STATE v JOJI DRASUNA (HAC0014 of 2002L)

HIGH COURT — CRIMINAL JURISDICTION

CONNORS J

6–8, 9 September 2004

Evidence — admissibility — witness evidence — police interview — whether confession statement voluntarily made — whether record of interview admissible in evidence — Constitution of the Republic of Fiji s 27.

Special Constable 2367 Sauqaqa travelled with others to an area near Ba when he saw several Fijian youths and one of them ran away. He got out of the police vehicle and chased the running Fijian youth (the Accused) who fell over on the gravel road. He tackled the Accused who fell onto a tramline and a scuffle ensued. Police assistance arrived and the Accused was conveyed to the Ba Police Station in a police vehicle. A fellow officer gave similar evidence. He further submitted that upon arrival at the Lautoka Police Station, the Accused was handed to the uniform officers and the special constable went off duty.

On 3 July 2002, the station diary of the police showed that PC 2598 Druma brought in under arrest the Accused from Ba with injuries such as bruises on left knee and head, cut on the right leg and lips, and both eyes were swollen. It showed that the Accused was later placed into a cell and the interviewing officer one Maciu Vava (Maciu) went to the cell where the Accused was detained and said that the Accused smelled strongly of liquor. Maciu decided that it was not appropriate for the Accused to be interviewed at that time. He later returned and conducted the caution interview. At the beginning of the interview, Maciu handed the telephone to the Accused who spoke to the legal aid office but was informed that the Legal Aid Officer was in the courthouse. Maciu informed the Accused of the unavailability of the legal aid officer and asked the latter if he wants to go ahead with the interview and the Accused answered in the affirmative and declined the presence of someone during the interview. The interview commenced. Maciu then gave evidence that he took the Accused to the hospital for medical examination. He said that he asked the Accused if he has any complaint and the Accused answered in the negative. Maciu also testified that the Accused did not complain of any assault while in custody and voluntarily signed the record of interview after it was read to him.

The Accused objected to the admission of his interview by the police on the following grounds: (a) that the Accused was brutalised before and during the interview; and (b) the confession statement was not voluntarily made. He denied that he agreed to the record of interview without medical examination and said that he requested medical treatment. He likewise said that he requested a lawyer and did not have the opportunity to speak on the telephone to the Legal Aid Office. He said that he signed the record of interview and that he made the statements contained in it because of fear. He said that he was threatened with further assault but made no allegation of any assault other than what he alleged took place at the time of his arrest.

Held — (1) The officer was a consistent witness whose answers under cross-examination were consistent with those given in his evidence in chief. Even if it were that the Accused was assaulted by the officers, it was necessary then to question whether that assault, if it occurred, impacted sufficiently in the record of interview to make such record inadmissible. Thus, no evidence was established to suggest that there was any alleged assault from the time of his arrival at the Lautoka Police Station until the conclusion of the record of interview. The court accepted was the evidence of the apprehending officers and the interviewing officer as to the events. The court was satisfied

beyond reasonable doubt that the caution interview was voluntarily made in circumstances of fairness to the Accused and accordingly, the admissions contained in the interview were admissible.

Determination made.

Cases referred to

R v Mallinson (1993) 1 NZLR 528, cited.

Cleland v R (1982) 151 CLR 1; 43 ALR 619; *Collins v R* (1980) 31 ALR 257; *R v Butcher* (1992) 2 NZLR 257; *R v Thompson* (1893) 2 QB 12; [1891–4] All ER Rep 376, considered.

K. Tunidau for the State

H. A. Shah for the Accused

Connors J. The Accused objects to the admission of his interview by police on 4 and 5 July 2002 into evidence. The grounds of objection as stated by counsel for the Accused are:

(1) The Accused was brutalised before and during the interview; and

(2) The confession statement was not voluntarily made.

The grounds upon which a confessional statement can be excluded from evidence, are either that it is not voluntarily made or that it was obtained unfairly and in breach of the rights given to persons in police custody under s 27 of the Constitution.

In relation to voluntariness, breaches of the judges' rules are relevant but do not determine what is voluntary. The real question under principle (e) under preamble to the judges' rules is whether the statement is 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".

Oppression is something which "tends to sap and has sapped that free will which must exist before a confession is voluntary".

A failure to comply with s 27 of the Constitution will result in the exclusion of evidence obtained from a person in custody unless the court is of the view, that it would be fair and just to include such evidence.

In *R v Mallinson* (1993) 1 NZLR 528 (*Mallinson*), (referred to with approval by the Chief Justice for Fiji in *Mul Chand Labasa* High Court case November 1999) the New Zealand Court of Appeal held that the onus was on the prosecution to show first that the suspect had been told of his right to consult a lawyer before the questioning began, and second that the suspect understood the substance of the right and that the exercise of the right would have been implemented if he chose to exercise it. However evidence that the right had been advised, normally led to an inference that the suspect understood the nature of the right.

In that sense *Mallinson* was not told of this right until an hour after his arrest, but before he was interviewed. His interview was excluded, and the jury directed to acquit. On a case stated to the Court of Appeal decided that the right to consult a lawyer, and the right to be informed of that right, arose on arrest, and the right must be communicated immediately after arrest and before "the legitimate interests of the person who is arrested are jeopardised". The police have a duty to inform the suspect of this right but no particular formula is required as long as the suspect knows he may exercise the right before questioning begins.

The Court of Appeal held that where he had been told of the right to a lawyer before questioning began, the proper inference should have been that he understood that the rights were exercisable immediately and before questioning began. Thus the trial judge should not have excluded the statements, and a new trial was ordered.

In *R v Butcher* (1992) 2 NZLR 257, Cooke P said at 266:

> As indicated in Kirifi, there may be circumstances in a particular case where, despite some degree of transgression of the rights, it is fair and right to admit a confession in evidence … prima facie however, a violation of the rights should result in the ruling out of the evidence obtained thereby. The prosecution should bear the onus of satisfying the court that there is good reason for admitting the evidence despite the violation.

In *R v Thompson* [1893] 2 QB 12; [1891–4] All ER Rep 376 Cave J at 18 said:

> I would add that for my part I always suspect these confessions, which I suppose to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not infrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession — a desire which vanishes as soon as he appears in a court of justice.

One might say what has changed since 1893.

In *Cleland v R* (1982) 151 CLR 1 at 15; 43 ALR 619 at 629 Murphy J said:

> The voluntariness of a confession is suspect if it is obtained by interrogation rather than being volunteered, of it, although volunteered, the procedure involved interrogation; if the confessor was in custody, lawful or otherwise; or if anything suggests inducement by threats, promises, false representations or other trickery. Because of circumstances appearing from the evidence, a judge may treat a confession as suspect for involuntariness (even if this was not asserted by the accused because he denies making it).
>
> If the accused is in custody the trial judge must be satisfied that, notwithstanding that the accused was under the control of the police or other custodians, the confession was voluntary. If there is suspicion of threats or other inducement, the judge must be satisfied that there were none, or that these did not operate by way of inducement.

Also in Cleland Deane J at CLR 18; ALR 632 said:

> At common law, a confessional statement is not admissible in evidence against an accused unless it be established that it was voluntarily made…if the making of such an alleged statement has been procured or influenced by unlawful or improper conduct on the part of law enforcement officers, that circumstance will be of relevance on the question whether the confession was voluntary. It will also, if it be established that the confession was voluntary, give rise to a subsequent question whether, in the discretion of the trial judge, evidence of the alleged confessional statement should be excluded for the reason that the reception of such evidence would be unfair to the accused: in this regard, the question is not whether the accused was treated unfairly; it is whether the reception of evidence of the confession would be unfair to him.

In *Collins v R* (1980) 31 ALR 257, Brennan J cautioned that it was important to ensure that a court does not tease out some fanciful meaning from or attribute some extravagant effect to what is said by a person in authority. When commenting on the observations of Lord Morris in *Deputy Commissioner of Taxation v Ping Lin*, his Honour said:

> What His Lordship emphasizes is the importance of ascertaining all of the facts which may bear upon the confessionalist's state of mind, and the importance of a

> practical commonsense assessment of the effect of those facts upon his mind. But the issue of voluntariness is not to be regarded as a mere problem of semantics: it is not resolved by a simple inquiry as to the meaning of the words used by a police officer (or other person in authority). An assessment must be made of the effect of the verbal and non-verbal conduct of the police officer (or other person in authority) upon the will of the confessionalist in the circumstances in which the confession is made. If the evidence does not show that the confession was made in the exercise of a free choice by the confessionalist to make it, the confession is inadmissible. As the means by which a confessionalist's will can be overborne are various, one cannot postulate in advance of particular cases the extrinsic circumstances which will necessarily result in the exclusion of a confession as involuntary, or which will inevitably prove insufficient to found a challenge to its voluntary character. When all the facts are ascertained then in a commonsense way the court must find whether or not the will of the particular confessionalist was overborne.

It follows therefore that the principles governing exclusion require the asking of the following questions:

(1) Was the interview/charge statement given voluntarily?
(2) Was it given in oppressive or unfair circumstances?
(3) Was there a breach of the rights under s 27 of the Constitution?
(4) If there was a constitutional breach, is there anything in the evidence to show that the prima facie exclusion rule should not apply?

In considering all of these questions, the onus is on the prosecution to prove beyond reasonable doubt, voluntariness, lack of oppression, no breach of the Constitution and, if there has been a breach, to show that the breach was inconsequential and did not result in unfairness or oppression.

I turn now to the evidence.

Evidence on behalf of the prosecution was given to the court by two of the apprehending officers. Special Constable 2367 Sauqaqa said in his evidence, that he traveled with others to an area near Ba, on approach he saw a number of Fijian youths and one of those commenced to run away. He says that he got out of the police vehicle and gave chase that the running Fijian youth fell over on the gravel road and that he then tackled the youth, who then fell onto a tramline. He says that a scuffle ensued, that punches were thrown by the Accused and he ended up on top of the Accused and he didn't recall if the Accused was face up or face down. He then says that assistance arrived and that the Accused was then placed in the Ba Police vehicle and transported to Ba Police Station.

His fellow officer, Watisoni Druma, gave similar evidence of travelling to the scene, of approaching a group and of one member of that group running away and the Special Constable alighting from the police vehicle first and giving chase. He says the other officers then alighted from the vehicle some seconds later and gave assistance.

He similarly describes the road or the place which the incident took place, as being a gravel road with a tramline and he describes a scuffle taking place between the Accused and the Special Constable and again that the Accused was transported from the scene to Ba Police Station and ultimately to Lautoka.

He then says upon arrival at Lautoka Police Station, the Accused was handed to the uniform officers and he and the Special Constable went off duty.

The Lautoka Police Station diary for the 3–5 July was tendered into evidence as Ex 4.

Entry No 197 of 3 July 2002 shows that at 2230 hours, PC 2598 Druma and party brought in under arrest one Joji Drasuna from Ba with injuries as follows: bruises on left knee, cut on the right leg, bruises on head, both eyes swollen and

cut on the lips. The diary further shows at Entry 202 at 2307 hours, some 37 minutes later, that the Accused was placed into a cell.

The interviewing officer, PC 1784 Maciu Vava, gave evidence that on the morning of 4 July 2002 after receiving instructions, he went to the cell where the Accused was located. He saw the Accused at about 8 am. The Accused smelt strongly of intoxicated liquor and he determined that it was not appropriate for him to be interviewed at that time. He gave evidence that he later returned and conducted the caution interview commencing at 11.15 am.

The station diary, Ex 4, indicates at Entry No 52 on 4 July 2002 at 0800 hours, a meal was served in the cell. The diary further indicates at Entry No 93 at 1033 hours, the Accused was escorted to the Crime office.

Police Officer, Maciu, gives evidence in accordance with the record of interview that is, that at the commencement of the interview, he cautioned the Accused and he said as is evidenced by question 3 of the record of interview:

> Q3: *Do you wish to consult a lawyer before commencing this interview?*
> A: *Yes I want to see Legal Aid.*

The record then indicates that at 1120 hours, he rang the Legal Aid office and spoke to Mrs Shalend who stated that the Legal Aid officer, Mr Sharma was in the courthouse:

> Q.4: *The Legal Aid Officer is in the courthouse, what else do you want.*
> A: *We just commence without interview.*
> Q.5: *Do you want someone to be present during your interview?*
> A: *No.*

The oral evidence given by the officer was that he handed the telephone to the Accused who spoke to the Legal Aid Office after he, the officer, had spoken to that office.

The officer then gave evidence with respect to the medical condition of the Accused at the time the interview commenced. His evidence was in accordance with Question 6 of the record of interview.

> Q.6: *Joji Drasuna, I want you to be taken to hospital so that you may be attended by medical doctor before we commence with your interview, what do you want?*
> A: *No, after we have completed our interview then I will go to the hospital.*

The interview then commenced.

The oral evidence the officer gave is also evidenced by the record of interview, Ex 1, that at 1300 hours the interview was suspended until 1400 hours for lunch, which consisted of vegetables and fried rice. At 1430 hours, the interview was suspended for reconstruction and recommenced at 1830 hours. The evidence of the officer was that the reconstruction took about 1 hour and at that time he took the Accused to the Lautoka Hospital. This is confirmed by Ex 2, a medical officer's report, which indicates that the Accused was examined on 4 July 2002 at 3.30pm, that is 1530 hours.

The officer was present when the medical examination was undertaken. He also gave evidence as Ex 1 indicates that the record of interview was suspended at 1945 hours on 4 July 2002 when the Accused was served dinner of chopsuey vegetables with rice and that the interview recommenced on 5 July 2002 at 0835 hours and then concluded at 1025 hours.

He says that he asked the Accused if he had any complaint and he said he didn't. He was asked in his evidence if any complaint was made by the Accused of assault between 4 and 5 July while the Accused was in custody and he said no. He says that the Accused voluntarily signed the record of interview after it had been read to him.

I found the officer to be a consistent witness whose answers under cross-examination were consistent with those given in his evidence in chief.

The final witness for the prosecution was PC 562 Qio who charged the Accused. The Accused made no statement when charged.

The Accused chose to give sworn evidence. In his sworn evidence, he says that he was drunk on the night of 3 July when approached by police officers. That he was standing on the road with 3 friends. Police officers arrived by vehicle, that one officer alighted and that officer then tackled him, the Accused to the ground and assaulted him. That he was kicked by another officer that his hands were held by officers and he was punched and beaten with a stick. That torchlight was shone on his face, he was punched in the right eye or hit there with a stick.

I note that no witness was asked whether a torchlight existed or was present that all witnesses indicated that it was a very dark night and the only evidence of light at the scene was that emanating from the police vehicles. He says he did not try to run away, that he merely stood there with friends and impliedly suggest that the assault by the police officers was completely unprovoked.

He denies that he had agreed to the record of interview commencing without him being medically examined and says that he requested treatment as late as the time which breakfast was brought to him on 4 July. He says that he requested a lawyer. He says that he did not have the opportunity to speak on the telephone to the Legal Aid office.

He says that he signed the record of interview and that he made the statements contained in it through fear. He was frightened. He says he was threatened that he would be further assaulted but he makes no allegation of any assault other than that that he alleges took place on the road, at the time of his arrest.

It is clear that the Accused suffered injuries, that fact is evidenced from the station diary and the medical officers' report. What is not so clear is the cause of those injuries, how they were obtained. Were they obtained as the two officers say in their evidence or was it a situation as described by the Accused, that is, that he stood there passively with his friends when the police vehicles arrived and the police officer for no reason at all, tackled him to the ground.

I have difficulty accepting the Accused version of events but in any event, even if, it were that the Accused was assaulted by the officers at about 9.30 on the night of 3 July, it is necessary then to question whether that assault, if it occurred, impacts sufficiently in the record of interview which commenced at 11 am, the next day, to make that record inadmissible.

As I have said, there is nothing in the evidence of the Accused to suggest that there was any alleged assault from the time of his arrival at the Lautoka Police Station on the night of 3 July until the conclusion of the record of interview at about 10.30 am on 5 July. The only evidence is, he says, he was threatened by the interviewing officer that if he didn't make the statements and didn't sign the statement then he would be further assaulted.

The authorities to which I have referred require in part a common sense approach to the facts. Those authorities also required there to be an overbearing and of course that overbearing must exist the time the statement is being taken.

The burden rests with the State to prove beyond reasonable doubt the confession was voluntarily made that there was a lack of oppression and that there was no breach of the Constitution or of the judges' rules. As I have indicated, I have difficulty accepting the Accused's evidence and accordingly I do accept the evidence of the apprehending officers and the interviewing officer as to the events.

But as I have said even if I were of the opinion that an assault took place on the night of 3 July then I am of the opinion that that assault in itself did not lead to there being any oppression in the course of the record of interview which was taken commencing at 11 am on 4 July and concluding at 10.35 am on 5 July and accordingly, I am satisfied beyond reasonable doubt that the caution interview was voluntarily made in circumstances of fairness to the Accused and accordingly the admissions contained in that interview are admissible.

Determination made.