**STATE**

**v.**

**WAISALE ROKOTUIWAI**

[HIGH COURT, 1996 (Pathik J) 27 November]

Criminal Jurisdiction

*Crime: procedure- disputed confession statement- inadvertent disclosure to assessors without prior trial within a trial- retrial ordered.*

During the course of a trial the record of a written cautioned interview with the accused was admitted after a trial within a trial was held. Subsequently and without warning to the Defence evidence of a complete oral confession was adduced in the presence of the assessors. In view of the material irregularity which had occurred the trial was aborted and a retrial ordered.

Cases cited:

*Bijendra Rao & Ors v R* (Crim App 41/86- FCA Reps 86/82
*Hennessey* (1979) 68 Cr. App. E. 419
*Judith Theresa Ward* (1993) 96 Cr. App. R. C.A.
*R v Murphy* (1869) L.R. 2P.C 535
*R v Olivo* (1942) 2 All ER 494
*R v Sarek* [1982] V.R. 971
*R v. Williams* (1925) 19 Cr. App. R 67

Interlocutory application in the High Court.

*J. Naigulevu* and *Ms Rachel Olutimayin* for the State
*Dr. John Cameron* for the Accused

**Pathik J**:

The accused is charged with the offence of murder contrary to s.199 of the Penal Code (Cap. 17) in that on 17 May 1995 at Kuku, Nausori in the Central Division, he murdered Manasa Tuisovivi Lewatora.

During the trial of this action, there was a trial within a trial. On 21 November 1996 I ruled that the written cautioned interview statement obtained from the accused on 17 and 18 May 1995 will be admitted in evidence as having been made voluntarily with the exclusion of questions and answers Nos. 100 to 105 which are inadmissible in the exercise of the Court's discretion as having been obtained in an improper and unfair manner.

Soon after the said Ruling the trial proper continued and the evidence of two witnesses were taken. On 22 November Det. Sgt. Eroni Gadolo (Eroni), the interviewing officer was testifying again (he was called in the trial within a trial as well) in the trial proper in the presence of the assessors.

In his evidence in chief before the assessors Eroni testified that there was an oral interview of the accused by him for an hour before the written cautioned interview took place some few hours later. In his evidence on being asked in examination-in-chief he told the Court that the accused made a full confession in the oral interview and he continued with the details of what the accused said in that regard.

Neither the prosecution stopped asking questions on this confession nor did the learned defence counsel raise any objection to evidence of confessionary nature being introduced in the trial proper in the presence of the assessors. However, Dr. Cameron raised an objection later on in the absence of the assessors as to the introduction of this damaging piece of confessionary statement about which he had no knowledge.

The learned Prosecutor Mr. Naigulevu agreed that there was "material irregularity" in that regard and that he has been instructed by the learned Director of Prosecutions to ask for re-trial and for the discharge of the assessors.

This is the application that is before me.

I set out briefly how this situation arose in this case.

In his evidence Eroni stated, inter alia, in so far as it is relevant to this application, that upon reporting on duty on 17 May 1995 at 7.00 a.m. he received a report of a man found on Bau Road early that morning. All crime officers had to be on stand by for briefing by ASP Vunisa.

Eroni was appointed the Investigation Officer (I/O) in this case.

The accused was brought to the Crime Office by Constable Tora. Eroni said that he interviewed the accused verbally for an hour in his office. He said that he suspected that he was the one who was involved in this matter. When the accused burst into tears, he said that "I suspected he must have been the one involved". He said that he "admitted to me that he was the one who was at the scene who kicked and assaulted the deceased that night".

When he told him "story" of Unaisi and Naibuka "he broke down" Eroni said that when he "admitted to me I cautioned him. He was with me for about an hour. I was waiting for the arrival of ASP Vunisa. One hour not continuous". When he broke into tears Eroni asked him if he wanted to drink water or relieve himself; he said "I took him when he wanted to relieve himself". It was then that he interviewed him. The oral interview was from about 1.00 p.m. to 2.00 p.m.

After that, he said, there was a break when some other witnesses were brought to the Station. At about 5.00 p.m. Eroni was instructed by ASP Vunisa to interview the accused formally which he did at 5.00 p.m. when two police officers were present. This was the written cautioned interview which the Court allowed to be admitted after a trial within a trial with the exception of questions and answers from question 100 to 105.

When Eroni was testifying and was going through the written cautioned interview there was lunch break and when the trial resumed at 2.15 p.m. the learned defence counsel asked the court if the assessors could be released while he made an application in their absence.

Dr. Cameron complained that he has been taken completely by surprise with the introduction of the verbal confession. He said that there had never been a mention of an earlier oral confession of the nature stated by Eroni. He said that he could not object to this evidence of confession being adduced in the presence of assessors and he was thinking of a way out and now he has found a convenient time to make it.

He said that with the introduction of this verbal confession the trial within a trial proceeded on a "false basis". The nature of the evidence involving the confession should have been drawn to his attention before and he would have raised objection to its admissibility in evidence and perhaps had that been done the statement allowed to be admitted would not have been admitted.

Dr. Cameron applies to Court to ask the Prosecution to reconsider its position. He said that the accused should not have to face a retrial or a mistrial. This confession was not led in the trial within a trial and now it is being led in the trial proper.

In view of this application the Court asked Prosecution to state its position in the matter. Initially Mr. Naigulevu replied that Dr. Cameron could have cross-examined on this in the trial within a trial. Then he suggested that the Court could ask assessors to disregard this alleged objectionable piece of evidence and that this procedure is not unusual and it can be done.

I then asked the Prosecution to give a serious consideration to the situation that has arisen an allowed a short adjournment for the purpose.

Then after the adjournment both counsel saw me in my Chambers. The learned counsel for the Prosecution stated that there has been a material irregularity and he has been instructed by the Director of Public Prosecutions to ask for retrial and that assessors be discharged in fairness to the accused. As an alternative he asked the Court to considers, if the assessors could be directed to ignore Sgt. Eroni's evidence as to oral confession.

In reply Dr. Cameron stated it would be difficult for him to agree to him cross-examining as an alternative. He sought an adjournment until Monday to consider his approach to the matter as a result of what the D.P.P. is now intending to ask the Court to do.

On resumption of trial on Monday 25 November in the absence of assessors when asked by Court Mr. Naigulevu said that the position is still the same as it was on Friday in that there is material irregularity and that upon DPP's instructions he is asking for a re-trial and discharge of assessors.

Both counsel made submissions.

A The Prosecution submitted that this is not a case in which it can enter *nolle prosequi*. It said that the Court has inherent jurisdiction to order a retrial. Without producing any authority Ms Rachel Olutimayain said that the present Chief Justice did this in Supreme Court Case No. 73/85 Bijendra Rao & others. She said that matter is entirely in the Court's discretion.

B Dr. Cameron submitted that to direct the assessors to disregard evidence regarding confession will not solve the problem that has arisen. This is not an appropriate case where he can ask for an acquittal. On retrial he submitted that Court has to take into consideration how far the case has proceeded and what evidence has been introduced. He said that we are nearing the end of the prosecution case. The irregularity has been brought about by the prosecution and he went to the extent of saying this has been done quite deliberately. He said that it will be entirely C unfair to allow the entire prosecution case to run again. The Prosecution should not be permitted to take advantage of its own conduct. He argued that this is just the case where the prosecution should enter *nolle prosequi*. Under the Constitution the accused is entitled to a fair trial and within a reasonable time. There will be a considerable delay if there is a re-trial; he said looking at the Prosecution's evidence at worst it was a case of manslaughter but he told the Court that the D accused is not charged with it nor is he pleading guilty to it.

Dr. Cameron stated that there are two possible courses open, firstly, to refuse the prosecution's application but the verbal "confession to stand and there be no further reference to the confession and that the written statement be not read any further", namely, to stop at the point the witness Eroni testified. Alternatively, to E allow application conditional upon the discharge of assessors and the State paying legal costs to be fixed by the Chief Registrar and further the Prosecution provide transcript of this trial at its own costs at the relevant time.

Determination of the Issue

F On the sudden difficulty that has arisen in the middle of a serious case after three weeks' of trial it is not possible for the Court to continue with the trial particularly because the alleged confessionary statements in the oral interview of the accused by Eroni has already been spilled before the assessors and it would be well nigh impossible to have those statements eradicated out of their minds even with an appropriate direction without causing grave injustice to the accused.

G That this is the situation in this case is accepted by both counsel.

From the decided authorities it emerges as a principle that assessors should and can be discharged by court in a situation such as this. It was so held in R v Sarek [1982] V.R. 971 by the Full Court of the Supreme Court of Victoria. It said that "the trial judge had power of his own motion to discharge the jury" if "he was of opinion that there was a high degree of need" (at p.982).

I adopt the following words of McInerney, J at p.983 to the situation in this case:

> Accordingly, I have come to the conclusion that, notwithstanding the attempts made by the learned trial Judge to correct the error made by the prosecutor in cross-examining without leave as to the prior convictions of the applicant, once those convictions had come out in evidence there was a situation in which it was impossible to have a trial according to law, in that the jury's mind by that time must have been irreversibly infected by that knowledge of the applicant's prior convictions. No redirection could, I think, have been effective to undo the result of the improper cross-examination conducted by the Crown prosecutor."

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As in Sarek I am strongly of the view that once the knowledge of the oral confession had come to the knowledge of the assessors "irreparable damage had been done to the prospects of obtaining a trial according to law" and there would be miscarriage of justice if the trial proceeded.

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The Prosecution agrees that there has been a material irregularity. The Court having ruled that part of the written interview was inadmissible, it was the Prosecutor's bounden duty not to introduce into the trial proper the very damning piece of evidence in the form of an oral confession. I agree with Dr. Cameron that he cannot be dreaming of what is in the verbal interview regarding confessions unless it is brought to his attention and thereby he would have had the opportunity to object to its admissibility. Except for a passing reference to verbal interview in the trial within a trial there was no indication of it in the deposition or divulged to the learned Defence Counsel. The following passage from the judgment of Glidewell L.J. in Judith Theresa Ward (1993) 96 Cr. App. R. is apt:

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> "the defendant is plainly entitled (subject to statutory limitations on disclosure, and the possibility of public interest immunity, which we discuss below) to be supplied with police evidence of all relevant interviews with him. We would adopt the words of Lawton L.J. in Hennessey (1979) 68 Cr. App. E. 419, 426, where he said that the courts must,
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> > '... keep in mind that those who prepare and conduct prosecutions owe a duty to the Courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence. We have no reason to think that this duty is neglected; and if ever it should be, the appropriate disciplinary bodies can be expected to take action. The judges for their part will ensure that the Crown gets no advantage from neglect of duty on the part of the prosecution."

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I must say that the Prosecution was very fair and its actions were well above board throughout up to the conclusion of the trial within a trial when I gave

Ruling to which reference has already been made herein before. But for reasons best known to the prosecution they were oblivious to the consequences of Eroni's evidence on confession and they completely forgot all the rules regarding the practice pertaining to the admissibility of evidence of a confessionary nature.

It was well within the powers of the learned Prosecutor to have steered clear of this oral interview by not asking any further questions in the evidence in chief. By continuing to adduce evidence in the manner he did led to the divulging of the full details of the confession. It was too late then to do anything about it. The learned Defence counsel could also have raised objection immediately there was any inkling of confession creeping in but I cannot hold it against him in delaying his objection in the wider interest of justice.

I am dumb-founded by this faux pas on the part of the Prosecution and I cannot imagine it to be a deliberate act coming from an experienced prosecutor.

Be that as it may, the blame lies squarely in the lap of the Prosecution for having adduced such a damaging piece of evidence in the manner it did in complete disregard of the interests of the accused and his expectation of a fair trial in a Court of justice. I fail to understand why the learned Prosecutor departed from the practice and procedure pertaining to confessions either oral or written in a trial. There is no denying the fact that persons can be convicted on confession alone, but there is a duty cast on the Prosecution in consultation with the defence to ascertain if defence is challenging the admissibility of confessions lest one falls into the trap as in this case.

The disgraceful manner in which the two prosecutors conducted this case on the aspect under scrutiny leaves much to be desired. They have done exactly the opposite of what D.P.P. has been lecturing to them to be fair, among other things. I hope the D.P.P. personally seeks an explanation for her prosecutors' conduct and takes appropriate measures. It is too serious a matter to be ignored when one looks at the time and expense involved in conducting trials.

The Court draws the prosecution's attention for the exercise of greater care in this regard in future cases. This very grave irregularity is something which it is desirable should not have occurred.

The important question for the purposes of the present case is to determine whether to award a *venire de novo*.

I find that in the circumstances of this case I have no alternative but to stop the case and discharge the assessors after having seriously considered the submissions of counsel.

Counsel have not been able to point to any provision in either the Penal Code or the Criminal Procedure Code which allows me to make an order for retrial. Although Ms Rachel referred to the case of Bijendra Rao & Ors v R (Crim App 41/86 F.C.A. FCA Reps 86/82) she was not able to produce the relevant portion

to Court on the matter of retrial in that case. But I have found a reference to the trial having been aborted as contained in 41/86 at p.12-13 of the photocopy judgment as follows:

> "We are not aware of the reason for aborting the earlier trial, but we understand that it was at an early stage, and presumably for some technical reason. No suggestion has been made or evidence advanced that something had emerged to prejudice the mind of the trial Judge."

Hence that case is not a precedent that there was order for retrial.

As was stated by Tucker J in R v Olivo [1942] 2 All ER 494 at 495, the "court clearly has jurisdiction to order a *venire de novo* which, of course, means an order on the appellant to attend and take his trial again in respect of the charge that lies against him, to plead to the indictment and be tried thereon duly according to law."

I have borne in mind the circumstances and facts of this case in deciding whether or not there should be an order for *venire de novo*. In a case where the defendant has been wrongfully denied a right to challenge a juror (R v. Williams (1925) 19 Cr. App. Rep., 67, CCA) a *venire de novo* was ordered; but it is not for any irregularity the court will make such an order such as, for example, jury having access to newspaper reports of case (R v Murphy (1869) L.R. 2P.C 535).

In this particular case having heard the arguments on both sides, looking at the facts surrounding this case and the circumstances in which the material irregularity came to be introduced which rendered such irregularity in my view incurable, I have come to the conclusion that the most appropriate and proper course which should be taken is that there should be a *venire de novo* and that the assessors be discharged which means that the accused to attend at the next Criminal Sessions and take his trial again in respect of the charge that lies against him, to plead to the indictment and be tried thereon according to law.

I accordingly order a *venire de novo* before a fresh panel of assessors.

I would like counsel to address me on the question of bail for the accused in the meantime.

*(Assessors discharged, venire de novo ordered.)*