IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

CRIM. NO: S.489/93

BETWEEN: THE POLICE

Informant

A N D: SESELA AFOA, male of Lona Fagaloa

Defendant

COUNSEL: Mr M. Edwards for Prosecution
Mr P. Fepuleai for Accused

DATE OF RULING: 2nd March 1994

DATE OF REASONS: 9th March 1994

REASONS FOR RULING OF SAPOLU, CJ

The accused Sesela Afoa has been charged that on 25 September 1993 at Lona, Fagaloa, he by an unlawful act, namely, shooting the deceased Nuutai Mafulu with a gun, caused the death of the deceased thereby committing the crime of murder.

The accused pleaded not guilty to the charge of murder and made no statement to the Police about the incident with which he has been charged. During the trial, the prosecution sought to call a witness, Faasega Gaseata, who is a prisoner at Tafaigata prison and who was detained in the same prison cell as the accused when the accused was remanded in custody on the present charge of murder. The gist of Faasega's evidence that the prosecution sought to adduce is that whilst he was detained in the same prison cell with the accused, the accused admitted to him his involvement in this incident and

that it is him, the accused, who shot the deceased with a gun causing the deceased to fall to the ground.

The defence objected to the admissibility of Faasega's evidence relying on the authority of two decisions by the United States Supreme Court in **Massiah v United States (1963) 377 U.S. 201** and **Miranda v Arizona (1966) 384 U.S. 436**. Counsel for the prosecution on the other hand argued that the evidence in dispute should be admissible relying principally on the decision by the Supreme Court of Canada in **Herbert v R [1990] 2 S.C.R. 151**. This Court ruled that the evidence of Faasega is admissible and that the reasons for that ruling will be given in due course. I now give those reasons.

It appears clear to me from **Herbert v R** that what is in issue here is the right to silence of a detained person as the accused was when he was detained in a prison cell. That right to silence is to be found in Article 6(1) of the Constitution: **Herbert v R.** Article 6(1) provides :

> "No person shall be deprived of his liberty except in accordance "with law".

Any person who is detained for murder, or for any criminal offence for that matter, is at risk of being deprived of his liberty. Article 6(1) now guarantees to such a person the right to silence as a legal right. In **Herbert v R** it is said that the right to silence of a detained person is 'a principle of fundamental justice to be found in the basic tenets of our 'legal system'. I respectfully agree. In my view not only is the right to silence a principle of fundamental justice, it is also a legal right which forms a basic tenet of our law and is now guaranteed by Article 6(1) of the Constitution.

In **Herbert v R**, the Supreme Court of Canada was dealing with the right to silence in terms of section 7 of the Canadian Charter of Rights and Freedoms and held that this right to silence is enshrined within that

provision. Section 7 of the Canadian Charter of Rights and Freedoms is similar to Article 6(1) of the Constitution and it provides :

"Everyone has the right to life, liberty and security of
"the person and the right not to be deprived thereof
"except in accordance with the principles of fundamental
"justice".

Even though the Court in **Herbert v R** decided that the right to silence is a principle of fundamental justice, I am of the view that it is also a legal right which forms a basic tenet of our law so that if any detained person is deprived of his liberty in breach of the right to silence then such deprivation is not in accordance with law and must therefore be in violation of Article 6(1) of the Constitution.

To highlight what is the real issue here, it is pointed out that the right to silence enshrined within Article 6(1) is not synonymous or identical with the right to counsel in Article 6(3) or the right against self-incrimination in Article 9(5) although it is interrelated with those rights. It is not necessary to embark in this case on a discussion of the interrelationship between the right to silence and the right to counsel and the right against self-incrimination. The interrelationship is comprehensively discussed in **Herbert v R**. I have adverted to the point in order to remove any confusion that the right against self-incrimination contained in Article 9(5) is synonymous with the right to silence. I will however come back to the right against self-incrimination as the defence seems to rely in part on Article 9(5) for excluding the evidence in dispute.

Now the right to silence is explained in **Herbert v R** by McLachlin J who delivered the judgment of herself, Dickson CJ., Lamer, La Forest, L'Heureux-Dube', Gonthier and Cory JJ. At page 180 of the judgment, McLachlin J says :

"The scope of the right to silence must be defined broadly
"enough to preserve for the detained person the right to

"choose whether to speak to the authorities or to remain
"silent, notwithstanding the fact that he or she is in
"the superior power of the state. On this view, the
"scope of the right must extend to exclude tricks which
"would effectively deprive the suspect of this choice.
"To permit the authorities to trick the suspect into
"making a confession to them after he or she has exercised
"the right of conferring with counsel and declined to
"make a statement, is to permit the authorities to do
"indirectly what the Charter does not permit them to do
"indirectly. That cannot be in accordance with the purpose
"of the Charter".

In page 181 McLachlin J goes on to say :

"Charter provisions related to the right to silence of a
"detained person under s.7 suggest that the right must be
"interpreted in a manner which secures to the detained
"person the right to make a free and meaningful choice as
"to whether to speak to the authorities or to remain
"silent. A lesser protection would be inconsistent not
"only with the implications of the right to counsel and
"the right against self-incrimination affirmed by the
"Charter, but with the underlying philosophy and purpose
"of the procedural guarantees the Charter enshrines".

Then in page 186 McLachlin J states :

"The essence of the right to silence is that the suspect
"be given a choice; the right is quite simply the freedom
"to choose - the freedom to speak to the authorities on
"the one hand, and the freedom to refuse to make a state-
"ment to them on the other. This right of choice compre-
"hends the notion that the suspect has been accorded the

"right to consult counsel and thus to be informed of the
"alternatives and their consequences, and that the
"actions of the authorities have not unfairly frustrated
"his or her decision on the question of whether to make
"a statement to the authorities".

Thus it appears that at the core of the right to silence is the freedom of a 'suspect' to make a choice whether to make a statement or not to make a statement to the authorities. This right to silence is also intertwined with the right to counsel and the right against self-incrimination. The right against self-incrimination is of course enshrined in Article 9(5) of our Constitution as a fundamental tenet of the right to a fair trial.

It must follow that the silence of a suspect or accused when confronted by the Police must not be interpreted in any way to mean an admission of guilt on his part. Silence is not an admission of guilt in this context and must not be given any evidentiary value. To say silence infers guilt would be a violation of the right to silence.

Having said all that, the question now is whether to admit the evidence of Faasega will be a violation of the accused's right to silence. The Court was unanimous in **Herbert v R** that the right to silence does not affect the admissibility of voluntary statements made by a suspect or accused to a cell mate provided that the cell mate is not acting as a police informant or an undercover police officer. In **Herbert v R**, McLachlin J puts the matter in this way at page 184 :

"Thirdly, the right to silence predicated on the suspect's
"right to choose freely whether to speak to the police
"or to fellow cell mates. The violation of the suspect's
"rights occurs only when the Crown acts to subvert the
"suspect's constitutional right to choose not to make a
"statement to the authorities. This would be the case

"regardless of whether the agent used to subvert the
"accused's right was a cell mate, acting at the time
"as a police informant, or an undercover police officer".

Sopinka J in his judgment says at page 201 says that a communication between an accused and another private individual is not subject to the right to silence.

In this case there is no suggestion that Faasega was acting as a police informer or conniving with the police in any manner when conversing with the accused in the prison cell. What happened was a conversation between two cell mates when the accused related his involvement in this incident saying that he is the person who shot the deceased with a gun. That being so the right to silence enshrined in Article 6(1) of the Constitution does not apply to exclude the evidence in dispute.

I turn now to the essentials of the submissions by the defence. The first submission by the defence is that the evidence in dispute should not be admissible on the authority of **Massiah v United States (1963) 377 U.S 201.** In that case the prosecution sought to adduce evidence from a conversation between the accused and a person who had connived with the federal agents to obtain statements from the accused who had retained a lawyer and pleaded not guilty to the charge against him. In connivance with that person the federal agents were able surreptitiously to listen to the conversation between that person and the accused wherein the accused made a number of incriminating statements. This conversation was made in the absence of the lawyer for the accused.

The United States Supreme Court by a majority held that the incriminating statements were deliberately elicited by the federal agents in the absence of the accused's lawyer and thus had denied the accused his right to counsel under the Sixth Amendment of the United States Constitution. The accused's conviction was quashed.

It is clear from the facts of Massiah v United States that there was connivance between the federal agents and the person who engaged the accused in a conversation wherein the accused made incriminating statements while the federal agents were surreptitiously listening in. In this case there is no suggestion of any connivance between the police and Faasega for the purpose of obtaining incriminating admissions from the accused while he was being detained in a prison cell. I hold therefore that Massiah v United States is distinguishable on the facts from this case and does not apply to exclude the evidence in dispute here.

As to the second submission by the defence based on Miranda v United States (1966) 384 U.S. 436, I have read that case and in my view it refers to custodial interrogation of a suspect by the police but it does not cover the precise point in this case. What we are concerned with in the present case is not custodial interrogation of an accused by the police but voluntary admissions made by the accused to a cell mate. I am therefore of the view that **Miranda v United States** does not assist the defence.

The third and final submission by the defence is based on Article 9(5) of the Constitution which enshrines the right against self incrimination. It is clear from **Herbert v R** that this right against self incrimination applies only during trial proceedings so that an accused cannot be compelled to be a witness against himself. But it is not synonymous with the right to silence under Article 6(1) although the two rights are inter-related. In **Herbert v R**, Sopinka J at pages 194 and 195 puts the matter in this way :

> "The principal difficulty in any discussion of the right to "remain silent, whether at the constitutional or common "law level, is the temptation to equate the right with the "related privilege against self-incrimination. This "distinction is discussed in my reasons for judgment "in "**Thomson Newspapers Ltd v Canada (Director of "Investigation and Research Restrictive Trade Practices "Commission) [1990] 1 S.C.R. 425**. It has been clear

"since the judgments of this Court in Cuor v The Queen [1972]
" S.C.R. 889; and Marcoux v The Queen [1974] 1 S.C.R. 763,
"that the privilege against self-incrimination has a very
"limited scope and applies only in the course of proceedings.
"As Dickson J (as he then was) stated in **Marcoux** at page 768 :
"'The privilege is the privilege of a witness not to answer
"'a question which may incriminate him'. This circumscrip-
"tion of the privilege accords with both its history and
"purpose : see Cross on Evidence (6th ed. 1985) at pp. 189-190.
"A privilege is an exclusionary rule of evidence which is
"appropriately asserted in court".

At page 173 of the same case Mc Lachlin J says :

"The second rule which is closely concerned with the right
"to silence of a person in jeopardy in the criminal process
"is the privilege against self-incrimination. It is distinct
"from the confessions rule, applying at trial rather than at
"the investigatorial phase of the criminal process : see
"Marcoux v The Queen [1976] 1 S.C.R. 763 at pp. 768-769.
"Yet it is related to the confessions rule both philosophically
"and practically".

So it is clear that the right against self-incrimination is not synonymous with the right to silence although the two rights are inter-related. It is also clear that the right of an accused against self-incrimination applies only during trial proceedings so that he cannot be compelled to be a witness against himself as provided in Article 9(5).

For all the foregoing reasons, I have therefore come to the view that the evidence in dispute in this case is admissible.

T F M Sakala
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CHIEF JUSTICE