IN THE SUPREME COURT OF FIJI

000423

Criminal Jurisdiction

Criminal Case No. 18 of 1984

R E G I N A

v.

1. VILIAME TURAGAIVIU
2. SURESH s/o Babu Lal

Miss N. Shameem for the Prosecution.
Mr. H.K. Nagin for the 2nd Accused.

RULING ON APPLICATION FOR SEPARATE TRIALS

Cases referred to:

(1) R. v. Assim (1966) 50 Cr.App.R.224.
(2) Prasad & Anor. v. R. 17 F.L.R.208.
(3) R. v. Grondkowski (1946) 1 All E.R.559.

The learned counsel for the second accused Mr. Nagin has made application for the separate trial of his client. Mr. Nagin submits that the two counts of receiving, that is, the sixth and seventh counts, under which the second accused stands charged, have no connection whatsoever with the first five counts in respect of which the first accused is charged. He submits that the information indicates that there is no connection whatsoever between the two accuseds, nor indeed is there any evidence to that effect.

The learned Crown Counsel Miss Shameem submits that although the information does not indicate any connection between the two accuseds, she bases her sub-

mission on the provisions of section 121(c) of the Criminal Procedure Code which read as follows:-

> "121. The following persons may be joined in one charge or information and may be tried together, namely -
>
> .....
>
> (c) persons accused of different offences provided that all offences are founded on the same facts, or form or are part of a series of offences of the same or a similar character;"

I consider that the trial has not yet commenced at this stage as no evidence has been led: see the case of Shiu Ram Civ.App.No. 52/80 F.C.A.

Section 120(3) of Criminal Procedure Code provides for separate trial of an accused on any count or counts appearing on the one information: but there is apparently no statutory provision however for the separate trial of an accused person joined with another accused in the one charge or information, under section 121 of the Code, as in this case. In the case of R. v. Assim (1) to which Miss Shameem has made reference, Sachs J. in delivering the judgment of the Court of Criminal Appeal observed as follows:

> "The first point that becomes quite clear upon an examination of the authorities is that questions of joinder, be they of offences or of offenders, are matters of practice on which the court has, unless restrained by statute, inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice."

In the case of Prasad & Anor. v. R. (2) Marsack J.A. in delivering the judgment of the Fiji Court of Appeal observed at p.213:

> "The application for separate trials must be made at the outset of the trial, and the Judge can act only on the material then before him, usually the depositions and the exhibits. The basis upon which the trial Judge should exercise his discretion has been authoritatively set out by the Lord Chief Justice Lord Goddard in R. v. Grondkowski (3) at p.561:
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> > 'The law is and always has been that this is a matter of discretion for the Judge at the trial .... The discretion no doubt must be exercised judicially that is not capriciously. The Judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners.'"

As to the facts of R. v. Assim (1) Sachs J. observed at p.235:

> "The present case is one in which it would on the facts in evidence clearly have been open to the Crown to insert in the indictment a count for one offence charging both accused of acting in concert: and it is thus particularly a case which demonstrates how artificial it would be to say that the joinder would have been proper if the Crown had added such a count, but was improper because that had not been done."

and again at p.236:

> "As a general rule it is, of course, no more proper to have tried by the same jury several offenders on charges of committing individual offences that have nothing to do with each other,

than it is to try before the same jury offences committed by the same person that have nothing to do with each other. Where, however, the matters which constitute the individual offences of the several offenders are upon the available evidence so related, whether in time or by other factors, that the interests of justice are best served by their being tried together, then they can properly be the subject of counts in one indictment and can, subject always to the discretion of the court, be tried together. Such a rule, of course, includes cases where there is evidence that several offenders acted in concert, but it is not limited to such cases.

Again, while the court has in mind the classes of case that have been particularly the subject of discussion before it, such as incidents which, irrespective of there appearing a joint charge in the indictment, are contemporaneous (as where there has been something in the nature of an affray), or successive (as in protection racket cases), or linked in a similar manner (as where two persons individually in the course of the same trial commit perjury as regards the same or a closely connected fact), the court does not intend the operation of the rule to be restricted so as to apply only to such cases as have been discussed before it."

Although the particular decision as Assim (1) was quite obviously based on the facts in that case, nonetheless the Court of Criminal Appeal laid down some general principles in the matter. Quite clearly the facts of Assim (1) are not on all fours with the present case as in that case a joinder of both accused in one count, jointly charging them under that count of acting in concert, was possible. That is clearly not the case here.

The question arises as to whether the offences laid in the information are

"founded on the same facts, or form or are part of a series of offences of the same or a similar character."

I understand however that Miss Shameem does not base her submission on the first leg of that extract from paragraph (c) of section 121 of the Code. Apparently the nexus between the counts is that it is alleged that the first accused was apparently one of a gang of thieves and that the second accused received the particular stolen property, at some stage or another, from that gang. It is not alleged that he received the property from the first accused and I understand that no evidence will be led by the prosecution to that effect. It seems to me the nexus in the matter is very slight, and indeed that such nexus might, on the face of it, be prejudicial rather than probative.

The Court has a discretion in the matter. I find myself, on the facts before the Court, in doubt and I consider that such doubt, as in the case of the general issue, should be resolved in the favour of the second accused who has made an application in the matter.

Accordingly I grant the application and I order that both accused be tried separately.

Delivered in Open Court This 2nd Day of April, 1985.

B P Cullinan

(B.P. Cullinan)
JUDGE