POLICE v FAISAOVALE (FOTU LENIU),
PAILA (SAMUELU),
MO'A (SANELE),
SITA (PERESETENE)

Supreme Court Apia
15 October 1975
Scully CJ

CRIMINAL LAW - Murder - Four accused jointly charged - Whether joint venture - Proof of common intention to steal taro but no proof that any one of accused contemplated use of the gun against anyone, or that it might be so used, or that they ought to have so known - Crimes Ordinance 1961 s 23(2) - No evidence as to who fired the shot that killed deceased - Submission of no case to answer upheld:

R v Anderson and Morris [1966] 2 All ER 644 followed. R v Abbott [1955] 2 All ER 899, R v Richardson (1785) 168 ER 296, King v Reginam [1962] 1 All ER 816 considered.

- Evidence (Admissibility) - Joint trial - Statement by one accused admissible only as evidence against him: vide Rhodes (1960) 44 Cr App R 23.

Slade for Police.
Enari for Faisaovale.
Stevenson for Paila, Mo'a and Sita.

SCULLY CJ (orally). I have heard the submissions of counsel and reflected on the law as quoted. Now the four accused are charged with murder. I have in mind section 23(2) of the Crimes Ordinance 1961:-

> Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was or ought to have been known to be a probable consequence of the prosecution of the common purpose.

Now there is no evidence at all as to who fired the shot. A shot was fired, which resulted in the death of the deceased, but the wife of the deceased heard the shot at a time when two of the accused Samuelu and Fotu were present in the vicinity of the shooting, but in her evidence she says she did not see any of them with a gun at the time of the shooting. Her daughter later saw one Peresetene, and she said in her evidence that she did not see him with a gun. Admittedly, vision was restricted on account of the undergrowth, but the evidence is still that he was not seen with any gun. No one saw the other accused there at that time, but in his statement he admits being in the vicinity, and he heard the shot. The State relies on the principle that all four were acting in concert. The law on a joint venture, or concerted action, is stated in R v. Anderson and Morris [1966] 2 All E.R. 644. That principle as put by counsel at page 647 and affirmed by Lord Parker, C.J. as "the true position", is this:-

> . . . that where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise,

> that that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but (and this is the crux of the matter) that if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act. Finally, . . . it is for the jury in every case to decide whether what was done was part of the joint enterprise, or went beyond it and was in fact an act unauthorised by that joint enterprise.

So the State must prove that the act, in this case the shooting of the deceased, was done in pursuant of a joint venture.

At this stage I must refer to the statements made by each accused. Where persons are charged jointly the law is succinctly stated in Rhodes (1960) 44 Cr. App. R. 23, which says:-

> The jury were indeed properly directed that, Mills' alleged statement having been made in the absence of Rhodes, "where a man makes a statement in these circumstances, it is evidence against him, but is not evidence against anybody else he may have mentioned."

So what each accused has said in his statement, which may tend to implicate another accused, is inadmissible, and I have ruled accordingly.

So the proof tendered by the State really comes down to the fact that the joint venture was a taro stealing venture, such ventures not being uncommon in this State, and indeed may be said to be part of the way of life. One accused who had the gun said it was to protect the plantation as against pigs, and may be any stray pig would have met an early fate. There is no proof at all that any of them would use the gun against anyone, or that any one knew that the gun might have been so used, or that they ought to have so known. So in law I hold that the State has not proved that the accused were acting in concert in relation to the killing. As I have said, there is no evidence as to who fired the shot, and when they are not acting in concert the law is as was stated by Lord Goddard, C.J. in R. v. Abbott [1955] 2 All E.R. at p. 901, and appears in the quotation by Lord Morris from the summing up of the trial judge in King v. Reginam [1962] 1 All E.R. 876 at p. 819:-

> If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case.

And Lord Morris went on to say:-

> In considering what was said in R. v. Abbott (1) reference may be made to R. v. Richardson (2), in which case it was said (3):
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> > One of them is certainly guilty, but which of them personally does not appear. It is like the Ipswich case, where five men were indicted for murder; and it appeared, on a special verdict, that it was murder in one, but not in the other four; but it did not appear which of the five had given the blow which caused the death, and the court thereupon said, that as the man could not be clearly and positively ascertained, all of them must be discharged.
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> (1) [1955] 2 All E.R. at p. 901; [1955] 2 Q.B. at p. 503.
> (2) (1785), 1 Leach, 387.
> (3) (1785), 1 Leach, at p. 388.

I should at this stage make reference to the fact that four accused are charged. We have evidence from one of the witnesses of the State that she saw in the vicinity people up to the number of nine.

Counsel for the defence have submitted, therefore, that on what has been put before the Court there is no case to go to the assessors and I uphold such submission. I therefore propose to withdraw the case from the assessors and discharge the accused.