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FILIMONE KAITAVU

v.

REGINAM

B [COURT OF APPEAL—Speight, V. P., Mishra, J. A., O'Regan, J. A.]

Criminal Jurisdiction

Criminal Law—Rape—Confession—allegation of improper inducement—failure try issue on voir dire—confession admitted without ruling there as to admissibility—new trial.

C

Hearing: 14 September 1987
Judgment: 24 September 1987

Appellant—In Person
M. Raza (Director of Public Prosecutions) and *S. Singh* for the Respondent

D Appeal by Filimone Kaitavu against his conviction for Rape.

The complainant said that she had been at a house where the appellant's brother and some friends and relatives had gathered. After overtures had been made to her by several of the males, she rebuffed them saying that she was a virgin and a school girl. She was attacked by the appellant badly beaten and then raped. Medical E evidence described severe injuries to her face and legs and redness around the vagina "consistent with but not conclusive of intercourse." A Detective Sergeant who interviewed the appellant produced a confessional statement in which the appellant purported to confess to the assault and the forced intercourse.

The appellant, who appeared for himself, cross-examined the complainant. He admitted the assault but denied intercourse. When the statement was about to be F introduced the learned trial Judge gave the appellant in the absence of the Assessors, in effect, an opportunity the conduct a voir dire examination. In the dialogue that followed, the appellant admitted that he had been cautioned, that no ill treatment had been given him. He further said—

> "The statement I gave was to assist the police so they would be able to carry out the investigation quickly. The contents of the statement which I gave is not G the truth."

And later—

> "They did promise me to give a statement and soon afterwards they would just file it in their records of the investigation ...."

H And later—

> "They did promise me Sir I would be set free soon after giving a statement."

The dialogue continued—

Chief Justice:	You say that you were not assaulted but they promised to set you free once your interview was completed. Is that the position?
Accused:	Yes. Sir, that is correct.
Chief Justice:	The next question is—set you free, free from what?
Accused:	For the investigation to end there and for me to go home.

Later the appellant told the Judge the question of charging him was not raised at all.

The learned trial Judge stated that "the accused is not denying that he made the statement but he denied the truth of what is contained in that statement. Therefore no issue of admissibility is involved in this matter".

The statement was taken into evidence. There was no ruling on the voir dire as to the effect the alleged promise to set free (whatever that meant) had if at all in inducing the confession.

Held:

"It must be shown that (the statement) has not been obtained by fear of prejudice or any hope of advantage originating from a person in authority". (*Prager* (1972) 56 Cr. App. R. 151.)

The Court referred to *Ibrahim v. R.* (1914) A.C. 599, and quoted the judgment of the Lord Chief Justice Lord Lane in *R. v. Rennie* (1982) 74 Cr. App. R. 207. *Rennie* was an "uptodate and helpful discussion of Ibrahim's case" and *D.P.P. v. Ping Lin* (1976) A.C. 574.

The Court concluded that the learned trial Judge erred when he used as the test of admissibility the fact that the appellant had elected or chosen to speak. But the appellant told the trial Judge he made a false confession because a person in authority (presumably the Detective Sergeant) had promised that "if he did so it would be filed away, he would be free to go and hear no more about the matter—a powerful and improper inducement if given."

As the appellant had raised the matter he was entitled to have it considered by the accepted method, i.e. the trial Judge conducting a trial within the trial to determine inter alia whether an improper inducement had in fact been made to the appellant. "The ruling (of the trial Judge) deprived (the appellant) of the challenge to which he was entitled".

Appeal upheld.

Conviction quashed.

New trial ordered.

Cases referred to:

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Ibrahim v. R. (1914) A.C. 599.
R. v. Prager (1972) 56 Cr. App. R.151.
R. v. Rennie (1982) 74 Cr. App. R. 207.
D.P.P. v. Ping Lin (1976) A.C. 574.

Judgment of the Court

B

SPEIGHT, V. P.

The appellant who appeared in person in both the Supreme Court and this court appeals against his conviction for rape, and also against the sentence of six years imprisonment.

The trial was quite short. There were only three prosecution witnesses—the com-
C plainant, a doctor and a detective sergeant who produced an alleged confessional statement. The prosecution's allegation was that various persons including the complainant and a girl friend of hers had been drinking in several places in Suva, and had finished at a house where the accused was, with his brother and some friends and relatives. The complainant said that overtures had been made to her by several of the males and she had rebuffed these, claiming she was a virgin and was still at
D school. She said she was then attacked by the accused, badly beaten and then raped. The doctor's evidence was that she had severe injuries to her face and legs and there was redness around the vagina consistent with, but not conclusive of intercourse. The Detective Sergeant who interviewed the appellant produced a confessional statement in which the accused purported to admit both the assault with injury and the forced intercourse.

Being an allegation of a sexual nature it was of course necessary to look for cor-
E roboration, and the learned trial judge quite correctly told the assessors that this could be found in the caution statement if they believed it to be a true account. In his summing up he said:

> "He (the appellant) said that he did make those statements which were recorded by D/Sgt. Taniela Maafu but he said the statements contained in the caution interview document were not true and that he only spoke them to the Sergeant
F because he wanted to free himself from police investigation quickly. He said the truth is that he never at any time had sexual intercourse with Phyllis. All he did was take her outside and punish her for telling lies to them, that she was a school girl and a virgin. He said while he was beating her, his brother came to them outside and took him away and back to the house".

and later:

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> "In this case, corroboration may be found (and this is a matter for you) in the caution interview statement of the accused and provided, provided only, if you

are satisfied as to feel sure that the statement contains, to a large extent, the truth of what happened, particularly in relation to the fact of the accused having sexual intercourse with Phyllis".

The appellant's defence at trial was that he admitted the assault, for he was angered by the complainant's claim as to her virtue, which he disbelieved, but he denied having had intercourse, with or without consent. He said that when he was beating the young woman his brother intervened so he desisted.

Now to understand how the matter had developed it is necessary to refer to some of the events at trial.

The appellant cross-examined the complainant and his defence of denial of intercourse but admission of assault emerged from the tenor of his questions. He also had the doctor agree that the redness of the vagina could have been caused by something other than intercourse.

The next witness was to be the detective. Counsel for the Crown alerted the learned trial Judge to the fact that an interview record was to be produced and the Judge very properly had the assessors retire. He then gave appellant the opportunity to object to admissibility. The record then reads:

"If you have any objections I would like to know the grounds of the objection you might wish to raise as to why this piece of evidence should not go before the Assessors. Is that clear to you?

Accused:	Yes, My Lord.
Chief Justice:	What is your position in this matter about the next evidence?
Accused:	The statement that I gave was given to assist the police so that they would be able to carry out the investigations quickly. The contents of the statement which I gave is not the truth. I just gave it to assist the police with their investigation. That is all I wish to say. It does not contain the truth at all.
Chief Justice:	What I wish to know is whether you are objecting to this evidence being given to the Assessors to hear and take into account when they deliberate your case because if you object then I will have to hold a separate inquiry as to whether it is admissible in law or not. Put it this way—you are not alleging ill-treatment by the police when you gave this interview?
Accused:	No, Sir, no such thing was done to me.
Chief Justice:	You are not alleging also that they made any promises that you should give your answers to the interviewing officer?
Accused:	No, Sir, they only cautioned me. They wanted to take a statement from me. They did promise me to give a statement and soon afterwards they would just file it in their records of the investigation that they were carrying out in this matter.
Chief Justice:	But they did not promise you that you will get off or anything like that.
Accused:	They did promise me, Sir, that I would be set free soon after giving a statement.

A Chief Justice: That raises the question of admissibility does it not?

Mr Chand: Depends on the term 'set free'.

Chief Justice: He is alleging a promise being made to him.

Mr Chand: It is unclear. My Lord. We don't know if it is a promise that he be let off from the charge altogether or a promise that after the statement is made he will be released on bail or something. It is a bit unclear at this stage.

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Chief Justice: You say that you were not assaulted but they promised to set you free once your interview was completed. Is that the position?

C Accused: Yes, Sir, that is correct.

Chief Justice: The next question is—set you free, free from what?

Accused: For the investigation to end there and for me to go home.

D Chief Justice: Was there any suggestion of you being charged at a later stage or was it not discussed at all? The question was not raised?

Accused: No, the point of charging me was not raised at all.

Chief Justice: So what you are telling this court is that you did give this interview statement and the answers contained therein but what you told the police is not the truth.

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Accused: That is correct. Sir.

Mr Chand: It was a voluntary statement. I think that is what he is saying.

F Chief Justice: That's what it amounts to.

Mr Chand: That's what we are concerned about at this stage, not the truth or otherwise of the statement.

Chief Justice: So it's a question of fact really?

Mr Chand: Yes.

Chief Justice: Therefore no trial within a trial is necessary?

G Mr Chand: No.

Chief Justice: In the circumstances I rule that a trial within a trial is not necessary because with respect to that caution interview statement, the Accused is not denying that he made the statement but he denied the truth of what is contained in that statement. Therefore no issue of admissibility is involved in this matter."

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The witness was then called and produced the caution statement which contained a full admission and confirmed the complainant's story.

It is of importance to note that at the conclusion of this evidence-in-chief the appellant did not ask any questions. That closed the prosecution evidence. A

Appellant was appropriately advised of his rights and elected to give evidence. He admitted the assault but denied the rape. The record of cross-examination in so far as it related to the confession in the caution statement reads:

"Q: And that is when you got hold of a stick and hit her with it.

A: Yes, Sir. B

Q: After that you pulled her outside near your bathroom.

A: Yes, Sir.

Q: From there you say that you ordered her to take off her clothes.

A: No, I did not tell her that. C

Q: That statement recorded by the police is not true?

A: No, I did not say that.

Q: Although you gave the statement to the police it is not true.

A: Yes.

Q: You say that you merely gave that statement because you wanted to assist the police in their enquiry. D

A: Yes, Sir.

Q: In other words it is a lie?

A: Yes, Sir.

Q: You also lied when you said that she took off her pants and her white top and you then instructed her to lie on the ground which she did. E

A: I have mentioned before that I made that statement because I wanted to be free.

Q: Although it was a lie when you told the police.

A: Because of what they promised me." F

It can be seen therefore that although appellant had not tested the Detective Sergeant with his version of the interview and although he had not so stated in evidence-in-chief the cross-examination did elicit this complaint of a promise made inducing an untrue confession. This of course was necessary in the interests of justice in the case of a man conducting his own defence, and it laid the ground for the very proper reference in the summing up already recited, when the assessors were told of the need to be satisfied of the truth of what appellant had said in the statement and were referred to appellant's claim that it was not in fact true. G

The difficulty we see however arose at the time when the learned trial judge ruled that a trial within a trial was not necessary because there was no issue of admissibility. The reason given was that appellant was admitting, in the absence of the assessors, that he had said what the Detective Sergeant had recorded.

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The crux of the matter is: why did he say it?

The modern view of the need for proof of voluntariness of confession before admission in evidence flows from the well known case of *Ibrahim v. R.* (1914) A.C. 599.

It must be shown that it has not been obtained by fear of prejudice or any hope of advantage originating from a person in authority. Or, as a later refinement, by the exercise of oppression. (*Prager* (1972) 56 Cr. App. R. 151).

We are obliged to Mr Raza for drawing our attention to *Rennie* (1982) 74 Cr. App. R. 207 for an uptodate and helpful discussion of *Ibrahim's* case and of *DPP v. Ping Lin* (1976) A.C. 574. The *Rennie* case proceeded on the assumption that at the time he made his confession the appellant may have been motivated by a hope or belief that by him so confessing the police would cease enquiring further into the matter and in particular would not enquire into the role his mother had played in certain criminal activities. But a claim that this was a promise made by the interviewing officer was rejected.

In delivering the judgment of the Court of Criminal Appeal the Lord Chief Justice, Lord Lane said:

> "Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if prompted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law. In some cases the hope may be self-generated. If so, it is irrelevant, even if it provides the dominant motive for making the confession. In such a case the confession will not have been obtained by anything said or done by a person in authority. More commonly the presence of such a hope will, in part at least, owe its origin to something said or done by such a person. There can be few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession".

In discussing the appeal and upholding the trial judge's decision to admit the learned Lord Chief Justice said:

> "How is this principle to be applied where a prisoner, when deciding to confess, not only realises the strength of the evidence known to the police and the hopelessness of escaping conviction, but is conscious at the same time of the fact that it may well be advantageous to him or, as may have been so in the present case, to someone close to him, if he confesses? How, in particular, is the judge to approach the question when these different thoughts may all, to some extent at least, have been prompted by something said by the police officer questioning him?"

The answer will not be found from any refined analysis of the concept of Lord Sumner's formulation. Although the question is for the judge, he should approach the principle and the spirit behind it, and apply his common sense: and, we would add, he should remind himself that "voluntary" in ordinary parlance means "Of one's own free will."

Now in the present case we have come to the conclusion that the learned trial Judge erred when he used, as the test of admissibility, the fact that the appellant chose to speak. As already said, the test is—why did he? Here the appellant had, in the absence of the assessors, told the court that he had made a false confession because a person in authority had promised that if he did so it would be filed away,

he would be free to go and would hear no more of the matter—a powerful and improper inducement if given. True it seems an unlikely story and its chance of success as a challenge to the prosecution's responsibility of proof of voluntariness might seem slim. But as he had raised the matter he was entitled to have it ventilated by the accepted method of a trial within a trial. A

Had that occurred and had the statement been admitted we go on to say that the way in which the matter subsequently proceeded and the way in which it was put to the assessors as an issue for determination was perfectly proper In the circumstances however the ruling deprived him of a challenge to which he was entitled. The conviction is quashed and a new trial ordered. B

Appeal allowed; convictions quashed; retrial ordered.