IN THE DISTRICT COURT OF NAURU

CRIMINAL JURISDICTION

Criminal Case No. 91/2018

THE REPUBLIC

-v-

JA

Before: *RM Penijamini R. Lomaloma*

Republic: *DPP Ronald Talasasa*

Defendant: *Mr. Vinci Clodumar*

Date of Hearing: *17-18 July 2019*

Date of Ruling: *8 August 2019*

RULING ON VOIRE DIRE

Catchwords: *Burglary, Voire Dire, Right against self-incrimination, Article 10(8) of Constitution; Judges Rules; s.54 of Child Protection and Welfare Act 2016—Parent or guardian or legal representative must be with a child suspect during interview.*

Introduction

1. The defendant is charged with one count of Burglary contrary to section 160(1)(a)(b)(c)(i) of the Crimes Act 2016. The particulars allege that on 6th September 2016, he entered the offices of the Nauru Fisheries and Maritime Authority with intent to commit theft

from the said building. He also charged in the second count with Theft contrary to section 154(1)(a)L(b) and (i) of the Crimes Act for stealing a laptop and cash to the total of $2,000.00 from the said building.

Prohibition Against Publication of Name

2. At the time of the alleged offending, the defendant was 15 years and 11 months old and was therefore a child as defined in the Child Protection and Welfare Act 2016. Pursuant to section 55(b) of the said Act, I prohibit the publication of the name of the defendant or any information that might lead to his identification. He shall henceforth be known in this Ruling as JA or the defendant.
3. On 16th July 2019, the defence filed a motion for a voire dire seeking to exclude the statement of the defendant of 11 September 2016 and his record of interview made on 16 February 2017 because they were obtained in breach of the Judge's Rules.
4. The DPP called three witnesses, Senior Constable Lambrusco Namaduk, Senior Constable Drusky Dabwadaw and John Jeremiah. The defendant testified in person and called Sgt John Deidenang.

The Facts

5. The events may be summarized shortly from the facts not in dispute. On the 6th of September 2016, there was a burglary at the Nauru Fisheries and Maritime Resources Authority (the "Fisheries Office) and some items and some cash stolen. The matter was reported to Police by John Jeremiah who at the time was the Chief Security Officer of Tango Security, a private security company contracted to provide security at the Fisheries office. Mr. Jeremiah testified that police did not seem to be making any headway with the investigation so he went to make inquiries which led eventually to him and one Boaz to go see the defendant on 13th September 2016 about the burglary. Mr. Jeremiah said after an admission by the defendant, they went to the Police station. Boaz is a policeman now but he was not one at the time of the burglary. Mr. Jeremiah said no force was used on the defendant, nor was he threated to go to the police.
6. The defendant was born on the 7th December 2000 and would have been 15 years 9 months on 13th September 2016 at the time he went to the police station. When the

defendant was taken to the police station, none of his parents or guardian was with him. At the police station, the officer there, now Sgt John Deidenang, (who testified for the defence) took the defendant's statement. John Jeremiah he was there when this started but police asked him to leave before they continued.

7. Sgt Deidenang said he asked the defendant his age and being told, he did not get one of his parents or a guardian to be present before he took the defendant's statement. The statement was made by the defendant and recorded by Sgt Deidenang. In the statement, the defendant made admissions of being involved in a burglary. Sgt Deidenang and the defendant said on oath that he was not forced into giving the statement nor was he cross-examined about it. However, no warning against self-incrimination was given by Sgt Deidenang when he became aware that the defendant was confessing to an offence. That statement is not admissible as evidence and the DPP correctly did not rely on it.
8. On 23 February 2017, the defendant was interviewed at the police station by then-Constable Drusky Dabwadauw with then Probationary Constable Lambrusco Namaduk at witnessing officer. The record of this interview is the subject of the voire dire.
9. Senior Constables Drusky and Namaduk testified in Court that also present was the defendant's father, Sanjay who signed the Record of Interview. The defendant however said that his father was at the police station but not in the same room as him and the two police officers when the interview was carried out. The defendant explained that the questions were typed on a computer and after the interview, they were printed on a printer outside the interview room and all of them then signed the interview. I will return to this issue later.
10. The allegation was put to the defendant in question and the defendant said he understood it. He was then given his right to remain silent and his right to have a legal representative:-

Q9:	Mr. Joshua Agege it is alleged on the date 06th September 2016, you were involved in a burglary at the Fisheries in Anibare District accompanied by Freeman Tokaatake, Rodell Depaune and Jerome Bop, do you understand?
A9:	Understand.
Q10:	Before I ask you any further questions I must warn you that you are not obliged to say anything unless you wish to do so but anything you do say may be put into writing and given up in evidence. Do you understand?

A10: Understand
Meitu
Q11: Mr Jeshua Agege, you have the right to a legal representative, do you wish to exercise this right?
A11: No
Keo
Q 12: Mr. Jeshua Agege, do you have anything to say relating to the allegation against you?
A12: Nothing
Keo

11. Both Snr Constables Drusky and Lambrusco agreed that when the defendant said this, he was exercising his right to remain silent. The defendant said he was exercising his right to remain silent. Thereafter, the police asked was about his confession to Sgt Deidenang on 13th September 2016 which then introduced his confession about the allegation which he had earlier exercised his right to remain silent.

The Right Against Self-Incrimination

12. Article 10 (8) of the Constitution protects the right against self-incrimination:

> *10. (8.) No person shall be compelled in the trial of an offence to be a witness against himself.*

13. The right against self-incrimination in a trial extends backwards to the time of the investigation and interview by Police because any statement given by the defendant to the Police can be used against him at the trial.

14. The history of the right against self-incrimination is best summed up by the US Supreme Court in the case of ***Miranda v. Arizona,***[1]

> *"The maxim nemo tenetur seipsum accusare had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, [were] not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his*

1. 384 U.S. 436, 442-443 (U.S. 1966)].

apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. ***The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand****. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."[Miranda v. Ariz., 384 U.S. 436, 442-443 (U.S. 1966)].*

15. Nauru, like the United States, has embedded the right against self-incrimination in our Constitution. In the UK, there is no written constitution so the Judges rules protects the rights against self-incrimination. The Judges Rules were made by the Judges in the UK in 1912 after the Secretary for Home Affairs asked for guidance to Police in detaining and interviewing criminal suspects. The rules have been amended and additions made with the last one issued as a Practice Direction in the UK in 1965. In the UK, they are now replaced by statute. Although they have the force of law, they have been applied by the Courts in the UK, Australia, NZ and other common law countries in the region.
16. The Judges Rules became part of the laws of Nauru by virtue of section 4 of the *Custom & Adopted Laws Act 1971* has been applied in Nauru by the Courts without reference to Article 10(8)of the Constitution.[2] The preamble to the Rules states:-

"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

[2] Benjamin v Republic [1975] NRSC 9; [1969-1982] NLR .(D) 44 (25 November 1975).

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."

17. In ***Ganga Ram and Shiu Charan -v- Reg (1983)***[3] the Fiji Court of Appeal outlined the two grounds for the exclusion of confessions at p.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; DPP -v- Ping Lin (1976) AC 574.*
>
> ***Secondly**, 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.** Regina -v- Sang (1980) AC 402, 436 @ C-E. This is a matter of overriding discretion and one cannot specifically categorize the matters which might be taken into account."(Emphasis mine)*

18. The Court in ***McDermott v The Queen(1948)***[4], Dixon J alluded to conduct which might amount to impropriety that could trigger the exercise of the discretion to exclude the confession or unfairness as including:-

> ***…. an attempt aimed to obtain answers prejudicial to the prisoner, or answers which confirmed the detective's opinion or suspicions or to insist on a reply or to beguile or entrap the prisoner.***[5] *(emphasis mine)*

19. ***R v Swaffield [1998] HCA 1;***[6] Brennan CJ at para 19 said of the discretion to admit the evidence[7]:-

[3] Appeal No. 146 of 1983: 13 July 1984
[4] 75 CLR 501 at 513
[5] . McDermott v The King(1948)76 CLR 501 at 509-510 per Dixon J

"R v Lee attributes a broader scope to that discretion. The unfairness against which an exercise of the discretion is intended to protect an accused may arise not only because the conduct of the preceding investigation has produced a confession which is unreliable but because no confession might have been made if the investigation had been properly conducted. If, by reason of the manner of the investigation, it is unfair to admit evidence of the confession, whether because the reliability of the confession has been made suspect or for any other reason, that evidence should be excluded. ***Trickery, misrepresentation, omission to inquire into material facts lest they be exculpatory, cross-examination going beyond the clarification of information voluntarily given, or detaining a suspect or keeping him in isolation without lawful justification - to name but some improprieties - may justify rejection of evidence of a confession if the impropriety had some material effect on the confessionalist, albeit the confession is reliable and was apparently made in the exercise of a free choice to speak or to be silent****. The fact that an impropriety occurred does not by itself carry the consequence that evidence of a voluntary confession procured in the course of the investigation must be excluded. The effect of the impropriety in procuring the confession must be evaluated in all the circumstances of the case."(emphasis mine)*

Application of the Law to the Facts

20. In the case before us, the defendant had made a confession to Police on 11 September 2016. As soon as the Police officer who recorded the confession was aware that a confession had been made, he should have stopped it and give the defendant his right against incrimination or the right to remain silent and given him his rights to consult a solicitor or pleader of his choice or the Public Defender. Even before that, because the defendant was a child, he should not have proceeded until one of his parents or a legal guardian was present. That statement is not admissible in this Court for those reasons.
21. Any admissions made by the defendant in September 2016 would be inadmissible because it breaches the rules against self-incrimination in Article 10(8) of the

[6] 192 CLR 159; 151 ALR 98; 72 ALJR 339 (20 January 1998)
[7] Ibid para 19

Constitution and Section 54 of the *Child Protection and Welfare Act* 2016 and the Judges Rules.

22. On 23 February 2017, the defendant had been given his rights to remain silent and in exercise of those rights had said he did not wish to answer any questions regarding the allegation put to him about his involvement in the burglary. Both the Interviewing officer and the Witnessing officer testified that they understood that the defendant had exercised his right to remain silent. The interview should have been stopped at that stage and no further questions should have been asked about the first statement to Police which had been obtained without his rights to remain silent being given to him. Instead they tried to obtain the confession from him by trickery which Brennnan J said in ***R v Swaffield [1998]*** should not do. This is particularly important when the defendant was only 16 years old at the time of the interview.

23. A police interview room is not a friendly environment for any adult accused. A child may not understand what the right to remain silent means unless it is properly explained to him. Even his guardian might not understand it. The US Supreme Court said this of a police interview room:

> *We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime* ***contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.***[8]

24. I believe that the statement above applies just as much in an interview room in Nauru. The pressures on a child in this situation is going to be much greater than for an adult and a child's will can be overwhelmed easily by the compelling pressures and lead to confessions. This has been recognized by the international community and led to the *UN Convention on the Rights of the Child (CRC)* which Nauru has ratified. Nauru has enacted the *Child Protection and Welfare Act 2016* which came into force on 10th June 2016, to protect the right, inter alia, of children undergoing investigations and enquires and

[8] 384 U.S. 436, 442-443 (U.S. 1966)] at 467

court proceedings. Section 54 of the Act applies to investigations involving children, who are defined in section 3 as those under the age of 18:-

54 Special requirements applying to investigations and inquiries involving children

(1) Despite the provision of any other law to the contrary, the following matters apply whenever an investigation or inquiry is undertaken in relation to a child by a police officer, an authorised officer, or any other person lawfully exercising powers of investigation or inquiry in relation to a child under any law:

(a) ***at all stages of the investigation or inquiry, the best interests of the child must be the primary consideration;***

(b) ***the investigation of or inquiry into the child must recognise and protect the rights and interests of the child at all stages of the justice process****, and must reduce trauma and secondary traumatisation of the child;*

(c) the matter must be promptly notified and referred to other relevant agencies to promote the protection and welfare of the child, and his or her rights;

(d) any action taken must permit the child to fully state his or her views, and the relevant officer must take into account the child's views in accordance with their age and maturity, and must respect the child's right to privacy;

(e) child-friendly interview environments and interview techniques must be implemented and applied;

(f) special procedures must be applied to reduce the number and length of interviews which children are subjected to;

(g) special facilities and appropriate processes must be provided and applied where the child has a disability to ensure the effective application of the requirements of this section;

(h) children are entitled to have a parent, guardian, legal representative or other appropriate support person agreed to by the child, present with them at all stages of the investigation and trial proceedings*;*

(i) measures must be implemented to ensure children are protected from direct confrontation with persons accused of violating their rights, and must not be subjected to hostile, insensitive or repetitive questioning or interrogation;

(j) investigations must be conducted expeditiously, and must be followed by expedited court proceedings;

(k) investigators who have received special training in relation to dealing with cases involving children must be engaged in the process, if they are available.

(2) All orders or approved procedures applying to members of the Police Force when they deal with children must be consistent with the requirements stated in subsection (1).

The Interests of the Defendant

25. .Section 154(1)(a) of the CWPA 2016 clearly states that the primary consideration at all stages of the investigation must be the interests of the child. These interests are:
    a. The interest of the defendant child is that he must get a fair interview.
    b. It is in his interest that once he has exercised the right to remain silent about the allegations, no more questions should be asked about them. If there are other allegations, they can be dealt with otherwise the interview should be terminated.
    c. A fair interview means that the police should not ask questions about facts revealed in a breach by Police of his right not to incriminate himself and thus bring in through a back door what the Court will not allow through the main door.
26. The defendant's rights against the self-incrimination under Article 10(8) of the Constitution must be respected in spirit and in practice.

The public Interest

27. In determining whether to admit the evidence of the confession, the Court must exercise its discretion after looking at both sides. The DPP, representing the community have interests to ensure that those who break the law are brought to justice. This is particularly important in view of the number of burglaries happening recently.
28. I have also taken account of the public interest that the police, in exercising powers under the law must follow the procedures set out in the Judges Rules, the various Acts and the Constitution.

The Presence of Guardians at the Interview

29. A disturbing issue arose from the evidence of the defendant about the fact that his father was not present with him in the room where the interview was taken. This was not raised in the cross-examination of the interviewing officer and the recording officer so that they could confirm or deny it as required under the *Rule in Browne v Dunn*.[9]
30. I would hesitate to ignore the sworn statements of the two Police officers and the signatures of the defendant's father on the Interview. In any case, it was not necessary for me to make a finding of fact whether the defendant's father was present in the room with him at the time of the interview because I had already found the confession inadmissible on other grounds.
31. Guardians, parents and legal representatives of the suspect have an important role to play in the investigation process. Their presence in the interview ensures that the Police will follow the Constitution, the Judges Rules, the Child Protection and Welfare Act and the general fairness provisions of the common law. In short, they ensure the integrity of the system of interviews of witnesses.

Conclusion.

32. I have taken all the matters discussed above and I find that it is unfair to the defendant to admit the whole of his confession in his caution interview with the Police on the 17th of February 2019. The record of interview will not be admitted at the trial of this matter.

……..

Penijamini R Lomaloma

Resident Magistrate

[9] *Browne v Dunn (1893) 6 R 67 (HL)*