REPUBLIC OF NAURU

IN THE REPUBLIC OF NAURU
YAREN DISTRICT
CRIMINAL JURISDICTION

Criminal Case No. 16/2018

Between	**The Republic**	
		Complainant
Against	**Joshua Hiram, Sarch Hubert, and Stonecold Maaki**	
		Defendant

Before	**Judge Rapi Vaai,**
For the Prosecution	**Susan Serukai, Public Prosecutor**
For the Defence	**Sevuloni Valenitabua, Public Defender**
Date of Hearing	**23rd, 24th September 2019**
Date of Judgement	**11th October 2019**
Case may be cited as	***Republic v Joshus H, Sarch H, and Stonecold M.***
Catchwords	

JUDGEMENT

Introduction

1. The three accused were charged with robbery contrary to section 159(a) (b) (c) Crimes Act 2016. It was alleged that on the 11th May 2016 the three accused, whilst in the company of each other stole a backpack containing a wallet and mobile phone of Mohammed Noor, and immediately before the time of stealing, the three accused used violence on Mohammed Noor in order to obtain the backpack stolen.

2. The information alleging the offence was not laid until 15th November 2018, some two years and six months after the alleged offending.

3. All three accused denied the charge, Trial commenced on the 23rd September 2019. Mr Noor the victim told the court he was riding his motor cycle, at night before midnight, towards the Nauru Hospital, where he worked, when he was attacked as he slowed at the speed hump. He could not identify his attackers.

4. No one else witnessed the incident. The only evidence which the police relied on to implicate the accused were the written statements by the accused given to the police in which they confessed their involvement in the criminal act.
5. Counsel for the accused objected to the admissibility of the written statement.

Grounds for objection to admissibility

6. Written grounds for objection were filed by counsel for the accuseds. They can be summarised as:

   (a) Statements were given without any allegations and proper cautions being put to the accused; and

   (b) The record of interview was in the English language when in fact the interview was conducted in the Nauru language.

The Voir Dire

7. Three police officers who fetched the accused from their homes and interviewed them at the police station on the 25th July 2017 testified, After commencement of their shifts at 9 O'clock the morning of the 25th July 2017 they were told to bring in the three accused for question, All accused were taken from their homes to the police station.

8. Defendants Maaki and Hubert were 16 years old at the time. Hiram was 18 years old. Maaki was interviewed from 11:49 am until 12:48 pm, when the recording of his statement was completed. Hiram's written statement was taken at 14:48 and completed at 15:10. Hubert statement was taken at 15:23 until 16:58.

9. It is common ground that the interview of each accused was conducted by two police officers. The recording officer asked the question in Nauruan and when the accused responded in Nauruan, the recording offices then typed into the computer the question and response in the English language. The witnessing officer did nothing other than witness the interview.

10. At the conclusion of the written statement the following words are the typed in before the statement is signed by the accused, the recording, officer and the witnessing officer.
    "I have read this statement and I have been told I can correct it after or add anything I wish. The contents of statements are true. I have made it of my own free will."

11. All three police officers told the court that when each of the accused verbally admitted the commission of the offence, the caution was then administered. The statements by defendants Hubert and Hiram were tendered, Prosecution struck difficulties during the examination in chief of police officer Duburiya who recorded the statement of the accused Maaki, and quite correctly decided not to tender the statement.

12. Prosecution correctly concealed that in the absence of a written statement containing the admission there is accordingly no evidence against Maaki and the charge against him should be dismissed. Defendant Maaki was accordingly acquitted.

Submissions by the prosecution

13. It was contended that despite the despite the fact that the interviews were recorded in English and not in Nauruan, the statements were nonetheless given voluntarily, were not obtained by unfair means, and in fact was recorded accurately. It was contended that when the accuseds made the verbal admissions they were then immediately cautioned and the accused proceeded to give an account of the robbery which was recorded accurately.

14. In exercising the court's discretion, it was contended that the admissions despite a breach on break of the Judges Rules should be admitted since no prejudice was caused to the accused.

Defence submission

15. Since rule IV (d) of the Judges Rules was breached the caution statements it was submitted should not be admitted. It was contended that breach of the Judges' Rules was the basis of inadmissibility of the statement in ***Benjamin v the Republic***[1] Counsel submitted of paragraph 3 (2) his written submissions;

> "The caution statement ought to be inadmissible and excluded as evidence in the defendants trial because not all that was said during the defendants respective interview were recorded, so there was a breach of Rule IV(d)"

16. It was also submitted that the allegation of robbery and proper cautions were not put to the defendants. It was argued that because the accused became suspects at the police station through their verbal admissions they should have been cautioned there and then and have the allegation put to them together with other questions if any. At paragraph 4 (5) of the written submission it is stated:

> "It is submitted that Caution Statement had to be made after a person has become a suspect. So the procedure for Sarch and Joshua ought to have been:

(a) They were told to go to the police station;
(b) They were to be asked what they knew about the motor bike jacking;

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[1] *(1985) NRSC 9*

(c) If the police officers had evidence that Sarch and Joshua committed the offence then the two defendants should be properly caution under Rule II Judges Rules;
(d) A proper allegation should be put to them respectively so that they could know exactly what they were being charged with;
(e) They should have been advised for their respective, rights to seek advice from a lawyer or legal practitioner;
(f) Further questions may have been asked of them after being advised by lawyer;
(g) Each of them then make caution statement respectively in accordance with Rule IV Judges Rules;
(h) Each of them has to be cautioned again before making their respective statements;
(i) All conversations or oral exchange in question and answer form and all caution and statements made must be recorded in the language spoken by the police officers and the two defendants.

17. In summary it is the unfairness of the process of the interview and the recording of the statements not the voluntariness, of the statement which is challenge. Counsel concedes the written statements were voluntarily given, but be contended nevertheless they were secured in breach the court of the Judges Rule.

18. It was for their submitted the accused must satisfy the court on the balance of probabilities that a voluntary confession should be excluded in the exercise of its discretion.

Was there a breach of the Judges Rules

19. It is important to remember that a breach of the Judges Rules is not in any way fatal. They are not rules of law. The history and discussion of the rules are cautioned in a number of English, Australian and New Zealand decisions. Briefly, the English Judges in 1912 approved four rules as guides to police officers. In 1918 another five rules were added. In 1964 the rules were replace by new set of Judges Rules.

20. Statements obtained from accused persons contrary to the spirit of the rules may at the discretion of the trial judges be rejected: see ***R v Voision*** [2] Numerous subsequent decisions in England, Australia and New Zealand demonstrate the existence of this discretion and the manner of its exercise. In ***Benjamin v Republic*** [3] Thompson CJ concluded that while the Judges Rules are not strictly part of the law of England, they are nevertheless are integral part of the process applied by the courts of England, and pursuant to the provisions of the Nauru custom and Adopted Laws Act 1971 and in the absence of any express provision to the contrary, the Judges Rules should be observed in Nauru so for as the circumstances of Nauru permit.

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[2] *(1918) 1 KB 531*
[3] *(1975) NRSC 9*

21. Rule 2 which the defence contended was breached need to be read together with rule 1. It will be convenient to set out the two rules:

> Rule 1: When a police office is endeavouring to discover the author of the crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not from whom he thinks that useful information can be obtained.
>
> Rule 2: Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any question, or any further questions, as the case may be.

22. The contention by the defence in paragraph 4 (5) of written submission that the defendants should be cautioned when they became suspect is contrary to rule 1. Caution is required only when the interviewing officer has made up his mind to charge the defendants.

23. Similarly the contention by the defence in the written submissions that at least two cautions should have been given is contrary to the spirit of Rule 2.
The procedure suggested by the defence which the police should have adopted in the investigation of the two accused's is misconceived and substantially not in accord with the Rules.

24. The evidence given in the voir dire established that the two accused were properly cautioned before their written statements were recorded. Rule 2 was complied with by the police.

Statements not recorded in the Nauru language.

25. It is common ground that there was a breach of the Judges Rules when the recording officer recorded the questions and answers spoken in Nauruan at the interview, in the English languages. The question to be decided is whether in the exercise of my discretion I should reject the statements for non-compliance. Defence counsel in his oral and written submission cited two previous decisions of this court. In ***Benjamin v Republic*** [4] the written statement of the accused was made in Nauruan, but recorded by the police officer in English, similar to the present case. The police did not tender the statement but gave enhance of what the accused said, evidence was given over two years after the statement was recorded and the police officer could only have given evidence of what the accused's said by refreshing his memory from the statements he recorded by translation over 2 years earlier. He in fact refreshed his memory not as to the actual Nauruan words spoken but by his translation. But there was another important fact which persuaded the court to reject the statement. The accuseds were charged with stealing a motor cycle and the accused confessed that they did not confess to having any intention to deprive the owner permanently of his motor cycle. In the absence of the precise words spoken, the court could not entertain the defence. It was accordingly a case not to admit the statement.

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[4] *Supra*

26. Recently in ***Republic v Rizzal Timothy*** [5] Khan J ruled inadmissible a statement, similar to the present case, conducted in Nauruan language but recorded in the English language by a police officer who had a very poor command of the English who required the assistance of a translator when he testified. At the voir dire the accused told the court he did not understand some of the question put to him.
Khan J in paragraph 13 and 14 of his ruling said;

> "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 question were translated from English to Nauruan language by the recording officer, constable 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 English language then why did he seek the assistance of an interpreter."

27. In the exercise of his discretion Khan J concluded;

> "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 prejudicial. So the benefit of doubt has to be resolved in favour of the accused."

28. In both cases the non-compliance significantly prejudicial the accuseds in their defence. The court in both cases could not ignore the possibility that due compliance, by accurate recording of what was spoken by the accused could have assisted the accused in the conduct of his defence. There was therefore a sufficient risk of unfairness to the accused to persuade the court in the exercise of discretion to exclude the statements.

29. In my view the facts in the present do not establish that the non-compliance resulted in any risk of unfairness to the accused or prejudiced them in their defence, if any. They were properly cautioned after they admitted their involvement in the robbery. They voluntarily gave their written statements in which they described how the robbery was executed. There was no indication from them of unfairness or prejudice.

30. The application to exclude the statements for breach of the Judges Rules is accordingly rejected.

<u>The Child Protection and Welfare Act 2016</u>

31. The court invited counsel to address the significance of the Child Protection and Welfare Act 2016 (The Act).
Both counsels conceded that the accused Hubert was 16 at the relevant time, was not accompanied by a parent, guardian or legal representative or a support person at the

[5] *Unreported, Supreme Court of Nauru 18/9/2019*

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time of the interview. Both counsels agreed that section 54 (1) (h) of the Act has been breached.

32. The importance and significance of the Act need no explanation. The preamble says it all;

"An Act to provide for the welfare, care and protection of all children in Nauru and for the enforcement of the rights of children as provided for by international conventions, and standards, while taking into account Nauru culture, traditions and values, and for related purpose.

33. Section 6 then provides that any law which, in interalia provides for processes relevant to dealing with children in any manner and in any contest, must be read and applied subjects to the provisions this Act and in the event of any inconsistency between the provisions of this Act and of any other law, <u>the provisions for this Act must prevail.(my emphasis)</u>

34. For the blatant breach of section 54 (1) (h) of the Act the statements by the accused Hubert is excluded.

<u>Article 5 (2) of the Constitution – Right to Consult Legal Representative</u>

35. Although briefly alluded to by defence counsel in his written submission the obvious breach of article 5 (2) of the constitution was not argued or raised. Neither accused, was accorded the opportunity to consult a lawyer or pleader before or during questioning by the police.

36. The first interview commended at 11:49am and the last one was completed at 4:58pm, so that the accuseds spent more than six hours of the police. Given their ages they probably could not fully understand and appreciate the meaning of the word:

> "Right to remain silent" A lawyer, pleader or guardian may have been able to explain it.
>
> "Without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individuals will to resist and to compel him to speak where h would not otherwise do so freely"[6].

37. For breach of Article 5(2) the statement by both Hubert and Hiram are excluded.

<u>Conclusions</u>

I. With the exclusion of the records of interview of both accused, the police have no evidence to prove the charge of robbery.

II. Both charges are dismissed and the two accused are acquitted.

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[6] *Miranda v Arizona 384 US 43b, 442-443(US 1966)*

Dated this 11th day of October 2019

Judge R. Vaai