions of our s.543. I find that an examination of and an inquiry into the practice in Queensland and Tasmania is of much greater assistance.

S.543 of our Criminal Code is identical with s.567 of the Queensland Criminal Code except that the

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(6) (1964) A.C. 1254
(7) (1918) 1 K.B. 416
(8) (1937) 3 All E.R. 537
(9) (1964) A.C. 1254

distinction between wilful murder and murder has been done away with in Queensland. Counsel for the Defence has cited two cases from Queensland, namely, Regina v. Knack (10) and R. v. Patrick Kenniff and James Kenniff (11). In Knack's case (supra) (12) it was held that an indictment could not charge murder of a male child together with murder of a female child. But this case was decided before the enactment of the Criminal Code Act, 1899, (which brought into operation the Queensland Criminal Code) when the law in Queensland was the English Common Law. The trial judge presumably followed the rule of practice laid down by English judges forbidding the inclusion of more than one felony in one indictment.

Kenniff's case (supra) (13) on the other hand was tried under the provisions of the Queensland Criminal Code. It would appear that at the commencement of the trial there was a joinder of two charges of murder in the indictment but before the close of the Crown case the trial judge required the prosecutor to elect on which of the charges he would proceed. It would appear therefore that the two charges were properly joined together in the one indictment and in the course of the trial the judge put the prosecutor to his election to prevent prejudice or embarrassment to the accused. This case was complicated by the fact that two accused persons were charged with two murders in one indictment.

S.311(2) and (3) of the Tasmanian Criminal Code is similar to our s.543 and provides as follows:-

> "(2) Except as provided in sub-section (3) hereof, charges of more than one crime may be joined in the same indictment, if those charges are founded on the same facts, or are, or form part of, a series of crimes of the same or a similar character. In any other case an indictment shall charge one crime only.
> (3) No indictment for murder shall contain a charge of any other crime."

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(10) (1888) 3 Q.L.J. 101
(11) (1903) St.R.Qd. 17
(12) (1888) 3 Q.L.J. 101
(13) (1903) St.R.Qd. 17

In Packett v. The King (14) the accused was charged in the Supreme Court of Tasmania on an indictment which contained two counts of murder founded on the same facts. He was convicted on both counts. His appeal to the Court of Criminal Appeal was dismissed. On an application to the High Court of Australia for special leave to appeal, the majority held that while a charge for murder could not be joined to a charge for an offence other than murder a count for murder could be joined with another count for murder. The following passage appears in the judgment of Dixon, J., as he then was -

> "It is evident that the words of sub-sec. 3 are equivocal. On the one hand, 'a charge of any other crime' may mean a count alleging some description of crime other than murder. If so, sub-sec. 3 would not forbid the inclusion in one indictment of two or more counts charging separate murders. On the other hand, the words may mean that in an indictment charging a murder the commission of no other criminal acts shall be charged even if they be murder.
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> In my opinion the former is the true meaning of sub-sec. 3. Sub-sec. 2 lays down the general rule which is qualified in the case of murder by sub-sec. 3. The general rule is that an indictment shall charge one crime only unless the charges are founded upon the same facts, or are, or form part of a series of crimes of the same or a similar character.....
> .....The expression with which sub-sec. 2 opens, 'except as provided in sub-section (3) hereof', does not except murder altogether from sub-sec. 2. It does not mean 'except murder'. It means 'subject to the provision contained in sub-sec. 3', or 'except in so far as is otherwise provided by sub-sec. 3'. It is, therefore, natural to expect in sub-sec. 3 not a complete negative to the liberty conferred by sub-sec.2 to join charges of connected criminal acts, but an abridgment or qualification. That qualification

(14) (1937) 58 C.L.R. 190

> is, I think, that in the case of murder the crimes joined must be all murder. Thus an indictment of murder must be confined to charges of murder, but may join more than one charge of murder if the charges are founded on the same facts or are or form part of a series of crimes....."

In the unreported case of Regina v. Barnabas Barabanada (15) heard at Port Moresby in January, 1974, Williams, J. found that the terms of s.311 of the Tasmanian Criminal Code were different to the terms of s.567 of our Code (now section 543) and therefore did not think that any real assistance was to be gained from Packett's case (supra) (16). Nevertheless he was of the opinion based on the natural meaning of the words that s.567 excludes the joinder with a charge of wilful murder, murder or manslaughter of a charge of any other kind of offence. He held that joinder of a charge of wilful murder, for example, with a charge of break and enter would not be authorized but that joinder of a charge of wilful murder with another charge of the same kind would be authorized.

With this finding of Williams, J. I respectfully agree. In the context in which the words "any other offence" are used and giving them their natural meaning I find that "any other offence" must mean any offence other than wilful murder, murder or manslaughter.

I find that s.543 of our Criminal Code and s.311 (2) and (3) of the Tasmanian Criminal Code are broadly similar and I see no reason why our s.543 cannot be given the same construction that the High Court of Australia gave to s.311 (2) and (3) of Tasmania. If the legislature had intended the last paragraph to have the meaning which counsel for the defence seeks to give it the last paragraph could have been drafted as follows:-

> "An indictment charging a person with wilful murder, murder or manslaughter must charge one

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(15) (Unreported) Judgment of Williams,J., Jan. 74
(16) (1937) 58 C.L.R. 190

offence only, and not two or more offences."

Considerations of expense, convenience and hardship to the accused are not irrelevant. Can a poor country such as ours afford the expense of a multiplicity of trials when all offences arising out of the same facts could be dealt with at one trial? With the acute shortage of judges is it desirable that there should be more than one trial when one will do? And why should the accused be made to face the ordeal of more than one trial? Of course, one must always guard against the possibility of prejudice or embarrassment to the accused. But as long as the court has the discretion to put the prosecutor to his election either at the commencement of the trial or in the course of the trial, as in Kenniff's case (supra) (17), I cannot see how injustice can be caused to the accused.

Here the objection is not on the ground that joinder of two charges of manslaughter are likely to prejudice or embarrass the accused but on the ground that the indictment is formally defective.

For reasons I have given I rule that the joinder is permissible.

Solicitor for the State: L.W. Roberts-Smith, Public Prosecutor

Counsel for the State : K.B. Egan

Solicitor for the Accused: N.H. Pratt, A/Public Solicitor

Counsel for the Accused : C.F. Wall

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(17) (1903) St.R.Qd. 17