TRUST TERRITORY OF THE PACIFIC ISLANDS,
Plaintiff-Respondent

v.

KENNEDY ESTE, ITIKO ROMAN, TEAS ESTE and APAS,
Defendants-Appellants

Criminal Appeal No. 64

Appellate Division of the High Court

December 22, 1977

Appeal following conviction of appellants tried for fishing with explosives. The Appellate Division of the High Court, Hefner, Associate Justice, held that where trial was not had until seventeen months after arrest, defendant had not asserted his right to speedy trial, prosecution had not attempted to delay trial and no prejudice to defendant was shown, right to speedy trial was not violated.

1. Appeal and Error—Briefs—Late Filing

Where for third time in past two appellate sessions the Attorney General's Office failed to observe the rules on appeal, the Attorney General having filed brief just two weeks before oral argument was scheduled, the brief would be stricken from the record and no oral argument by the Attorney General's representative would be allowed.

2. Constitutional Law—Right to Speedy Trial—Tests

The four factors to be considered in determining whether speedy trial was denied are length of delay, reason for delay, defendant's assertion of his right, and prejudice resulting from the delay.

3. Constitutional Law—Right to Speedy Trial—Assertion or Waiver

In absence of statute prescribing exact times by which criminal cases are to be heard, a precise time when the right to a speedy trial must be

asserted or waived cannot be set and each case must be analyzed on its own.

4. **Constitutional Law—Right to Speedy Trial—Delay**

In considering delay of trial for purpose of determining whether right to speedy trial was violated, court must consider district in which case was pending and availability of a court and court personnel to hear the case.

5. **Constitutional Law—Right to Speedy Trial—Delay**

Where criminal case was heard in Truk District, where no High Court Justice had been permanently assigned for many years, delay of seventeen months from arrest to trial was not, for purpose of determining whether right to speedy trial was violated, extraordinary.

6. **Constitutional Law—Right to Speedy Trial—Right Not Denied**

Where trial was not had until seventeen months after arrest, defendant had not asserted his right to speedy trial, prosecution had not attempted to delay trial and no prejudice to defendant was shown, right to speedy trial was not violated.

BURNETT, *Chief Justice*, BROWN, *Associate Justice*, and HEFNER, *Associate Justice*

HEFNER, *Associate Justice*

The appellants were charged by complaint on March 13, 1975, with a violation of 45 TTC Sec. 1, Fishing with Explosives. The offense was alleged to have occurred on February 8, 1975. Although the case was set for trial in the District Court on March 27, 1975, it did not go to trial for unknown reasons. On August 14, 1975, the case was transferred from the District Court to the High Court. On July 23, 1976, an information was filed charging the same section and at or about this time, the appellants filed two motions which are the subject of this appeal. The first was a motion to dismiss the information on the ground that the appellants had been denied a speedy trial. The second was a motion for discovery. The Court granted certain portions of the motion but denied appellants' motion for a list of prosecution witnesses and their statements.

[1] On August 2, 1976, an amended information was filed and the trial was held on August 31, 1976. After conviction, the appellants prosecuted this appeal on three grounds.[1]

It is asserted that the appellants were denied their right to a speedy trial; that the trial court erred in taking judicial notice of the court calendar and sittings in Truk District, and that the trial court erred in not requiring the prosecution to divulge the names of its witnesses upon their motion for discovery.

For the determination as to whether the defendants were denied a speedy trial, this court adopts the balancing test developed in the United States Supreme Court case of *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

[2] The four factors to be considered are the length of delay, defendants' assertion of their right to a speedy trial, the reason for the delay, and prejudice resulting from the delay.

[3] In the Trust Territory, the right to a speedy trial is guaranteed in 1 TTC Sec. 4. There is no statute which prescribes exact times by which misdemeanor or felony cases are to be heard. With no such statute, the nature of the right to a speedy trial makes it impossible to pinpoint a precise time in the process when the right must be asserted or waived. *Barker v. Wingo*, supra.

The lesson learned from *Barker v. Wingo* is that each case must be analyzed and the four factors mentioned above be considered in the light of the case before the court.

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[1] Although the appellants' brief was filed and served on the Attorney General on or about May 5, 1977, the Attorney General filed no appellee's brief until October 25, 1977, just two weeks before this matter was set for oral argument.

This is the third such failure by the Attorney General's Office to observe the Rules on appeal in the last two appellate sessions. Pursuant to the prior decision of this Court, the brief of the Attorney General is stricken from the record and no oral argument by the Attorney General's representative was allowed.

A. LENGTH OF DELAY:

It was seventeen and one-half months from the time the first information was filed to the date of trial. The appellants argue that in the Trial Division case of *Trust Territory v. Borja,* Crim. Case 19-73, Mariana Islands, it was held that seventeen months was extraordinary. However, a comparison with the facts in that case to those present here reveals the need to analyze each case as it is presented.

In *Borja,* by the time the motion for dismissal for failure to obtain a speedy trial was heard, the case had never been set for trial and a total of twenty-one months had elapsed from the first filing of the complaint to the motion to dismiss. The seventeen month period noted in *Borja* was from arrest to arraignment.

[4] In considering whether the length of delay is extraordinary, an additional consideration must be given in the Trust Territory. That consideration is the District in which the case is pending and the availability of a court and court personnel to hear the case.

[5] This case was heard in the Truk District where no High Court Justice has been permanently assigned for many years. This has a direct effect on the length of time a case can go to trial. Under these circumstances, it cannot be said that the length of delay of seventeen and one-half months from the arrest to trial was extraordinary.

B. DEFENDANTS' ASSERTION OF THEIR RIGHT TO A SPEEDY TRIAL:

The appellants concede that at no time up until their motion to dismiss, did they request or demand a speedy trial. The court in *Barker v. Wingo* stated that the defendant has no duty to bring himself to trial. However, there is no doubt that this is a factor to be considered. In *Borja,* supra, the defendant asserted his right early in the

proceedings. This assertion of right is important in the Trust Territory and this case is an example of that. Since the High Court sat infrequently in Truk, it necessarily assigns priority to certain matters. If a defendant demands a speedy trial, this should have a direct effect on the lapse of time between arrest and trial. Without a demand for a speedy trial, the case is set behind other matters which may have been filed before.

C. THE REASON FOR THE DELAY:

It cannot be said or inferred in any way that the reason for delay was caused by the appellants. The delay was a combination of the transfer of the case from the District Court to the High Court, amendments to the charges by the prosecutor and the fact that a High Court Justice was not permanently assigned to Truk District. This does not demonstrate, in any way, that the delay was a scheme or plan by the prosecution to delay the trial to the detriment of the defendant.

D. PREJUDICE RESULTING FROM THE DELAY:

The Supreme Court in *Barker v. Wingo*, supra, discussed three types of prejudice about which the appellants can complain: (1) Pre-trial incarceration; (2) Anxiety and concern of the accused; and (3) The possibility that the defense will be impaired.

Here, there was no pre-trial incarceration. It can be expected that any defendant in a criminal case has anxiety and concern about the charges pending against him but nothing out of the ordinary is shown in this case.

If there is no pre-trial incarceration, the other main factor the court must consider is whether the defense has been impaired by the delay. Once again the record is barren of any showing in this regard, except that one co-defendant, Apas, died before trial. It is not shown how the absence of his testimony impaired the defense; indeed, it is not shown

that Apas would have even testified. The general assertions that memories fade over a period of time is not in and of itself sufficient to demonstrate that the defense is impaired. The charges pending were simple and the case, according to the appellants, could have been heard in the District Court. (Appellants' Brief, page 5.)

Thus, it is concluded that the record does not show any prejudice to the appellants resulting from the period of time from arrest to trial.

[6] After considering the four factors above, it is determined that the trial court's order denying appellants' motion to dismiss for failure to be provided a speedy trial was proper and that the appellants were not denied their right pursuant to 1 TTC Sec. 4.

The next issue raised on appeal can be summarily disposed of. At the time of the trial court's ruling, Rules of Evidence 9, 10 and 12 (promulgated January 1, 1966) were in effect.

The trial court judge judicially noted that the delay in the trial was caused by the transfer of the case to the High Court and the infrequent sittings of the High Court in Truk. That these matters could be properly noticed under Rule 9(2) (c) is clear.[4]

Lastly, the appellants urge that the trial court's denial of their motion for the names of the prosecution witnesses, combined with the delay of the trial, resulted in the appellants' inability to prepare for trial. Since we have determined that the time between arrest and trial did not impair the defense, the remaining issue is whether it was error for the trial court to deny the appellants the list of the prosecution's witnesses.

Under Rule 7, Trust Territory Rules of Criminal Procedure in effect at the date of appellants' motion, it is clear that the trial court could use its discretion in refusing the list of prosecution witnesses. Appellants adequately

point out that Rule 7 is out of date and leaves much to be desired. *Trust Territory v. Lucas*, 6 T.T.R. 614 (Tr. Div. 1974).

Effective January 1, 1977, a new Rule 7 allows additional discovery but still does not specifically require the prosecutor to divulge the names of his witnesses prior to testifying. Whether the Rules on Criminal Procedure should be amended in this regard is a matter that should be considered apart from this appeal.

The judgments of convictions of the appellants are AFFIRMED.