STATE v PECELI MASIDOLE and 2 Ors

HIGH COURT — CRIMINAL JURISDICTION

SHAMEEM J

10–16, 17 April 2002

[2002] FJHC 61

Evidence — admissions — admissibility of confessions — person in authority — right to silence — Constitution s 27(3) — Judges Rules.

The three Accused persons challenged their admissions made to the police, to the Chairman of the Village Crime Prevention Committee, and to the doctor regarding a burnt house. They alleged the admissibility of their confessions made to a person in authority.

Held — The result of the deprivation of the right to be told of the right to remain silent rendered the confession by the 1st Accused to Mr Namalu made in the presence of the police unfair and inadmissible. The prosecution may not lead evidence of it. All other admissions are admissible.

Admissions admissible except that of the 1st Accused to Adre Namalu.

Cases referred to

Director of Public Prosecutions v Ping Lin [1976] AC 574; *Ibrahim v R* [1914] AC 599; *Law v Canada* (1999) 170 DLR (4th); *Magee v United Kingdom* (2000) 8 BHRC 646; *R v Butcher* [1992] 2 NZLR 257; *R v Goodwin* [1993] 2 NZLR 153; *R v Harper* [1994] 3 SCR 343; *R v Sang* [1980] AC 402, cited.

Ganga Ram and Anor v R Criminal Appeal No AAU46/83; *Gough v Chief Constable of the Derbyshire Constabulary* [2001] 4 All ER 289; *R v Elliot* (1996 – 98) 4 HRNZ, considered.

Tabuya and *Kurisaqila* for the State

R. Lal for the 1st Accused

N. Shivam for the 2nd and 3rd Accused

Ruling

Shameem J. The three Accused persons challenge their admissions made to the police, to the Chairman of the village Crime Prevention Committee, and to the doctor at the Navua Hospital. There are six sets of admissions challenged. The grounds for challenge are that:

(1) The 1st Accused was not cautioned before he made his first admission to Special Constable Iowane at Saliadrau Village on the 2nd of November 2000;

(2) The 1st Accused was not cautioned before he made his second admission to Adre Namalu, the Chairman of the Crime Prevention Committee on the 2nd of November 2000;

(3) The 1st and 2nd Accused were questioned while drunk when they made admissions to Sgt Aca White, at Adre Namalu's house on 2 November 2000;

(4) The 1st and 3rd Accused were unfairly questioned by Dr Ranjeet Singh at the Navua Hospital on the 3rd of November 2000;

(5) The 1st, 2nd and 3rd Accused did not understand their right to remain silent, or their right to counsel when they were interviewed by police officers at Navua Police Station on the 3rd of November 2000, and their interviews were given as a result of oppressive and unfair conduct by the police.

In order to determine the admissibility of these admissions, a trial within trial has been held commencing on April 10th 2002.

The principles which determine the admissibility of confessions made to a person in authority by an Accused person, are governed by the Judges Rules and the Constitution.

The preamble to the Judges Rules states as follows:

That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.

In *Ganga Ram and Shiu Charan v R* Criminal Appeal No AAU46/83, the Fiji Court of Appeal outlined the two grounds for the exclusion of confessions at 8:

It will be remembered that there are two matters each of which requires consideration in this area. First, it must be established affirmatively by the Crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force, threats of prejudice or inducement by offer of some advantage — what has been picturesquely described as "the flattery of hope or the tyranny of fear. Ibrahim v R [1914] AC 599; *Director of Public Prosecutions v Ping Lin* [1976] AC 574.

Second, even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which the police behaved, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or by unfair treatment.R v Sang (1980) AC 402 436 *at C–E. This is a matter of overriding discretion and one cannot specifically categorize the matters which might be taken into account.*

Further, the rights of suspects who are arrested or detained, are protected by s 27 of the Constitution. These rights include the right to be informed "promptly in a language that he or she understands that he or she has the right to refrain from making a statement". [s 27(3)]. A breach of the Constitution may also be a ground for excluding admissions. Counsel for the 2nd and 3rd Accused submitted that the rights under s 27 of the Constitution are absolute, that is, that breaches must lead to exclusion. However, the Bill of Rights contained in the Constitution contains a number of rights, together with broad values which might conflict with other broad values. Where there is such a conflict, as there might be between the right of an Accused person, and the public interest in bringing offenders to justice, it is the judiciary which has the responsibility of deciding how a balance is to be struck in a particular case (see *Law v Canada* (1999) 170 DLR (4th)). As Laws LJ said in *Gough v Chief Constable* (2001) 4 All ER 289, 320:

To give effect to the right's uppermost assertion — its logical extreme — would alike confound the right's moral credentials and its practical utility. The reason is, first, that the claim of moral authority for any right given by the general law rests upon the fact that the right belongs to every citizen, as do all other rights thus given: so that in any particular case, whether as a clash of interests, it is inherent in the nature of the right itself that the individual who claims its benefit may have to give way to the weight of other claims. And secondly, the rights practical utility rests upon the fact that there can

be no tranquillity in the state without a plethora of unruly individual freedoms, which will be measured in the language of rights; anything else looks tyranny in the face without blinking; so that in any particular case, the Crown the possessors of one such right can consign the others beneath the throne, which will sooner or later undercut the community fabric.

In *R v Elliot* (1996–98) 4 HRNZ, the New Zealand Court of Appeal held that the right to consult a lawyer without delay and to be informed of that right are not to be regarded as absolute and should be interpreted according to the individual circumstances of the case. This was also the view of the European Court of Human Rights in *Magee v United Kingdom* (2000) 8 BHRC 646.

I find therefore that the obtaining of a confession after depriving a suspect of his rights under the Constitution may lead to the exclusion of the confession. The burden is on the state to prove, first non-deprivation and second that if there was deprivation, then the confession should still be admitted. Finally the burden is on the prosecution to prove, first voluntariness, second lack of oppression, and third fairness, beyond reasonable doubt.

In the course of the trial within a trial, the prosecution called thirteen witnesses, most of whom were police officers. The defence called no evidence.

Special Constable Iowane Taukeisalili gave evidence that the burning of the deceased and his house was reported to the Namosi Police Post by Adre Namalu, the Chairman of the Crime Prevention Committee of Saliadrau Village. He and other special constables accompanied Mr Namalu to the village and saw the three Accused persons walking around the village. SC Iowane saw the 1st Accused seated at the front door of his house. His hand was wrapped in cloth and he was soaking it in a bucket of water. At that point he had been told by a villager (Mataika) that the 1st and 3rd Accused had been involved in a fight with him outside the deceased's home just before the fire, but that he had no information linking the 1st Accused to the offence.

SC Iowane and Makario walked over to the 1st Accused and the following conversation took place:

Q: Why is your hand wrapped?
A: It is burnt.
Q: How was it burnt?

The court record then reads the following narrative by SC Iowane: "The 1st Accused then answered that he went inside the house of his namesake with one gallon of benzine. Then he asked his namesake what was the cause of the death of his father and that it was caused by his witchcraft. His namesake did not admit it. Then he started to pour benzine on him and around his house. Then his namesake admitted he did witchcraft on his father. Then he lit the match to burn the house. Then his hand got burnt and he jumped back outside".

SC Iowane then returned to the burnt house to guard it. He said that the 1st Accused smelt of alcohol and his eyes were red. He said that he spoke to him because he was related to him, and wanted to know what had happened to the 1st Accused's hand. He later recorded the conversation in his notebook. Under cross-examination he said that although the Accused smelt of alcohol, he was not staggering nor was his speech slurred or abnormal. He said he did not caution the Accused because he was not a suspect. The conversation took place at 4pm on the 2nd of November, some 3 hours after the fire.

At about 6pm the village Crime Prevention Committee decided, after discussing the matter with the special constables, that the three Accused should be kept "for their own protection" in the house of Mr Namalu. They were taken there, apparently with their consent, and kept there until the police arrived from Navua at 9pm. It is clear from the evidence that the Accused were at no time free to leave the house, and that they were in custody.

There, the Accused and members of the Committee sat and drank yaqona together. Adre Namalu then asked the 1st Accused:

Did you people cause the fire, and burnt the house?

His answer was: "Yes". He then asked: "Why did you burn the house down". The 1st Accused then answered saying that he burnt the house down because his namesake had caused the death of his father by witchcraft. He had no further conversation on the subject with the Accused. Under cross-examination Mr Namalu agreed that the committee was held in respect in the village, that he had brought the special constables to the village from the police post, that the decision to detain the three Accused was made jointly by the committee and the police, and that it was he who decided who the suspects were. He further gave evidence that when the 1st Accused was making his admissions, Special Constables Iowane and Keleto were both inside his house. He said that everyone in the house could hear what was said.

Sergeant Aca White and his team arrived at 9pm and went to Special Constable Keleto's house for a briefing. There they were told where the Accused were. He with the others then went to the house of Adre Namalu where a sevusevu was presented. Sergeant Aca White then approached the second Accused and asked what his name was. He said *Setareki*. Sergeant White then cautioned him then asked him what had happened. He said that he had assaulted Mataika to distract the villagers while Veramo set fire to the house.

Sergeant White then approached the 1st Accused and asked him for his name. He then cautioned him. The 1st Accused then told Sgt White that he intentionally set fire to the house because they believed the deceased was practising witchcraft which killed his late father. The sergeant then informed the three Accused that they were under arrest for murder and that he was taking them into custody. He did not question the 3rd Accused.

All three Accused were then taken to the Namosi Police Post where they were locked in the police cells at about midnight. They were taken to Navua Police Station the next day, on the third of November at 3.40pm. At Navua Hospital, the 1st and 2nd Accused were examined by Dr Ranjeet Singh at 5.45pm. The 1st Accused told Dr Singh that he had burnt his right hand with fire while lighting a house with Super Benzine. Dr Singh recorded this in the medical report. The 1st Accused had a few blisters on his right hand which required no treatment.

The 2nd Accused was examined by Dr Singh at 6pm. He had an injury to his right hand, which he said was caused while fisting his uncle. His wound was dressed. There were no other injuries on either Accused.

The Accused were then taken to the Navua Police Station where their formal interviews commenced at 7pm. They each took approximately three hours. The 1st Accused made full admissions in a more detailed form than his previous admissions. The interview was under caution, and was recorded after he had been told of his right to counsel.

The 2nd Accused also made full admissions that he had planned with the 1st and 2nd Accused to burn the house of their grandfather and great-uncle because he had been practising witchcraft. The 3rd Accused admitted that he had heard of a plan but denied being a party to it. He further said that he only participated in the fight with Mataika because he wanted to stop his brother from assaulting Mataika. He said that his right elbow landed on Mataika by accident. The 3rd Accused's statement is therefore only partly inculpatory. I now turn to each admission in turn.

(i) The admission of the 1st Accused to SC Iowane

I have listened carefully to the evidence of Special Constable Iowane. I accept that he thought that he was speaking to the 1st Accused as a relative and not a police officer. However, SC Iowane (who was in uniform) was attending a scene of crime. Whether or not he was there to investigate, as opposed to merely guard the scene until the CID arrived, the fact is that he was a person in authority. Therefore any admission made to him must be shown by the prosecution to be voluntary and fairly obtained.

As to the Judges Rules, r 1 provides that:

> *When a police officer is trying to discover whether or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained.*

Rule 2 provides:

> *As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.*

When SC Iowane approached the 1st Accused, the only information he received, was from a member of the Crime Prevention Committee that the first and third Accused had been involved in a fight with Aminio Mataika in front of the deceased's house just before the fire. There was no other information implicating the 1st Accused. Although counsel for the 1st Accused pointed to his burnt hand as a ground for suspicion, I consider that in a village full of people who had tried to put out the fire, a burnt hand was hardly a suspicious circumstance on its own. I consider that when SC Iowane asked the 1st Accused about his hand, he was involved in a casual conversation with a relative. He might well have been trying to discover who was responsible for the fire, but that he was entitled to do, until he had evidence which gave him reasonable grounds to caution a suspect. I do not think that he was in breach of the Judges Rules. Further, it is not suggested that the statement was not voluntary. Indeed it is the 1st Accused who volunteered the information while sitting outside his own home. I am satisfied beyond reasonable doubt that the admission was made voluntarily.

As to his alleged state of drunkenness, I accept the evidence that he was smelling of alcohol and that his eyes were blood-shot. However, in order for the questions to be unfair, the alcohol consumption must have affected the Accused's ability to speak freely and without oppression. The Judges Rules are silent on the questioning of those who are drunk and incapable, but as counsel for the 2nd and 3rd Accused rightly submits, confessions made by the drunk are hardly likely to be given any weight at all by any court. The Police and Criminal Evidence Act (UK) 1984 specifically prohibits questioning suspects who are drunk. Code C of the Act prohibits the questioning of those who are "unfit through drink or drugs

to the extent that he is unable to appreciate the significance of questions put to him". This makes good sense from a practical point of view.

However, much depends on the facts of each case. What is relevant is the amount of liquor consumed, the lapse of time since consumption, the effect on the suspect, and the police officer's assessment of whether the suspect was able to understand the nature and significance of the questions.

In this case the alcohol was consumed, according to the interview notes, before 1pm. The conversation with SC Iowane took place at 4pm. There was no slurred speech, no staggering and no other signs of alcohol consumption other than the bloodshot eyes. SC Iowane thought his speech was normal. Mr Namalu thought his speech was normal. The record of the conversation with the 1st Accused is coherent and logical. Further it is entirely consistent with the 1st Accused's statements made the next day when he was interviewed at Navua Police Station.

I therefore find, that although the 1st Accused had consumed alcohol, he was not drunk when he spoke to SC Iowane. I am further satisfied beyond reasonable doubt that there was no unfairness or oppression on the part of SC Iowane on speaking to him and I hold that this admission is admissible in evidence.

(ii)

I now turn to the admission made by the 1st Accused to Adre Namalu. Although it is certainly arguable that Adre Namalu was not a person in authority because he is related to the three Accused and is a villager who held no authority over the Accused in terms of the investigation or prosecution of the offence, the circumstances of this case show that it was Mr Namalu who reported the offence, Mr Namalu who organised the Crime Prevention Committee, Mr Namalu who decided who the suspects were, Mr Namalu who liaised with the police, and Mr Namalu who with the police, decided that the suspects should be kept in custody. Further the police and Mr Namalu (and his Committee) were clearly acting jointly on all these matters, certainly until Sgt Aca White's team arrived from Navua. For these reasons, in the circumstances of this case, I consider Mr Namalu to be a person in authority because of his close connection to the investigative process. This is particularly so, because the conversation with the 1st Accused took place in the presence of two police officers.

Of course, a lay person in authority is not expected to follow the Judges Rules. Those rules are only for the guidance of police officers. However, the prosecution must show the court that a confession made to a person in authority was voluntary, and fairly obtained. There is no doubt in my mind that the confession was voluntary, and that the 1st Accused was bent on unburdening himself about the alleged events of the day.

However I am not satisfied beyond reasonable doubt, that the questioning was fair. When the 1st Accused confessed to SC Iowane, he immediately became a suspect under Judges Rule 2. A caution ought to have been administered by SC Iowane to prevent him from making any further statements. No such caution was administered, and the 1st accused made a further damaging admission to Mr Namalu, in the presence of two police officers, one of whom knew of the earlier admission.

The failure to administer a caution is more than a technical breach of the Judges Rules. It is a breach of s 27(3) of the Constitution. Of course it might be argued that because the 1st Accused was not formally arrested, the rights under s 27(3) do not apply. However, the intention of s 27 is that the rights are clearly intended to apply to those who are in custody. The fact that the police did not see

fit to formally arrest the Accused until the Navua Police arrived, does not in my view, deprive the suspect of his rights under s 27. To find that an unlawful detention or arrest deprives the detainee of his rights under the section would be to defeat the purpose of s 27 altogether. It would mean that the police could deprive a suspect of his s 27(3) rights simply by saying that there had been no formal arrest. The New Zealand Court of Appeal has concluded that the rights of a suspect under the Bill of Rights, apply even where there is de facto detention *R v Butcher* [1992] 2 NZLR 257; *R v Goodwin* [1993] 2 NZLR 153.

The result of the deprivation of the right to be told of the right to remain silent, in my view renders the confession to Mr Namalu, made in the presence of the police, unfair and inadmissible. The prosecution may not lead evidence of it.

(iii) The third category of admissions was in relation to the statements made to Sgt Aca White

Unlike the statement made to Mr Namalu, these admissions, made by the 1st and 2nd Accused were made after each Accused was properly cautioned in terms of the Judges Rules and s 27(3) of the Constitution.

I accept Sgt White's evidence that the Accused were each speaking normally and were not drunk although their clothes smelt of liquor. I accept that Sgt Aca White was in the best position to assess (as SC Iowane was earlier) whether the Accused persons were capable of understanding the significance of the questions put to them, and, in Sgt Aca's case, the significance of the caution. The questions put to the Accused were plain and simple and easy to understand, particularly in the Fijian language. The 1st Accused's response was similar to his earlier response (and to his later interview at Navua) and I am satisfied beyond reasonable doubt that the admissions were both voluntary and fairly obtained.

As to the failure to inform the Accused of their right to counsel, this might have affected admissibility except for the fact that all Accused waived their right to counsel in their formal interviews, and did not get counsel to represent them even when they appeared in court for their court appearances. Mr Vere appeared for the first time on the 22 of December. It seems clear on the evidence that the 1st and 2nd Accused were determined to make statements, and the reading of the right to counsel right would have made no difference whatsoever to their statements (see *R v Harper* (1994) SCR 343 (Canadian Supreme Court).

I am satisfied beyond reasonable doubt that the statements of both Accused were voluntary and fairly obtained. They may be led in evidence.

(iv) The statements to Dr Ranjeet Singh

Both 1st and 2nd Accused made admissions to the doctor. These admissions were recorded in the Outpatients' Record, and the police medical report.

I do not consider the doctor to be a person in authority. He was and is, an independent person who saw the Accused privately, in the absence of the police, who remained outside. The statements are clearly admissible as statements against the interests of the Accused. I do not accept counsel's submission that the doctor fabricated that portion of the reports on the basis of the police notes about the incident. Dr Singh appeared to me to be an honest and professional witness, who is totally disinterested in this trial or its outcome. The probative value of the statement is obvious. It shows consistency in the Accused's stories from the time the 1st Accused was first approached by SC Iowane, to their interviews at the police station. It clearly outweighs any prejudicial effect on the defence case. I rule both statements admissible.

(v) The caution statements

All three caution statements were held over a period of about 3 hours each. There were breaks for refreshment and cigarettes. Each Accused was told in the clearest terms of his right to remain silent, and his right to a lawyer. Each Accused waived that right, the 1st and 2nd Accused specifically, and the third Accused impliedly. In the case of the third Accused, he was not asked "Do you want a lawyer" after he was told of his right to one, but his counsel conceded that his interview (which is partially exculpatory) would have been given by him anyway, in that form, if he had been represented by counsel.

Although the Accused were all in custody, they had been travelling to Navua, and visiting the hospital after their release from Namosi Police Post, and their interviews were conducted shortly after the hospital trip. I do not consider that they were treated unfairly or oppressively. Indeed, there is no evidence at all before me that they were so treated. I accept the evidence of all the interviewing officers and the witnessing officers, that the interviews were given voluntarily. I am satisfied of both voluntariness and fairness beyond reasonable doubt.

For these reasons I hold that each interview made by the Accused, is admissible. In coming to this conclusion I have completely disregarded the evidence led by the State of the 1st Accused's previous criminal record. As I informed counsel during the trial within a trial, I consider that a proper application should have been made to lead that evidence, thus giving the defence an opportunity to object, and make submissions. For that reason, I disregard that evidence entirely.

(vi) Charge statements

Only the 1st and 2nd Accused made statements after they were charged. They both made admissions consistent with their caution statements.

Each was cautioned, and according to each police officer who gave evidence in relation to the charges, each understood the meaning of the caution. I would be surprised to hear otherwise. Each Accused had been cautioned, in Fijian, twice before the final caution was administered after the charge was read. I do not accept the submissions of counsel that the caution was too complicated for the Accused to understand. Read out in Fijian, the words *You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down and given in evidence* have a clarity about them that every person, whether educated or not, could not fail to understand. In any event, there is no evidence that they did not understand.

I am satisfied beyond reasonable doubt that the obtaining of the charge statements of the 1st and 2nd Accused was both voluntary and fair and I hold them both to be admissible.

Conclusion

Other than the statement of the 1st Accused to Adre Namalu on the 2nd of November 2000, all other admissions made are admissible and may be led in evidence.

Admissions admissible except that of the 1st Accused to Adre Namalu.