IN THE FIJI COURT OF APPEAL

530

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. 11 OF 1993
(High Court Criminal Case No. 10 of 1992)

BETWEEN

ALIFERETI NAQIRI **APPELLANT**

-and-

THE STATE **RESPONDENT**

Mr. T. Savu for the Appellant
Mr. D. McNaughtan for the Respondent

Date and Place of Hearing Suva
Date of Delivery of Judgmen

JUDG.

On 24 March 1993 the appellant was convicted of murder and sentenced to life imprisonment. His appeal is against the conviction. The grounds of appeal, as formally stated by Mr Savu, are :-

[1] That the learned trial judge erred in law in failing to consider that the effect of caution given by the Police Officer under the Judges Rules given the long interval between the time he was held in custody up to the time he was eventually interviewed and charged, which undoubtedly would have waned the Appellant;

[2] That the learned trial judge erred by not finding that the caution given in accordance with the Judges Rules was not only inadequate but more importantly unconstitutional; and

[3] ***That the learned trial judge erred in law in his summing up by failing to caution the Assessors in the accepting of the stick as evidence because the "red spots" found on it were never proven to be human blood nor being the same blood group as that of the Appellant.***

The person whom the appellant was charged with murdering was found in Vatumali, Navosa lying dead on the ground at a place where buses were parked. The case for the prosecution depended almost entirely on admissions made by the appellant during an interview conducted by a police sergeant just over a month after the death occurred and also in a brief statement made shortly after the interview when the appellant was formally charged. There was no evidence directly linking the appellant to the killing other than those admissions.

The appellant, who was related to the deceased, was among a number of persons interviewed by the police in the days immediately following the killing, which apparently occurred in the early hours of the morning on 16 May 1992. However, no action was taken against him at that time. It was not until 16 June 1992 that the police went to a house where the appellant was residing with his wife's family, asked him to accompany them to Sigatoka police station and subsequently took him to Keyasi police post where the interview was conducted in which he made the admissions. He was taken from the house at 8.00am and then taken on to Keyasi police post soon after noon. The interview commenced at 11.25pm; it concluded at 4.45am on 17 June 1992. The first occasion on which a caution was administered to the

appellant was apparently at the commencement of the interview.

At the trial counsel for the appellant objected to the admission of the record of interview and the statement made after charge on the ground that they were obtained by unfair and oppressive means and in breach of the Judges Rules and that they were prejudicial. A trial on the voir dire was conducted and at its conclusion the learned trial judge ruled that the record of the interview and the statement made after charge were admissible. Evidence of them was presented to the Court in the presence of the assessors.

The interview was conducted by Sergeant V. Tasivatu in the Fijian language. He recorded it in writing in that language and subsequently translated it into English. Soon after the commencement of the interview and the administration of the caution, he recorded a question asked by him and the answer to it. The English translation reads :- Q. **"Now, what you know about the death of [the deceased]?"** A. **"I had punched him and also hit him with a piece of timber, but I did not mean to kill him."** In answer to a number of other questions the appellant was recorded as explaining why he had punched and hit the deceased. He was recorded as saying that he had subsequently placed a white terylene sack under the deceased's head and as having been shown such a sack which was found under the head of the deceased and having said that it was like the sack which he placed there. It was recorded also that he was shown a stick which had been found a short distance from the body and identified it as the stick

with which he hit the deceased, that he was taken from the police post to the place where the body had been found and showed the police the places where the fighting started and where he picked up the stick, and also other places which he had been recorded as having referred to during the interview. He was recorded as having agreed, after returning to the police post, that those were the places he had referred to earlier in the interview. The statement which he allegedly made after charge was recorded in the Fijian language and an English translation made. It reads:- **"I agree with my statement given to the police officer before this. I didn't mean to kill [the deceased]. I only wanted to assault him or harm him because of his behaviour towards me and my family."**

In the course of the trial on the voir dire the appellant gave evidence that, while at Keyasi police post before he was interviewed, he had been assaulted by a relative and also by a police officer and had suffered injuries to his ribs and face. He gave evidence also that he did not take part in the interview. He acknowledged that the signatures on the record of the interview were his but said that he had been asleep when it was prepared and that he had simply signed it when requested to do so. He denied that he made the statement recorded after charge but admitted that he signed it. He said that he signed the record of interview and the statement partly because he had been intimidated by the assaults and partly because a police inspector had told him that, if he did so, he would be charged with manslaughter and not murder. He admitted that he was taken out to

the scene of the offence in the middle of the night but said that he slept in the vehicle and did not point out any places as alleged in the record of the interview. He admitted also that he had not complained to the police inspector about being assaulted or to the Magistrates' Court until the third occasion on which he appeared in court.

During the trial on the voir dire a number of police officers gave evidence that the appellant was not assaulted, that he took part in the interview and said and did what was recorded and that he did so voluntarily. The inspector gave evidence that he had not offered any inducement to the appellant. The learned trial judge, in giving reasons for ruling that the record of interview and the statement after charge were admissible, made findings of fact adverse to the appellant, broadly accepting the evidence given by the police officers. The substance of the evidence given on the voir dire was subsequently again before the assessors. As each of them expressed the opinion that the appellant was guilty of murder, it is apparent that all of them rejected the appellant's evidence.

We can dispose quickly of the third ground of appeal. The learned trial judge's address to the assessors was full and carefully expressed. His reference to the stick was made during consideration of the record of interview. His Lordship referred to what the appellant was recorded as having said, including that he had allegedly admitted that the stick exhibited at the trial and shown to him was the stick he had used to hit the deceased.

In that context the fact that the red spots on the stick had not been proved to be human blood was not significant.

It is convenient to deal with the first and second grounds together. In spite of the terms in which they are expressed, essentially two arguments were advanced in support of them. They were -

> *(1) that the admissions were not made voluntarily, the appellant's will having been overborne by the long period when he was kept at Sigatoka police station and then Keyasi police post before the interview was commenced; and*
>
> *(2) that by the time that the interview commenced the appellant was being detained in breach of section 6 of the Constitution and that it was contrary to the public interest to admit evidence of the interview conducted while that breach was occurring.*

We shall now consider the first of those arguments. At the trial on the voir dire the evidence was directed mainly to the questions whether the appellant had been assaulted or offered an inducement. Little evidence was given by the prosecution witnesses about how the appellant spent his day or what meals were provided for him; in answer to questions put in cross-examination a police officer said that he could not remember whether the appellant had had lunch but that he had had dinner. The appellant gave evidence that he was given only one meal, at 4pm, and had been given tea for breakfast and lunch; he said that he was sleeping in a room at Keyasi police post from 5.30pm until about midnight. He was given cocoa during the interview.

Evidence was given by the police officers that the interview was not conducted earlier in the day because they were out trying to locate certain other persons in connection with the investigation.

The learned trial judge, in giving his ruling to admit the evidence of the interview and the statement after charge, took account of those facts. He said :-

> *"I am very much aware of the effect of long wait in the exercise of my discretion. It must be noted that accused was sleeping in the room provided for him at the Police Post. The accused is a very strong looking man aged 27 years. If accused had no sleep or rest and no meal before interview then there would be some reasons to find that this was unfair and oppressive. It could not be said his will sapped or crumbled. The accused may have suffered personal inconvenience. Personal inconvenience is one thing and situation of oppression another.*
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> *I find nothing necessarily unfair or oppressive in the tactics adopted by the interviewer in this case. The purpose of interview is to solve crimes and without them much crime would remain unsolved. It is the duty of courts to ensure that brutal methods, and unfair or oppressive methods are not used, not to deprive the police of every effective means of dealing with or solving crimes."*

He had earlier observed that the appellant had gone **"willingly"** with the police officers and had made no attempt to leave the police post. We consider that the evidence may not support what is implied in those terms, that is to say that the appellant believed that he was free not to go with them and not to stay at the police post if he wished to leave. Nevertheless,

we consider that his Lordship was entitled, on the evidence, to conclude as he did that there was no oppression or overbearing of the appellant's will such as to make involuntary the admissions he made during the interview. In coming to that conclusion we have regarded as significant that at the interview, although the appellant made admissions, he was clearly trying to exculpate himself.

The second argument, however, has caused us more concern. Section 6 of the Constitution prohibits depriving a person of his personal liberty except, inter alia, **"upon reasonable suspicion of his having committed ..... a criminal offence."** It requires that, as soon as reasonably practicable, he is to be informed of the reason for his arrest or detention and that, if not released, he is to be **"afforded reasonable facilities to consult a legal representative of his own choice"** and **"brought without undue delay before a court".** D/PC Tuinamaro gave evidence that on 16 June 1992 he **"went to [the village] to pick Accused and his brother"** and **"brought"** him to Sigatoka police station, whence he was **"taken"** to Keyasi police post. D/I Lesavua gave evidence that the appellant **"was brought to Police Station"** from the village and **"from Sigatoka Police Station to Keyasi Police Post".** The appellant gave evidence that at the village he was **"asked"** to go to the police station and that there D/I Lesavua told him that he had killed [the deceased] while drinking and questioned him for a while. If the appellant was being detained, it appears that he was told the reason. There is no evidence that he asked to see a lawyer or was told that he might do so if he wished.

The questions which have to be considered are :-

> *(1) Was the appellant under arrest or in detention and, if so, from what time?*
>
> *(2) Was there any breach of section 6 of the Constitution either because he was not afforded reasonable facilities to consult a lawyer or because of failure to take him before a court on 16 June 1992?*
>
> *(3) If the answer to (1) is "Yes" and that is also the answer to (2), ought the evidence of the record of the interview and of the statement after charge to have been excluded?*

It is, of course, a question of fact, and of inferences to be drawn from facts established, whether the appellant was under arrest or detained. The learned trial judge decided that he was not. If there was evidence from which he could reasonably draw that conclusion, we should not, we consider, interfere with his decision. However, we are not convinced that that is the case. Although the prosecution disputed the appellant's evidence that he was locked in a room at Keiyasi police post, the evidence given by the prosecution witness was not that he was free to leave the police post but only that he was free to move about there. No evidence was presented to show that he was given the option of not accompanying the police officers to Sigatoka police station or of not being taken to Keiyasi police post. The appellant is an unsophisticated villager. There was an onus on the prosecution to show that he went, and remained with the police, voluntarily and was not being detained. In our view he may well have been in detention for the whole of that day.

There was no evidence that the appellant was afforded any facilities to consult a lawyer. Again the onus of proving that he was afforded reasonable facilities lay on the prosecution. In our view, therefore, there may well have been a breach of the requirements of section 6 of the Constitution by reason of failure to provide such reasonable facilities.

Whether a person who was being detained was brought before a court with undue delay must always be a question of fact, although often the answer will be clear. The circumstances of the present case are such that, although a borderline case, in our considered opinion the delay was not such as should be categorised as undue delay.

Section 19 of the Constitution provides redress for persons affected by contravention of the provisions of Chapter II (which contains section 6). Remedies for some types of contravention, e.g. an action for false imprisonment, are available at common law or as the result of statutory provision. Some acts which are breaches of the provisions of Chapter II may be punishable as criminal offences. It does not necessarily follow, however, that the fact that there has been a breach of section 6 makes inadmissible the record of an interview or a statement made after caution.

In our view, so far as the consequences are concerned, such a breach is very similar to a failure to comply with the Judges' Rules and should be treated by the trial Judge in much the same

way. The consequences of a failure to comply with the Judges' Rules were discussed by the Court of Appeal (Criminal Division) in **Prager v R** (1971) Cr. App. Rep.151. The Court observed that it may render records of interview and statements inadmissible but that the decision whether they should or should not be admitted was a matter within the discretion of the trial Judge. In our view in the case before us on appeal, if there was a breach of section 6 of the Constitution, the learned trial Judge had such a discretion. Of course, the discretion had to be exercised reasonably. That meant taking into account what was fair and reasonable in all the circumstances but, above all, whether or not the questions had been answered, and the statement made, voluntarily.

We can find no basis for holding that His Lordship erred in admitting them. He found, as he was entitled to do on the evidence before him, that they had been given and made voluntarily. He placed considerable weight on that. Consequently, even if there was a breach of section 6 of the Constitution, we would dismiss the appeal.

We have come to the conclusion that the evidence of the record of the appellant's interview and the statement he made after being charged were properly admitted. Consequently, we dismiss his appeal.

Decision

Appeal dismissed.

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Sir Moti Tikaram
President Fiji Court of Appeal

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Mr. Justice I. R. Thompson
Judge of Appeal

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Mr. Justice P. Hillyer
Judge of Appeal