



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE NO 5 OF 2019

BETWEEN

REPUBLIC

AND

LD AND MBS

Before: Khan, J
Date of Hearing: 6 and 7 October 2020
Date of Submissions: 12 and 13 October 2020
Date of Ruling: 20 October 2020

Case may be cited as: The Republic v LD and MBS

CATCHWORDS: Criminal Law – Confessional Statement – Where juvenile offender arrested and interviewed in the absence of a parent – Where a male companion was present – Whether the arrest was lawful – Whether the detention was lawful – Whether the offender was given opportunity to seek legal representation – Whether the interview was in compliance with section 54 of the Child Protection and Welfare Act 2016.

APPEARANCES:

Counsel for the Prosecution: S Serukai
Counsel for First Juvenile: V Clodumar
Counsel for the Second Juvenile: F.Ribauw and E.Soriano

RULING

INTRODUCTION

1. MBS is a juvenile. His date of birth is 15 August 2005. He is 14 years old. He is charged with another juvenile who is referred to as LD in this case for an offence of aggravated robbery where they are alleged to have robbed a shop keeper in Aiwo District on 29 November 2019 of cash in the sum of \$500; and that at the time of the robbery they were armed with an iron rod.

BACKGROUND

2. He was arrested by the police on 3 March 2020 and taken to Nauru Police Station where he was detained in custody until 4 March 2020 when he was interviewed. I shall discuss later the circumstances in which he was arrested.
3. At the time of his arrest MBS was at his grandparents' home. When the police arrived, he was asleep and was woken up by his grandfather and later spoken to by the police and taken to Nauru Police Station.
4. At the police station he was handed over to the investigating officer – Sgt Lady Jane Hilo (Sgt Hilo). He was locked in a cell which is also shared by adults until his interview the following morning.
5. After the arrest the police made several attempts to contact his mother but without any success, however, the mother contacted the investigating officer later in the evening. According to Sgt Hilo, she was yelling at her and was very aggressive questioning as to why MBS was taken into police custody; she threatened to lodge a report with the Commissioner of Police against her.
6. The interview of MBS was carried out on 4 March 2020 at around 10am. The conversation was in Nauruan language and both Nauruan and English version was typed into a computer. The mother was not present when the interview commenced and a person by the name of Alphadutch, who claimed to be a caretaker of MBS was present. During the interview the mother walked in and not long thereafter MBS made a confession that he with another person had robbed the shop keeper at Aiwo District.

NOTICE OF VOIR DIRE

7. On 25 May 2020 the defence gave written notice to the prosecution that it would be challenging the admissibility of the record of interview. The grounds of the challenge are as follows:
 - 1) That the accused was treated unfairly when he was arrested on 3 March 2020 and was detained for 24 hours without his parent's knowledge;
 - 2) That the caution interview commenced without parents or guardians present;

- 3) That the accused is a juvenile aged 14 years old when he was detained for 24 hours. At the commencement of the interview no parent was present until at near end of the interview when the mother walked in and was advised to sign the caution statement;
- 4) That the caution statement is in breach of the Judge's Rules;
- 5) That the caution is in breach of Article 10(8) of the Constitution – 'right against self-incrimination';
- 6) That the caution is in breach of Section 54 of the Child Protection and Welfare Act 2016.

RELEVANT LAW

8. Thompson CJ in *Benjamin v Republic*¹ stated that the Judge's Rules of England are applicable to Nauru. He stated at page 3 as follows:

"By virtue of Section 4 of the Customs and Adopted Laws Act 1971, the law in force in Nauru relating to evidence in the statute law and the common law in force in England on 31st January 1968, except as amended by Nauruan Statute, eg The Civil Evidence Act 1972. While the Judge's Rules are not strictly part of the law of England, they nevertheless are an integral part of the process by which that law is applied by English Courts. As such, in the absence of express provision to the contrary in the laws of Nauru, they should be observed here so far as the circumstances of Nauru permit."

STANDARD OF PROOF

9. For the confession to be admitted in evidence it has to be established that it was obtained voluntarily. In a consultation paper on 'The Procedure Governing the Admissibility of Confession Statements in Criminal Proceedings'² (Consultation Paper) stated as follows at [1.5] and [1.6]:

[1.5] It is a fundamental principle that for a confession to be admitted as evidence for the jury's consideration, the trial judge must be sure, or be satisfied beyond reasonable doubt in a trial within a trial (known by lawyers as a *voir dire*), that the confession was made "voluntarily" by the defendant.

[1.6] In *Ibrahim v R*, Lord Sumner defined the concept of "voluntariness" as follows:

"It has long been established as a positive rule of English Criminal law, that no statement by the accused is admissible against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

¹ [1975] NRSC 9; [1969 – 1982] NLR (D) 44 (25 November 1975)

² Mr Peter Kwok Bun S.I.T, Government Counsel

BURDEN OF PROOF FOR ADMISSIBILITY OF CONFESSION

10. As stated, the burden of proof for admissibility of confession in UK is beyond all reasonable doubt – whilst in Australia the burden of proof is on a balance of probabilities.
11. I refer to [2.5] and 2.6] of the Consultation Paper where it is stated:

[2.5] In Australia, *voir dire* proceedings in relation to confession statements have been rare. This might be due to the lower standard of proof required of the prosecution in the determination of whether the confession statement was made voluntarily. In *Wendo v R* the High Court of Australia held that:

“in determining whether a confession statement was made voluntarily, the standard of proof to be applied by the trial judge is not that of proof beyond reasonable doubt. It is a mistake to transfer the general propositions as to proof beyond reasonable doubt laid down in Woolmington v DPP [1935] A.C.462 from their application to the issues before the jury to incidental matters of fact which the judge must decide.”

[2.6] Thus, in Australia, the standard of proof required at the *voir dire* in criminal cases is the civil standard of a balance of probabilities, and not the higher criminal standard of proof beyond reasonable doubt currently adopted by other common law jurisdictions such as Hong Kong and England. As the Evidence Act 1995 is a recent enactment, it remains to be seen whether the Act would affect the frequency with which *voir dire* proceedings are held in respect of the issue of voluntariness.

THE COURT’S RESIDUAL DISCRETIONARY POWER

12. I refer to [1.11] and]1.12] of the Consultation Paper where it is stated:

[1.11] Even where a confession is voluntarily made, a trial judge may exercise his residual discretionary power to refuse to admit the confession if he is of the opinion that on all the evidence before him, or in the light of all the material circumstances, it would be unfair to the defendant to admit the confession in evidence. In *R v Sang*, Lord Diplock explained how this discretion should be exercised:

“So I would hold that there has now developed a general rule of practice whereby in a trial by jury the judge has a discretion to exclude evidence which, though technically admissible, would probably have a prejudicial influence on the minds of the jury, which would be out of proportion to its true evidential value.”

[1.12] In the same judgment, however, Lord Diplock held that this discretion should seldom be exercised:

“... the function of the judge at a criminal trial as respects the admissibility of evidence is to ensure that the accused has a fair trial according to law. It is no part of a judge’s function to exercise disciplinary powers over the police or

prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained, but with how it is used by the prosecution at the trial. A fair trial according to law involves ... that there should be excluded from the jury information about the accused which is likely to have an influence on their minds prejudicial to the accused which is out of proportion to the true probative value of admissible evidence conveying that information.”³

He went on:

“... the fairness of a trial according to law is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted. However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused’s guilt it is no part of his judicial function to exclude it for this reason.”⁴

NAURUAN POSITION

13. In Nauru as a result of the Custom and Adopted Laws Act 1971 we adopted the common law of England which was in force as at 31 January 1968; and as at that date the position in England was that confessional statement to be admissible had to be proved beyond all reasonable doubt. So, for this confession statement to be admissible in evidence the burden of proof is on the prosecution to prove beyond all reasonable doubt that the confession was obtained voluntarily.

JUDGE’S RULES

14. The Judge’s Rule is a Practice Note of the Queen’s Bench Division⁵ where Rules 1 to 6 is stated. In the footnote No. 3 titled ‘Interrogation of Children and Young Persons’. It is stated:

“As far as practicable children (whether suspected of a crime or not) should only be interviewed in the presence of a parent or a guardian, or, in their absence, some person who is not a police officer and is of same sex as the child. A child or young person should not be arrested, nor even interviewed, at school if such action can possibly be avoided. Where it is found essential to conduct the interview at school, this should be done only with the consent, and in the presence, of the head teacher, or his nominee.”

³ Ibid, at 436, 437

⁴ Ibid, at 436, 437

⁵ 1964 1 All E.R. 237

15. Section 54 provides:

PART 6 – INVESTIGATIONS AND COURT PROCEDURES WHERE CHILDREN ARE INVOLVED

Section 54 – Special requirements applying to investigations and enquiries involving children

- 1) Despite the provision of any other law to the contrary, the following matters apply whenever an investigation or inquiry is undertaken in relation to a child by a police officer, an authorised officer, or any other person lawfully exercising powers of investigation or inquiry in relation to a child under any law:
 - a) at all stages of the investigation or inquiry, the best interests of the child must be the primary consideration;
 - b) the investigation of or inquiry into the child must recognise and protect the rights and interests of the child at all stages of the justice process, and must reduce trauma and secondary traumatisation of the child;
 - c) the matter must be promptly notified and referred to other relevant agencies to promote the protection and welfare of the child, and his or her rights;
 - d) any action taken must permit the child to fully state his or her views, and the relevant officer must take into account the child's views in accordance with their age and maturity, and must respect the child's right to privacy;
 - e) child-friendly interview environment and interview techniques must be implemented and applied;
 - f) special procedures must be applied to reduce the number and length of interviews that children are subjected to;
 - g) special facilities and appropriate processes must be provided and applied where the child has a disability to ensure the effective application of the requirements of this section;
 - h) children are entitled to have a parent, guardian, legal representative or other appropriate support person agreed to by the child, present with them at all stages of the investigation and trial proceedings;
 - i) measures must be implemented to ensure children are protected from direct confrontation with persons accused of violating their rights, and must not be subjected to hostile, insensitive or repetitive questioning or interrogation;

- j) investigations must be conducted expeditiously, and must be followed by expedited court proceedings;
 - k) investigators who have received special training in relation to dealing with cases involving children must be engaged in the process, if they are available.
- 2) All orders or approved procedures applying to members of the Police Force when they deal with children must be consistent with the requirements stated in subsection (1).

CIRCUMSTANCES OF ARREST OR DETENTION

- 16. MBS was arrested on 3 March 2020 by Constable Nordoff Detageouwa (PC Nordoff) from his grandfather's home. He said that he reported for duty at 9am and was requested by his superior Inspector Daniel to arrest MBS, and as a result of this he went to look for him at Alphasdutch's residence and his mother's residence and eventually found him at his grandparent's residence.
- 17. When he got to the grandfather's residence, he advised him that he was looking for MBS and will be arresting him as he committed crime of aggravated robbery. The grandfather told him that MBS was asleep and he will wake him up.
- 18. When MBS woke up PC Nordoff told him that he was being arrested and will be taken to the police station and if he has to say anything it will be recorded and given in evidence in Court and he was given his right to be silent. PC Nordoff stated that the arrest took place at 11am.
- 19. PC Nordoff has been in the police force for 2 years. He has no formal training in arresting juveniles; and he said that he was advised by his superiors that juveniles can be arrested under section 5 of the Bail Act as the offence was a serious one and for this reason he did not see it important to ask MBS of his age.
- 20. After he arrested MBS, he brought him to the Nauru Police Station and handed him to the investigating officer Sgt Hilo who locked him up in the police holding cell which is also shared by the adults.
- 21. After MBS was put in the cell, Sgt Hilo and other officers went to look for his parents. They went to the grandparent's house and requested them to inform his mother. The grandmother gave the mother's phone number to her and she called that phone number 5 times but there was no response. She then told the grandparents to advise the mother that MBS was in police custody. She also requested the grandparents to come to the police station and they refused to do so and said that it had nothing to do with them.
- 22. MBS's mother contacted Sgt Hilo on the evening of 3 March 2020. According to Sgt Hilo she was aggressive and yelling at her and questioned her as to why her son was locked up. She told her that the offence that he is alleged to have committed was serious and the mother's response was that she would lodge a complaint against her to the Commissioner of Police.

RECORD OF INTERVIEW

23. On 4 March 2020 MBS participated in a record of interview. Before the interview commenced Sgt Hilo saw Alhadutch in the kitchen area of the police station and asked him to be present in the interview and he agreed to do so. He told Sgt Hilo that he was MBS's caretaker.
24. When the interview commenced, Alhadutch, Snr Const Derek Deduna (SC Deduna), Sgt Hilo were present. The interview as I stated earlier was in Nauruan language and Sgt Hilo typed the interview in the computer in both the Nauruan version and English translation. The interview commenced at 10am.
25. When the interview was at question 8 or 9, MBS's mother walked in and was upset because she was not informed of the interview. The interview continued and Sgt Hilo stated that she told MBS at question 8 or 9 that he was entitled to seek legal representation but she failed to record it. Later she changed her version and stated that the right to legal representation was given at question 1.

CROSS EXAMINATION

26. Sgt Hilo in her cross examination said that she was not aware of the time of the arrest of MBS on 3 March 2020; she had asked the response team to care for MBS while he was in the cell; that he was locked up in an adult cell as no special cell facilities were available for juveniles. She had requested her grandmother whom she visited at 4pm to bring food for him.
27. She stated that there was no break during the interview; she did not record in the interview the presence of Alhadutch, the arrival of MBS's mother; or her assertion that the mother spoke to the lawyer Mr Soriano after her arrival. She refuted suggestion that the mother left the interview for a few minutes to buy Panadol for MBS. She denied that MBS was shivering and not feeling well.

MBS'S VERSION

28. MBS denies that he was told he was being arrested by PC Nordoff, that he was taken to the police station for some questioning and would be released shortly. He said that the cell was dirty and disgusting; that it smelled of petrol. He used his shirt to clean up a space so that he could lie down on the floor and sleep.
29. He said that he was not offered any food or drink whilst he was in the cell; until his mother brought him food and drink; he was not sure of the time of her arrival, but it was still daylight; and some 10 minutes later Alhadutch came with some more food but he had already eaten.
30. He said that he was not feeling well and had body aches.

MBS'S MOTHER'S VERSION

31. She agreed that she had called Sgt Hilo on the phone on the evening of 3 March 2020 and was upset because of the arrest of MBS. She agreed that she yelled at her and threatened to report her to the Commissioner of Police. Later she spoke to the Commissioner of Police who later gave her some information about the arrest of her son. She called the Commissioner of Police again and told him that she wanted to bring some food in and he told her that she could do so.
32. She later brought food for MBS. When she met MBS he had his t-shirt in his hand and was wearing short pants. She gave him food and asked him how he was and he said he was feeling cold. She stayed with MBS until he finished eating and she left the extra drinks for him. She asked as to when MBS would be released and she was advised that he would be released around 9.30 to 10am the following day.
33. She went back to the police station the next morning with her cousin's wife and they walked into the Domestic Violence Unit room where MBS was interviewed. She did not know Sgt Hilo by name but recognised her face. She enquired as to why did the interview start without her and Sgt Hilo did not say anything in response and continued with the interview. She sat next to MBS quietly.
34. She asked MBS as to how he was and he told her that he was feeling feverish so she left the interview and went to the shop next to the police station to buy Panadol. When she returned another police officer had walked into the Domestic Violence Unit office with 2 other people. She was asked to go to the play room next to the Domestic Violence Unit room.
35. Later Sgt Hilo came in the play room and she and MBS signed the record of interview and later MBS was taken to the police station.

CONSIDERATION

Whether MBS was arrested?

36. The matter that I have to determine is whether MBS was lawfully arrested. Article 5(2) of the Constitution provides:
 - (2) A person who is arrested or detained shall be informed promptly of 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.
37. PC Nordoff had informed MBS's grandfather that he will be arresting him as he committed the crime of aggravated robbery and the grandfather said that he will wake him up as he was sleeping. When MBS woke up and came out PC Nordoff told him that he was being arrested and will be taken to the police station and anything that he says will be recorded and given in evidence; he did not give him the reasons for his arrest which he was obliged to do.

38. When he was brought to the police station he was handed over to Sgt Hilo and he was locked in the cell; again he was not given any reasons for his detention; nor was he given the right to consult a lawyer. Because of the failure to advise MBS initially for the reason of his arrest; and later for the failure to advise him of the reasons for his detention – his arrest was unlawful – see *R v Stafford*⁶ where the Court held that ‘the accused’s detention was unlawful and rejected a confession made by him’.

RECORD OF INTERVIEW

39. When Sgt Hilo conducted the record of interview she complied with the Judge’s Rule 1964 as contained in footnote No. 3; she made lots of efforts to get in contact with the mother; and in her absence she had Alphas Dutch who was a person of the same sex.
40. The Judge’s Rule was made in 1964 and now we have the Child Protection Welfare Act 2016 (CPWA Act) and section 54(h) which provides that children are entitled to have a parent, guardian, legal representative or other support person agreed to by the child to be present **at all stages of the investigation**; this is indeed a very strongly worded provision; and section 54(1(a) provides that at all stages of the investigation ‘the best interests of the child must be the primary consideration’. (emphasis added)
41. Section 54(2) provides that all approved procedures applying to the police force when dealing with children must be consistent with the requirements of subsection (1); that means that the Judge’s Rule relating to children is no longer applicable.
42. Miss Serukai did not seek to ascertain or clarify from Sgt Hilo as to why was the provision of section 54 of the CPWA Act was not complied with, despite this being one the main grounds of challenge of the admissibility of the record of interview; this is the law applicable to the children and has to be observed by the police officers when carrying out an investigation against a child offender.

WHETHER MBS WAS OFFERED ADVICE TO SEEK LEGAL REPRESENTATION?

43. Sgt Hilo was struggling to pinpoint as to when MBS was given the opportunity to seek legal representation; his mother arrived at question 8 or 9 and he was not given an opportunity to seek legal representation or be given an opportunity to consult her mother privately. Sgt Hilo said that the mother spoke to Mr Soriano a lawyer; it was not the mother seeking legal advice; it was MBS who needed legal advice. I think fairness demanded that the interview should have been suspended at that stage to allow MBS to seek legal advice; but she continued with the interview and he made a confession.

HOW LONG WAS THE DETENTION FOR

44. PC Nordoff said that MBS was arrested at around 11am; where the defence suggested that he was arrested after 9am. Sgt Hilo states that she does not know when he was arrested and understandably so as she was not present when the arrest was effected. The defence in

⁶ (1976) 3 SASR 392

their notice states that he was detained for 24 hours which would be in breach of Article 5(3) of the Constitution which provides:

- (3) A person who has been arrested or detained in the circumstances referred to in paragraph (c) of clause (1) of this Article and has not been released shall be brought before a judge or some other person holding judicial office within a period of twenty-four hours after the arrest or detention and shall not be further held in custody in connection with that offence except by order of a judge or some other person holding judicial office.
45. PC Nordoff did not produce his police notebook to the Court which would have had details or entry as to the time of the arrest; nor was the police station diary or the cell diary book produced which would have details of when MBS was brought to the police station and when he was locked in the cell respectively.
46. I am left in doubt as to when he was exactly arrested; if the detention exceeded 24 hours then the police were not entitled to interview him for the record of interview.
47. The other aspect of the interview which I find very disturbing is that Sgt Hilo failed to record as to who were present during the record of interview; as to when did the mother arrive; as to who did she come in with; as to when the mother went to call Mr Soriano. These are important matters and failure to record them draws unnecessary attention on the investigators.

CONCLUSION

48. I find that the prosecution has failed to prove beyond all reasonable doubt the onus cast on it and I hold that the confession is inadmissible.

DATED this 20 day of October 2020.

Mohammed Shafiullah Khan
Judge

