

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

10/6

T.198/93
T.101/94

NOT
RECOMMENDED

BETWEEN

COOPER

Applicant

760

AND

CROWN SOLICITOR

Respondent

AND BETWEEN

EDMONDS

Applicant

AND

QUEEN

Respondent

Hearing: 23 May 1994

Counsel: *Phillip Hamlin* for Crown
Denise Wallwork for Accused Cooper
Nigel Faigan for Accused Edmonds

Judgment: 23 May 1994

ORAL JUDGMENT OF TOMPKINS J

Solicitors for Crown:

Meredith Connell and Co, Auckland

Solicitors for Accused Cooper:

Field and Co, Auckland

Solicitors for Accused Edmonds:

Nigel Faigan, Auckland

The Crown has presented an indictment against seven accused including the applicant Cooper and the applicant Edmonds. Each of the applicants have applied for orders that trials against each of them be severed from the trials against the others.

On 22 February 1993 a truck loaded with tobacco and cigarettes was the subject of an armed robbery. The driver of the truck, who on the Crown case was the applicant Cooper, was bound and gagged, put in the boot of a car, taken about 100 kilometres from Auckland and released. The truck itself was driven to a warehouse where the goods were removed and distributed.

Initially the Crown presented an indictment against six of the accused, that is not including Cooper. Depositions in respect of that trial were taken. Following further investigations the Crown alleged that Cooper, far from being an innocent victim, was himself a party to the events that occurred. An amended indictment was then presented that included Cooper as one of the four charged with stealing the tobacco. Edmonds was also one of those four. He was further and alternatively charged with receiving the stolen goods from Cooper. The other four counts in the indictment involved the other accused.

The Application by Cooper

The application by Cooper for severance is based on two broad grounds. The first is that the statement by Edmonds implicates Cooper to such a degree as to justify a separate trial. Ms Wallwork submitted on behalf of Cooper that Edmonds was attempting to reduce his own culpability by implicating Cooper as the driver of the truck.

An examination of the transcript of Edmonds' video taped interview provides some support for the contention that he was implicating Cooper. He describes the arrival of the truck at the warehouse at Mt Wellington and although he does not expressly say so, it is a fair inference from what he says that Cooper voluntarily allowed himself to be bound up and voluntarily entered the boot of Edmonds' Rolls Royce, the vehicle by which he was transported to Ngaruawahia and released. In another part of the transcript he describes how Cooper was bound up and again, although he does not expressly say so, the nature of the description suggests that Cooper was acting voluntarily. Later in the interview he denied that he had done an aggravated robbery and denied that he had done a kidnapping. When challenged with discrepancies between

his account and Cooper's, Edmonds said that he could not say whether Cooper was telling the truth but "he is involved with the um ah, the stealing of the cigarettes".

The overall effect of this evidence is that Edmonds is suggesting, although he does not expressly say so for reasons no doubt relevant to his own denial of culpability, that Cooper was somehow involved.

The issue, therefore, becomes whether this implication of Cooper is such as to justify a separate trial. I am quite satisfied that it is not. On the Crown case, this whole transaction was a joint venture in which all the seven accused were involved to varying degrees and it is rare for severance to be granted where there is a joint venture allegation of this kind: *Queen v Gillies and Jorgensen*¹. In those situations it is quite common for statements made by one accused to involve some degree of implication of another. Unless the circumstances are truly exceptional that does not justify a severance.

I raised in the present case with Mr Hamlin the possibility that some of the passages of which Ms Wallwork complains being omitted but I accept Mr Hamlin's submission that that is not an appropriate course because the Crown would contend that Edmonds' acknowledgment that he was aware of Cooper's involvement in what occurred is evidence not against Cooper but against Edmonds as being at least consistent with the Crown case that Edmonds knew exactly what was occurring and was implicated in the theft itself.

The second ground advanced by Ms Wallwork is that it is unjust and unfair to Cooper, who on her submission is prima facie a victim of an aggravated robbery, to be required to be seated in the dock and tried with those who he says robbed him at gunpoint, assaulted him, tied him up and abducted him.

But of course, this submission rather begs the question. On the Crown case he was directly involved. If the Crown is unable to prove that case then of course he is a victim and one could understand his concern being charged with the very persons who were responsible for what he says occurred to him. I do not consider that this is a reason for ordering a separate trial. If, however, Cooper can demonstrate a genuine concern that he may be physically

¹ [1964] NZLR 520.

intimidated by his co-accused, there may well be reasons for the trial judge to order that he be kept separate from the other accused when being transferred to and from the prison and when being at the court. More evidence than is currently before me would be needed to justify this course, but if such evidence is provided and accepted, such an order may be appropriate.

The application for severance by Cooper is, therefore, declined.

The Application by Edmonds

Mr Faigan, on behalf of Edmonds, submitted that it was in all the circumstances unjust for him to be tried along with the other co-accused. He submitted correctly that count one involves an allegation by the Crown that Edmonds, Cooper and the others were all participating in a joint criminal endeavour to steal the tobacco products. He submitted that it was part of Edmonds' defence that he had no knowledge whatsoever of the intentions of Cooper before or at the time the tobacco products were stolen. However, I did not understand him to advance any more detailed grounds than that in support of his application. Indeed, it may well be to Edmonds' advantage to be tried at the same time as Cooper because if Cooper maintains his claim that he was robbed, kidnapped and abducted and if he persuades the jury to that effect, far from prejudicing Edmonds' trial it would be at least consistent with what he is now claiming, namely that he had no knowledge at all of the events that had occurred before the truck with the allegedly stolen goods arrived in the warehouse.

There being no other grounds advanced, that plea for severance is also declined.

The only other outstanding matter of which Mr Hamlin is aware was a possible application under s 347 to be brought by Mr Roberts on behalf of the accused Johnstone. Ms Wallwork advises that she was asked by Mr Roberts to inform the court that that application will not be proceeding. The fixture that

has been made to deal with it on 3 June can therefore be vacated. As far as the present counsel are aware, there are no other outstanding pre-trial issues. The trial should be able to proceed on 27 June.

Chambers J