Akiwo v. Supreme Court, 1 ROP Intrm. 96 (1984)

RAYMOND AKIWO,
Petitioner,

v.

SUPREME COURT OF THE REPUBLIC OF PALAU TRIAL DIVISION,
Respondent,

REPUBLIC OF PALAU,
Real Party in Interest.

SPECIAL PROCEEDING NO. 5-83
Criminal App. No. 57-83

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: February 9, 1984

Counsel for Petitioner: Douglas F. Cushnie
Counsel for Respondent: Russell E. Weller, Jr., Attorney General

BEFORE: MAMORU NAKAMURA, Chief Justice; ROBERT A. HEFNER, Associate Justice; HERBERT D. SOLL, Associate Justice.

NAKAMURA, Chief Justice:

At the first trial of this case, the court, having heard the direct testimony of the first prosecution witness, granted defendant's motion to dismiss the Amended Information because of the illegal appointment and consequent unauthorized actions of the special prosecutor, and declared a mistrial. When another Information was filed[,] petitioner made a pretrial motion for dismissal of the action on the grounds of double jeopardy and selective prosecution. The retrial motion was denied on both grounds.

Defendant now petitions the Appellate Division of the Supreme Court for a Writ of Prohibition to halt the proceedings against him in the Trial Division. Petitioner alleges that the trial court is acting in excess of its jurisdiction, claiming that Article IV, Section 6 of the Constitution of the Republic ⊥97 of Palau bars his retrial because he is being placed in double jeopardy for the same offense.

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I

On November 25, 1982, an Information was filed charging petitioner, with one count of Murder in the First Degree and one count of Assault and Battery with a Dangerous Weapon. At a bail hearing conducted on that day, both the Attorney General and the Deputy Attorney General declared that a conflict existed due to their close working relationship and social acquaintance with petitioner who is a Public Safety Officer. The court itself declined to appoint a special prosecutor, but advised the Attorney General's Office that it was empowered to do so under Trust Territory Rules of Criminal Procedure, Rule 3(a). As a result, on November 29, 1982, the President of the Republic, Haruo I. Remeliik, appointed John Tarkong as special prosecutor in the case. John Tarkong is a Senator in the Olbiil Era Kelulau.

On December 22, 1982, Special Prosecutor John Tarkong filed an Amended Information charging petitioner with both First and Second Degree Murder, and Assault and Battery with a Dangerous Weapon.

On February 22, 1983, trial commenced. After an opening statement by the special prosecutor, and the swearing and direct testimony of the first prosecution witness, defense counsel orally moved for dismissal of the Amended Information and discharge of the defendant. The motion was based on an assertion that John Tarkong was not qualified to serve as a special prosecutor. This contention was made pursuant to Article IX, Section 10 of the Constitution and Public Law No. 7-8-2. Both provisions prohibit a member of the Olbiil Era Kelulau from holding any other public office or public employment.

Defense counsel asserted that the Information and the prosecution under Mr. Tarkong's representation had no force and effect, and that essentially the entire proceedings were a nullity.

On February 24, 1983, the trial court rendered its decision on the defendant's motion. The trial court ruled that John Tarkong was not a ". . . person otherwise authorized to act . . ." as a special prosecutor in accordance with the text of the Trust Territory Rules of Criminal Procedure, Rule 3(a) and pursuant to the provisions of Public Law No. 7-8-2 and Article IX, Section 10 of the Constitution. The trial court consequently dismissed the Amended Information as defective, ⊥98 ". . . since it was prepared, filed and signed by a person not authorized to act in the capacity of special prosecutor . . . ," and declared a mistrial. *Republic of Palau v. Raymond Akiwo*, Crim. Case No. 361-82, (Tr. Div. Feb. 1983), Memorandum Opinion at 6.

The trial court's Memorandum Opinion stated that manifest necessity existed for the granting of the mistrial. It also stated that the defendant's motion for dismissal was essentially and functionally indistinguishable from a motion for a mistrial, citing *Lee v. United States*, 423 U.S. 23, 97 S.Ct. 2141 (1977). The trial court noted that there had been no allegation that the prosecution or the court had been guilty of bad faith or had undertaken to harass or prejudice the defendant. Memo. Op. at 6-7.

Following the trial court's ruling, defense counsel stated that by his silence he did not mean to acquiesce in the declaration of the mistrial. Trial Transcript at 28.

On March 2, 1983, another Information was filed charging petitioner with Murder in the First Degree and Assault and Battery with a Dangerous Weapon. On March 28, 1983, petitioner moved to dismiss on the basis that he was being placed twice in jeopardy in contravention of Article IV, Section 6 of the Constitution and was the victim of selective prosecution. On May 2, 1983, after all written arguments had been submitted and oral argument heard, the trial court denied the motion to dismiss on both the selective prosecution and double jeopardy grounds.

In denying the motion to dismiss on the basis of double jeopardy the trial court stated that it was impossible to permit the trial to proceed after the special prosecutor was ruled ineligible and that manifest necessity existed to declare the mistrial in the earlier proceeding.

On May 9, 1983, just before the start of defendant's retrial, defense counsel filed petitions for a Writ of Prohibition and an Alternative Writ of Prohibition asserting that the trial court was acting in excess of its jurisdiction since double jeopardy barred his retrial. Hearing on the Alternative Writ of Prohibition was held on May 10, 1983, at which time the Alternative Writ of Prohibition was granted, halting further proceedings until arguments on the Writ of Prohibition could be heard and a ruling on that Writ could be made by this Court.

⊥99 II

In Section 6 of Article IV on Fundamental Rights, the Constitution of the Republic of Palau provides the following protection: "No person shall be placed in double jeopardy for the same offense."

This case is one of first impression in construing this constitutional provision. This Court recognizes that a similar right is provided in the Bill of Rights of the United States Constitution. The Fifth Amendment of the United States Constitution states in pertinent part, ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Since the Republic of Palau constitutional provision is similar to the United States constitutional provision, we may look to the double jeopardy law as it has evolved in the United States for guidance in interpreting Article IV, Section 6. This Court recognizes, however, that it is by no means bound by the letter of United States law, constitutional or otherwise, and that it is free to forge its own interpretations of this Republic's Constitution and laws in light of community standards of justice unique to the Republic of Palau.

III

As this is a case of first impression in construing the double jeopardy provision of this Republic, it will be beneficial to broadly outline the competing interests and policy considerations that involved.

The double jeopardy provision manifests a constitutional policy of finality in criminal proceedings for the benefit of the defendant. *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 457, 554 (1971) (plurality opinion). If a defendant is acquitted, or if he is convicted and the

conviction is upheld on appeal, he may not be retried for the same offense. *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192 (1896). In cases culminating in an acquittal, this will prevent the Government from having another opportunity to supply evidence which it failed to offer in the earlier proceeding.

The benefit accruing to the defendant is not confined to final judgments, for a defendant also has a protected interest in having his guilt or innocence decided in one proceeding in front of a particular tribunal. *Wade v. Hunter*, 336 U.S. 684, 69 S.Ct. 834, 837 (1949). Reasons to protect a defendant's right to have his trial completed by a particular tribunal have been elaborated as follows:

⊥100 Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently as a general rule, the prosecutor is entitled to one and only one, opportunity to require an accused to stand trial. *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 829-839. (footnotes omitted) (1978).

Another reason the Government should not be allowed multiple attempts to convict is the Government's greater resources and power which can be put to use by the Government to the great disadvantage of criminal defendants. *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 223 (1957). Additionally it is important to prevent the possibility of multiple punishments for the same or a lesser offense, whether in a single trial or multiple trials. *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 1079 (1976).

While the aforementioned interests of the defendant are substantial, they must be balanced against society's interests in the fair and prompt administration of justice. In *Wade v. Hunter*, *supra*, society's interests were explained as follows:

> The double jeopardy provision . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible . . . [.] In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again.

⊥101 . . . What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments. 69 S.Ct. at 837 (footnotes omitted).

In double jeopardy cases there must be a balancing of the aforementioned competing

interest of the defendant and society's interest in the fair and prompt administration of justice.

IV

The line of United States Supreme Court decisions dealing with mistrials has balanced the defendants' interests in double jeopardy protection with legitimate prosecutorial interests. This accommodation is reflected in two general rules governing re-prosecution following a mistrial.

When a mistrial is declared upon the motion of defendant, or otherwise with his consent, the general rule is that the double jeopardy bar to re-prosecution is removed. *United States v. Jorn*, *supra*. The exception to this rule occurs only if the reason giving rise to the successful motion for a mistrial was prosecutorial or judicial conduct intended to provoke the defendant into moving for a mistrial. *Oregon v. Kennedy*, 50 LW 4544, 102 S.Ct. 2083 (1982); *United States v. Dinitz, supra*.

When a mistrial is declared over a defendant's objection or where he has not consented to the mistrial, the general rule is that double jeopardy bars retrial. *Arizona v. Washington, supra*. The exception to this rule exists in cases where the mistrial was justified by "manifest necessity," or it was otherwise dictated by the "ends of public justice." *United States v. Perez*, 9 Wheat. 579, 6 L.Ed. 165 (1824); *Illinois v. Somerville*, 410 U.S. 458, 93 S.Ct. 1066 (1973).

V

In urging that double jeopardy bars his retrial the petitioner makes the following contentions: (1) that he did not consent to the mistrial and that the mistrial was declared sua sponte by the trial court; (2) that there was no manifest necessity to justify the granting of a mistrial; and (3) that there was prosecutorial overreaching and thus re-prosecution would be barred even if there was manifest necessity for a mistrial.

⊥102 The petitioner additionally argues that his interests were not adequately taken into account in the trial court's balancing test. He asserts that the proceedings could have gone on and that the trial court should have asked him whether he wished to have the proceedings continue before the original tribunal.

The Government responds that legal jeopardy had not attached due to an improperly constituted court and due to the fatally defective Amended Information. They further contend that, if jeopardy did attach, the declaration of the mistrial, which was done at the behest of the defendant, does not preclude re-prosecution since there was no overreaching, bad faith, intentional misconduct or harassment intended to goad the defendant into making his motion or taint the proceedings to his prejudice.

VI

The initial inquiry in this case focuses on the attachment of jeopardy. Jeopardy has been

defined as "exposure to danger." *Kepner v. United States*, 105 U.S. 100, 24 S.Ct. 797 (1904). As a second "exposure to danger," or double jeopardy, is prohibited by this Republic's Constitution.

The United States Supreme Court has declared that jeopardy attaches in a bench trial when the court begins to hear evidence. In *Serfass v. United States*, 420 U.S. 387, 95 S.Ct. 1055 (1975) it was stated that:

> As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purpose and policies are implicated by resort to the concept of "attachment of jeopardy" . . . [.] In a non-jury trial jeopardy attaches when the court begins to hear evidence. The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is "put to trial before the trier of facts . . . [.]" *Id*. at 1062.

In this case the trial court had begun to hear evidence, as the first prosecution witness was sworn and his direct testimony taken. The petitioner was thus exposed to all ⊥103 the anxieties and expenses attendant to a trial, and was exposed to the danger of a conviction. We therefore hold that jeopardy had attached and reject the Government's contention that jeopardy had not attached due to an improperly constituted court and the fatally defective Amended Information.

VII

The next inquiry is, which of the two general rules applied in mistrial cases is to be properly applied here. The pertinent question is, was the declaration of the mistrial done at the behest of the defendant?

The views of the Government and the defendant diverge on this issue. Both sides argue the position that allows the application of the general rule most favorable to their side.

The defendant contends that he gave no consent to the mistrial, that *Lee v. United States, supra*, upon which the trial court draws an analogy, is distinguishable and that there was no manifest necessity here which would remove the bar to a retrial. The Government argues that the declaration of the mistrial was done at the behest of the defendant and, therefore, there should be no bar to retrial in the absence of prosecutorial or judicial misconduct intended to goad the defendant into moving for a mistrial.

The trial court in its Memorandum Opinion not only found that "manifest necessity" existed for the granting of a mistrial, but further that defendant's motion for dismissal in essence constituted, and was functionally indistinguishable from, a motion for a mistrial. The court stated further that it found no prosecutorial or judicial action undertaken to harass or prejudice the defendant, and thus there was no bar to retrial. Memo. Op. at 7.

In *Lee v. United States*, the defendant made a motion to dismiss the information for

failing to charge the specific intent of the alleged crime. The motion was made at the last minute, just before the commencement of the bench trial and thus before jeopardy had attached. The trial court, noting the last minute timing of the motion, reserved its right to rule on the motion and began the trial. After all the evidence at trial was in, but before a verdict was rendered, the trial court returned to address the defendant's motion to dismiss. The court then granted that motion.

The defendant was later charged and tried again for the same crime, and this time convicted. The defendant appealed his conviction. The United States Supreme Court, in ⊥104 affirming the defendant's conviction, found that the District Court's dismissal was clearly not predicated on any judgment that the defendant could not have been prosecuted for the crime charged and also found that the trial court had granted the motion to dismiss clearly contemplating a second prosecution. The court then concluded at 97 S.Ct. 2146 that:

> . . . the order entered by the District Court was functionally indistinguishable from a declaration of mistrial . . . the distinction between dismissal and mistrials has no significance in the circumstances here presented and that established double jeopardy principles governing the permissibility of retrial after a declaration of mistrial are fully applicable.

The trial court's drawing of an analogy and its application of the principles of law as established in *Lee v. United States*, is supported by the very similar facts of these two cases.

A critical factor in the ruling in *Lee v. United States* was the last minute timing of defendant's motion to dismiss. The opinion states at 2144:

> By the last minute timing of the defendant's motion to dismiss, he virtually assured the attachment of jeopardy; and by failing to withdraw the motion after jeopardy had attached, he virtually invited the court to interrupt the proceedings before formalizing a finding on the merits.

We have a similar factual situation here, but in the case before us, defense counsel made his motion to dismiss at a point in the proceedings even later than did the defendant in *Lee*. Unlike the defendant in *Lee*, defense counsel in this case did not make his motion before the start of the trial, but instead waited until after the testimony of the first prosecution witness was taken. He thereby assured that jeopardy had attached before making his motion and invited the trial court to interrupt the proceedings before a finding on the merits.

There is no reason to believe that defense counsel could not have made the motion to dismiss before the trial had commenced and before jeopardy had attached, as he specifically stated that the possible constitutional infirmity of the special prosecutor had come to his attention over the weekend, ⊥105 before the start of the trial. Trans. at 14.

Other similarities between this case and *Lee* are found. As in *Lee*, the trial court in the case before us clearly did not dismiss the action on any judgment that the defendant could not

have been prosecuted for the crimes charged and the trial court here also specifically contemplated a second prosecution when it stated that it would leave it up to the executive branch of the Government whether to properly and lawfully re-file this case and to pursue this prosecution to a just end. Memo. Op. at 7.

The defendant in making his double jeopardy arguments made the point that the lower court failed to adequately consider his interests. He asserts that it was possible for the trial to continue, that he should have been asked whether he wished to proceed or not, and that a discussion of possible options should ensued. A similar argument was made by the defendant in *Lee v. United States*. In that case the defendant asserted that once the court determined to hear evidence he was entitled to have the trial proceed to a formal finding of guilt or innocence. 97 S.Ct. at 2144. The United States Supreme Court met these arguments by pointing out that the proceedings were still in the defendant's control. The court stated that:

> Counsel or petitioner made no effort to withdraw the motion, either after the initial denial or after the court's reminder that the motion was still under consideration. And counsel offered no objection when the court, having expressed its views on the petitioner's guilt, decided to terminate the proceedings without having entered any formal finding on the general issue.

The same situation was presented here. While counsel for the defendant asserts that he was never presented with any options by the trial court, he fails to recognize that the onus for action was upon himself. He retained primary control over the course to be followed after he brought to light his objections with regard to the special prosecutor.

With the proceedings still in his primary control, he made no effort to withdraw his motion and present possible options to the trial court at any time during the two day span between the time he made the motion and the lower court's decision to terminate the proceedings.

Following the trial court's ruling to terminate the ⊥106 proceedings, defense counsel stated that by silence he did not mean to acquiesce in the declaration of the mistrial. We do not find that this statement stands in the path of a holding that the mistrial was declared at defense counsel's behest. Defense counsel cannot initiate action by the court, obtain what he requests, and then afterward state that he does not acquiesce in the court's actions.

Under the particular facts of this case, noting that defense counsel initiated the trial court's action to dismiss and declare a mistrial; that he waited until after the trial had begun before making what was properly a pretrial motion; and that he retained primary control over the proceedings and yet failed to withdraw his motion and present options to the court before the trial court's decision to terminate the proceedings, the declaration of mistrial is held to have occurred at the behest of the defendant. The question of whether or not manifest necessity was present need not be addressed.

Under the aforementioned holding, we adopt the reasoning of *Oregon v. Kennedy, supra*. In that case it was stated at 50 LW 4546 that:

> Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of Double Jeopardy to a second trial after having succeeded in aborting the first on his own motion.

As to Petitioner's assertion that there was indeed prosecutorial overreaching sufficient to bar re-prosecution, we find sufficient support in the record that this was not so. The trial court specifically stated that:

> . . . there being no allegation of underlying error motivated by bad faith or undertaken to harass or prejudice the defendant on the part of the prosecution or the Court, that there is no bar to retrial. (Trans. at 27.)

The underlying error here was the erroneous appointment of a Senator of the Olbiil Era Kelulau as the special prosecutor. At the time the appointment was made, however, there was a question of law as to whether Senator Tarkong's appointment was unconstitutional. This question was ⊥107 only answered when the trial court made its ruling on the motion. Thus, the appointment cannot be said to have been made with any intent to subvert the proceedings and this error cannot be characterized as having been done with the requisite intent required under *Oregon v. Kennedy*.

This Court does not find that the appointment of Senator Tarkong as special prosecutor was done in bad faith or with any intention to provoke the defendant to make a motion for dismissal, or to prejudice or harass him. Certainly the error in this case was as prejudicial to the Government as to the defendant.

IX

The retrial of petitioner in this case is not barred since he is not being placed in double jeopardy for the same offense in contravention of Article IV, Section 6 of the Constitution of the Republic of Palau. The trial court, therefore, possesses jurisdiction over this matter, and the petition for Writ of Prohibition is hereby Denied.