



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 23 of 2017

BETWEEN

Republic

And:

Rizzal Timothy

Before: Khan, J
Date of Hearing: 6 September 2019
Date of Submissions: 13 September 2019
Date of Ruling: 18 September 2019

Case may be cited as: *Republic v Rizaal Timothy*

CATCHWORDS:

Whereas the accused alleged that he was denied the opportunity to consult a lawyer as provided for in Article 5(2) of the Constitution –Whereas the police made unsuccessful attempts to contact the Public Defenders’ lawyers- Whereas accused agreed to be interviewed without consulting a lawyer- Whereas the accused made confessions- Whereas the Nauruan translation was not recorded in the record of interview in breach of Judges Rules- Whether it should be admissible in evidence.

APPEARANCES:

Counsel for the Republic: F Lacinivalu
Counsel for the Defendant: S Valematabua

RULING ON VOIR DIRE

INTRODUCTION

1. The accused is charged with the following: -

Count 1 (Representative)

Indecent treatment of girls under 17; Contrary to s.216 of Criminal Code 1899.

Particulars of Offence

Rizzal Timothy between 1 January 2014 to 11 May 2016 at Nauru, unlawfully and indecently deals with F K, a girl under the age of 17 years.

Count 2 (Representative)

Statement of Offence

Indecent acts in relation to a child under 16 years old; Contrary to s.117(1)(a), (b) and (c)(ii) of the Crimes Act 2016.

Particulars of Offence

Rizzal Timothy between 12 May 2016 to 22 September 2017 at Nauru, intentionally and indecently touched F K, a girl under the age of 16 years and the said acts were indecent and he was reckless about the fact that the acts were indecent.

RECORD OF INTERVIEW

2. Following a report made to the police, the accused was arrested on 22 September 2017 and he participated in a record of interview in which he made certain confessions.
3. The accused now challenges the admissibility of his confessions on two grounds which are:
 - a) The Record of the Caution Interview of the defendant Rizzal Timothy which as purportedly recorded on 22 September 2017, was unfairly obtained and should be inadmissible as evidence in the defendant's trial as the defendant was not availed the opportunity to consult or be advised by a legal practitioner before his interview commenced.
 - b) The record of the caution interview of the defendant dated 22 September 2017 was unlawfully obtained and should be inadmissible as evidence in the defendant's trial in that the questions and answers were not spoken fully in the Nauruan language as the interviewing officer could not even translate some questions from English to Nauruan.

RIGHT TO A LAWYER

4. Article 5(2) of the Constitution provides:
 - (2) A person who is arrested or detained shall be informed promptly for the reasons for his arrest or detention and shall be permitted to consult in the place in which he is detained a legal representative of his own choice.
5. It is not in dispute that the accused was informed during the record of interview, and in particular at question 11, that he had a right to seek a legal representative. After he was

informed of his right, the interview was suspended and the accused was put in another room whilst the interviewing officer, Const Namaduk and the witnessing officer Snr Const Reweru made attempts to find a lawyer and after 10 minutes they brought the accused back to the interviewing room. They advised him that it was late around 8 to 9 pm and lawyers were not available. Unfortunately, the record of interview should have stated that the interview was suspended and at the time when it resumed again.

6. Thereafter the accused said to the police that he could tell them as to what happened.
7. The questions were asked in English and translated in Nauruan language and only the questions were written in English and the Nauruan version of the question were not recorded.
8. When the interview commenced the accused as I stated earlier made certain admissions.
9. Under Article 5(2) of the Constitution the onus is on the police to inform an accused of the reasons for his arrest and then allow him to consult a lawyer of his choice. In this matter the accused was advised as to the reasons for his arrest (see question 9 of the record of interview) and was also informed that he had the right to consult a legal representative and the interview was suspended. The accused did not say to the police that he had a particular lawyer in mind whom he wanted to consult and the police made efforts on his behalf to contact the lawyers from the Public Defender's office, which they invariably do, and nobody was available.
10. Under Article 5(2) all the police were required to do was to allow the accused to consult a lawyer and they went beyond that and made efforts to contact the Public Defenders lawyers. In *Bunning v Cross*¹ it was stated at page 76 as follows:

“In *Lawrie v Muir*² in the passage cited by Lord Hodson speaking for their Lordships in the Judicial Committee in *King v The Queen*³ The Lord Justice General, Lord Cooper said:

“From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict-

- a) The interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and
- b) The interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps highhanded interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the

¹ [1977-1978] 141 CLR 54

² (1950) S.L.T. 37 at pp 39-40

³ [1969] 1AC 304 at p315

public prosecutor to vindicate the law. On the other hand the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular matters.”

11. It was further stated at p.76 as: In *King v The Queen*⁴ their Lordships do indeed, while applying *Kuruma*⁵, so enlarge the matter to be considered under the rubric of unfairness to the accused, a concept which they observed to be ‘not susceptible to closed definition’, that it discloses approaches of what was served in Ireland’s case⁶. Their Lordships agreed with Lord Macdermott CJ who said in *Reg v Murphy*⁷, **that unfairness to the accused was to be judged, ‘in light of all the material facts and findings and all the surrounding circumstances.** The position of the accused, the nature of the investigation and the gravity or otherwise of the suspected offence, may all be relevant’. (Emphasis added by me.)
12. In the circumstances, I find that the accused’s complaint that he was not given an opportunity to consult a lawyer has no basis.

NAURUAN LANGUAGE

13. The questioning in the record of interview as I stated was only written in English and the English translation into Nauruan language was not recorded.
14. All the questions were translated from English into Nauruan language by the recording officer, Const Namaduk, and that would mean that he was quite proficient in English language, however, when he gave evidence in court in respect of voir dire he sought the assistance of an interpreter. The questioning in court is in the English language and if he was indeed so proficient in the English language then why did he seek the assistance of an interpreter? In *Benjamin v Republic*⁸ Thompson CJ stated as follows:

“Rule IV(d) of the Judges Rules provides that ‘whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement’. That particular words and phrases in Nauruan language may be interpreted with different meanings or shades of meaning by different translators is well known to the Courts here. It is therefore not an adequate compliance with Rule IV(d) for Nauruan police officer to record in English a statement made to him in Nauruan, having made the translation himself without recording the actual Nauruan words used.”

15. And His Honour Thompson CJ later stated in *Benjamin* as follows:

“The Court should have before it a record of precise words spoken, in the language in which they were spoken, unless it is not reasonably possible. The record or notes made by the interpreter should, therefore, be in the language spoken by the person who made the statement, unless the interpreter is not literate in that language. If there are likely to be a large number of cases in which interpreters are required to be used who are not

⁴ [1969] 1AC 304

⁵ [1955] AC 197

⁶ (1970) 126 CLR 321

⁷ (1965) N.I.L.R. 138 at p.149

⁸ [1975] NRSC 9; [1969-1982] NLR (D) 44 (25 November 1975)

literate in the languages in which statements translated by them are made, it may be necessary for a system of tape recording statements to be adopted, with adequate safeguards to prevent falsification and obviate the risk of allegations of falsification.”

16. Notwithstanding the breach of the Judges Rules I still have the discretion to admit the confession provided and I am satisfied that the confession was made voluntarily and not unfairly.
17. The accused complained that he did not understand some of the questions put to him and the only way to verify that would be to have the translation recorded and put before the Court, but unfortunately that is not available. So, the benefit of doubt has to be resolved in favour of the accused.


CONCLUSION

18. For the reasons given I hold that the confessions made in the record of interview is not admissible in evidence.

GENERAL OBSERVATION

Thompson CJ had suggested in 1975 that a tape-recording device be used to obviate allegations of falsification. Unfortunately, it seems that the Nauru Police still do not have any kind of recording devices. I would like to impress upon the authorities to provide the police with video recording devices as a matter of urgency. I say this as apart from cases relating to Nauruan's we also have many cases before the court of other nationals.

DATED this 18 day of September 2019


Mohammed Shafiullah Khan
Judge

