

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No. 52 of 2014

STATE

vs

- 1. MATAIASI ULUI**
- 2. MAIKELI LOKO**
- 3. RAKESH KUMAR**
- 4. VINOD SEGRAN**

Counsel : Ms. S, Kiran with Mr S. Seruvatu for the State
Mr. I. Khan with Mr. M. Raratabu for the first
and second accused
Mr. M. Raza for the third accused.
Mr. A. Sen with Mr. W. Pillay for the fourth
accused.

Date of Ruling : 25th January 2018.

RULING
(VOIR DIRE NO.2)
(Res Gestae)

1. The State intends to call three witnesses on the general issue, witnesses who they expect to attest to hearing the deceased make utterances identifying his assailants, these declarations being made some 27 hours before he died.
2. They seek a ruling on the admissibility of these utterances, as an exception to the Rule against hearsay, either as dying declarations or as an exception under the principle of *res gestae*.
3. Before ruling on the matter, this Court has made enquiry of the witnesses in question to determine the following issues:

1. Was the victim/deceased *in extremis* at the time of making these declarations?
2. Was there a possibility that the utterances were concocted or distorted.
3. Were the declarations so close in time and circumstances to the assault that they can be said to flow on from the assault and be “part of the story”?

The Prosecution Evidence

4. The prosecution called the three witnesses in question and their evidence was adduced. Two of the witnesses were cross-examined extensively defence Counsel while the third was not cross-examined at all.
5. PW1 in the enquiry was Vishak Kumar Naidu, the brother of the deceased. He said that after leaving a grog session with friends he arrived home at about 7.30pm on the 14th April 2014. His mother was in great distress because his father was seriously injured. He saw the deceased and noted that he was injured all over his body. The witness put him in his car to take him to hospital and in the car, the deceased said “I was assaulted” and later that at Rakesh’s residence, “I was assaulted by Vinod, Matai and Mikeli: Rakesh was standing and watching.” When they were on the way to the hospital the deceased told him: “drive slowly because I won’t survive.”
6. The deceased was taken to the hospital where he died some 24 hours later.
7. Apart from identifying his assailants he said nothing about the incident.

8. PW2 in the enquiry was Monisha Devi, the 16 year old daughter of the deceased. On the 14th April 2014, she was sleeping when her grandmother woke her at about 7.30 or 8pm and told her to see her father's condition. She saw him in his room and noted the extensive injuries over his body. He was spitting blood. His mother was in the room too and they sat each side of him. The witness was very disturbed and asked him what happened. He said that he had been assaulted and when she asked who by, he said "Rakesh, Vinod, Matai and Mikeli". Just those 4 names and nothing else. She told of getting him out of the room to the verandah. He couldn't stand or walk so they (mother, brother and witness) carried him out. He was placed in the car and they set off to the hospital, the son and daughter sitting in the back seat. At one point in the journey the deceased said "Drive slowly, I won't survive."

9. PW3 was Divinil Naidu was the son of the deceased and the brother of PW2. He went into the room where his father was lying and saw him in the same deplorable state as attested to by PW1 and PW2. He heard what the deceased was saying at the time. He gave a report of what was said – that he had been assaulted and that Vinod and Matai had been there. He was vomiting and spitting blood. In the vehicle on the way to the hospital his father was crying and speaking in a very low voice and saying that he had been assaulted like an animal. The witness said that he (ie the witness) was very emotional and he was unable to recall a lot.

The Law

10. The law relating to the reception of evidence in exception to the rule against hearsay evidence under the doctrine of *res gestae* was first expounded by the Privy Council in **Ratten** [1972] AC 378 and adopted by the House of Lords in **Andrews** [1987] A.C. 281. Lord Ackner in **Andrews** (*supra*) said that the utterance made must have a “close and intimate connection” between the exciting events in issue and the making of the statement, the theory being that the spontaneity of the utterance is some guarantee against concoction.
11. The learned authors of **Blackstone’s Criminal Practice 2016** write that the statement is sufficiently “spontaneous” if it is so closely associated with the event which has excited the statement, to be able to state that the mind of the declarant was still dominated by the event.
12. The Court of Appeal has recently (30 November 2017) dealt with the matter in this jurisdiction in **Chand** AAU112 of 2013 where the Court approved the adoption of the **Ratten** principles. In the light of those decisions it falls to this Court to examine the spontaneity of the utterances along with an assessment of the relevance of the utterances to the principal event leading to them.
13. Defence Counsel have made very strong written and oral submissions in objection to the admissibility of the utterances; all of which the Court has taken into consideration.

Discussion.

14. The Court immediately discounts the evidence of PW3 in this enquiry. He gave evidence of his father's utterances in reported speech, not in exact terms as they were spoken. He admits that he was in an emotional state and his recollection was vague.
15. The prosecution may well call him to give evidence of his view of his father's condition but not to give evidence of what the father is reported to have said.
16. The evidence of PW1, Vishek Kumar Naidu, is quite clear. It is not relevant, as Mr Khan pleads, that the witness has had time and motive to concoct or distort the words spoken. The test is whether the words spoken were such a spontaneous adjunct to the "event" to prevent concoction **by the declarant**. (My emphasis).
17. Nor is it relevant that there were discrepancies between the evidence of the prosecution witnesses. Those discrepancies, if they exist, are a matter for the trial on the general issue, not for this trial within a trial.
18. Mr. Raza calls into question the spontaneity of the utterances. He submits that there is no evidence of what happened to the deceased in the 2 or more hours between 5.30pm and 7.30pm. In addition, along with Mr. Khan, he pleads that the witnesses had a motive to make accusations against the accused; allegations that are irrelevant to the test this Court must apply.
19. Mr. Sen is a very strong oral submission, took issue particularly with the evidence of PW2 Monisha Devi, the daughter of the deceased. He pleads that the evidence she gave of the utterances of her father were in Hindi and that when she gave that evidence

to this enquiry she did not give verbatim evidence of the Hindi words but gave the meaning of his utterances in English. The statements are therefore, he pleads, hearsay upon hearsay, and her own interpretation of what her father said.

20. The evidence she gave was that on seeing the multiple injuries and deplorable condition and on being told by him that he was assaulted she asked; "by who?" and he said "Rakesh, Vinod, Matai and Mikeli". This writer does not speak or understand Hindi, but I am certain beyond reasonable doubt that that utterance would be the same in Hindi as it is in English. The utterance consists of 4 names; not a narrative.
21. The deceased's allegation that he was assaulted is evidence that can be led to explain the utterance relied upon by the prosecution.
22. I cannot accept Mr. Sen's submissions in this regard.

Analysis

23. PW1, PW2 and PW3 all gave evidence of the tragic condition of the deceased at the time they saw him. He was obviously *in extremis* and in such state he was so emotionally overpowered by events that the Court discounts the possibility of concoction or distortion. His mind was totally controlled by the event. Length of time between the event and the utterance is again irrelevant in the circumstances.
24. His tragic condition is also testament to having been assaulted immediately prior to his being found, making his utterances relied upon by the prosecution only understandable in the context of the assault and therefore part and parcel of the "event".

25. I find that despite the declarant being in the belief that he would not survive, that evidence is insufficient to make a finding that the statements were dying declarations.
26. This Court finds that the utterances made by the deceased to Vishek Kumar Naidu and Monisha Devi are admissible in exception to the rule against hearsay under the doctrine of *res gestae*.
27. The statements are relevant evidence which should be admitted in the interests of justice. The witnesses will be tested at trial and the assessors will be appropriately directed on the issues so they may give whatever weight they wish to that evidence.



P.K. Madigan
Judge