

IN THE SUPREME COURT OF SAMOA

HELD AT APIA

S.123/97-126/97 &  
S.143/97

BETWEEN: POLICE

Informant

A N D

MAIAVA TOTIVE TOFU of  
Fasitoo-uta and Satoalepai, Savaii

Defendant

Counsel: P T Tanielu and M Tuatagaloa for prosecution  
R S Toailoa for accused

Hearing: 19 May 1998

Ruling: 19 May 1998

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**REASONS FOR RULING OF SAPOLU, CJ**

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The present accused is faced with 20 charges, namely:

- (1) five charges of theft as a servant under section 85(1)(a) and 86(1)(h) of the Crimes Ordinance 1961;
- (2) five charges of forgery under section 107(1) of the Crimes Ordinance 1961;
- (3) five charges of uttering a forged document under section 108(b) of the Crimes Ordinance 1961; and

- (4) five charges of unlawfully obtaining the issue of a passport under section 13(1)(c) of the Permits and Passports Act 1978.

Counsel for the accused by way of a preliminary application, submitted that further proceedings in the present trial should be stayed because the charges against the accused infringe the provisions of section 8 of the Crimes Ordinance 1961.

Section 8 provides:

“(1) Where an act or omission constitutes an offence under this Ordinance and under any other Ordinance, the offender may be prosecuted and punished either under this Ordinance or under that other Ordinance.”

“(2) Where an act or omission constitutes an offence under 2 or more Ordinances other than this Ordinance, the offender may be prosecuted under any one of those Ordinances.”

“(3) Where an act or omission constitutes an offence under 2 or more provisions of this Ordinance or of any other Ordinance, the offender may be prosecuted under any one of those provisions..”

“(4) No one shall be punished twice in respect of the same offence.”

The provisions of section 8 which are submitted on behalf of the accused to have been infringed are subsections (1), (3) and (4). Section 8 of our Ordinance is almost identical word for word to section 10 of the Crimes Act 1961 (NZ). The differences between the two statutory provisions are insignificant and not material for the purposes of this decision. It follows that New Zealand authorities on section 10 of the Crimes Act 1961 (NZ) are very relevant to the construction of section 8 of our own Ordinance.

In relation to section 8(1) of the Crimes Ordinance 1961, the application on behalf of the accused is that the act or acts with which the accused has been charged under the Ordinance are the same as the act or acts with which the accused has been charged under the provisions of the Permits and Passports Act 1978. It is then submitted that these proceedings should be stayed while the prosecution elects which charges it should proceed with, that is, whether the prosecution should proceed only with the charges under the Crimes Ordinance 1961, or whether the prosecution should proceed only with the charges under the Permits and Passports Act 1978. Counsel for the accused did not rely on any authority in support of his application.

Senior counsel for the prosecution strongly opposed the defence's application. She submitted that section 8(1) of the Crimes Ordinance 1961 would apply if the acts which constitute the offences with which the accused is being charged under the Ordinance are the same or substantially the same as the acts which constitute the offences with which the accused is being charged under the Permits and Passports Act 1978. If the acts which constitute the offences with which the accused is being charged under the Ordinance are not the same or substantially the same as the acts which constitute the offences with which the accused is being charged under the Act, then Senior counsel for the prosecution submitted that section 8(1) of the Ordinance does not apply. In view of the New Zealand authorities produced by counsel for the prosecution in support of her submissions, I would accept for present purposes that the test whether section 8(1) of the Ordinance applies or not is to ask whether the acts which constitute the offences with which the accused is being charged under the Ordinance are the same or substantially the same as the acts which constitute the offences with which he has been charged under the Act.

In the case of *R v Clarke* [1982] 1 NZLR 654 the accused was charged with and convicted of two counts: (1) a count of manslaughter in that he killed someone by an unlawful act, namely, reckless driving; and (2) a count under section 55 of the Transport Act 1962 (NZ) that while he had excessive alcohol in his blood he was in charge of a motor vehicle and by an act or omission caused the death of someone. The accused in that case appealed against his double conviction. In dismissing the appeal, the New Zealand Court of Appeal held that section 10 of the Crimes Act 1961 did not apply to the circumstances of that case. At p 656, Somers J who delivered the judgment of the Court said:

“[Section 10] and its immediate forerunners, s.6 of the Crimes Act 1908 and s.25(1) of the Acts Interpretation Act 1924, have been referred to in a number of cases; See *R v Young* (1914) 33 NZLR 1191, 1198-1201, *R v Burton* [1941] NZLR 519 and *R v Moore* [1974] 1 NZLR 417 all decisions of this Court. The present case calls for no further exegesis. It does not turn on s.10(4) which relates to punishment - see *Moore* at 421 - but on s.10(1). Even if that subsection be interpreted as restrictive and not permissive - we do not determine the point which was not fully argued and only note the contrary view in Adams on Criminal Law and Practice in New Zealand (2<sup>nd</sup> ed) para 178 - the act or omission of the applicant constituting each offence was not the same or substantially the same.

“On the manslaughter charge the ‘act or omission’ was the act of killing Mrs Satherley by the unlawful act of reckless driving. On the second count it was causing her death by an act or omission in relation to the applicant’s driving materially caused by his blood/alcohol level.”

That passage was cited with approval by Williams J in the High Court of New Zealand in the case of *R v Turanga* [1993] 1 NZLR 685, 687. I will refer to *Turanga’s* case again when I come to the application for the accused under section 8(3) of the Ordinance.

I come now to the question whether for the purpose of section 8(1) of the Crimes Ordinance 1961, any of the acts which constitute the offences with which the accused is charged under the Ordinance is the same or substantially the same as any of the acts with which the accused is charged under the Permits and Passports Act 1978. In my view, the answer must clearly be no. On each of the theft as a servant charges, the "act" is the act of the accused, as an officer of the government of Samoa, of stealing a passport which was the property of the government of Samoa. On each of the charges under section 13(1)(c) of the Permits and Passports Act 1978, the "act" is the act of obtaining the issue of a passport by making false statements and representations. These two "acts", in my view, are not the same or substantially the same.

On each of the forgery charges under the Crimes Ordinance 1961, the "act" is the act of making a false passport. That is also, in my view, not the same or substantially same as the "act" of obtaining the issue of a passport by making false statements and representations in respect of each of the charges filed under section 13(1)(c) of the Permits and Passports Act 1978. Likewise on each of the charges of uttering a forged document under the Crimes Ordinance 1961, the "act" is the act of causing any person to use, deal with, or act upon a forged document as if it were genuine. That is also not the same or substantially the same as the "act" of obtaining the issue of a passport by making false statements and representations in respect of each of the charges under section 13(1)(c) of the Permits and Passports Act 1978.

I have, therefore, come to the conclusion that the present charges do not infringe the requirements of section 8(1) of the Crimes Ordinance 1961 and accordingly that provision does not apply to this case.

That brings me to section 8(3) of the Crimes Ordinance. Here the Court will be dealing only with the charges under the Crimes Ordinance. Senior counsel for the prosecution submitted that to determine whether section 8(3) of the Ordinance applies to this case, the question is whether the acts or omissions involved in each of the different offences with which the accused is charged under the different provisions of the Crimes Ordinance are the same or substantially the same. She referred to *R v Turanga [1993] 1 NZLR 685*. In that case Williams J at p.687 said that section 10(3) of the New Zealand Crimes Act 1961 does not apply if the acts or omissions involved in each separate offence with which an accused is charged are not the same or substantially the same. Section 10(3) of the Crimes Act 1961 (NZ) is identical in wording with section 8(3) of our Ordinance except that the New Zealand provision uses the term "Act" whereas section 8(3) of our Ordinance uses the term "Ordinance"

Now, for each offence of theft as a servant in this case, the act involved is the act of stealing a passport; for each offence of forgery the act involved is the act of making a false passport; and for each offence of uttering a forged document, the act involved is the act of causing any person to use, deal with or act upon a forged document as if it were genuine. Here again I am of the view that the acts involved in those different offences of theft as a servant, forgery, and uttering a forged document are not the same or substantially the same. Therefore, section 8(3) of the Ordinance does not apply to this case.

I turn now to section 8(4) of the Crimes Ordinance 1961. I did point out to counsel for the accused in the course of the argument that it does not appear appropriate to refer to section 8(4) at this early stage of the present trial because that provision expressly relates to punishment. It says that no person shall be liable to be punished twice for the same offence. That suggests that section 8(4) comes into play after there are convictions. But we are only at the start of the trial and no evidence has been called. Section 8(4) is, therefore, not relevant at this stage of this trial.

In all then, the application made on behalf of the accused to stay further proceedings in the present trial because the charges filed by the prosecution infringe the provisions of sections 8(1), (3), (4) of the Crimes Ordinance 1961 is denied.

*TFM Sapala*  
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CHIEF JUSTICE

Solicitors:

Attorney General's Office, Apia, for prosecution  
Toailoa Law Firm, Apia, for accused