

R v VAIANGINA

Supreme Court, Nuku'alofa

Webster J.

Criminal case No. 49/1990

17 August 1990

10 *Judges Rules - applicability to Tonga*

Criminal procedure - charging and questioning suspect - procedure to be adopted

The accused was tried for a criminal offence. During the course of the trial, a police constable described how he had interviewed the accused, and then charged him after the interview was completed.

HELD, making no finding as to the record of interview,

1. The Judges' Rules do not apply in Tonga by virtue of sections 21 and 22 of the Evidence Act (Cap. 15);
- 20 2. However under sections 21 and 22 of the Evidence Act statements made by an accused to the police could be challenged on the grounds of unfairness, and the principles of the Judges' Rules were appropriate to determine this question;
3. Under these principles, a person being interviewed by the police should be charged as soon as there is sufficient evidence to charge him, i.e. prima facie evidence as distinct from mere suspicion; and after that the person should be asked no further questions except to clear up something which is unclear, or to prevent or minimise harm to others or the general public; but a further special caution must then be given and the answers recorded; at no stage should threats
- 30 4. The accused in this case should have been charged before the interview by the police constable.

Statutes considered

Evidence Act (Cap. 15), Sections 21, 22.

Cases considered

40 *R v Pailate & others* Criminal case No. 120/1988

R v Fainga'anuku Criminal cases 36, 67/1988

R v 'Okalani Langi Criminal cases 13, 14/1989

Extract from Judgment of Mr Justice Webster

This is a sensible case to say something about the principles of the former Judges Rules in relation to Tonga, as there appears to be frequent confusion. In any event the Rules have now been replaced in England by the Police and Criminal Evidence Act 1984 and its accompanying Code, which is very much stiffer than the Judges Rules were.

50 I fully accept that, in view of sections 21 and 22 of the Evidence Act, the Judges Rules never did bind the Court or the police in Tonga as decided by this Court in *R v. Pailate & Ors* (Case 120/88). In that case the Chief Justice said it would lead to confusion if this Court were to apply some but not all of the Rules, or attempt to apply them in a modified form.

But even if the actual terms of the Rules did not bind the Court, questions of fairness, oppression and unreliability are always bound to arise if statements by an accused to the police are contested under section 21 or 22, especially where the Court has a discretion under section 22 if the accused was in custody.

60 The Judges Rules did no more than provide details of the application of the very basic principle in our criminal law that the accused has a right to silence and a right not to be convicted out of his own mouth - except if he makes a voluntary statement to the police or gives evidence in Court.

I believe that the relevant principles to be extracted from the Judges Rules, as these principles must apply as a matter of fairness to procedure in Tonga, are as follows:-

1. 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 useful information may be obtained. This is
70 so whether or not the person has been taken into custody.

All citizens have a duty to help police officers to discover and catch criminals. But apart from arresting him, the police cannot compel any person against his will to come to or remain in a police station.

2. As soon as a police officer has evidence giving him reasonable grounds for suspecting that a person has probably committed an offence - the beginnings of a case - he must caution the person before putting to him any question or any further questions relating to that offence.

80 Once he has been cautioned a record must be kept of the interview. All this has already been said in *R v. Fainga'anuku* (Cases 36 - 67/88).

There is nothing wrong with the police telling or showing the accused what another person has said or the evidence making them suspect him. Again this has already been said in *R v. 'Okalani Langi* (Cases 13 - 14/89).

3. When a police officer is questioning a person about an offence and has enough evidence to charge him - that is enough prima facie evidence as opposed to suspicion - he must *without delay* charge the person or tell him that he may be prosecuted for the offence.

90 4. After that stage no questions about that offence should be put to the accused though he may, if he wants to, make a voluntary statement after a further caution.

5. However as an exception an accused may be asked questions about the same offence (a) to clear up something that is unclear or (b) to prevent or minimise harm to others or the general public. A further special caution must be given and his answers recorded if that is done.
6. An accused may also be questioned later about other offences.
7. At any stage of an investigation every person should be able to communicate with and consult a lawyer provided there is no unreasonable delay and the administration of justice is not hindered.
8. It goes without saying that the police should not at any stage use threats, fear or force on a suspect.

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In this case I do not rely on the Record of Interview so I make no finding about it. However I think the acid test is this. The accused essentially denied all questions put to him and Police Constable Lavemai got no new information from him, but immediately at the end of the interview the accused was charged. In my view the accused should have been charged beforehand.