

JOINT COURT OF THE NEW HEBRIDES

CONDOMINIUM v. FRED CHARLEY of EMAU

JUDGMENT

When the Court, composed of the British and French Judges and assisted by an Assessor, sat to commence this case the acting Public Prosecutor, Mr. CAROLAN, B.L., raised a point of law which went to the jurisdiction of the Court as composed. It was a novel point which, if established, would hold that in criminal proceedings the Joint Court assisted by one Assessor is not properly composed, lacks jurisdiction, and has been incompetent in criminal trials for the past thirty years. In support, Mr. CAROLAN referred to the Anglo-French Protocol of 1914 and the Exchange of Notes of 1939 between the two Powers. Having dealt with the Treaty between the two Powers resulting in the signing of the Protocol, he referred to Article 10 of the Protocol by virtue of which the Joint Court was established, and to Article 11. The relevant portions of these Articles read :

" ARTICLE 10

" COMPOSITION OF THE JOINT COURT

" 1. A Joint Court shall be established consisting of
"three Judges, of whom one shall be President"

" ARTICLE 11

" ASSESSORS

" 1. In the trial of criminal cases, the Joint Court shall
"be assisted by four Assessors, taken from the leading non-
"native inhabitants of the Group.

" 2. These Assessors shall be chosen by lot from two sep-
"arate lists drawn up jointly by the High Commissioners or
"Resident Commissioners at the beginning of each year, and
"containing respectively the names of the leading dependents
"of either Power. If one of the leading inhabitants thus
"chosen is absent from Efate when the case is ready for trial,
"he shall be replaced by a leading dependent of the same Power
"who is in Efate and has been chosen by lot from one of the
"two lists drawn up.

" 3. The Assessors shall have a vote in deciding the
"question of the guilt of the accused, but a consultative
"voice only in deciding the sentence.

" 4. The Public Prosecutor and each accused person may
"challenge peremptorily two of the Assessors."

He then passed to the Exchange of Notes of 1939 and quoted the first and second numbered paragraphs of it :-

" (1) Notwithstanding the provisions of the Protocol of the 6th August, 1914, during the absence from the New Hebrides of the President of the mixed Tribunal, the British Judge and the French Judge sitting together shall exercise the jurisdictional powers conferred on that Tribunal by Article 12 of the Protocol.

" (2)(i) They shall be assisted in hearings other than those relating to proceedings concerning immovable property by an Assessor entitled to speak and vote. . . "

It was the submission of Mr. CAROLAN that the effect of this Exchange of Notes on the Protocol was to require the Court, composed of the British and French Judges, to be assisted by the four Assessors provided for by Article 11 of the Protocol and an additional Assessor as provided for by this Exchange of Notes.

In support of his submission, Mr. CAROLAN argued that the Joint Court continued to exist as established by the Protocol, save that there is no longer a President. To fill this gap an extra Assessor is provided for, whose function at a trial is (at least numerically) to replace the President. Unlike the Assessors provided for in Article 11, this Assessor is entitled to speak and vote ; the other four having merely a vote in deciding the guilt of the accused and a consultative voice in deciding the penalty. Mr. CAROLAN continued that in interpreting legislation a Court ought to examine it in its entirety to ascertain the intent. He maintained that throughout the Exchange of Notes there is a thread which indicates that the intention was to replace the President by this fifth Assessor. He referred to the first paragraph cited above ; to paragraph (2)(ii)(b) of the Exchange of Notes which establishes the nationality of the Assessor ; and passed to (2)(iv), which reads :

" The Assessors shall be taken from the list drawn up in accordance with Article 11 of the Protocol of the 6th August, 1914 ; except in cases where they are chosen by ballot, they shall be appointed by agreement between the British Judge and the French Judge."

He submitted that Article 11 is still in force and that paragraph (2) of the Exchange of Notes is supplementary thereto. He laid emphasis on the use of the word "Assessors", the plural, and the relative pronoun "they" in paragraph (2)(iv).

Mr. COULTER, the acting Native Advocate, adopted the arguments of Mr. CAROLAN and had nothing to add.

To deal with the point raised there are three factors to be considered : first, the composition of the Court; second, the jurisdiction of the Court; and third, the Assessors.

Article 10 of the Protocol ordained that there should be a Joint Court composed of two Judges and a President. By Article 12 that Court was given certain civil and criminal jurisdiction, and Article 11 provided that in the exercise of its criminal jurisdiction the Court should be assisted by four Assessors. In 1939 the President of the Joint Court intended to leave the New Hebrides and the two Powers decided to make provision for the functioning of the Court in his

absence. This intention of the two Powers is indicated by the opening of the Exchange of Notes of that year.

" I have the honour to inform you that, in order
"to make provision for the functioning, during the
"absence of the President, of the Joint Court, estab-
"lished under Article 10 of the Protocol"
". . . the Government of the United Kingdom of Great
"Britain and Northern Ireland desire to conclude an
"agreement with the Government of the French Repub-
"lic in the following terms : "

and it then continues with paragraph (1) previously quoted. What that paragraph does is to vest in the two Judges, sitting together, the jurisdiction of the Joint Court previously vested in the two Judges and the President by Article 12. This, it is clear, was intended to be a temporary expedient to last during the absence of the President. The wording of paragraphs (3) and (6) emphasise this. This jurisdiction embraces civil and criminal matters and matters pertaining to the registration of title.

The second numbered paragraph, using practically the same words as used in Article 11, provides for the Court to be assisted by "an Assessor". Taking the first two paragraphs together there is no ambiguity. They clearly set out the composition of the Court and its jurisdiction, and make provision for it to be assisted by one Assessor. To suggest, as was suggested by Mr. CAROLAN, that paragraph (1) intended to vest in the two Judges merely the executive and administrative functions of the President, is unsustainable, as provision is made for this elsewhere; paragraph 6 provides for this. It reads :-

" All the powers conferred exclusively on the
"President of the Mixed Tribunal by the Protocol
"of 6th August, 1914, or by any subsequent Act
"shall, during his absence from the New Hebrides,
"be vested in and exercised by the British Judge
"and the French Judge acting jointly."

Thus, it was clearly the intention of the two Powers:-

- (a) that the jurisdiction of the Joint Court shall be exercised by the British and the French Judges sitting together ; and
- (b) that all the powers, the exercise of which were the sole function of the President, be conferred on the two Judges acting jointly.

As was said earlier, if the decision on the point raised by Mr. CAROLAN rested solely on paragraphs (1) and (2) there would be very little to support him. However, (2)(iv) would appear to give support to his contention:-

" The assessors shall be taken from the list
"drawn up in accordance with article 11 of the Proto-
"col of the 6th August, 1914; except in the cases in
"which they are chosen by ballot, they shall be ap-
"pointed by agreement between the British Judge and
"the French Judge."

The use of the word "assessors" instead of "assessor", and "they" instead of "he", and the reference to Article 11 of the Protocol as the method to be resorted to in preparing the list of Assessors do appear to support him.

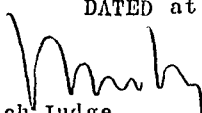
There is no doubt that this is a badly drawn and ambiguous paragraph. However, paragraph (2)(iv) is purely procedural. Its primary purpose is to indicate the source from which Assessors will be available to the Court when required. The source is the lists drawn up jointly by the High or Resident Commissioners each year in accordance with the provisions of Article 11, containing the names of the Assessors for the Joint Court for that year. The drafters were obviously visualising that more than one Assessor would be required for the functioning of the Court over the year in which the list was effective, hence the use of the plural. As a result of using the plural in this context, in the opening words of the paragraph, it is the opinion of the Court that the drafters of the Exchange of Notes continued to use the plural throughout the paragraph. Had the drafters intended that there should be two different types of Assessors they would have worded paragraph (2), the operative one, in a way clearly to indicate that the Assessor there referred to was additional to the four provided for in Article 11 of the Protocol. If their intention was to avoid a hiatus by reason of an equal number of votes for and against a conviction, there would appear to be no justification for having two types of Assessor. After conviction there does not appear to be any logical reason why four of the five Assessors should have to remain silent on the question of the penalty to be imposed. If, on the other hand, the intention was to ensure a decision during the President's absence on all matters to be decided on a trial, then the change from four Assessors to one Assessor who had the right to express an opinion as to the Court's judgment and penalty, is logical.

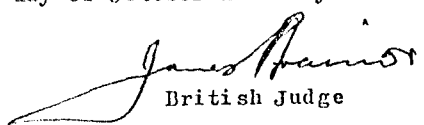
This Court is satisfied that the Exchange of Notes intended to, and did, vest the jurisdiction of the Court in the two Judges and directed that the Court should be assisted by one Assessor who, so far as reaching a decision as to guilt or otherwise in a criminal case and the penalty (if any) is concerned, would fulfil the function of the absent President. In arriving at this decision the Court finds considerable support from the fact that for more than thirty years the Court has operated as at present composed and assisted. It must be assumed that during that time the two Powers were aware of the form of assistance the Court received and, at least impliedly, accepted that the Court functioned properly and as intended.


There is no record in the Joint Court of this point of Mr. CAROLAN's having been raised previously, although it would seem to be almost impossible for it to have been overlooked since 1939. It certainly has been the topic of considerable discussion between the present Judges of the Joint Court. It is however of considerable persuasive interest that the two judges who sat with the last President before his departure were the same judges who first implemented the Exchange of Notes of 1939. They heard and decided the first criminal case after the Exchange of Notes on the 23rd February, 1940 and were assisted by one Assessor. The Court is aware, from correspondence in the Registry, that they were privy to the negotiations leading to the final Exchange and in fact approved the draft enactment subsequently established by the Exchange of Notes.

The Court holds, therefore, that the Court as at present composed and assisted is properly constituted.

DATED at Vila the 28th day of October in the year 1970 ./.


French Judge


British Judge


Registrar