IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY **CR 7, 73 and 74 of 2019**

REX

-v-

'EIKI TU'IVAKANO a.k.a NGALUMOETUTULU KAHO
Accused in CR 7

'ILEANA TAULUA
Accused in CR 73

'ISAPELA TU'AKOI
Accused in CR 74

PROSECUTION'S APPLICATION FOR JOINT TRIAL

RULING

BEFORE:	LORD CHIEF JUSTICE WHITTEN
Counsel:	Mr T. 'Aho for the Prosecution
	Mr W. Edwards Snr SC for the three accused
Date of hearing:	15 November 2019
Date of ruling:	3 December 2019

Introduction

1. By application dated 19 June 2019, the Prosecution seeks an order that all three of the above proceedings be heard together in one joint trial.

2. The grounds for the application are stated, in summary, as:

   (a) the Prosecution case against Lord Tu'ivakano[1] is founded on the "same facts" as the cases against the other two accused;

   (b) the offences alleged against Tu'ivakano form, or are part of, a series of offences of a similar character to the offences alleged against the other two accused; and

[1] Who, for the sake of brevity, and with respect, is hereafter referred to simply as 'Tu'ivakano'.

(c) there would be no injustice to Tu'ivakano if the three indictments were heard together by a single jury.

3. The application is opposed by Tu'ivakano. Mr Edwards confirmed during the hearing that the other two accused, Taulua and Tu'akoi, do not oppose the application and are content to have their matters heard together. It is therefore only Tu'ivakano who seeks a separate trial.

4. Delay in hearing and determining this application may be attributed to the change in Lord Chief Justice after the application was filed, and the decision to hear and determine first the later application by Tu'ivakano to dismiss certain charges against him. A ruling on that application was delivered on 25 October 2019. In the result, count 8 was dismissed and the remainder of the charges on the indictment continue to proceed to trial. Further, for the reasons explained below, both counsel filed supplementary submissions on this application in early November 2019.

Indictments

5. Each accused is the subject of separate indictments.

6. Tu'ivakano is charged with two counts of money laundering, two counts of perjury, one count of making a false statement for the purpose of obtaining a passport, (now) six counts of accepting a bribe as a government servant,[2] two counts of possession of a firearm without a licence and one count of possession of ammunition without a licence.

7. Taulua is charged with five counts of making a false declaration and one count of possession of an unlawfully issued passport.

8. Tu'akoi is charged with four counts of making a false declaration and four counts of forgery.

9. Each of the accused has pleaded not guilty to all counts respectively against them.

Submissions

10. The Prosecution filed submissions in support of the application on 10 July 2019. Mr Edwards filed submissions in opposition on 26 July 2019.

[2] Following my ruling dated 25 October 2019.

Prosecution/Applicant

11. The Prosecution's primary submissions may be summarised as follows:

(a) The case against Tu'ivakano is founded on the "same facts" as the cases against the other two accused. In that regard, the Prosecution relies upon a Summary of Facts and Schedule of evidence and witnesses in seeking to demonstrate that the charges against all three accused arise out of a "common factual background". It also relies upon an observation made by Paulsen LCJ in a previous ruling that there "*is a good deal of evidence that [Tu'ivakano] was involved with Sien Lee, Tu'akoi, Taulua and others to obtain fraudulent passports for Chinese nationals and that for his involvement and influence, he received payments.*"

(b) The offences alleged against Tu'ivakano form, or are part of, a series of offences of a similar character to the offences alleged against the other two accused.

(c) It relies principally on the English Court of Criminal Appeal decision in *R v Assim*.[3]

(d) If joinder is not granted, the same witnesses will have to be called to give the same evidence in different hearings which is not only unnecessary but a waste of court resources.

(e) In *R v 'Amini Tangata'iloa*[4] which involved an indictment containing 7 counts of embezzlement and 7 counts of falsification of accounts and the statutory limitation imposed by s.160 of the *Criminal Offences Act*, Ford J opined that the said provision was designed to overcome the problem identified in two decisions including *R v Novac*,[5] where Bridge LJ, delivering the judgment of the Court, said:

> *"It must always be the responsibility of those who have the conduct of a prosecution of any magnitude to consider those wider questions. It is quite wrong for prosecuting authorities to charge, in a single indictment, numerous offenders and offences, simply because some nexus may be discoverable between them, leaving it to the Court to determine any*

[3] [1966] 2 Q.B. 249 at 261.
[4] [2001] Tonga LR 44.
[5] (1977) 65 Cr App 107 at 118.

application to sever which may be made by the defence. If multiplicity of defendants and charges threatens undue length and complexity of trial then a heavy responsibility must rest on the prosecution in the first place to consider whether joinder is essential in the interests of justice or whether the case can reasonably be sub-divided or otherwise abbreviated and simplified. In (a) jury trial brevity and simplicity are the hand-maidens of justice, length and complexity its enemies."

(f) In response to the *Novac* warning, the Prosecution submits that is essential in the interests of justice that the matters are combined to give a jury a holistic view of the alleged offending.

(g) There would be no injustice to Tu'ivakano if the three indictments were heard together by a single jury.

Tu'ivakano/Respondent

12. Mr Edwards submitted, in summary, that:

(a) If all the charges were heard in one trial, they would total some 28 counts.

(b) The decision in *Assim* concerned accused jointly indicted who sought separate trials or appeals against convictions.

(c) A joint trial would be "in breach of the Constitutional declarations" in clauses 10 to 14 thereof. Clause 11, in particular, provides the procedure on indictment, including that "at his trial the witnesses against him shall be brought face-to-face with him (except according to law) and he shall hear their evidence and shall be allowed to question them and to bring forward any witness of his own and make his own statement regarding the charges preferred against him....". In attempting to protect his rights in the trial, Tu'ivakano would be facing other witnesses and other charges not in his indictment.

(d) In a joint trial, Tu'ivakano would be "duty-bound to question the witnesses for (presumably that is meant to be 'against') Taulua and Tu'akoi to ensure that he is not prejudiced by the evidence";

(e) The decision in *'Amini Tangata'iloai* (the *Novac* warning) "does not assist in the present application and does not affect the jurisdictional issue of limiting the trial

to the counts in the indictment of Tu'ivakano only". Notwithstanding the wide powers the court has under s.5 of the *Supreme Court Act*, the form of trial and procedure defined under the *Constitution* must still be applied.

(f) As to the Crown's submission that there is a commonality of facts across the charges concerning all three accused, Mr Edwards says the offences are unrelated, and, if herded together with the evidence concerning the other two accused, will result in the jury being open to speculation and inferences based on inadmissible and irrelevant evidence adduced in the cases against Taulua and Tu'akoi.

(g) The length of the trial, the number of witnesses and complexity of the accounts across the three indictments will cause unfairness and injustice. In that regard, he relies on the warning in *Novac* that 'in jury trials brevity and simplicity are the handmaidens of justice, length and complexity its enemies'.

Supplementary submissions

13. When I delivered the ruling on the strike out application on 25 October 2019, I raised with counsel the fact that there did not appear to be any reported decision in Tonga in relation to a joint trial application such as the instant (as opposed to severance). I also noted from preliminary research the decision in *Crane v. Director of Public Prosecutions* [1921] 2 AC. 299 which appeared to be long standing English authority for the proposition that a joint trial on separate indictments against a number of accused would be a nullity. Counsel were invited to consider that and any other common law decision on the point. As a result, they filed supplementary submissions on 1 November 2019 and 5 November 2019 respectively.

14. Mr 'Aho relied on the decisions in *Clunas* [1992] 1 SCR 595 (SCC), *Clayton* [1983] 2 AC 473 (HL) and *Rogerson and McNamara* (No. 3) [2015] NSWSC 965, which I will address in detail below.

15. Mr Edwards submitted that the "the situation in England, Australia and Canada after the judgment in *Crane* ... has not advanced significantly in a contrary direction with any definitive ruling on the point of a joint trial of defendants separately indicted". He further submitted that "it is unacceptable for joint trials to be ordered on economic grounds of cost and time. It will open a flood gate to the holding of joint trials of

defendants indicted separately."

Applicable law

16. In the absence of any statutory provision or authoritative decision in Tonga directly on this issue, the 'starting point', is to identify the applicable law? It will be seen for the reasons developed below that it is also the determinative point.

17. Pursuant to sections 3, 4 and 5 of the *Civil Law Act* [Cap 25], the common law of England is to be applied with such modifications as may be required by those provisions which focus attention on the circumstances prevailing in the Kingdom of Tonga. As the Court of Appeal observed in *Leiola Group Ltd v Moengangongo* [2010] TOCA 10:

> *"This is potentially important because in the common law world there have been incremental and significant changes to the common law."*

Other submissions

18. As will be seen below, the decision on this application turns on the issue of the applicable law. Where the law precludes a certain course, and does not involve considerations of discretion, that will ordinarily be the end of the matter.

19. It is therefore not necessary for me to consider or determine the other competing submissions. However, for completeness, I will briefly address a number of them.

Commonality

20. In a detailed schedule to his primary submissions, Mr Edwards set out a summary and analysis of the charges. He submitted that based on that analysis "the charges do not form or are part of a series of offences of the same or similar character". His analysis focussed on particular features of the collective charges including:

    (a) The bribery counts span dates from 31 July 2013 to 31 December 2014, during which it is alleged that Tu'ivakano accepted monies as an inducement to approve the issuance of Tongan passports to various Chinese nationals.

    (b) The charges against Taulua of making false declarations are said to have occurred between 11 October 2012 and 16 August 2013. The declarations were in support of applications for passports for Chinese nationals namely Singkei Lou, Shanoi

Kam, Guang Chan Xiao, Shiwei Hu and Orlandoni Wong. The one count of possession of an unlawfully issued passport is alleged to have occurred on 27 January 2016 in relation to a passport purportedly issued in the name of Li Wang.

(c) The charges against Tu'akoi span between 12 October 2012 and 19 August 2013 when she allegedly made false declarations for the purpose of obtaining passports and made false documents by making false material additions to Tongan passport application forms for Shiwei Hu, Singkei Lou, Orlandoni Wong and Xiao Guang Chang.

21. In my view, the commonality, generally, between the charges against Taulua and Tu'akoi, in terms of the timeframes, nature of the offending conduct concerning documents relevant to obtaining passports and the identity of the Chinese nationals for whom those passports were intended, is obvious.

22. However, were it to be thought that on that fairly simple analysis, the temporal separation between the offences alleged against Tu'ivakano on the one hand and those against Tu'akoi and Taulua on the other, by itself, militated against a finding of sufficient nexus, a closer, more detailed examination of the Crown's Summary of Facts tends to suggest otherwise.

23. I will not recite all the relevant allegations in the Summary. Save to say I have considered them carefully (as I did on the strike out application) for the purpose of this application.

24. At the end of the Summary, the prosecution case is described as:

> *"The entirety of the evidence establishes that Tu'ivakano, upon the request of Tu'akoi, who was working together with others including Taulua, for and on behalf of Sien Lee and his wife Ms Lee Ying Huang, to lodge various fraudulent passport applications with the Immigration Division of the Ministry of Foreign Affairs, and to have those applications approved by Tu'ivakano. In return for the favour shown by Tu'ivakano, he received payments directly or indirectly from Sien Lee and his wife Lee Ying Huang."*

25. In my view, the alleged offending, as a whole, could also be described thus: each of Tu'ivakano, Tu'akoi and Taulua played a necessary part in an overall endeavour to have

fraudulent passports issued for Chinese nationals for and/or at the request of Sien Lee, for which, Tu'ivakano received, directly or indirectly, various payments. The requisite false applications and supporting documentation were allegedly prepared and supplied by Tu'akoi and Taulua. Tu'ivakano allegedly used his position, through his instructions and approvals, and in the face of concerns as to legal impropriety, to effect the issuing of the passports. Without the involvement of any one of the accused and their respective alleged offending, it is unlikely any of the passports would ever have been produced.

26. Like Paulsen CJ, I am satisfied that there is a nexus or common factual background between the alleged offending of the three accused and their alleged involvement with each other and Sien Lee in relation to the production of fraudulent passports, for which, Tu'ivakano allegedly received payments.

27. However, none of the accused have been charged with having jointly committed any offence. The charges against each are the subject of separate indictments. That is an important feature of this application.

The Constitution

28. I do not accept Mr Edwards' submissions to the effect that clauses 10 to 14 of the Constitution preclude a joint trial or that it would be "in breach of the Constitutional declarations". Clauses 10, 12, 13 and 14 say nothing on the point. His submission in relation to clause 11 necessarily inserts a limitation that ***only*** the witnesses against Tu'ivakano may be brought to face him at his trial. The express language of the clause does not support that interpretation. There is nothing in the Constitution which prohibits a joint trial in the circumstances hereunder consideration. Similarly, the *Criminal Offences Act* and the *Supreme Court Act* and its Rules,[6] do not contain any express provisions on the issue of joint trials.

29. The conclusion I reach on this point is no more than observed above: there is no Tongan statutory or authoritative case law which answers the question.

Supreme Court Act

30. Mr Edwards referred to the broad powers conferred on the Court by s.5 of the *Supreme*

[6] Which apply only to civil actions and not criminal proceedings.

Court Act which includes, inter alia, all the powers for the time being vested in or capable of being exercised by the High Court of Justice in England and Wales, and all powers that the court considers necessary or desirable to enable it to give effect to and enforce the judgments and orders of the Court and to ensure that all reasonably obtainable evidence is available to the court.

31. I do not see, and it was not the subject of submission by either counsel, how that provision speaks to the procedural (or, as Mr Edwards put it: the jurisdictional) issue of whether more than one indictment against more than one accused can be placed before one jury. Any powers conferred on the UK High Court by statute (including procedural Rules) are not applicable to the law in Tonga (without express statutory adoption).[7] Section 5 of the *Supreme Court Act* must be read in conjunction with the *Civil Law Act*, referred to above, such that where Tongan statute law is silent on an issue, the common law of England and the rules of equity shall apply.

Important distinctions

32. Before turning to the parties' submissions on the applicable law, it is important to first understand the relevant differences in principle and approach to:

    (a) issues in relation to joinder and severance as compared to applications for a joint trial; and

    (b) trials of Magistrates court summary offence complaints or informations versus Supreme court indictments.

Joinder vs Joint trial

33. As the discussion below on the authorities cited by the parties (and others) demonstrates, different considerations apply to cases concerning joinder compared to those concerning applications for a joint trial of separate indictments against a number of accused, none of whom have been charged with jointly committing any one or other offence on the indictments.

34. While the term 'joinder' may generically include all issues concerning more than one

[7] *Tupou v Saulala* [2004] Tonga LR 158; *Percy v Tonga Expeditions Limited* [2013] TOSC 47 at [16].

count and/or accused, in the ordinary course, joinder involves one indictment containing a number of charges against one person or one or more charges against a number of persons. The cases in that category usually involve applications or appeals on the issue of severance, i.e. whether all the counts on the indictment should be heard together or whether certain counts or accused should be tried separately.

35. This application involves the opposite.

Summary informations vs Indictment

36. In *Munday v Gill* (1930) 44 CLR 38 [considered further below], Dixon J said that there is "a great distinction in history, in substance and in present practice between summary proceedings and trial upon indictment". Trials on indictment are in traditional parlance "pleas of the Crown": proceedings in form and in substance between an individual and the State. A prosecution for an offence punishable summarily is in contrast "a proceeding between subject and subject".

37. Different considerations therefore arise on applications for a Magistrate to hear more than one complaint against an individual at the same time compared to an application in a superior court, for a judge and jury to hear more than one indictment against more than one person.

Prevailing common law

38. I turn now to the applicable common law on joint trials from England and a comparative study of other common law jurisdictions.

England

39. In *Crane v. Director of Public Prosecutions* [1921] 2 AC. 299, the appellant was charged on indictment with receiving certain skins knowing them to have been stolen. One, Morton, was charged on a separate indictment with stealing the skins and also with receiving the same. The prisoners were given in charge to the same jury and were tried together, convicted and sentenced. The fact that the prisoners were not jointly indicted was not brought to the notice of the Recorder or of the counsel appearing in the case. At the hearing of the appeal, it was discovered that the prisoners were charged on separate indictments.

40. Lord Atkinson held (p. 321):

> *"When an accused person has pleaded 'Not guilty' to the offences charged against him in an indictment, and another accused person has pleaded 'Not guilty' to the other offence or offences charged against him in another separate and independent indictment, it is, I have always understood,* ***elementary in criminal law that the issues raised by those two pleas cannot be tried together****. See also R. v. Olivo [1924] 2 All E.R. 494. Even where the two accused consent to being tried together, a joint trial of separate indictments against them will invalidate the trial. R. v. Dennis [1924] 1 K.B. 867. Avory J. for the Court said (p. 869): No criminal Court has jurisdiction to try two separate indictments at one and the same time, and therefore the consent given to such a trial cannot give jurisdiction."*
>
> [emphasis added]

41. The 'rule' in *Crane* remains cited in Archibald.[8] It has been cited and applied in numerous decisions on the issue of whether an irregularity in procedure which prevents the trial ever having been validly commenced renders it a nullity so as to warrant the grant of a writ of *venire de novo*. For example, see *Young v R.* [2016] EWCA Crim 1321.

42. In *Director of Public Prosecutions of the Virgin Islands v Penn* [2008] UKPC 29, the Privy Council referred to *Crane* in this context:

> *"[20] It is true that in certain criminal law contexts, the courts have identified a Parliamentary intention to treat particular steps as pre-conditions to the validity of the proceedings. In* ***Crane v DPP****[1921] 2 AC 299, the trial jointly of two Defendants who had been indicted separately was held to be a nullity (****although, if a joint indictment had been properly presented, the two could have been tried together****)...."*
>
> [emphasis added]

43. The early above cases were decided at a time when the UK *Indictments Act* 1915 was in force. More recently, the procedure in England for joint trials is regulated by the *Criminal Procedure Rules* 2015.[9] Halsbury's Laws of England[10] describes the modern English approach to **joinder** of two or more defendants as follows:

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[8] At least in the 9th edition, Sweet & Maxwell, 4-198.
[9] Rule 3.21.
[10] Criminal Procedure (Volume 27 (2015), paras 1–434; Volume 28 (2015), paras 435–957 at 326.

> "Where two or more persons join in the commission of an offence, all (or any number) of them may be indicted for that offence jointly in one indictment.
>
> As a general rule, it is not proper for a jury to try several defendants together on charges of committing individual offences that have nothing to do with each other; where, however, the matters which constitute the individual offences of the several alleged offenders are founded on the same facts or form or are part of a series of offences of the same or a similar character,[11] and the interests of justice are best served by their being tried together, **they may properly be the subject of counts in one indictment** and, subject always to the discretion of the trial judge, may be tried together.[12] This rule is not limited to cases where there is evidence that several alleged offenders acted in concert.[13] Charges against some only of the defendants may be included in an indictment charging them all;[14] but in complicated cases where the indictment contains numerous counts concerning different persons the prosecution should endeavour to divide the trial into convenient parts in order to reduce the issues before the jury and render the duties of the court easier.[15] Indictments should be kept as short as possible; and no more defendants should be tried together on one indictment than is necessary for the presentation of the case against the principal defendant. Necessity, not convenience, is the guiding factor.[16]"
>
> [emphasis added]

44. And on the issue of **joint trials** of separate indictments:[17]

> "Two defendants who are separately indicted may not be tried together. Such a trial is a nullity even though counsel on both sides have purported to consent."

45. Accordingly, the common law in England, according to the rule in *Crane*, is that placing more than one indictment before a jury is not permitted and any trial involving the same will be a nullity. To avoid contravention of that rule, where offences are founded on the same facts or form or are part of a series of offences of the same or a similar character, and the interests of justice are best served by their being tried

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[11] Criminal Procedure Rules 2015, SI 2015/1490, r 10.2(3), which applies equally where the counts in question relate to different defendants as it does to a single defendant.
[12] *R v Assim.*
[13] *R v Assim.*
[14] *R v Hooley, R v Macdonald, R v Wallis* (1922) 92 LJKB 78, 16 Cr App Rep 171, CCA.
[15] *R v Shaw* [1942] 2 All ER 342, 28 Cr App Rep 138, CCA; *R v Greenberg* [1942] 2 All ER 344, 28 Cr App Rep 160, CA (citing *R v Carless, R v Stapley* (1934) 25 Cr App Rep 43, CCA).
[16] *R v Thorne* (1977) 66 Cr App Rep 6, CA; and see para 322.
[17] Ibid, at 327, citing *Crane* and *Dennis*.

together, they may properly be the subject of counts in one indictment and, subject always to the discretion of the trial judge, may be tried together.

46. The UK *Criminal Procedure Rules* 2015 (as amended) are the statutory embodiment of the common law pertaining to criminal procedure with modifications thereto. They apply to the Senior Courts of England and Wales, which include the Crown Court, the High Court of Justice and the Court of Appeal. The Crown Court is the highest court of first instance in criminal cases. Rule 3.21 provides for applications to the Crown Court for joint trials of offences charged by separate indictments or defendants charged in separate indictments; and separate trials of offences or of defendants charged by the same indictment. Subrule (4) deals with severance of joined counts on one indictment. Otherwise, my research has not identified, nor did counsel refer to, any decisions[18] concerning applications under rule 3.21 for a joint trial of defendants charged in separate indictments.

Australia

47. *Crane* was unanimously accepted by the High Court of Australia in the seminal decision of *Munday v Gill* (1930) 44 CLR 38. There, it was observed that the principle and the recognition of the basic duty of a Court to adhere to the procedure of dealing with separate criminal cases separately was definitely established by *Crane*. Reference was also made to *Dennis*,[19] where it was held that even where two accused consent to being tried together, a joint trial of separate indictments against them will invalidate the trial.

48. The High Court also held that in the absence of any statutory direction to the contrary, the fundamental doctrines in *Crane* and *Dennis* applied to summary convictions. In that regard, s.15 of the Tonga *Magistrates Court Act* [CAP. 07.36] requires every summons to be for one offence only, but where a Magistrate considers it expedient, he/she may deal with a number of summonses against one accused either together or separately.

49. *Munday v. Gill* was followed and applied in many decisions throughout the 1900s, such as *Russell v Bates* (1927) 40 CLR 209, *Collaton v. Boothey* [1934] S.A.S.R. 429; *R v Landy* [1943] VLR 73; *Lawrie v Stokes* [1951] NTJ 65 and *R v Howard* (1992) 29

[18] Nor any guidance from the Criminal Practice Directions 2015.
[19] (1924) 1 K.B. 867 at 869 per Avory J.

NSWLR 242 at 247-248. The rule was succinctly stated in *R v Tagaras*[20] as: "one indictment, one jury".

50. More recently, the issue arose in *R v Swansson and Henry* [2007] NSWCCA 67. The criminal conduct there was conspiracy between 10 individuals to import prohibited drugs into Australia. A five judge bench of the Court of Criminal Appeal considered the question whether the trial of a person was a nullity in circumstances where each appellant had been tried, along with other co-accused, upon separate indictments in respect of Commonwealth and State offences with which each was charged.

51. The Crown sought to characterise the rule in *Crane* as merely a rule of practice, rather than as a rule of law. It submitted that no coherent justification for the rule appeared in the authorities and, as the rule played no relevant role in what was described as the "modern" criminal justice system, it ought to be "jettisoned".

52. The Court of Appeal followed *Crane*, applied *Munday v Gill* and endorsed the proposition that there can be only one indictment in any one criminal proceeding as a long-established rule of criminal procedure that must be observed.[21]

53. In rejecting the Crown's submissions that the Court ought follow *Clunas*, which overruled longstanding Canadian authority based on *Crane* on the basis that the rule could be characterised as a "technicality" which was said not to serve "a real purpose", the NSW Court of Appeal considered that "Australian jurisprudence has not developed in the same way."

54. Further, in relation to the Canadian approach, in this regard, of treating trials on indictment the same as by information, it was said that that had not been the Australian rule since *Munday v Gill* and, in that respect, Australian and Canadian case law had long since diverged.

55. The Court of Appeal concluded that if the position was to change, it would have to be left to the High Court to do so.

56. The Crown applied for special leave to appeal to the High Court, essentially asking the Court to depart from the rules in *Crane, Munday v Gill, Talbot v Lane, Landy* and

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[20] NSW Court of Criminal Appeal, 9 April 1974, unreported.
[21] At 409 [11], 411 [26], 412 [35]; 418 [83]; 421 [104]; 430 [151]; 435 [182].

Tagaras. During submissions, the rule in *Crane* was described as having become 'so entrenched ... that it requires legislative intervention for the position to be changed.' The High Court considered there were insufficient prospects of success of the appeal to warrant a grant of special leave and the application was dismissed.[22]

57. Of course, as with England, most States of Australia have enacted legislation in relation to joinder and severance (as explained above). However, they have generally not provided for joint trials of separate indictments. For example:

(a) s.29 of the NSW *Criminal Procedure Act* 1986 preserves to the court the discretion not to hear proceedings related to two or more offences or two or more accused persons together if the court is of the opinion that the matters ought to be heard and determined separately in the interests of justice;

(b) s.586(12) of the Queensland *Criminal Code* permits any number of persons charged with committing different or separate offences arising substantially out of the same facts or out of closely related facts so that a substantial part of the facts is relevant to all the charges to be charged *in the same indictment* and tried together;[23]

(c) s.278 of the South Australian *Criminal Law Consolidation Act* 1935 permits joinder of several charges against the same accused but does not provide for joint trials of separate indictments against different accused.[24]

58. None of those statutory developments has seen a departure from the rule in *Crane*.

New Zealand

59. Like the Australian States referred to above, New Zealand criminal procedure on joinder is governed by legislation. Section 138 of the *Criminal Procedure Act* 2011 provides for trial of different charges together and confers on the Court a wide discretion to join charges and defendants and an equally wide discretion for the Court to order charges be heard separately in the interests of justice: *Churchis v R* [2014] NZCA 281 at [28]; *R v Wira* [2015] NZHC 2712.

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[22] *R v Henry; R v Swansson* [2007] HCATrans 312.
[23] *R v Leslie* [1989] 2 Qd R 673.
[24] *The Queen v Rigney* (1975) 12 SASR 30 Bray CJ, with whom Jacobs J agreed.

Canada

60. The Prosecution here relies upon the decision of the Canadian Supreme Court in *R v Clunas* [1992] 1 SCR 595, as an example of a jurisdiction which it says has "rejected the classical ratio of *Crane*."

61. There, on the issue of whether a court has jurisdiction to try two separate informations (for summary offences) in a single trial, Lamer CJ, who delivered the decision of the Court, stated, relevantly and in summary:

    (a) That the Court had previously shared the approach described in *Clayton* [referred to further below], at pp. 562-63, namely that "(a)ny rule of practice or procedure which makes (a Magistrate's) task more difficult or demands subservience to technicalities is to be deprecated" ... and that rules of procedure and practice should be adopted "...which encourage the better attainment of justice, which includes the interests of the prosecution as well as of defendants, so long as the necessary safeguards are maintained to prevent any risk of injustice to defendants." That required the court to reconsider its decisions in *Phillips* [1983] 2 S.C.R. 161, and *Khan* [1984] 2 S.C.R. 62, which had answered the above question in the negative.

    (b) Those decisions were based on, inter alia, *Crane*,[25] which was described as reflecting "ancient and current practice" at the time of hearing *Phillips*. Reference was also made to *Dennis*, which like a series of other appellate cases in Canada, consistently followed the rule in *Crane*. To that point, the overwhelming weight of authority in Canada, based on *Crane*, was against a joint trial of more than one indictment or information.

    (c) The question arose therefore whether the rule against joint trials of separate indictments or informations served no purpose and was based on no sound principle.

    (d) A separate basis for supporting the principle in *Crane* was that '(t)he joinder of two or more indictments or informations for trial raises fundamentally different problems from those which arise in the joint trials of several persons accused

[25] Per Lord Atkinson in that case at p. 321.

under one indictment or information.

(e) Further, it was argued that the common law rule against joint trials of separate indictments or informations had been incorporated by implication into the *Criminal Code*. Throughout the *Code*, reference is made to trial on *the* indictment or *the* information. Even the provisions in relation to multiple counts and severance indicate that a trial is to proceed on one indictment or information.

(f) However, it was observed that the practice, since *Crane*, has been changed in England by the decision of the House of Lords in *Clayton*, albeit a decision by which the Canadian Supreme Court was not bound.

(g) While an elaborate procedure is provided under the Canadian *Criminal Code* for joint trials,[26] all that had to be done was that to the extent possible the same procedure be followed when joining indictments. For joint trials, the same procedure could be followed when proceeding simultaneously on multiple informations.

(h) The Court concluded on this issue by adopting the American federal *Rules of Criminal Procedure* formulation that when joinder of offences, or of accuseds for that matter, is being considered, the court should seek the consent of both the accused and the prosecution. If consent is withheld, the reasons should be explored. Whether the accused consents or not, joinder should only occur when, in the opinion of the court, it is in the interests of justice and the offences or accuseds could initially have been jointly charged.

(i) It was also decided, by reference to *Criminal Law Amendment Act*, 1985, S.C. 1985, c. 19, s. 119 and s. 795 of the *Criminal Code*, that a joint trial could be conducted on a mixture of summary and indictable offences.

62. *Clunas* was recently applied in *R v Sciascia* [2017] 2 SCR 539, where the two-part common law test for joinder of a provincial charge and a criminal charge was described as firstly requiring *that the offences could initially have been jointly charged*; not whether it is technically possible to use the same prescribed form, but rather whether

[26] Sections 589 to 593.

there is a sufficient factual nexus between the provincial charges and the criminal charges. The second element requires that a joint trial be in the interests of justice. That inquiry involves a weighing of the costs and benefits of a joint trial. An accused person's consent is relevant, but the ultimate decision of whether to conduct a joint trial lies with the court.

Joinder and severance cases

63. The Prosecution here relies heavily on the decision in *R v Assim* [1966] 2 QB 249. There, the court considered the propriety of joinder of two accused charged with separate offences irrespective of any statutory warrant for such a course. The appellant argued that the court had no power in law to try together two defendants on an indictment containing only two counts, one count being against him for malicious wounding, and the second count being against his co-defendant for assaulting a different victim.

64. Earlier in the judgment of the English Court of Criminal Appeal, Sachs J noted:[27]

> *"... **certain definite principles as to joinder have been established — as, for example, [T]here can be no joint trial of separate indictments (Crane v Director of Public Prosecutions** [1921] 2 AC 299) and that wholly disconnected and similar offences ought not to be joined in the same indictment even against the same accused (Rex v Muir [1938] WN 163)".*
>
> [emphasis added]

65. Subject to that, his Honour, on an examination of the authorities, made a number of observations on questions of *joinder*, be they of offences or of offenders. Firstly, "they are matters of practice on which the court has, unless restrained by statute, inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice. Secondly, joinder of counts being a matter of practice, any error in the application of relevant rules would normally amount to an irregularity and would not result in the trial court having no jurisdiction. Thirdly, there had never had been a clear, settled and general practice based on principle as to the occasions when joinder of offenders is in practice correct; moreover, there may well have been wide fluctuations as to what might be called the terminal limits at any one time of the

[27] At 257.

application of the practice then in force."

66. Sachs J concluded with the following passage, referred to in the Prosecution submissions on this application:[28]

> *"As a general rule it is, of course, no more proper to have tried by the same jury several offenders on charges of committing individual offences that have nothing to do with each other than it is to try before the same jury offences committed by the same person that had nothing to do with each other.* ***Where, however, the matters which constitute the individual offences of the several offenders are upon the available evidence so related, whether in time or by other factors, that the interests of justice are best served by their being tried together, then they can properly be the subject of counts in one indictment and can, subject always to the discretion of the court, be tried together****. Such a rule, of course, includes cases where there is evidence that several offenders acted in concert but is not limited to such cases".*
>
> [bold emphasis as per submission; underlining per my emphasis.]

67. That approach has been affirmed in:

(a) subsequent English decisions, e.g.: *R v Camberwell Green Justices: Ex Parte Christie* (1978) 2 All ER 377 and by the House of Lords in *In re Clayton* (1983) 1 All ER 984;[29]

(b) Australia, e.g.: *Annakin v R* (1988) 17 NSWLR 202 at 20; *The Queen v Hogan, Walters, Rusu, Hadley, Faulkner, Savaglia and Hutchinson* (Unreported, Supreme Court of South Australia Court of Criminal Appeal, 725 of 1990, 31 October 1990, 19 December 1990) and *R v Ita* [2003] NSWCCA 174; and

(c) New Zealand, e.g.: *R v D & S* [1996] 2 NZLR 513; *R v F* [2012] NZCA 371.

68. In *The Queen v Rigney* (1975) 12 SASR 30, Bray CJ was not convinced that the conclusion in *Assim's* case was historically sound. Notwithstanding, he concluded:[30]

> *".... that instead of pursuing these independent historical enquiries we ought to acknowledge the authority of Assim's case and accept the view*

[28] At 261.
[29] Also known as *Clayton v Chief Constable of Norfolk.*
[30] At 46.

> *that, **apart from exceptions like the rule in Crane's case** (1921) 2 AC 299, questions of joinder, be they of offences or of offenders, are matters of practice on which the court has, unless restrained by statute, inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice' ... "*

69. I pause there to make two observations about the statements in *Assim*:

    (a) Firstly, they are confined to considerations of joinder in the usual sense, that is, whether multiple counts are sufficiently connected that they can properly be the subject of one indictment.

    (b) Secondly, and in any event, not only did the Court of Criminal Appeal not seek to overturn or depart from the rule in *Crane*, it expressly affirmed it as an established definite principle.

70. The Prosecution also relies on the decision in *R v Clayton* [1983] 2 AC 473 (HL). A husband and wife had been separately charged on summons in respect of a number of informations and a third alleged a similar offence jointly committed. Both cases involving all five informations were heard by the justices at the same time. No consent was given. The consolidated appeals in that case were said to have raised important questions of practice and procedure in the Magistrates Courts in England and Wales.

71. Lord Roskill canvassed a number of previous decisions as authority for the principle that justices should never proceed to hear informations at the same time without the defendant's consent, and that to do otherwise, was without jurisdiction and contrary to law. His Lordship said:[31]

> *"... by 1947 a rule of practice and procedure had evolved, whether or not it was correctly based upon section 10 of the Magistrates Court Act of 1848, which made it irregular for any Magistrates' Court to try more than one information at the same time in the absence of consent.... Any rule of practice or procedure which makes their task more difficult or demands of subservience to technicalities is to be deprecated and your Lordships may think that this House should now encourage the adoption of rules of procedure and practice which encourage the better attainment of justice, which includes the interests of the prosecution as well as of defendants, so*

[31] At 489.

long as the necessary safeguards are maintained to prevent any risk of injustice to defendants."

72. At 490, his Lordship referred to *Assim*, for the circumstances in which it was proper to join separate offenders charged on separate counts **in the same indictment**. At 491, his Lordship held:

> *"... the practical difficulties which arise from rigid adherence to the rule of practice enunciated in Edwards v Jones [1947] K.B. 659 and in the later cases to which I have referred are indeed manifest. Common sense today dictates that in the interests of justice as a whole* ***Magistrates should have a discretion*** *in what manner they deal with these problems. ... Obstruction by a defendant is put at a premium. Today I see no compelling reason why your Lordships should not say that* ***the practice in Magistrates' Courts in these matters should henceforth be analogous to the practice prescribed in [Assim] in relation to trial on indictment. Where a defendant is charged on several informations and the facts are connected, ... I can see no reason why those informations should not, if the justices think fit, be heard together. Similarly, if two or more defendants are charged on separate informations but the facts are connected, I can see no reason why they should not, if the justices think fit, be heard together.*** *... Of course, when this question arises, as from time to time it will arise, justices will be well advised to enquire both of the prosecution and of the defence whether either side has any objection to all the informations being heard together. If consent is forthcoming on both sides there is no problem. If such consent is not forthcoming, the justices should then consider the rival submissions and, under any necessary advice from their clerks, rule as they think right in the overall interest of justice.... Absence of consent, ... should no longer in practice be regarded as a complete and automatic bar to hearing more than one information at the same time or informations against more than one defendant charged on separate informations at the same time when in the justices' view the facts are sufficiently closely connected to justify this course and there is no risk of injustice to defendants by its adoption. Accordingly the justices should always ask themselves whether it would be fair and just to the defendant or defendants to allow a joint trial. Only if the answer is clearly in the affirmative should they order a joint trial in the absence of consent by or on behalf of the defendant."*
>
> [emphasis added]

73. I pause again to note here that:

(a) Firstly, *Clayton* is limited to the practice at the time within the English

Magistrates Court. In Tonga, that is governed by the relevant corresponding Act.

(b) Secondly, the decision imports considerations of consent which, according to *Dennis*, are not relevant to the prohibition against joint trials of separate indictments.

(c) Thirdly, for the reasons identified in *Munday v Gill* above, different considerations apply to procedures applicable to trials of multiple counts and accused on summary offences compared to trials before jury on indictment.

For those reasons, in my view, *Clayton* does not assist the present application.

74. The third supplementary authority relied upon by the prosecution is the NSW decision in *R v Rogerson; McNamara* [2015] NSWSC 965. There, Rogerson and McNamara were indicted for murder and supply of methylamphetamine.[32] Each applied for separate trials and Rogerson also applied to have the counts against him heard separately. Bellew J considered the authorities establishing general principles which govern the discretion to make an order for separate trials, which may be summarised (citations omitted) as follows:[33]

(a) As a general proposition, **crimes which are alleged to have been committed jointly** should be prosecuted in a joint trial: *Assim*. There are strong reasons of principle and policy why persons charged with committing an offence jointly ought to be tried together: *Webb and Hay*. There are administrative factors too such as consideration by the same jury at the same trial is likely to avoid inconsistent verdicts, particularly when each accused tries to cast the blame on the other or others.

(b) Any dangers for an accused in a joint trial by reason of the admission of evidence which would not be admitted at the trial of one accused must be obviated by express and careful directions to the jury as to the use they may make of the evidence so far as it concerns each accused: *Harbach*.

(c) In determining whether a separate trial should be granted the Court must carry out a balancing process between the community interest and the question of undue

[32] A later amended indictment against Rogerson, pleaded (as an alternative to the first count) a count alleging an offence of being an accessory after the fact to murder.
[33] At [60] ff.

prejudice to an accused. An exception to the general rule arises where there is a real risk of positive injustice to an accused. The existence of such a risk is "the critical question": *Fernando; Amos; Collie.*

(d) Strong reasons for a joint trial may be further strengthened where each accused deploys a "cutthroat" defence: *Webb and Hay*; *Bedford; Destanovic.*

(e) It is contrary to the interests of justice that there be inconsistent verdicts. Those interests generally require that where the accounts of accused persons differ, such differences should be resolved by the same jury at the same trial. Consideration by the same jury at the same trial is likely to avoid inconsistent verdicts, particularly when each accused tries to cast the blame on the other or others: *Demirok.*

(f) It is also in the interests of justice that the whole picture, or a conspectus of the respective roles of each accused in the crimes with which they are charged, is presented to the members of the jury: *Collie*; *Ali.*

(g) Questions of cost and inconvenience are not irrelevant in determining whether separate trials ought be ordered: *Oliver.*

(h) Some prejudice to one or other accused is inevitable in any joint trial. That is a factor which must be taken into account in striking the necessary balance: *Dellapatrona; Duffield.*

(i) In that regard, the common law proceeds on the assumption that the jury will obey any direction which is given by a trial judge: *Kearnes.*

75. Mr Edwards submitted that *Rogerson* does not assist the Prosecution here as it 'involved joint charges and a refusal to order separate trials.' I agree. It is distinguishable by that feature alone. Moreover, none of the principles discussed have any application to the circumstances of the instant case, or to the question of whether it is permitted by established common law to order a joint trial of separate indictments against three accused, where none have been charged jointly with any offence. I do not understand, nor was it submitted, that *Rogerson & McNamara* is or could be authority for a departure from the rule in *Crane*.

76. But for the rule in *Crane*, the principles governing applications for severance may have been instructive on this application. However, in my view, they cannot simply be inverted to apply to converse applications for a joint trial of a number of accused on separate indictments.

77. The severance decisions generally involve starting with one indictment, albeit containing more than one count against one accused or joint counts against more than accused. If the application is refused, the one indictment would proceed before one jury thereby not contravening the rule in *Crane*. If severance of counts and/or accused is ordered, the resulting separate indictments will be heard separately by different juries, thereby again not contravening the rule in *Crane*. By contrast, the present application, if granted, would contravene the rule in *Crane*.

Result: *'Crane'* is determinative

78. For the foregoing reasons, I consider that the Court is bound by the longstanding English common law rule in *Crane*.

79. It has been consistently applied in Australia where statute has not otherwise intervened or altered the rule.

80. New Zealand's procedure is governed by statute.

81. Canada's jurisprudence on the issue has developed in a different direction to England, Australia or New Zealand. Canada's position is also subject to a statutory Criminal Code. Mr Edwards' submissions in relation to *Clunas* must be accepted. Whatever might be thought of the merit or persuasiveness of the reasoning in *Clunas* for modern criminal procedure and case management, the position in Canada cannot usurp this Court's statutory directive to apply the common law of England to this application.

82. Any preference for the Canadian approach or an extension of *Assim* to other than charges properly joined in a single indictment, thereby seeking to displace the rule in *Crane,* can only be achieved, in Tonga, by legislation, such as amendments to the *Criminal Offences Act* or dedicated Criminal Procedure Rules as seen in the other jurisdictions referred to above.

83. In those circumstances, it is unnecessary to consider further the other submissions

concerning, for instance, whether ordering a joint trial on economic grounds of cost and time would 'open a flood gate to the holding of joint trials of defendants indicted separately'; or whether in any joint trial, Tu'ivakano would be "duty-bound to question the witnesses" called against Taulua and Tu'akoi to ensure that he is not prejudiced by the evidence; or whether it is essential in the interests of justice that the matters are combined to give a jury a holistic view of the alleged offending; or the public interest in avoiding the risk of inconsistent verdicts; or the length and complexity of a joint trial; or issues of cost, time, court resources or inconvenience to witnesses; or the warnings in *Novac*. For by this ruling, the merit or otherwise of any such discretionary matters to be weighed in the balance between the interests of justice and possible prejudice to Tu'ivakano, do not arise.

84. Put simply, the prohibition in *Crane*, against more than one indictment being heard before one jury, is determinative. The Court does not have power to alter or depart from that rule whether by means of purported (but erroneous) application of the principles from the severance cases, the above discretionary considerations which fall from those principles, or otherwise.

Orders

85. The Prosecution's application for a joint trial of the indictments in proceedings CR 7, 73 and 74 of 2019 is refused.

SUPREME COURT TONGA

NUKU'ALOFA
3 December 2019

M.H. Whitten QC
LORD CHIEF JUSTICE