

REGINA -v- DEROL HAVIMANA

HIGH COURT OF SOLOMON ISLANDS
(Mwanasalua, J.)
Criminal Jurisdiction

Criminal Case No. 136 OF 2009

Date of Hearing: 18th November 2010
Date of Ruling: 22nd November 2010

Henry Kausimae for Crown
Michael Holora and Sevuloni Valenitabua for Accused

RULING

Mwanasalua, J: The accused, Derol Havimana, is charged with one count of murder, two counts of assault causing actual bodily harm and one count of common assault, contrary to sections 200, 245 and 244 of the Penal Code respectively. These charges arose from an incident which occurred on 16 December 2008 at Gnulahage Village, West Maringe District, in the Isabel Province.

The accused was arrested by the Police and brought to Honiara as a suspect. On 19 December 2008, he was taken from the Watch House at the Central Police Station to Police Headquarters at Rove, for interrogation. This took place in the criminal investigation office. From 16.55 hours to 21.50 hours a police investigation officer obtain a statement from the accused in English. The statement was in question and answer form. The accused, the investigation officer and his witnessing officer signed the statement.

The statement contains admissions which suggest that the accused committed the offences referred to above. Thus the accused now challenges the admissibility of the statement on the ground that the use of the statement against him in the main trial would be unfair to him because (1) it was obtained from him in breach of stage 3 of the Solomon Islands Judge's Rules (the Rules) and (2) the investigation officer breached the Rules when he continued questioning him after he told the investigation officer in his answer to question II, that he wished to remain silent on the allegation against him.

The steps in stage 3 of the Rules (Taking of Written Statements from suspects) are as follows:

"Suspect Statement Invitation

If you wish to remain silent you may do so. If you wish to, you may give a written statement. You can write it or I will. That is up to you. If you do give a written statement it may be produced to a court if you go to court. Do you wish to make a written statement?"

"Suspect Statement Start

I agreed to give a statement of my own free will. I want the Policeman to write down my statement. I have been told I can remain silent. I know the statement may be used in court. It is true what I now put in the statement."

"Suspect Statement End

I understand what is in the statement which I have read (or "which has been read to me"). It is True"

On breach of the Rules, the prosecution submits that the investigation officer has a choice whether to conduct a record of interview (ROI) or to take a written statement from the accused.

The view of this court, is that, the investigation officer will only have a choice if the accused first agrees to give a statement and requests the investigation officer to write it down for him. The statement is usually in question and answer form (ROI), as in this case. There is no evidence that the accused agreed to give a statement nor requested the investigation officer to write it down for him. The prosecution submission is accordingly rejected.

On the right to remain silent, the prosecution submission is that the interviewing officer does not have to stop asking further questions of the accused even if the accused says he wanted to remain silent. Further, the prosecution submits that the accused does not have to answer any subsequent question after he had elected to remain silent.

The view of this court is that if an accused elects to remain silent then no questioning or further question can be made by an accused, unless the accused subsequently decides to waive the right to silence.

Breach of the Judge's Rules (SI)

In Regina V Lusebaea, Fefele, Ila, Kiki and Kwaimani, HCSI CRC 335 of 2004 Cameron J said at paragraph 11, before excluding the accused person's statements in the ROI:

"The Judge's Rules (SI) require a suspect statement, 'I agree to give this statement of my own free will. [I want the policeman to write down my statement] I have been told I can remain silent. I know the statement may be used in court. It is true what I now put in the statement".

His Lordship further added:

"The words in the brackets are only included if the suspect requests the police officer to write the statement. The reason for specifying the full caution should be recorded is so that the court may be satisfied, so far as possible, that the suspect was in fact given and understood the rights contained in the caution, including the consequences of making the statement.....In Mr. Ila's statement, the paragraph relating to the caution omits altogether any reference to the consequences of making the statement".

Right to Silence

As to right to silence, counsels for the accused refer to the following authorities;

R v Evans [1962] SASR 303. In that case the interviewing police officers continued to question the suspect after the suspect told them that he did not desire to say any more or that he declined to speak except in the presence of his solicitor.

The court said, per Napier CJ, Mayo and Chamberlain JJ, at 306 citing Lenthal v Curran [1933] SASR 248 at 260:-

"Up to the present it has not seemed necessary to the Judges of the court to insist upon a strict observance of the rules, approved by the Judges of England, for the guidance of the police when interrogating persons in custody or suspects of crime (See Archbold (26th ed) p.390), or to make a general practice of rejecting or discountenancing evidence of answers obtained by interrogation of persons in custody".

Their Lordships then qualified this statement, at 306 to 307 as follows:-

"In view of what happened in this case, it is apparent that there are police officers who are under some misapprehension as to their duty, we think that the time has come for this court to say, quite bluntly, that it is not permissible for a police officer to persist in interrogating persons in custody beyond the point at which they intimate the desire to say nothing or no more.

Their Lordships further state at 307:-

"We can understand the impatience of a detective, who meets with an obstacle of this kind, when he wants to get own with the business; but the answer is that caution is not a mere form of words. The fact is that the suspect is not obliged to say anything, and, if he declines to speak (save in the present of his solicitor), the police officer who allows zeal to outrun discretion or who tries to blow-beat or trick the suspect into answering may be doing a grave disservice to the force to which he belongs, and to the administration of justice".

The Queen v Ireland [1971-1972] 126 CLR 321. In that case the interviewing officers continued to question the suspect after the suspect had told them that he did not want to answer any further question. In relation to this Barwick CJ said at 333:-

"In Reg. v Evans [1962] SASR 303 referred to in the judgment delivered in the Supreme Court, the Supreme Court of South Australia in conformity with its earlier decisions in Lenthal v Curran [1933] SASR 248 and Bailey v The Queen, [1958] SASR 30 decided that it was improper for police investigating the commission of a crime to persist in questioning a suspect after an indication that he did not wish to answer any more questioning. In those cases, police questioning had so persisted but no statement or admission by the suspect had resulted. None the less the court condemned the further questioning and excluded evidence of it in the exercise of what is now a clearly established judicial discretion to exclude evidence otherwise admissible because of unlawfulness or unfairness of the manner of its discovery or creation".

In Regina v Talu [2005] SBHC at page 4, the ROI was excluded on the ground that the right to remain silent was not read to the accused by the police. His Lordship Palmer CJ stated, in that page:

"They are obliged to disclose fairly and fully to the accused when interrogating him that his rights include the right to remain silent or to speak and tell his side of the story or to answer questions. Where an accused has not been given an opportunity to exercise his discretion whether to speak or to remain silent, then such statement is liable to be excluded unless it is clear the accused decided to waive such rights".

Authorities on Unfairness

In Van Der Mee v the Queen per Wilson, Dawson and Tookey JJ it was stated that fairness discretion focuses on unfairness to the accused and not whether the police have acted fairly or not. It was stated at p.115:

"The Question is not whether the police have acted unfairly; the question is whether it would be unfair to the accused and to use his statement against him.....unfairness in this sense, is concerned with the accused's right to fair

trial, a right which may be jeopardized if a statement obtained in circumstances which affect the reliability of the statement”.

The point to be decided in this vire dire is whether the statement (ROI) obtained from the accused by the Police on 19 December 2008 is admissible. The first contention of counsels for the accused is that the court should refuse to admit the statement under Section 169 (b) of the Evidence Act 2009 (the Act). The confessional statement in this case was obtained on 19 December 2008. The caution in that statement was administered to the accused on that date. The court can only consider provisions of the Act if the arrest or caution occurred as from the date on which the Act came into force. That is to say, from 1 October 2009 (See Section 190 (2) of the Act).

The second contention of counsels for the accused is that it would be unfair to use the statement against the accused because of the breach to the Rules by the interviewing officer, in particular, the non-compliance with stage 3 of the Rules. The court will accede with this submission because it would be unfair to use the statement as evidence against the accused, when he gave no consent to give a statement nor requested the police officer to write down the statement for him. In these circumstances the accused will not have a fair trial. For these reasons, the court will rule the statement inadmissible and it is accordingly excluded as evidence in the main trial.

Order accordingly.

THE COURT