NZLR

CN558

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

9/12

T.270/94

NOT RECOMMENDED 1828

BETWEEN	ANE AUMUA	
	Applicant	
A N D	THE QUEEN	
	Respondent	

Hearing: 12 October 1994

Counsel: Mr P David and Ms JS Morris for Applicant
Mr PK Hamilin for Respondent

Judgment: 12 October 1994

(ORAL) JUDGMENT OF MORRIS J

Solicitors for Applicant:
Russell McVeagh McKenzie Bartleet & Co, DX 85, Auckland.
Solicitors for Respondent:
Meredith Connell, Auckland.

The applicant is due to stand trial in the District Court at Auckland before a Judge and jury on Monday next 17 October on 17 counts brought under the provisions of ss 229(a) and 227(b)(2) of the Crimes Act 1961 i.e. 14 charges of using a document and 3 of theft as a servant. She has applied for the following orders:

(a) Under s 28J of the District Courts Act 1947 that the trial be removed to the High Court for the hearing;
(b) Under s 361C(1) and (2)(c) of the Crimes Act 1961 that leave be given to the applicant to apply out of time for trial before a Judge without a jury; and
(c) Under s 361(5) of the Crimes Act 1961 that she be tried by a Judge alone without a jury.

Counsel have made it quite clear the primary objective is to secure trial by Judge alone in this Court.

It is submitted it is in the best interests of justice that these orders be made and it is proper for them to be made having regard to the following principal factors:

1. The complexity of the case brought about because of the volume of the documentary evidence to be produced and the necessity of handwriting experts to consider many entries in these documents.

   I am informed it is at present intended that a handwriting expert will be called for the applicant who will contest evidence given by the handwriting expert called by the Crown;

2. An interpreter will, without doubt, be required for many of the witnesses which will make it more difficult for a jury to follow the "documentary trail";

3. It would appear from the affidavit filed in support that the duration of the trial will be considerably shortened, possibly by 5 or 7 days.

It is accepted the principle to be applied in any such application as this is as set out in the judgment of Gault J in ***Tunnicliff & Ors v. Queen***, T.239/90, in which he stated at p 2:

> "The jurisdiction to transfer proceedings for a trial in the High Court is conferred by s 28J of the District Courts Act and the discretion is to be exercised if the Judge reaches a firm conclusion that the interests of justice require removal."

He then refers to a couple of authorities and continues:

> "The jurisdiction clearly envisages that there will be criminal trials which not only because of their complexity but also because of their public importance perhaps because they affect a considerable section of the public and involve issues of wide interest and importance are appropriate for trial in the High Court even though they fall within the jurisdiction of the District Court."

Other judgments to which I have been referred set similar principles.

In support of the application an affidavit has been filed by Ms JS Morris of Auckland, solicitor, and I find it of assistance to me in determining this matter. From the affidavit and discussions with counsel, the history of these proceedings appears to be this:

17 November 1993:	Accused pleaded not guilty and elected trial by jury;
02 March 1994:	Depositions heard;
24 May 1994:	Fixture made for the hearing of the trial to commence on 17 October;
07 October 1994:	Counsel for applicant appeared before District Court Judge Emery and an adjournment was granted until 17 October.

I understand from counsel the date of 17 October was not consented to by counsel who appeared for the applicant.

During those months the solicitors acting for the applicant, who were first instructed by her in September 1993, had considerable difficulty in securing a grant of legal aid from the Legal Services Board which does not seem to have been finalised until some time in September 1994. Between September 1993 and today the solicitors have had attendances and have taken limited instructions from the applicant. I should say, however, it is plain from the affidavit she has not been a client who does much to assist herself. I note in particular she failed to keep an appointment with her solicitors in early September 1994. She subsequently claimed to be unwell when further appointments were made for her but the medical certificate annexed to the affidavit does little to convince me of any serious illness on her part. She is clearly a woman difficult to contact and the solicitors have difficulty keeping in touch with her either by telephone or by post and indeed it appears letters to her have brought no response.

I have not read the depositions. I accept however, and indeed Mr Hamlin who appears for the Crown accepts, the issues are succinctly set out in the affidavit filed at p 7 paragraph 12 thereof as follows:

> "The respondent is alleging that the applicant while being an employee of the Department of Social Welfare created a number of fictitious beneficiaries to whom she granted benefits. The respondent also alleges that the applicant improperly continued benefits. The respondent further alleges that the applicant set up or operated bank accounts into which the funds from the benefits were directed and that the applicant withdrew money from these accounts for her own use."

This summary is supported by the summary of facts supplied to the applicant's solicitors by the Police.

I turn now to deal with the specific grounds advanced bearing in mind the principles referred to in the decision of Gault J.

1. **As to the complexity of the case:**

   There will, without doubt, be many documents produced and the greater number of them will have to be examined and referred to by handwriting experts. I do not however consider the documents are unduly complex if they are of the type referred to in paragraph 12 of the affidavit to which I have referred. As I understand it, they include applications for benefits, bank statements, and the like. The handwriting experts will, if my experience is anything to go by, be able to succinctly and accurately refer to the matters in the handwriting upon which their opinions are based and I have no doubt at all that a jury will be able to determine which opinion is correct just as easily as could do a Judge sitting alone;

2. It has been suggested the use of an interpreter in the circumstances of this case might lead to misunderstandings by a jury and certainly would lead to it becoming more complex than before a Judge alone.

   I cannot accept that. Juries regularly sit in both jurisdictions in trials of this nature and otherwise, and I suspect the translators in the District Court would have as much, if not greater, experience than those in the High Court;

3. **Duration of Trial:**

There will not be any significant saving of time should I grant this application.

In addition to the foregoing I have made enquiries of the Registrar here in Auckland as to when this trial would proceed if I were to grant these applications. I am informed there is no available date before the second quarter of 1995. It appears to me that a factor to be borne in mind in deciding what steps should be taken in the interests of justice must be when the trial will ultimately be concluded as it must be in the interests of justice that trials be concluded reasonably expeditiously.

There is nothing of public importance in this trial. The issues do not affect a considerable section of the public nor are they of wide interest.

In today's criminal jurisdiction, the District Court sitting with a jury hears all manner of trials and this trial in my opinion can be equally well dealt with, if not better dealt with, in the District Court than in the High Court by a Judge alone.

Having considered all the matters put before me and having read the submissions and the affidavit filed in support of the motion I am satisfied, in the interests of justice, these proceedings should be left where they are namely the District Court where they will be heard before a District Court Judge and jury and accordingly the application is dismissed.

In conclusion I simply refer to the difficulties which the applicant's solicitors have faced in obtaining a grant of legal aid. They clearly have done their best to ensure a grant with ample time to enable them to prepare for trial. I do not think this is a matter which should weigh with me in this application and I have not allowed it to weigh with me on this application. It will be for the trial Judge to determine whether or not there has been an inability to prepare which should be met by an adjournment.