IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

49 N2LR

T.5/84

995

REGINA

v.

B BINDON.

Hearing: 24th August, 1984.

Counsel: Knuckey for Applicant.
Morgan for Crown.

Judgment: 24-8-84

JUDGMENT OF TOMPKINS, J.

The Crown has brought against the Applicant a series of charges. In the draft indictment presented by the Crown it charges that -

(1) B BINDON on the 7th day of April 1983 at W in Hamilton with intent to cause grievous bodily harm to H Kidwel wounded the said H Kidwel.

(2) B BINDON on the 7th day of April 1983 at in Hamilton with reckless disregard for the safety of others discharged a firearm at another person.

(3) B BINDON on the 7th day of April 1983 at Street in Hamilton without lawful purpose was in possession in a public place of a firearm.

(4) B BINDON on the 8th day of April 1983 at 7 Street in Hamilton with intent to cause grievous bodily harm to T Tanna, wounded the said T Tanna.

(5) B BINDON on the 8th day of April 1983 at Road in Hamilton with intent to cause grievous bodily harm to M Brandt wounded the said M Brandt.

The Applicant has applied, pursuant to s.340 of the Crimes Act, 1961, for an order that he be tried separately in respect of these counts. Specifically he submits that he

should be tried separately -

1. On counts (1), (2) and (3).
2. On count (4).
3. On count (5).

Counts (1), (2) and (3) relate to events that occurred on the 7th April, 1983, at Street. The Crown alleges that a group of men, including the Applicant, went to the Mongrel Mob headquarters in 1 Street, that the Applicant had in his possession a shotgun, that the group broke down the front fence of the property, and laid about the Mongrel Mob members who were there. In the course of doing so the shotgun was discharged. In addition to the gun the group had with them other items of an offensive nature.

There are six eyewitnesses to these events, only one of whom the Crown claims positively identifies the Applicant. Another witness describes a person of the description of the Applicant. This is apparently not difficult because the Applicant is an abnormally large man.

Count (4) relates to events that occurred at Street in the retail area of Hamilton. A car with a number of men in it, including, the Crown alleges, the Applicant, stopped another car, smashed the windscreen with an iron bar claimed to be wielded by the Applicant, and proceeded to assault a person who was also a Mongrel Mob member. It is claimed that the Applicant uttered words such as "kill that Mongey". These events occurred at about 3.30 p.m.

Evidence has been given by eight eye witnesses, six of whom purport to identify the Applicant.

Count (5) relates to events that occurred at 5.30 p.m. also on the 8th April, 1983. Two cars containing a group of men arrived in Road, Hamilton, armed with offensive items such as chains, sticks, etc., attacked a person who was also a member of the Mongrel Mob, and gave him a beating. There were eight eye witnesses to that event, four of whom purport to identify the accused. An axe was used in that assault. Although the Crown alleges that the evidence establishes the Applicant's presence, there is no direct evidence of violence on his part.

It was submitted on behalf of the Applicant, pursuant to s.340(3), that it was conducive to the ends of justice that the accused should be tried separately. More specifically, Mr. Knuckey submitted that the Applicant would be prejudiced in his defence if the counts were heard together because of a real possibility that the jury would be unable to treat the three unrelated events separately. Despite any direction that may be given to it, he submitted that a jury would find it extremely difficult not to be influenced by evidence relating to one of the events when judging the count or counts relating to another.

Mr. Knuckey submitted that there would be two principal issues involved in the Applicant's defence. The first is one of identification, i.e. whether the prosecution evidence sufficiently identifies the Applicant as being present and involved on each of the occasions. The second is one of intent, namely, whether even if the evidence establishes that the Applicant was present, it also establishes that he can be considered to have the intent that is an ingredient of each of the counts.

There is no evidence to identify the other persons involved in any of the three events. No other persons have been charged.

For the Crown, Mr. Morgan submitted that the evidence of what occurred on any one of the events would be admissible evidence in the counts relating to another. So that the evidence relating to all the counts is in any event admissible on each. Alternatively, he submitted that even if they were not, this was still not a case for severance.

In support of his first submission, he contended that there were sufficient similar aspects to each of the three events as to make all the evidence admissible in respect of each count. He referred to the fact that in each case there was a group of men involved, that the attack was made on a member of the Mongrel Mob, that although different in detail the attacks were similar in nature, and that they were all close in time, being separately only by some twenty-four hours. There was therefore, he submitted, a sufficient degree of similarity in the events to justify their admission on the issue of identity. This was on a basis similar to the admission of similar fact evidence. He cited in support the judgment of the Court of Appeal in R. v. Paunovic (1982) 1 N.Z.L.R. 593.

Alternatively, he submitted that even if the evidence relating to all counts was not admissible on each, then the facts are such that the jury can readily distinguish between the three events. Of the total of twenty-eight witnesses, only one is giving evidence common to all three, and he is the police constable who arrested the Applicant and to whom the Applicant declined to make any statement. Otherwise the great bulk of the remaining evidence is by the eye witnesses, whose evidence is brief, and clearly relates to only one of the three events. Further, the evidence shows that there are different motor vehicles involved in each three events, and that, of course, they occurred at different places. Therefore, particularly when properly directed, it would be relatively simple for the jury to

regard each incident separately.

Finally, he cited R. v. Bennett (C.A.32/78, 4 July, 1978) and in particular that part of the judgment of the Court delivered by Woodhouse, J. at p.5:-

> " But having said that it is necessary to remember . . . . . that the ends of justice always require a proper balance to be kept between what may seem to be the legitimate interests of the accused and the no less important interests of the public in the fair and efficient despatch of court business. "

In dismissing the appeal against a refusal to order separate trials, the Court of Appeal were influenced by the fact that the evidence in itself is uncomplicated and the offences are readily distinguishable.

In my view this application must be dismissed.

Although it will finally be for the trial Judge to determine whether all the evidence is admissible in respect of the counts relating to each of the three events, I consider that there have been convincing reasons advanced in this case why they should be, particularly on the issue of identity. But even if the trial Judge were to conclude that they were not, I consider that the three events are clearly distinguishable one from the other, the evidence of the witnesses equally falls into three clearly defined categories, and that with it being emphasised to the jury, not only in the summing-up but also by counsel, that they must regard each of the events separately, I see no reason why they should not do so. It follows from that that I do not consider that the Applicant will be prejudiced in his defence, if, as I consider to be the case, the jury judge the guilt or innocence of the Applicant by taking into account only the evidence which relates to each count.

For these reasons the application is dismissed.

Solicitors:

Tanner, Fitzgerald, Getty, Hamilton, for Applicant.

Crown Solicitor, Hamilton, for the Crown.