IN THE DISTRICT COURT OF NAURU
(Criminal Jurisdiction)

CRIMINAL CASE NO. 32 of 2015

BETWEEN:

THE REPUBLIC OF NAURU
Complainant

AND:

NATTHAN SOLOMON AND SUMICH DETENAMO
Defendant

Mr. Filimoni Lacanivalu for Republic
Mr. Vinci Clodumar for defendants

Date of hearing: 11 August 2016
Date of Ruling: 17 August 2016

Ruling

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1. The defendants are charged with breaking into a building with intent to commit an offence contrary to section 422 of the Criminal Code 1899 and persons found in a building with intent to commit a crime contrary to section 425 of the Criminal Code 1899. On the 20 April 2016 Mr. Clodumar informed the court that the defendants will plead not guilty. Mr. Clodumar also informed the court that the defendants will be challenging the admissibility of the cautioned statement and record of interview of the defendants on the grounds that the defendants are alleging that prior to the obtaining of the caution statement and conducting the record of interview the defendants alleged that they were made promises to the effect that if they confess that some assistance would be made should they appear in court.

2. This matter was listed for a voire dire hearing to be conducted on the 11 August 2016. The prosecution called its first witness Acting Inspector Starsky Dagagio. Amongst other questions being asked, during cross-examination he was asked the following questions:

   Q: I put to you before the start of interview that you, Inspector Raynor Tom and Nathan Solomon had a general discussion about the incident?

   A: Correct

   Q: At that time Inspector Raynor Tom said it is better for you to tell the true facts and we complete the interview quicker and if you go to court we can assist you?

3. Mr. Lacanivalu objects to the question being asked by Mr. Clodumar suggesting that Inspector Raynor Tom as the officer who offered the inducement. The reason for the objection raised by Mr. Lacanivalu is that he had requested Mr. Clodumar to give him the list of names of police officers that the defence would like to cross-examine and Mr. Clodumar has informed him that the police officers he required to cross-examine are those who conducted the interview.

4. The effect of Mr. Lacanivalu's argument is that Mr. Clodumar should not cross-examine prosecution witnesses on any allegations of inducement purporting to implicate Inspector Raynor Tom because the defense did not disclose in detail to the prosecution the particulars of the inducement in terms of when it was made, who made it, how it was made and what was offered as an inducement to enable the prosecution to thoroughly prepare their case for the voir dire hearing. Mr. Lacanivalu further submits that there is a duty on the defence to disclose to the prosecution and in failing to comply with that duty the defense should not be allowed to put its case to the prosecution witnesses as Mr. Clodumar is now attempting to do. Mr. Lacanivalu argues that to allow the defendants to do so would be prejudicial to the prosecution because the defense have failed to inform the prosecution of whom they intend to cross-examine.

5. Mr. Lacanivalu in his submissions cited the obiter comments in State v Alesi Naleve & Kelera Marama[1] where his honor P.K.Madigan said:

"The accused objects to their admissibility on the grounds of assaults, threats, inducements and oppression during interviews. A letter sent to the State prior to the voir dire lists the objections in most general terms in that both accused were beaten by officers, that there were threats, that they were interviewed over long hours and that each was promised that she would be released if she implicated the other in her interview. Such very general objections are to be deprecated: the State is entitled to know in exact detail what the allegations are in order to prepare adequately for the voir dire and the Court needs to know too, so that the issues can be confined and time wasted on irrelevancies, as happens so often, can be saved. This case is a prime example of the all general, "Scatter-gun" approach where multiple all-encompassing objections are launched in the hope that one or more of the objections might "hit-home". In these proceedings some of the objections were not developed and more objections were picked up and relied upon as proceedings developed. It should now be appropriate and in the interests of an efficient voir dire that Counsel provide specific and detailed objections to the creation of the records sought to be challenged, and if it is not provided for the prosecution and the Court to insist on it."

6. Mr. Clodumar submits that he has read through the provisions of the Criminal Procedure Act 1972 and he could not find any provisions in the said legislation that imposes a duty on the defence to disclose to the prosecution in detail the exact objections to the admissibility of the record of interviews to the prosecution. In addition to this Mr. Clodumar further submits that he has a duty under the *Brown and Dunne* rule to put his client's case to the prosecution witnesses and this is what he is doing.

7. It is my view that the comments by his Honor P.K.Madigan in *State v Alesi Naleve & Kelera Marama*[2], as cited by Mr. Lacanivalu is more a scathing remark about how the defence

[1] The State v Alesi Nalave & Kelera Marama Criminal Case No. HAC 029 of 2004L (2 November 2011) at paragraph 2 page 2.
[2] The State v Alesi Nalave & Kelera Marama Criminal Case No. HAC 029 of 2004L (2 November 2011)

presented its case during the voir dire hearing and a suggestion on how to better improve and conduct an efficient voir dire hearing; not a statement of law. But even if I am wrong on this, there is simply no consequence or penalty imposed by his honour in this case for the failure by the defence to provide specific and detailed objections to the records sought to be challenged. So the submission by Mr. Lacanivalu that this court should not allow the defence to cross-examine on issues not disclosed to the prosecution is misguided and misconstrued.

8. In the case of *Tua v Regina; Bitiai v Regina [2005] SBHC 77; HCSI CRAC 569 of 2004 (6 July 2005);*

"The magistrate held a pre-trial review/conference and imposed certain pre-trial directions to be complied with. These included that the defence were required to state what the nature of defence would be; and in the event their defence was a positive one, to give full particulars to the court and the prosecution. When defence disclosed that their defence to the assault charge was that of self-defence and to that of intimidation, a claim of right, the presiding magistrate further directed that full particulars be provided including who threatened the defendant, how he was threatened and names of witnesses to be called. When the defence declined to give particulars the presiding magistrate ruled that the defence will not be able to give evidence addressed to any issue that they had not given full particulars of to the court."[3]

9. On appeal to the High Court his Lordship Chief Justice Sir Albert Palmer said:

"In so far as the direction was issued for the purpose of assisting the court and the parties in the efficient conduct of the trial, I find nothing wrong or illegal about those directions. Any court is entitled to conduct a pre-trial conference for the purpose of maximizing court time, resources and facilities and securing the efficient conduct of a trial. To that extent the actions of the court in asking the defence to disclose nature of defence in that pre-trial conference was not unlawful. Where the court over-stepped its mark was in imposing sanctions/penalties on the defence if they did not disclose their defence and other particulars at that particular point in time. The

[3] Tua v Regina; Bitiai v Regina [2005] SBHC 77; HCSI CRAC 569 of 2004(6 July 2005) at paragraph 1 page 1

most that can be done is to request disclosures for purposes of assisting the efficient conduct of the trial but without prejudice to the right of the accused to remain silent or reserve his defence till close of prosecution case. If the accused chooses to remain silent or reserve his defence and require the prosecution to prove its case, then there is nothing further the court can do. No adverse inference can be drawn against the accused even if after close of prosecution case he then elects to give evidence and run a defence which had not been disclosed earlier on. It may draw some appropriate comment from the presiding magistrate, but it cannot be used as a basis to prevent him from calling witnesses and running defence, which was the effect of the order of the presiding Magistrate in this case and possibly other cases as well."[4]

10. The effect of the objection taken by the prosecution to the line of cross-examination taken by Mr. Clodumar, if accepted by the court, is in effect to not allow the defence to put its case to the prosecution witnesses for this voir dire hearing.

11. I find the views expressed by his Lordship Chief Justice Sir Albert Palmer in *Tua v Regina; Bitiai v Regina*[5] relevant and applicable to dealing with the objection by the prosecution. Although the comments were made in relation to the conduct of trials, they are equally applicable to voir dire hearings. Similar to trials the legal burden to prove that the caution statement and the record of interview have been obtained voluntarily from the defendants rests on the prosecution and the standard to discharge that legal burden is one of proof beyond reasonable doubt. The objection taken by the prosecution is overruled.

12. Mr. Lacanivalu has also submitted that in the event that this court refuses to uphold the objection taken by the prosecution then the court should grant leave to allow the prosecution to call Inspector Raynor Tom as a prosecution witness. It is only in exceptional circumstances that the court on application by either of the parties or of its own motion can call a witness under section 100 of the Criminal Procedure Act 1972. The prosecution has not provided this court any shred of

[4] Tua v Regina; Bitiai [2005]SBHC77;HCSI-CRAC 569 of 2004(6July 2005) at page 3
[5] Tua v Regina; Bitiai [2005]SBHC77;HCSI-CRAC 569 of 2004(6July 2005)

evidence to justify why this court should exercise its discretion which is sparingly exercised to grant leave to allow the prosecution to call inspector Raynor Tom to give evidence. I refuse to prematurely exercise the court's powers under section 100 of the Criminal Procedure Act 1972. To do so would be to commit an error of law on the part of the court.

Dated this 17 day of August 2016

Emma Garo
Resident Magistrate

THE SEAL OF THE DISTRICT COURT
REPUBLIC OF NAURU