IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

S. 10/94

BETWEEN: THE POLICE

Informant

A N D: AFA TAALILI of Salelesi

Defendant

Counsel: T. Malifa for accused in support of application
M. Edwards for prosecution

Hearing: 1st July 1994

Decision: 4th July 1994

DECISION OF SAPOLU, CJ

The accused in this case is being charged with murder and his trial has been set down for hearing before myself as presiding Judge and a panel of five assessors on 5 July 1994. His counsel advised the Court that he proposes to challenge for cause two of the assessors for this trial. The matter was then called in Court with both counsel for the prosecution and the accused being both present. The accused was also present.

In Court counsel for the accused restated his position. He proposes to challenge for cause two of the five assessors on the list of assessors. He says he does not have any present grounds for the proposed challenge but he seeks leave from the Court to cross-examine two of the named assessors. It appeared to the Court that the application raises an important question,

that is, is it permissible for counsel who proposes to challenge an assessor for cause but has no foundation of fact for such a challenge to cross-examine an assessor he wants to challenge. I decided to reserve my decision on the question raised and I now deliver that decision.

The right of a prosecutor or defendant to challenge an assessor for cause is provided in section 96 of the Criminal Procedure Act 1972 which provides :

> "(1) At any time before an assessor is sworn, the prosecutor
> " or the defendant may challenge him for cause, or the
> " presiding Judge may of his own motion remove him.
>
> "(2) The Judge shall not allow a challenge nor remove an
> " assessor of his own motion unless he is satisfied
> " that there is some reasonable and sufficient objection
> " to the assessor.
>
> "(3) If the Judge is satisfied as aforesaid, he shall remove
> " the assessor and substitute another".

It is clear from section 96 of the Act that the right to challenge an assessor for cause must be exercised before an assessor is sworn. Such a challenge will not be allowed unless the presiding Judge at the trial is satisfied that there is reasonable and sufficient objection to the assessor who is being challenged. If the presiding Judge is satisfied that there is reasonable and sufficient objection then he must remove the assessor under challenge and replace him with another assessor.

In this case there is clearly no reasonable and sufficient objection against the assessors that counsel for the accused proposes to challenge for cause as there is no foundation of fact for the challenge. The application for leave to challenge the named assessors therefore appears

to the Court to be an attempt made for the purpose and the hope that something may be elicited from the examination of the named assessors on which a challenge for cause may be launched against them.

Now English law on the point raised in the present application seems quite clear. In R v Chandler (1964) 48 Cr. App. R.143, 154 where the point raised in the present case was also raised in respect of a juror, Lord Parker CJ in delivering the judgment of the English Court of Appeal says :

> "Be that as it may, the fact of the matter is that, before any "right to cross-examine the juror arose, the appellant would "have to lay a foundation of fact in support of his ground of "challenge. It is no good his saying, 'I think this man is "'antagonistic' or calling somebody to say, 'I do not think he "'likes processions, he thinks they are unreasonable'. There "must be a foundation of fact creating a prima facie case "before the man can be cross-examined".

That passage was cited with approval by Lawton J in R v Kray (1969) 53 Cr. App. R.412 where he also says :

> "Before a challenge for cause can be effectively made, the "challenger must lay a foundation of fact.... Having myself "read the newspapers which have been produced in court, I "am satisfied that there has been established such a prima "facie case of probability of prejudice as to enable "Mr Patts-Mills to make a further application, namely that "he be allowed to examine the jurors who came into the jury "box to be sworn".

In the next case of R v Broderick [1970] Crim. L.R.155 the English Court of Appeal held :

> "It has never been the practice to allow potential jurors to "be paraded for cross-examination in a fishing way to ascer- "tain whether there might possibly be some ground on which "a challenge might subsequently be made, and there was no "foundation in law for introducing such a practice".

Perhaps it will not be out of order to quote from the commentary which follows that case on page 156. It says :

> "In most of the states of the U.S.A., counsel for both sides "are given the opportunity to examine each juryman in court "as to his history, his prejudices and opinions, etc., in "order to decide whether to challenge him. It is not unusual "for one or two days to be consumed in this process and in "exceptional cases it has taken weeks. This has never been "allowed in England. One of the many reasons why challenge "has assumed so much more importance in the United States "than in England, no doubt, is the heterogeneous character "of the American population".

It is therefore clear that where a prospective juror is challenged for cause there must be a foundation of fact creating a prima facie case before he can be cross-examined. If there is no foundation of fact creating a prima facie case then a prospective juror cannot be cross-examined for the purpose of ascertaining whether there might be possibly some ground on which a challenge might subsequently be made against him. And where the ground of the challenge for cause is prejudice, then there must be a foundation of fact creating a prima facie case of probability of prejudice before a prospective juror can be cross-examined. All this is clear from the cases of R v Chandler, R v Kray and R v Broderick.

Turning again to section 96 of the Criminal Procedure Act 1972, it is clear that a challenge for cause against an assessor will not be allowed and an assessor will not be removed unless there is a reasonable and sufficient objection to the assessor concerned. Such an objection need not be restricted to one of fact, it may also be an objection on a question of law. And once a foundation of fact creating a prima facie case is laid for an objection to an assessor, then the prosecutor or the defendant as the

case may be, may further apply to the Court to be allowed to cross-examine the assessor. If there is no foundation of fact creating a prima facie case for an objection against an assessor, then neither the prosecutor nor the defendant will be allowed to cross-examine the assessor in a fishing way in order to ascertain whether there might possibly be some ground on which a challenge might subsequently be made against the assessor.

In this case there is no reasonable and sufficient objection made against the two named assessors that the defence proposes to challenge for cause. There is also no foundation of fact creating a prima facie case against the named assessors. The purpose of the cross-examination sought is clearly to ascertain in a fishing way whether there might be some ground on which a challenge might subsequently be made. I refuse the application.

Before leaving this decision, there are two more matters I should refer to. The first matter is that where cross-examination is allowed during a challenge for cause against an assessor, that should be done on oath upon the voir dire. The second matter is the practice in the United States of America as to the examination by counsel of each juror in Court as to his history, his prejudices and opinions, etc., in order to ascertain whether to challenge him. If the principal reason for that practice is the heterogeneous character of the American population, then that reason does not apply in Western Samoa. May be the ethnic and cultural diversity in the United States as well as the history of the United States justify the practice of challenging jurors which exists in American society. But this country has not had anything resembling the history of the United States and dcoes not have the ethnic and cultural diversity one

finds in American society. I accept the English practice in relation to the cross-examination of a juror as more appropriate to the circumstances of this country than the American practice. The method and basis for the selection of assessors under our system as opposed to the method and basis for the selection of jurors in systems with jury trials is also a matter to be considered.

T.F.M. Sapolu

CHIEF JUSTICE