

KAP, KISAN and CHIRO, Appellants  
v.  
TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee  
Criminal Case No. 225  
Trial Division of the High Court  
Truk District  
April 4, 1969

Motion to dismiss indictment by District Prosecutor. The Trial Division of the High Court, H. W. Burnett, Associate Justice, held that such a motion was addressed to the sound discretion of the court and that where the government has valid reason for electing to proceed with prosecution of the action the motion should be granted.

Motion to dismiss granted.

1. Criminal Law-Discretion to Prosecute

Section 491 of the Trust Territory Code relating to dismissal by Attorney General or District Attorney, was adopted from Rule 48(a), Federal Rules of Criminal Procedure, and thus court may be guided in its interpretation by the decisions of the Federal Courts. (Fed. Rules of Crim. Proc., Rule 12; T.T.C., Sec. 491)

2. Statutes--Construction

A statute adopted from another jurisdiction carries with it the construction placed upon it by the courts of that jurisdiction.

3. Criminal Law-Discretion to Prosecute

The purpose of the Rule allowing the Attorney General or District Attorney, by leave of court, to file a dismissal of an indictment, is to prevent harassment of a defendant by charging, dismissing and re-charging without placing a defendant in jeopardy. (T.T.C., Sec. 491)

4. Criminal Law-Discretion to Prosecute

A dismissal under Section 491 is the equivalent of the nolle prosequi under common law, since the defendant has not been placed in jeopardy, and does not prohibit the prosecution from filing another information at a later date. (T.T.C., Sec. 491)

5. Criminal Law-Discretion to Prosecute

It should be the function of the court, in determining whether leave to dismiss would be granted, to assure itself that the prosecutor has a valid reason for choosing not to proceed and that his motion to dismiss is not a part of a course of conduct designed to harass the defendant. (T.T.C., Sec. 491)

6. Criminal Law-Discretion to Prosecute

A motion to dismiss an indictment made by the Attorney General is addressed to the sound judicial discretion of the court, bearing in mind

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the purpose and intent of the statute and in exercising that discretion the court should take care that it does not infringe upon the proper exercise of executive discretion. (T.T.C., Sec. 491)

7. Criminal Law-Discretion to Prosecute

Where the government has valid reason for electing not to proceed with the prosecution of an action, the government's motion to dismiss should be granted. (T.T.C., Sec. 491)

8. Criminal Law-Discretion to Prosecute

A dismissal under Section 492 of the Trust Territory Code, would be a dismissal with prejudice, would prohibit any refileing of the same charge, and thus fulfill the intent of Section 491. (Fed. Rules of Crim. Proc., Rules 48(b), 48(a); T.T.C., Sees. 492, 491)

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BURNETT, *Associate Justice*

Defendants were originally charged in District Court Criminal Case No. 3070 with the offense of Assault and Battery. The District Prosecutor moved for dismissal and in support thereof advised the court that the defendants were police officers, that the alleged offense was committed while in the process of making an arrest, and that the Sheriff would handle the matter administratively. This was followed with a motion filed by the Public Defender's Representative, which recommended that the Prosecutor be removed for conflict of interest, that administrative action be made the responsibility of someone other than the Sheriff, and that dismissal be made contingent upon some administrative action being taken.

, The Presiding Judge of the Truk District Court, without ruling on the motion to dismiss, transferred the case to the High Court upon representations being made that it was to be handled by the District Attorney and the Public Defender. I consider the motion to dismiss, filed by the District Prosecutor, to be still pending, notwithstanding transfer to this court; in any event the motion has been orally renewed by the District Attorney.

**[1-3]** Section 491, Trust Territory Code, provides as follows:-

"Dismissal by Attorney General or District Attorney. The Attorney General or the District Attorney may by leave of court file a dismissal of an information, or complaint, or citation and the prosecution shall thereupon terminate. Such a dismissal may not, however, be filed during the trial without the consent of the accused."

Section 491 was adopted from Rule 48(a), Federal Rules of Criminal Procedure, and thus we may be guided in its interpretation by the decisions of the federal courts, since, as a generally recognized rule, a statute adopted from another jurisdiction carries with it the construction placed upon it by the courts of that jurisdiction.

"In adopting this portion of the Federal Rules of Civil Procedure, we adopted the established interpretation as to its application. . . ." *Reed v. Allen*, 121 Vt. 202, 73 A.L.R.2d 1161.

While decisions which follow the date of adoption are not necessarily controlling, they are nevertheless persuasive, particularly so in this case, since I find no prior decision in the Trust Territory construing Section 491.

"It is now provided by the Federal Rules of Criminal Procedure that the Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment. Rule 48 (a) Fed. Rules Crim. Proc. 18 U.S.C.A. In the absence of the Rule, leave of court would not have been required. The purpose of the Rule is to prevent harassment of a defendant by charging, dismissing and re-charging without placing a defendant in jeopardy. *Woodring v. United States*, 8th Cir. 1963, 311 F.2d 417." *United States v. Cox*, 342 F.2d 167 (1965).

**[4, 5]** A dismissal under Section 491 (or under Rule 48 (a)) is the equivalent of the nolle prosequi under common law, since the defendant has not been placed in jeopardy, and does not prohibit the prosecution from filing another information at a later date. Thus it should be the function of the court, in determining whether leave to dis-

miss would be granted, to assure itself that the prosecutor has a valid reason for choosing not to proceed and that his motion is not a part of a course of conduct designed to harass the defendant.

It is important that the court at all times bear in mind the line of separation between its area of responsibility and that of the executive branch of our government. It is not the province of the court in this instance to concern itself with questions of administrative discipline and its decision should not be made dependent on any such action being taken.

[6, 7] The motion is addressed to the sound judicial discretion of the court, bearing in mind the purpose and intent of the statute. In exercising that discretion the court should take care that it does not infringe upon the proper exercise of executive discretion, here vested in the District Attorney. From the reasons advanced by the District Prosecutor, I conclude that the government has valid reason for electing not to proceed with the prosecution of this action and the motion to dismiss should therefore be granted.

[8] While not necessary to decision of the question presented by this motion, it may be appropriate, in order to emphasize the distinction, to consider further the limits placed upon the court with respect to the continuance of a prosecution if the court, in its exercise of discretion, were to deny leave to dismiss.

"The Attorney General is the head of the Department of Justice, a part of the Executive branch of the Government. Even were leave of Court to the dismissal of the indictment denied, the Attorney General would still have the right to adhere to the Department's view that the indictment cannot be supported by proof upon a trial of the merits, and accordingly, in the exercise of his discretion, decline to move the case for trial. The Court in that circumstance would be without power to issue a mandamus or other order to

compel prosecution of the indictment, since such a direction would invade the traditional separation of powers doctrine. And if the indictment continues to remain in status quo, each defendant would be in a position to move for dismissal of the indictment under Rule 48 (b)." *United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n.*, 228 F.Supp. 483.

A dismissal under Rule 48(b) (Section 492 of the Trust Territory Code), would be a dismissal with prejudice, would prohibit any refile of the same charge, and thus fulfill the intent of Rule 48(a) (Section 491, Trust Territory Code).

The motion to dismiss is granted, and the defendants discharged.

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