

HELD AT APIA

S.889/92

BETWEEN:            THE POLICE

A N D:                FEGI BREBNER of Puipaa and  
                                 Lotofaga

Counsel:            H Aikman for Prosecution  
                                 K Sapolu for Defence

Decision:            19th April 1993

---

DECISION OF SAPOLU, CJ

---

Now this case was first called on 4 November and then it was adjourned to the 19th December 1992 for mention before this Court. On 14 December last year this Court set down this case for hearing on the 20th to the 22nd April.

On 20 April, which was yesterday before 9.30am, counsel for the Prosecution sought an adjournment from the Court of this matter because two of the Prosecution witnesses were not available. That adjournment was to be until 2.00pm yesterday afternoon. The Court granted the adjournment and deferred this case until 2.00pm yesterday afternoon because the Prosecution had two of its witnesses absent. Warrants of Arrest in respect of those witnesses were issued by the Court yesterday morning and the Police went out yesterday morning to find them.

At 2.00pm, counsel for the Prosecution again sought another adjournment from the Court for the case to be adjourned to 9.30am this morning because the Police had still not found the witnesses in respect of whom the Warrants of Arrest /<sup>were</sup> issued. Counsel for the Prosecution then asked the Court to have the assessors retired whilst she puts an application to the Court. During your retirement, counsel for the Prosecution for the first time since December last year, makes the application to the Court that I should disqualify myself from presiding in this case because counsel for the defence is my sister.

Now I have no involvement in this case but the only ground which the Prosecution is advancing in support of its application is that counsel for the defence in this case is my sister. One of the matters mentioned by counsel for the Prosecution was that it has been the understanding of the Prosecution and the Registrar of this Court that I was not to preside in this case, but enquiries by myself after this case was adjourned yesterday afternoon shows that that was never the understanding of the Registrar of this Court. Now after a period of 4 months since this case was mentioned in December last year and adjourned to the 20th April 1993 for hearing by this Court there has never been any communication by the Prosecution that it wishes the judge to disqualify from presiding in this case. Now the defence is ready to proceed.

You ladies and gentlemen have been summoned to sit in this case and this case was supposed to start at 9.30am yesterday morning but it was only at 2.00pm yesterday afternoon that the Prosecution made application that I disqualify myself. In these circumstances and for other reasons which I gave yesterday afternoon, I decided to decline the application by counsel for the Prosecution. Notwithstanding that, counsel for the Prosecution this morning also repeats the same application and you have heard that application and I feel that you being the assessors in this case, I must state in the decision that I have already given that the application declined. That decision still remains. But there is a second application by counsel for the Prosecution and that is to further adjourn this case because the Prosecution has still not located two of its witnesses in respect of whom the Court has already issued Warrants of Arrest. Now I would like to hear counsel for the Defence on the second application by the Prosecution for another adjournment on the basis that two of the Prosecution witnesses have still not being located by the Police, even though other witnesses are available.

Counsel for the defence applied to dismiss the charge.

I have also just received the case stated by the Prosecution about half an hour ago and I have not had enough time to consider the application for this

case. So I do not prepare to deal with the case stated today, but I must say that there is nothing in the law to stop a trial from proceeding because a party has filed an application for a case stated from this Court to the Court of Appeal. In other words, the trial is still to proceed and the case stated is to be dealt with at a different time. Now I have considered the application by the Prosecution for a further adjournment of this case. This matter has been before the Court for more than 4 months. Yesterday the Prosecution was unable to proceed because two of its witnesses were not available and Warrants of Arrest have been issued by the Court for them to be brought before this Court. At 9.30 yesterday morning the Court and the assessors were ready to hear the case and the Defence counsel was ready to proceed with the case. However, the Court granted the application by the Prosecution for this case to be adjourned to 2.00pm yesterday afternoon so that the Police could bring its two absent witnesses for the hearing. At 2.00pm yesterday afternoon, the Prosecution had still not found those two witnesses, but the Prosecution had other witnesses available. This case was adjourned from yesterday afternoon to 9.30am this morning for this case to proceed and counsel for the Prosecution apparently advised counsel for the Defence yesterday that the Prosecution was going to proceed this morning with the witnesses that the Prosecution has. But this morning, the Prosecution is again seeking an adjournment when the Defence counsel is ready to proceed and the assessors are ready to hear it. This is not the first time the Court has been ready to proceed as the Court and the assessors were ready to hear the case at 9.30am and again at 2.00pm yesterday afternoon. It appears to the Court that the Prosecution is not ready to proceed at all.

Now I must give due weight to the interests of the Prosecution. On the other hand the interests of the defendant have also to be considered. These charges have been hanging over him for more than 4 months.

The Prosecution also advised the Defence counsel yesterday that the Prosecution was going to proceed this case with these witnesses. I think in these circumstances the Court must take a stand as to what is fair and should be done in the circumstances of this case. On that, I put aside any inconvenience to the Court but I cannot put aside any inconvenience to the defendant. The Court has therefore come to the decision that the application for a further adjournment in view of all circumstances shall be refused.

The charge is also dismissed.

*Tom Snydal*  
.....  
CHIEF JUSTICE