

**TRUST TERRITORY OF THE PACIFIC ISLANDS,  
Plaintiff-Appellee**

**v.**

**WAAYAN, Defendant-Appellant**

**Criminal Appeal No. 60**

**Appellate Division of the High Court**

**December 9, 1977**

Appeal following involuntary manslaughter conviction. The Appellate Division of the High Court held that although in bringing a criminal defendant to trial, the "government" usually means the courts and prosecution, where the Trust Territory established a Public Defender's Office, such office had equal responsibility with the courts and prosecution to see that defendant's rights were not violated; and where, prior to filing of complaint, prosecution notified Public Defender's Office that defendant and another it was representing, who were to be charged with same crimes, had a potential conflict of interest, and the Public Defender and prosecution did not advise defendant or the court of the conflict until Public Defender's notice to the court two years and two months after prosecution had advised Public Defender of the conflict, and no provision for separate counsel was made during that period, and court did not appoint counsel for defendant until more than five months after court was notified of the conflict, all three government institutions shared responsibility for a delay in trial which amounted to violation of right to speedy trial, and defendant, tried eight days after appointment of counsel, would also be found to have been denied effective assistance of counsel, and conviction would be reversed.

**1. Constitutional Law—Right to Counsel**

One of the most fundamental rights guaranteed to any individual charged with a crime under Trust Territory system of law is the right to assistance of counsel.

**2. Constitutional Law—Right to Counsel—Preparation of Case**

Right of one charged with a crime to assistance of counsel goes beyond mere appointment of counsel and includes allowing reasonable time for counsel to prepare for the trial.

**3. Constitutional Law—Right to Counsel—Preparation of Case**

No set formula is available to establish the reasonableness of the time allowed defense counsel to prepare for a criminal trial; rather, reasonableness of the time allowed must be determined by the facts and circumstances of each particular case.

**4. Constitutional Law—Right to Counsel—Preparation of Case**

Where defendant was charged with first degree murder, counsel was not appointed for him until over two and one-half years after the acts giving rise to the charge and the filing of the information, and counsel had only

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eight days to prepare for trial, counsel was not allowed reasonable time to prepare his defense and defendant was denied his right to counsel.

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

In determining whether right to speedy trial has been violated, court must consider length of delay, reason for delay, defendant's assertion, if any, of his right, and prejudice, if any, to defendant.

**6. Constitutional Law—Right to Speedy Trial—Attachment of Right**

Right to a speedy trial attaches when one is arrested or formally charged with a crime.

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

While there is no specific time lapse after arrest or formally being charged with commission of a crime which establishes a per se violation of right to a speedy trial, there must be some substantial delay before there is any need to consider the other factors involved in determining whether the right has been violated.

**8. Constitutional Law—Right to Speedy Trial—Burden of Proof**

The longer the delay between an arrest or formal charge of commission of a crime and the time of trial, the greater the government's burden of demonstrating justification for the delay which outweighs any prejudice to the defendant.

**9. Constitutional Law—Right to Speedy Trial—Tests**

Where trial was held 33 months after filing of complaint, delay was such that close review of the other factors to be considered in determining whether right to speedy trial was violated was mandated.

**10. Constitutional Law—Right to Speedy Trial—Assertion and Waiver**

Failure to assert right to speedy trial does not necessarily imply waiver of that right.

**11. Constitutional Law—Right to Speedy Trial—Assertion and Waiver**

Where conflict in interest between defendant and another charged with same crimes required representation by separate counsel and counsel was appointed for defendant 33 months after filing of complaint and eight days before trial, defendant was not in position to effectively assert or intelligently waive right to speedy trial and thus did not impliedly waive the right through failure to assert it and such failure should not be weighed heavily against him in determining whether right to speedy trial was violated.

**12. Constitutional Law—Right to Speedy Trial—Prejudice**

Where counsel for defendant claiming denial of right to speedy trial was not appointed until 33 months after filing of murder charge and eight days before trial, and thus defendant could not benefit from investigation and preservation of testimony and other evidence during that period, and testimony of crucial on-the-scene witness was no longer available, sufficient prejudice to defendant existed.

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

It is the government's not the defendant's responsibility to bring defendant to trial.

**14. Constitutional Law—Right to Speedy Trial—Right Denied**

Although in bringing a criminal defendant to trial, the "government" usually means the courts and prosecution, where the Trust Territory established a Public Defender's Office, such office had equal responsibility with the courts and prosecution to see that defendant's rights were not violated; and where, prior to filing of complaint, prosecution notified Public Defender's Office that defendant and another it was representing, who were to be charged with same crimes, had a potential conflict of interest, and the Public Defender and prosecution did not advise defendant or the court of the conflict until Public Defender's notice to the court two years and two months after prosecution had advised Public Defender of the conflict, and no provision for separate counsel was made during that period, and court did not appoint counsel for defendant until more than five months after court was notified of the conflict, all three government institutions shared responsibility for a delay in trial which amounted to violation of right to speedy trial, and defendant, tried eight days after appointment of counsel, would also be found to have been denied effective assistance of counsel, and conviction would be reversed.

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*For Appellant:* PAUL W. ODEN, Micronesian Legal Services Corporation, Yap Office, Colonia, Yap District

*For Appellee:* JOHN K. RECHUCHER, District Attorney, Colonia, Yap District

Before BURNETT, *Chief Justice*, BROWN, *Associate Justice*, WILLIAMS, *Associate Justice*

A criminal complaint was filed on June 21, 1973, charging the defendant and David Gilpong with murder in the first degree and assault and battery in the death of Steve Tunfel on June 19, 1973. On July 13, 1973, prior to filing of the criminal information the District Attorney for the Yap District advised the Public Defender's Office of a potential conflict of interest between the two defendants. Since there was no other counsel available in the Yap District, the Public Defender's Office representative appeared at the initial bail hearings on behalf of both

defendants. A criminal information conforming to the complaint was filed on July 20, 1973. The Public Defender's Office representative continued to represent both defendants and the matter was set for trial during the early part of 1975.

As a result of a stipulation by counsel the trial was continued by order of the Court dated February 19, 1975. During this period neither the Public Defender nor the District Attorney notified the Court of the conflict of interest between the two defendants.

Upon the arrival of a new staff member of the Public Defender's Office a notice of conflict was filed on September 19, 1975 and this was the first time the matter was brought to the attention of the Court. The Court was unable to immediately provide separate counsel for the defendant due to the lack of an effective system for appointment and compensation of attorneys and the lack of available attorneys.

Counsel for defendant-appellant was finally appointed on March 10, 1976, eight days before the date set for defendant's trial. Defendant David Gilpong, represented by the Public Defender's Office, entered a plea of guilty to assault and battery and defendant was tried and found guilty of involuntary manslaughter.

Defendant-appellant has raised several issues on this appeal, the most significant of which are the allegations that he was denied his right to effective assistance of counsel and a speedy trial.

First we will consider whether defendant was afforded effective assistance of counsel.

[1, 2] One of the most fundamental rights guaranteed to any individual charged with a crime under our system of law is the right to have the assistance of counsel for his defense. *State v. Kane*, 479 P.2d 207, 209 (Hawaii 1971). This right goes far beyond the mere appointment of counsel

as the court recognized in *Cowan v. State*, 528 P.2d 327, 330 (Okla. 1974) wherein the court stated:

The duty imposed on courts to assign counsel is not an empty formality and is no way discharged by an assignment of counsel at such time or under such circumstances as to prevent counsel from rendering effective assistance in preparation and trial of the case—he must be given a reasonable time to prepare for trial, investigate the facts and examine the applicable law.

[3] Naturally no set formula or time limit is available to establish the reasonableness of the time which should be allowed counsel for preparation of a case. The reasonableness of such time must be determined by examining the facts and circumstances of the particular case.

[4] The principal charge of first degree murder against the defendant-appellant in this case represents one of the most serious crimes. The acts giving rise to the charges arose over two and one-half years prior to the appointment of counsel and counsel was given only eight days to prepare his defense. Although counsel did a credible job in his defense of the charges this court is compelled to find the period allowed counsel for preparation to be unreasonable in light of the circumstances thereby denying defendant-appellant of his right to counsel.

[5] In determining if the defendant-appellant's right to a speedy trial has been violated, the circumstances of the case must be reviewed in light of the four factors which form the basis of any balancing test as cited in *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed.2d 101, 92 S.Ct. 2182 (1972). The factors cited in *Barker v. Wingo* are: Length of the delay; defendant's assertion of his right; prejudice to the defendant; and the reason for the delay.

[6-9] LENGTH OF THE DELAY. It is well established the right to a speedy trial attaches when the defendant is arrested or formally charged with a crime. *U.S. v. Andros*, 484 F.2d 531 (1973). In applying this rule to the case at

hand the length of the delay from the date of the filing of the complaint to the date for trial is 33 months. While there is no specific time lapse which establishes a per se violation of a defendant's right to a speedy trial, there must be some substantial delay before there is any need to look further into the other factors. *Turner v. Estelle*, 515 F.2d 853 (1973). The longer the delay the greater the burden on the government to demonstrate justification for the delay which outweighs any prejudice to the defendant. *U.S. v. Rucker*, 464 F.2d 823 (1972). The length of the delay in this case of 33 months mandates a close review of the other balancing factors as cited in *Barker v. Wingo*, supra.

[10, 11] DEFENDANT'S ASSERTION OF HIS RIGHT. The record reflects the defendant did not demand a speedy trial. However, as recognized in *Barker v. Wingo*, supra, the mere failure to assert one's right to a speedy trial does not necessarily imply waiver of the right. The nature of the conflict in this case required that the defendant-appellant be represented by separate counsel and yet said counsel was only appointed eight days prior to the trial. Thus the defendant was not in a position to effectively assert or intelligently waive his right to a speedy trial. The court therefore considers the defendant has not waived his right to a speedy trial in this matter and that the failure to make the demand should not be weighed heavily against him.

[12] PREJUDICE TO THE DEFENDANT. It is stated in *Turner v. Estelle*, 515 F.2d 853 (1973), that: "Prejudice, like the other factors, is neither inherently necessary nor inherently sufficient for finding that the defendant's right to a speedy trial has been violated." It is evident from a review of the record in this case that defendant has suffered substantial prejudice as a result of the delay. During this 33-month period the defendant did

not have counsel and was not in a position to adequately investigate and preserve testimony or other evidence. One of the witnesses who was present during much of the activity which gave rise to the death of the victim was not present at the time of trial and his testimony was not otherwise available. It is clear from the record that such testimony could have had a substantial bearing upon the guilt or innocence of the defendant. While the mere lack of an available witness is not in and of itself sufficient prejudice, we consider the long period of denial of effective assistance of counsel together with the lack of the ability to preserve evidence as demonstrated in this case to be sufficient prejudice.

**REASON FOR THE DELAY.** It appears from the record in this case that the prosecution has been ready to go to trial and that only one continuance upon the stipulation of both counsel was granted by the court on February 18, 1975. It does not appear the prosecution has sought any tactical advantage from defendant's dilemma. The court stated in *Strunk v. U.S.*, 412 U.S. 434, 37 L.Ed.2d 56, 93 S.Ct. 2260 (1973):

Unintentional delays caused by courts or prosecutors are among the factors to be weighed less heavily than intentional delays, calculated to hamper the defense, in determining whether constitutional right to speedy trial has been violated but the ultimate responsibility rests with the government.

[13, 14] There is little question that it is the government's responsibility to bring the defendant to trial and the defendant has no duty to bring himself to trial. *Barker v. Wingo*, supra. As the term government is used in most cases it means the court and the prosecution. However, in view of the criminal justice system in the Trust Territory the term should not be so limited. The Trust Territory government has established the Public Defender's Office to represent indigent defendants and the Office is no less a governmental

function than the prosecution or the court and as such is charged with equal responsibility to ensure that the defendant's rights are not violated. This is particularly true in Micronesia where most of the individuals involved are unfamiliar with the American concepts of justice and therefore must rely on the Public Defender to initially protect their interests. There is little question under the facts of this case that the defendant should have had separate counsel and that such counsel should have been appointed at the earliest stage of the proceeding. *U.S. v. Davenport*, 478 F.2d 203 (1973). The conflict of interest between the defendant-appellant and David Gilpong should have been clear and obvious from the very beginning. In fact, the Public Defender's Office was notified by the District Attorney of the potential conflict even prior to filing of the formal criminal information. Yet, the Public Defender's Office did not take any steps to advise the defendant of the conflict or even make the court aware of the conflict until September 29, 1975. The record further reflects that from the time of filing of the original charges until the date the Public Defender filed a notice of conflict, the Prosecutor took no steps to advise the court of the conflict although it was obvious during this period that no provisions for separate counsel had been made. It thus appears the delay in this case rests not within the ambit of crowded court calendars, unavailability of witnesses or similar delays generally considered beyond the control of the government. Even taking the unique situation involved in Micronesia the delay could have been prevented by prompt action of all the representatives of the agencies which comprise the criminal justice system, the court, the prosecution and the Public Defender. Although no one individual or office has been responsible for the delay, all involved must bear some of the responsibility. After consideration of all of the foregoing factors, this court



finds the defendant's right to a speedy trial has been violated. And that defendant has been denied effective assistance of counsel, therefore, the finding of the trial court must be reversed.

Although defendant-appellant has raised other issues in the brief on appeal, however, the court does not consider said issues to be meritorious and there is no need to discuss them in view of the court's ruling on the denial of the defendant's right to a speedy trial and effective assistance of counsel.

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**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