IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

No. T.6/88

BETWEEN EADE

Applicant

A N D THE POLICE

Respondent

LOW PRIORITY

Hearing: 28 April 1988

Counsel: Traicee E. McKenzie for Applicant
J.J. Strettell for Crown

Judgment: 5.5.88

JUDGMENT OF HOLLAND, J.

The applicant was committed for trial in the High Court at Invercargill on charges of attempted murder, two charges of wilful damage by means of an explosive, one charge of unlawfully taking a motor vehicle and another charge of using a firearm against a constable. The charges arose out of incidents which occurred on 3 January 1988. The trial is due to take place in Invercargill in the week commencing 16 May 1988. Counsel for the applicant has applied pursuant to section 322 of the Crimes Act 1961 for an order directing that the accused shall be tried at a sitting of the High Court in Dunedin instead of Invercargill to which Court the applicant has been committed for trial.

The section empowers an order to be made if it appears to a Judge that it is expedient for the ends of justice. There have been many cases where the Courts have considered applications under this section. The Court of

Appeal has consistently stated that it does not desire to place a gloss on the words of the statute. In the course of argument counsel referred me to R v Tuckerman (CA48/86 18 April 1986), R v Pope & Anor (T.4/87 3 June 1986) a judgment of Hardie Boys J., R v Hamley (CA17/81, 15 April 1981), and an earlier Court of Appeal decision of R v Davis (1964) N.Z.L.R. 417. I am indebted to the summary of the relevant principles set out in the judgment of Hardie Boys J. in R v Pope.

In Tuckerman's case Casey J., delivering the judgment of the Court, said that the Courts approach must be "to ask whether there is a real risk that a fair and impartial trial might not be possible in (Invercargill)". That is undoubtedly a helpful and convenient question to ask where the issues raised allege the risk of bias against the accused either because of matters known or likely to be known to jurors that are personal to the accused or matters known or likely to be known to jurors that are personal to the victim. It is important also to give proper weight to the observations of Cooke J. giving the judgment of the Court of Appeal in R v Snowdon (CA257/85 3 February 1986) that what is clear from the established cases "is that local prejudice is an established ground on which a change of venue may be ordered".

In the present case the applicant alleges local prejudice but the prejudice relied upon is a prejudice against gangs or in favour of the police, rather than a particular prejudice relating to the applicant or the police

officer or officers against whom it is alleged that the applicant used a firearm or attempted to murder. The issues accordingly have much greater similarity to those before the Court in Hamley's case (supra). There McMulllin J., in dealing with prejudice against alleged gang members in Timaru, said:-

> "It is a matter of common experience that in the dignified and dispassionate atmosphere of the Courtroom any feelings of revulsion against the crimes themselves, sympathy to the victim, or prejudice against the accused, soon disappear. It is not to be lightly assumed that jurors will refrain from putting aside any prejudice which they might harbour against an accused from the nature of the crime when they are instructed to do so by the Judge."

It is also clear from the authorities that subject to any risk of injustice because of local prejudice it is prima facie desirable that persons charged with crimes should be tried by their peers in or near the community where the crime was committed. This sometimes creates problems in provincial cities where jury panels are smaller and also where, because of the lesser population of the district, public interest in certain crimes is likely to be more general and active than is often the case in larger cities which have become more blase to the horrible aspects of certain crime today.

The depositions disclose that on the night of 3 January there was a bombing of premises owned by the Trustbank at Waikiwi, just out of Invercargill, followed very shortly by a bombing of headquarters of the Road

Knights gang in Balmoral Drive, Invercargill. The police observed a number of persons in the vicinity of the bomb explosion at Balmoral Drive. Police Sergeant Gane was driving a police vehicle when another vehicle overtook his car on his right. It appears that two shots were fired shattering the driver's window of the vehicle that he was driving. Police Constable Henderson was in a vehicle which followed another vehicle travelling without lights. At a stage when the police car in which he was travelling was brought to a halt he dropped his head below the dashboard and immediately thereafter heard two shots fired. It is the Crown's allegation that the applicant was a party to the bombing of the bank premises as a diversion to the bombing of the gang headquarters to which crime the Crown submit the applicant was also a party. It is further submitted that he was a party to the attempted murder of Sergeant Gane and to the using of a firearm against Police Constable Henderson.

The application has been supported by affidavits from the applicant, from a law clerk employed by the applicant's solicitors, from a City Councillor and Deputy Mayor, from the sub-editor of the Southland Times, a newspaper circulating in Invercargill, and from a person who conducted talkback radio programmes. It is apparent that the events of 3 January caused considerable public disquiet in Invercargill. The events were reported on Monday 4 January in the Southland Times and there followed from there on substantial publicity as to the adverse effect on Invercargill of gangs. I have considered extracts from the

Invercargill paper from 4 January through to 17 February 1988. Although depositions were taken on 6 and 7 April 1988 no reliance is placed on any newspaper publicity after 17 February 1988.

It is apparent that there were two radio talkback shows in January and February discussing the problems of gangs in Invercargill. It is also apparent that from time to time Detective Sergeant Bell, who was the officer in charge of the case, made public statements not specifically related to these alleged crimes but clearly arising out of them and disclosing a concern by him as a senior police officer in relation to gang activities. There are reported statements from the Mayor of Invercargill expressing concern, as well as a chronology of gang incidents listed in the newspaper showing events from 3 November 1985 up to 16 August 1987. It is obvious that for the week or so following 3 January 1988 the local newspaper has referred to historic events of gang related incidents which were likely to influence readers adverse to gang activities. Those events included killings between two gangs described as the Road Knights and The Damned. The newspaper reports and comments emphasised gang rivalry between The Damned and the Road Knights with many instances of violence, including a prosecution against three members of the Road Knights gang on charges of murder of a member of The Damned gang which in October 1987 resulted in a discharge of the three members of the Road Knights gang at the preliminary hearing on the grounds that there was

insufficient evidence to justify a trial. There were also critical public comments by a local member of Parliament and the Opposition Parliamentary spokesman on Police.

The law clerk employed by the applicant's solicitors is a leading member of a local rugby club and he emphasised that there had been recent discussions of criminal activities in the area, including the murder of a Miss McKinnell in Arrowtown which is acknowledged by all concerned not to have been in any way gang related. He emphasised, however, that there was substantial sympathy amongst those with whom he discussed criminal activities for the police, and in particular Sergeant Bell. He also stated that he was a member of a Masonic Lodge and that from comments he had heard in that environment:- "the impression was that the defendant must be guilty because the police say that he is".

The Deputy Mayor of Invercargill, who described his occupation as "Council Member", stated that he had not been following the instant case very closely but he was aware of various public reactions which had been brought to his attention. He referred to the radio talkback shows and said that he had discussed the gang problem with members of the public and estimated that between 80-90% of those people with whom he had spoken had expressed the opinion that gang members should be controlled. He further expressed the opinion that the news media had blown the instant incident up. He said:-

> "The public see the gangs as a major criminal association, and in my opinion in the last 6-7 months there has been an increase in the number of people who believe that gangs must be removed from Invercargill before the crime rate can be seen to decrease".

He then said, more importantly:-

> "I believe that with the sympathy that the public have towards the police's problems and coping with the crime rate in this city and the existing strong feeling against the gangs and the individual gang members that it may be difficult to find members of the public with a sufficiently open mind uncoloured by the media attention which this case has attracted".

These comments are, however, substantially countered by an affidavit from the Mayor who had earlier made public comments critical of gang activities in Invercargill and the problems which they created. She said:-

> "That I believe that public opinion in Invercargill and in Southland expresses a concern as to the activities of gangs and the disruption they cause. That my own opinion is that the people of Invercargill and Southland would hear the trial without prejudice to either party and a jury picked from the city of Invercargill and surroundings would bring in their verdict on what they heard in the Court."

Counsel for the applicant acknowledged that the jury list for the Invercargill High Court totalled 5009 persons and that in the public criticism nothing had been conveyed of a personal nature either for or against the applicant. Nevertheless, she submitted that by the time the applicant was arrested it was firmly implanted in the minds of the reading public of Invercargill that the bombings were

gang related, that the attempted murder was gang related, that the public were led from both civic and national leaders to believe that Invercargill was suffering from an enormous gang problem, and that there was a risk that the jury might, because of the firm belief that the activities were gang related, consider that the applicant was a gang member or a gang affiliate and therefore guilty.

Rather surprisingly, counsel indicated that the applicant maintained that he was not a gang member and indeed it was inferred from her submissions that it may be part of the applicant's case that he is not even a gang affiliate. If those should be the facts then any antipathy that exists towards gangs would have little reflection upon him. I likewise am of the view that if such antipathy exists a jury will be reluctant to assume, without persuasive evidence, that a person is a gang member or gang affiliate.

Nevertheless, I must accept that the case which will be presented against the accused is that he participated in gang related criminal activities. I accept the opinion of the Deputy Mayor that between 80-90% of citizens with whom he has discussed criminal activities consider that gang members should be controlled, and indeed such citizens may possibly have stronger views. I am quite satisfied, however, that that is the opinion of the vast majority of citizens throughout the whole of the country. All Judges are conscious of this situation in the criminal trials over which they preside throughout the country. The

evidence does not satisfy me that there is any greater antipathy to the criminal activities of gangs in Invercargill than there is in Dunedin, Timaru or Christchurch, or indeed throughout the whole of New Zealand.

The real problem is that that general antipathy might be more acutely applied in the case of this particular trial in a relatively small area where such activities have shocked the community, whereas in larger cities such activities have become more commonplace. In this regard there is a very strong antipathy to those who commit rapes and aggravated robberies. The public of New Zealand is undoubtedly fed up with the number of serious crimes involving needless violence. I am satisfied, however, that the obligations placed on a jury, and the attitude of jurors to their obligations, is such that within the confines of the Court such antipathy as might have existed can be eliminated from their reasoning processes in bringing in a verdict. Indeed, I am satisfied that an Invercargill jury can, in the circumstances, give this applicant as fair and impartial a trial as any jury anywhere in New Zealand. Judges have been conscious of the need to impress upon juries that they must eliminate any prejudice or feelings of emotion from their deliberations, and in all cases do so. Where, as here, the trial is of a sensational nature, and where there has been substantial pretrial publicity, that aspect is emphasised and will be emphasised.

If it is considered that the jury might be subjected during the trial to substantial public pressure

because of what almost inevitably will be a greater degree of publicity which will be given to the trial in Invercargill than in other cities, I am willing to consider an application under section 373(2) of the Crimes Act 1961 that the jury shall be kept together for the period of the trial. I am not, however, disposed to make such an order without an application being made in that regard either by counsel for the accused or counsel for the Crown.

In the meantime, it does not appear to me that it is expedient for the ends of justice that the applicant should be tried in a High Court other than the High Court at Invercargill. I am not satisfied that there is a real risk that a fair and impartial trial might not be possible in Invercargill, and although I am satisfied that the majority of the citizens of Invercargill may, prior to the commencement of the trial, have some degree of prejudice, I do not consider that such prejudice is "local prejudice" of such a nature as will inhibit the applicant from having a fair trial in Invercargill. The application is dismissed.

This judgment is not to be published until after verdict or earlier disposal of the proceedings.

Solicitors:

Hewat Galt, Invercargill, for Applicant
Crown Solicitor, Invercargill, for Respondent