R v Fakalata

Supreme Court, Nuku'alofa
Hampton CJ
Cr 1078-1081/96

12 & 13 May 1997

Criminal law - admissibility of confession statements
Evidence - criminal law - confession - admissibility

The accused was prosecuted for manslaughter as a result of alleged gross negligence. In the course of the jury trial objection was taken to the admissibility of the interviews by the Police, of the accused, and the resulting statements. The police officers who conducted the main interview were not available to give evidence.

Held (on the voir dire conducted without the jury present)

1. The interview was not admissible; the only officer called for the Crown was only in the interview from time to time, played no part in the interview and had no recollection of the questions and answers. He did not sign or counter-sign the record. He could not say if the record was accurate.
2. So the pre-conditions rightly expected for an interview to be admissible were not present; and in any event the court would have exercised it's discretion to exclude such evidence, under the proviso to s.22 Evidence Act, in all the circumstances.
3. Ruled out in the judge's discretion also, was the statement taken 8 hours later by another officer not involved in the first interview and not tasked to speak to the accused at all, who took the accused from the cells charged him (without authority) and took a statement.
4. Some 4 hours later the original interviewing officer returned, took the accused from the cells, charged him again and took a statement, which purported to be the accused's own narrative. But it had emerged that the officer asked the accused questions yet only the replies were recorded and incorporated into the statement. The statement was misleading. The court was left with no idea how it was composed. Again it was excluded in the judge's discretion.
5. (In the presence of the jury) The accused should be discharged as there was insufficient evidence to allow the case to go to the jury. There was simply no evidence.

Case considered : Ibrahim v R [1914] AC 599
Statute considered : Evidenc Act ss 16, 20, 21, 22

Counsel for prosecution : Mr Malolo
Counsel for defence : Mr Paasi

Judgment

The accused is on trial on counts of manslaughter by negligence and drunken driving. After the greater part of the Crown case was heard, some twelve witnesses so far, the Crown got to the stage of calling evidence of police interviews and police statements taken from the accused.

The trial being a jury trial, the jury has been sent away and evidence has been heard by me, from some 3 police officers in the absence of the jury. Mr Paasi for the accused says that the record of interview, the answers given to charges and statements following the charging are not admissible.

I am aware and take account at all times of the matters of law particularly the Ibrahim Ibrahim v R [1914] AC 599 referred to me by Mr Malolo, and to the provisions of the Evidence Act (Cap.15) and in particular section 16 which defines what an admission is, section 20 which defines what a confession is, section 21 which is fact is a statutory enactment setting out the effect of the Ibraham Case, and section 22 which indicates when confessions can be admitted and that the Court has a discretion in certain circumstances as set out in the proviso to that section.

The events giving rise to these charges are said to have occurred in the early hours of the morning of the 1st of October 1994. A young man involved in a motor accident as alleged, is said to have died at 5:00 am on the 3rd of October 1994. The accused was arrested later that same date about 8:00 pm. It would seem from what I have heard, that he was in custody from then on for the rest of the time relevant to this ruling.

This part of the inqury proceeded in 3 marked stages:

First, a question and answer interview conducted by the Investigating Officer Vaihu, in the presence of two other officers, on the 3rd of October between 10:39 pm and concluding in the early hours of the 4th October, at 28 past midnight. This part was conducted by CID Officers. I note and comment here that for some reason not explained to me in the evidence, at the end of that interview the accused was kept in custody and indeed he was put in the cells, but was not charged and not given the opportunity to answer that charge. Either a man is going to be charged or he is not, and it seems to me to be quite inappropriate to interview, put him in the cells and leave him there for 12 hours. Not only inappropriate, wrong in my view and that casts a shadow over everything else that follows.

The second stage occurred about 8 hours later, on the morning of 4th October, when some uniform traffic police officers entered into the act, charged him (the accused) with a negligent driving charge and then took a statement from him after that charge. That occurred between 8:10 am and 9:25 am.

The third phase involved the CID Officers again. The Investigating Officer Vaihu, but with a different accompanying officer this time, Detective Corporal Hausia.

This time 2 charges were laid, one of manslaughter and the other of negligent driving. But quite why he should have been charged twice in relation to the same accident with negligent driving under the same section of the Traffic Act

is not explained to me. Again, it seems to me to be quite wrong. But he was charged with 2 charges and then a statement taken. That charging and statement occurring between 12:54 pm and 1:40 pm on 4th October.

Before I look in detail at those 3 phases. I make a general observation or two:

First, as to phases 1 and 3, Officer Vaihu did not give evidence, is not available, is in the United States of America. That may be a reflection on the delay in bringing this matter to trial, which does not reflect well on the Magistrates Court, but does not reflect well either on the police and the prosecution which have a duty to keep an eye on these things.

The second general thing is this. That I have considerable unease about the whole process here, from what I have heard in evidence, about the delays and about the way things have been done. Some of those causes of unease I have already commented on.

To turn then to the first phase, that is the CID interview (by question and answer) lasting just short of 2 hours on the late night of 3rd October 1994. The Investigating Officer, who was also the Interviewing Officer, Mr Vaihu, as I have commented is not present in Court and cannot give evidence. Nor can one of the other officers present, Mr Latu, who is also away from the Kingdom, is no longer a police officer, and who was the appointed officer to listen to the interview and counter-sign it.

I was left with the evidence of a third stringer as it were, again an Officer Latu, and what I say is not a reflection on him, and should not be seen by him as being a reflection on him, because he was not there to play any part in this interview at all, and he had no real interest in it. He had no part in the interview. He did not sign or counter-sign any documents. He made no notes and has in effect no recollection of events himself, apart from being present from time to time during the interview.

And I say from time to time deliberately because, reflecting his lack of any real interest in the proceedings, he was in and out on a number of times, he cannot say how many, over that 2 hour or so period, just short of mid-night. He cannot say, and does not try to say, that he knows the questions that were asked and whether all the questions were recorded, and the answers that were given and whether all the answers were recorded. Nor can he say (and he was honest and truthful in his evidence in chief and his cross-examination), that what Mr Vaihu recorded was accurate, particularly insofar as whether he did accurately record what the accused said in his answers.

In my view the evidence is such that the pre-conditions that one, rightly, would expect before a question and an answer interview such as this would be admitted in evidence, are not present here, and cannot be present, because of the absence of the questioner himself or, at the very least, the other officer present who was taking a part. That latter officer at least, from what I heard in evidence, was present through the whole interview, and had a role in the interview.

So it seems to me that this record of interview, which I had marked as "E", is not admissible, as not meeting those pre-conditions of admissibility. In any event, given what I have already said, I would have declined to admit it in my discretion under the proviso to section 22 of the Evidence Act.

I will not repeat the reasons why I would exercise my discretion in that way. I have already incorporated them in what I have said thus far. But there are, in addition, questions in this interview which, as recorded, are leading questions in the nature of cross-

examination and, in addition, put matters to the accused from alleged eye witnesses who have not been called (again I suspected because of the effluxion of time) as witnesses in this trial.

I therefore refuse to admit into evidence the record of interview marked as "E". To some extent that interview affects all that follows.

There then enters, some 8 hours later, the uniform police officers and I am now talking about phase 2. Here the man who did the charging, and took the confession statement so-called, did give evidence, that is Constable Toki. Mr Toki had been involved in some way in the inquiry on the night of the alleged accident, and of his own volition, off his own bat, on the morning of 4th October, he decided to get the accused out from custody in the cells, and speak to him himself. He was not asked by any superior, or any other, officer to do so.

It is apparent from his evidence that he knew the CID was involved and were conducting the investigation. Yet he thought he would poke his oar in and have a go at this accused himself, it would seem. He had no knowledge of the interview previously conducted or of its contents. He knew nothing of what had preceded and why the man was in custody. He could give no answer, in effect, as I understood him, as to why he should have done this with out interview, without caution afterwards, just charged him in this way.

Again I see that is totally inappropriate conduct by a police officer, taking somebody, when it is not his inquiry, and interviewing in this way. Again I intend to exercise my discretion and refuse to admit evidence of the charge and the answer to the charge that was given allegedly by the accused and the statement which then followed. I had marked those two documents as "F" & "G". What possible right or authority he had to walk into the cells, get a man out and charge him in the way that he did, and as his first step, is quite beyond me.

We then come to the third phase of this interviewing process. The CID re-enter the field. This, I remind myself, is Mr Vaihu coming back in some 12 hours after his interview had been finished, this time accompanied by a different officer (as I have noted Corporal Hausia). I have already commented on the unexplained delay of 12 hours between end of interview and charge. Here, in a document I have marked as "H", the accused was charged with manslaughter by way of negligence and with negligent driving (I have already commented on the second, that this is the second of such type of charge that was laid against him within a 4 hour period).

The evidence from Mr Hausia left me somewhat uneasy and uncertain, and certainly not proved beyond reasonable doubt in my mind, as to whether the form of caution which is shown at the start of the printed form of the charge was actually spoken to the accused before the charge were read. There was a contradiction in his evidence between what he said to Mr Paasi in cross-examination as to that, and what he said in re-examination to Mr Malolo.

In any event the answer given to the charges, I find is somewhat equivocal and does not take the Crown very far. Of more significance is the statement subsequently made which has been marked as "I". This is put forward as being a voluntary statement made by the accused himself as his own statement and it is recorded entirely in a narrative form to give the indication that this is the man's own statement.

Now it has to be remembered (and I remind myself and the police should remind

themselves) that by this time the man has been in custody for something like 17 or 18 hours and has been charged by then with 3 charges, one of which is manslaughter. It emerged however that during the taking of this statement, questions were asked by the investigating officer, Mr Vaihu, of the accused. Mr Vaihu was conducting this part of proceedings, not Mr Hausia and again what I say is not a reflection on Mr Hausia. But he told me that he heard Mr Vaihu ask questions, as to how many he was not certain. The questions were not written down at all. Answers were written down and written into the statement. He, Mr Hausia, says the questions was asked to clarify matters as the statement went along.

Given the history of this matter, in the way I have had it placed before me and as I have detailed it above, I am entirely dissatisfied with such a method of proceeding. If questions are going to be asked by investigating officers of persons in custody in a situation as this accused was, then the questions must be recorded, not just the answers. A statement presented in the way this one was, as being his own free voluntary "confession" statement (and I put confession in speech marks) is quite misleading. The Court here is left with no idea as to how this statement came about, how it was composed.

Again I intend to exercise my discretion under section 22, the proviso, and refuse to admit the evidence, first of the charges' form marked "H" and then the statement marked "I". That proviso is particularly appropriate to this stage because it says: "Provided always that where a confession is alleged to have been made to a police officer by the accused person while in custody, and in answer to questions put by such police officer, the Court may in its discretion refuse to admit evidence of the confession".

I stress the phrase, in that proviso "questions put by such police officer". Here, there were questions. The Court is not able to be told what they were.

I add that, in addition to the reasons I have already given for excluding all of these documents "E, F, G, H & I", the contents in any event, seem to me to be at best somewhat equivocal and speculative. I would have been concerned as to the weight which any Court could put on them in the circumstances of this case.

[The Crown then closed it's case and submissions were heard, as to whether there was a case to be let go to the jury. The Court then ruled further]:

Thank you for your patience, Mr Foreman, members of the jury, your patience in waiting. What I tell you is this, that I have heard the objection or objections to the evidence which is the rest of the Crown case, and I have decided and ruled that none of that evidence can be given in front of you. That evidence relates to the interviewing of and the taking of statements from the accused by various police officers. And after hearing the evidence I have just given a detailed ruling why the evidence should not be admitted.

And I add, while I think of it, that in the circumstance the case now is in, I lift the order which I previously made prohibiting any publication of what has taken place in the absence of the jury, that is now able to be published and so is my judgment. The result of my ruling, the rest of the evidence being inadmissible means that the Crown case is now finished, there is no more evidence from the Crown, which means that the only evidence that the Crown have in support of these two quite serious charges, is the evidence that you heard yesterday and again, for a brief while, this morning.

That evidence, in my view, is no where near sufficient to even reach a stage where it is appropriate to allow the case to go to the jury for decision. There is simply no evidence, in my view, on which a jury could convict on either of these serious charges.

It is not meant as any reflection on Mr Malolo, who appears for the Crown, but, with the passing of time (remembering of these events took place in the end of September, start of October 1994, 2 1/2 years ago) a number of important witnesses, who would otherwise had given evidence for the Crown, are unavailable (and important witnesses such as, I understand it, possible eye witnesses, people who were involved in the events on the night, as well as police officers who were involved in the actual interviewing of the accused). One is left, and I am sure others in this court will be left, with an uneasy feeling that Justice is not able to be done here because of the absence of witnesses. That in itself is something of a disgrace and a reflection on the way that some parts of the Justice system are administered in the Kingdom, and on the way that some parts of the police and prosecution's system are administered (e.g. the way in which police and prosecution do not keep a proper eye on cases which they have brought and make sure that cases are brought to trial at an early stage). There is an old saying, and there is wisdom in the saying: "justice delayed is justice denied" and I suspect that you and I, in the last 2 days, have seen an example of that.

Here on the evidence, there is no evidence or no satisfactory evidence as to for example, how the young man now deceased came to be injured. If it was in a motor accident, where he was on the road; or was he off the road, whereabouts was he at the time? Was he walking, running, standing still. How was he clothed, what was the lighting. No satisfactory evidence connecting the van that is shown in the photographs with involvement in the motor accident, that one that occurred outside the shop. No evidence or satisfactory evidence placing the accused as the driver of any such white van. No proper evidence which would indicate the method of driving of the van, whether in terms of speed or path, off the road or on the road or otherwise. No evidence at all of any markings on the road which might indicate some point of impact or brake marks or swerve marks or anything of the like. No evidence or proper evidence which might indicate the state alleged against the accused (supposing the Crown could get over all those other hurdles), that he was drunk and incapable of having proper control of a motor vehicle.

Let alone any concerns that there might be as to causation of death, the linking of a traffic accident (if there was one with this boy) to his actual death, given the absence of any post-mortem investigation and report. Those are the sort of things, and they are not exhaustive, that make me say that there is no evidence on which a jury could convict. That this is not a case that can go to a jury. I am going to discharge you from giving a verdict and, in a moment, discharge the accused.

The accused will stand please.

Because of those difficulties with the evidence, or the lack of evidence rather, I formally discharge you on both counts. You are acquitted and discharged on both counts. I do not intend to say more but I have already underlined my concerns as to the delay which has occurred here and the results that have flowed from that delay.

You are free to go!

Mr Foreman, members of the jury, thank you for your service. It has only been the one case for you to hear this week. You have not completed that, in a sense, but that is what I am here for. I am here, as I said, to referee and if things are not within the rules, well then so be it. Thank you for the performance of your duty. It is an important civic duty that you do, and I am grateful, and the Kingdom is grateful, for your serving in the way you do.

You are now free to go your own way. I kept you back, to make sure we could complete it tonight. It seemed inevitable that we were going to finish tonight, so I kept you waiting on, rather than bringing you back tomorrow morning. Thank you.