HIGH COURT. Apia. 1958. 27, 28, March; 10, April. MARSACK C.J.

Criminal law - accused charged with theft - written statement to Police - whether statement made while accused in custody - cross-examination by Police Officer taking statement - statement in breach of Judges' Rules - whether a voluntary statement - meaning of "voluntary" - weight and admissibility of statement.

The trial Judge has a discretion to admit in evidence the statement given by an accused person to a Police Officer notwithstanding the violation of the Judges' Rules if in the opinion of the Judge the statement was made voluntarily.

R. v. Voisin (1918) 87 L.J.K.B. 574, 577; R. v. Bass [1953] 1 All E.R. 1064, 1066; Ibrahim v. R. [1914] A.C. 599; and R. v. Baldry 21 L.J.M.C. 130 referred to.

Semble - having regard to the passage from Ibrahim's case (supra) (quoted in the judgment) on what would amount to a "voluntary" statement - that if intended to be an exhaustive definition of "voluntary", the said passage laid down too narrow a limitation; and that a statement cannot be regarded as voluntary if the interrogation to which the accused person has been submitted is such as in the opinion of the Court may have imposed a mental and physical strain on him to the extent that the statement should be attributed not to his own will but to his inability to stand the strain any longer.

Cornelius v. R. (1936) 55 C.L.R. 235, followed.

R. v. Knight (1905) 20 Cox C.C. 711, referred to.

The general circumstances under which a statement was given must be given careful consideration for all these go to the weight to be attached to such evidence.

Ibrahim v. R. (supra), referred to.

It is for the prosecution to prove affirmatively that the statement was not made under the influence of improper inducement affecting its voluntariness and in case of doubt, the Court should reject the statement.

R. v. Thompson (1893) 62 L.J.Q.B. 93, followed.

Accordingly, in the circumstances of this case, held that the statement given by the accused while under great mental distress, and given under harassing cross-examination by the Police Officer inducing the accused to make statements that were not accurate, was not a free and voluntary statement and must be rejected; and that in any event no great weight could be given to it.

Information dismissed.

Metcalfe, for accused.

Cur. adv. vult.

MARSACK C.J.: The accused is charged with the theft of £255.11.9 in money the property of the Government of Western Samoa on divers dates between the 1st April 1956 and the 29th January 1958. The evidence for the prosecution establishes the following facts:

(1) The accused Samasoni was cashier for the Banana Scheme and had held that position at all material times. As cashier he was officially responsible for the cash received and disbursed under the operation of the Banana Scheme, though in fact sums of money were handled by other members of the

staff when the pay envelopes were being made ready for handing to the banana growers and when the payments were made.

(2) On the 29th January 1958 the accused Samasoni, in a state of considerable distress, disclosed to Mr Pavitt the Marketing Officer that there was a substantial cash shortage in the Banana Scheme funds.

(3) This shortage was certified as £255.11.9 by audit about the 3rd February 1958. The audit does not establish over what period the shortage occurred. Mr Topp, the Auditor, is unable to say whether the shortage was due to criminal acts or to inefficiency.

(4) The accused Samasoni has pleaded guilty to forgery in that he signed the names of Auelua and Sasa'e respectively to pay-out sheets which indicated that Auelua was entitled to draw £5.10.6 and Sasa'e 5/6. It is, however, not established that the accused received these sums of money.

(5) The accused made two statements to the Police; one on the 30th and 31st January (which was not produced) and one on the 12th February in which he admits stealing various sums of money from Banana Scheme funds on different occasions between April 1956 and January 1958 and states that the total shortage was £255.

(6) The accused made other contradictory statements from time to time, to the Police, the Auditor, and Mr Pavitt; and in particular he informed Sub-Inspector Kruse on the 13th February that he had been wrong in saying that his thefts started in April 1956; and he affirmed that the total amount he had used was not more than £180.

(7) Although regular audits had been made of the Banana Scheme accounts no shortage was discovered until the disclosure made by accused on the 29th January 1958.

Apart from the statement made by the accused to the Police on the 12th February and produced at the hearing, there is, in my opinion, insufficient evidence to establish beyond reasonable doubt the guilt of the accused on the charge of theft of £255.11.9 of any other ascertainable amount. The statement made to Mr Pavitt early in the morning of 29th January to the effect that there was a shortage of about £200, and the obvious distress of accused at the time, are equally consistent with an inference that the shortage in cash was due to negligence on the part of the cashier, or even to negligence or criminal acts on the part of other members of the staff who from time to time had access to the cash.

There is no evidence of extravagant living or of any circumstances in the private life of the accused to indicate that he was living beyond his income.

It is true that the accused was cashier and had the handling of moneys received from the Bank and disbursed to growers, but other members of the staff also took part in the pay-outs and in making up envelopes for that purpose.

About a year ago the accused asked Mr Pavitt to be relieved of the very great responsibility of handling the funds of the Banana Scheme, and to be appointed to another position. There was at that time no suspicion of any shortage and Mr Pavitt stated that he throughout trusted Samasoni implicitly. Mr Pavitt was unable to arrange for any other person to take over the position of cashier and the accused continued to hold that post. The Court agrees that the responsibility was in fact an onerous one. Evidence was given that the total amount involved for example in one pay-out,

that of 17th January, was over £25,000.

The question as to whether the accused should be convicted or not of the theft of £255.11.9 thus depends very largely on the admissibility of the statement of 12th February and of the weight to be given to it as evidence.

Mr Metcalfe contends that the statement should not be admitted or at worst should not be given its full face value for two reasons:

(1) The extreme mental distress of the accused during the investigation and the many conflicting explanations given by the accused under the stress of his mental disturbance.

(2) The fact that the statement made on the 12th February, although expressed to be a voluntary one, was in fact made largely as a result of cross-examination by the Police Officer concerned, Sub-Inspector Kruse, and thus in violation of Rule No. 7 of the Judges' Rules which reads as follows:

> "A prisoner making a voluntary statement must not be cross-examined and no question should be put to him about it except for the purpose of removing ambiguity in what he has actually said."

As to the first point, Mr Metcalfe's argument really amounts to this: that when an accused person makes a number of contradictory explanations both before and after the taking of a statement in writing by the Police, the Police should not be allowed to select just that particular statement or series of statements which tends to prove the guilt of the accused and to ignore the rest.

The circumstances surrounding the making of the statement are important. It appears that in the course of routine enquiries by the Superintendent of Police and the Auditor the accused was asked a number of questions, and his replies were noted by the Police stenographer; and at some stage during these enquiries, which terminated on the 31st January, Superintendent Philipp gave the accused the usual warning. This statement was not signed and was in fact not produced to the Court. The Superintendent was unable to make contact with the accused later in connection with this statement but left a message for the accused to call at the Police Station to see him. The accused came to the Police Station about mid-day on the 12th February. The Superintendent at that time was engaged and the accused was intercepted by Sub-Inspector Kruse who informed the accused that he desired to ask him some questions. The accused was then taken to the office of Sub-Inspector Young, and Sub-Inspector Kruse questioned the accused about a cheque for £2.10.0 issued by the accused on 4th February, which was dishonoured by the Bank on presentment. The accused said, "I made out the cheque thinking that I had money in the Bank". Sub-Inspector Kruse then said "Where did you get the money to pay the £2.10.0 that day to the holder of the cheque?" The accused did not reply and it was not until the question had been asked three times that the accused said, "I got the money from my overtime which I kept in a drawer at the office". The Sub-Inspector went on "if you had money in the office why then did you have to issue a cheque? I am quite satisfied that you did not have any money when you were suddenly called upon either to pay up the sum of £2.10.0 immediately or have the matter reported to the Police." After a considerable hesitation the accused said "I got the money from the petty cash with the intention of repaying it." The Sub-Inspector then said "well then you must have had something to do with the Banana Scheme shortage." After considerable hesitation the accused replied "Yes, I am responsible for that shortage". The Sub-Inspector said "How do you mean you are responsible?" The accused said "I used the money".

The Sub-Inspector then gave Samasoni the usual warning which, it is to be noted, had already been given to him a fortnight before. After this the Sub-Inspector says the "accused elected to make a statement in the

English language."

In the course of cross-examination at the trial the Sub-Inspector amplified his account of what took place between himself and the accused at the time the statement was taken. He says in his evidence:

> "I told him that I had investigated his store accounts and Bank Account and was satisfied that he did not have any money. I told him he must have had something to do with the Banana Scheme shortage. He began to make his statement after this, perhaps about 1.30 p.m. While I was taking his statement I asked him questions as to certain points; for example, 'Was there any special reason for your taking this money?' I usually had to lead him up to the point and I then let him carry on. While I was taking the statement, I said to him 'How much money did you use from the Bonus money?' I also asked him then 'How did you manage to keep this business a secret?' I also asked him 'What was the last time you took money from the Banana Scheme?'".

Although the accused had not actually been arrested and had gone to the Police Station voluntarily in response to a request from the Superintendent I think that he was virtually in custody when he made the statement. He had been intercepted by Sub-Inspector Kruse and taken to another room at the Station for the purpose of a questioning by the Police. Some of the questions to which exception was taken by Counsel to the accused were put to him prior to a formal warning, and some subsequently when he was in fact making his statement. There can, I think, be little doubt that Rule No. 7 of the Judges' Rules was not observed by Sub-Inspector Kruse and that many of the answers were elicited by cross-examination after the Police Officer had decided to charge him with the offence of theft. The question then arises as to whether this statement, being obtained in violation of Rule No. 7 is none the less admissible in evidence and entitled to carry full weight as a free and voluntary confession by the accused.

The origin and purpose of the Judges' Rules is explained by the Court of Criminal Appeal in R. v. Voisin (1918) 87 L.J.K.B. 574 at page 577:

> "In 1912, the Judges, at the request of the Home Secretary, drew up some rules as guides for police officers. These rules have not the force of law. They are administrative directions the observance of which the Police authorities should enforce on their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the Judge presiding at the trial."

The effect of a contravention of one of the Judges' Rules is discussed by the Court of Criminal Appeal in R. v. Bass /1953/ 1 All E.R. 1064 per Byrne J. at page 1066:

> "This Court has said on many occasions that the Judges' Rules have not the force of law, but are administrative directions for the guidance of the Police authorities. That means that if the Rules are not complied with, the presiding Judge may reject evidence obtained in contravention of them. If, however, as R. v. Voisin shows, a statement is obtained in contravention of the Judges' Rules it may nevertheless be admitted in evidence provided it was made voluntarily."

Byrne J. goes on to quote with approval the well-known passage from Ibrahim v. R. /1914/ A.C. 599:

> "It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence 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. The principle is as old as Lord Hale."

The law on this subject is stated even more concisely by Parke B. in R. v. Baldry 21 L.J.M.C. 130:

"By the law of England, in order to render a confession admissible in evidence, it must be perfectly voluntary."

Applying those principles to the present case it appears that the trial Judge has a discretion to admit the statement of the accused, notwithstanding the violation of Rule No. 7, if in his opinion that statement was made voluntarily.

The extract above quoted from Ibrahim's case would appear to indicate that "voluntary" in this connection could properly be applied to all statements which had been obtained otherwise than by fear of prejudice or hope of advantage held out by a person in authority. If this is intended as an exhaustive definition of "voluntary", with the greatest respect I am inclined to think that this limitation is too narrow; and that a statement cannot be regarded as voluntary if the interrogation to which the accused person has been submitted is such as in the opinion of the Court may have imposed a mental and physical strain on him to the extent that the statement should be attributed not to his own will but to his inability to stand the strain any longer. This was the principle stated and applied in the Australian case of Cornelius v. R. (1936) 55 C.L.R. 235. In R. v. Knight (1905) 20 Cox C.C. 711 statements were rejected because they were obtained from the accused before arrest by means of a long interrogation by a person in authority over him.

It is hard to say from the evidence precisely what was the mental state of the accused at the time he made the statement to Sub-Inspector Kruse. The Sub-Inspector in his evidence says that he appeared then to be normal, though he seemed reluctant to reply to questions. The evidence of the Marketing Officer, Mr Pavitt, makes it clear that on every occasion when the accused spoke to him, from the time of the original disclosure on 29th January until the day after the making of the written statement to the Police the accused was in a highly emotional state and mentally very disturbed; so much so that Mr Pavitt himself became distressed. Mr Topp, Government Auditor, says in his evidence:

"Samasoni was mentally extremely disturbed. Any efforts by me to find out more about the matter made him still more distressed."

Superintendent Philipp confirms this with reference to his own enquiries.

There is some further suggestion of this in the fact that the accused made a number of contradictory statements, including one to Mr Pavitt on the 13th February that his statement to the Police the previous day was incorrect. There is even some small evidence of mental disturbance in the statement itself. One sentence of that statement reads:

"On Wednesday 29th February 1958 I knew there was a shortage of £255 and I made up my mind to reveal the shortage."

The 29th February 1958 is a day which does not exist. When Sub-Inspector Kruse was cross-examined about the obvious mistake of February for January he replied that he put it in the statement because that is what Samasoni said. No attempt was made to correct it. Moreover the fact that the shortage was £255 was not known on the 29th January. At the time the original disclosure was made the figure mentioned by Samasoni was "about £200". On consideration of all the relevant evidence I find it difficult to conclude that the statement was a voluntary explanation made by an accused person in the full possession of his faculties and not under emotional stress.

Even if these matters are not sufficient to exclude the statement of

the accused they must I think be considered very carefully when the question of the weight to be attached to the statement is being decided. Later in his judgment in Ibrahim v. R, Lord Sumner says:

> "It is to be observed that logically these objections all go to the weight and not to the admissibility of the evidence. What a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest, or otherwise strictly goes only to its weight."

It is I think clear that the statement as a whole cannot be accepted as entirely accurate. At best it can only amount to a confession by the accused that he had used certain funds belonging to the Banana Board, without specific details as to amounts or the times and methods of the defalcations. The evidence establishes that a number of other persons has access to the money and had the handling of it when payments were prepared for and made to banana growers. The accused's statement as it stands, if accepted, merely goes to show that the accused had been guilty of theft of some undetermined amount at some undetermined time from the funds of the Banana Scheme.

In R. v. Thompson (1893) 62 L.J.Q.B. 93 it was held that the onus is on the prosecution to show affirmatively to the satisfaction of the Judge that the statement was not made under the influence of any improper inducement and that the Judge should in the event of any doubt subsisting on this head reject the confession. At page 95 Cave, J. quotes with approval the dictum of Baron Parke in the Queen v. Warringham -

> (the prosecutor is) "bound to satisfy me that the confession which he seeks to use against the prisoner was not obtained from him by any improper means. I am not satisfied of that for it is impossible to collect from the answers of this witness whether such was the case or not....I reject the evidence of this witness, not being satisfied that it was voluntary."

At page 96 Cave, J. lays down that it is the duty of the prosecution to prove in case of doubt that the prisoner's statement was free and voluntary and if they do not adequately discharge that obligation the statement should not be received.

But shortly, I find that the statement of 12th February was made by accused when he was virtually in custody and it was extracted from him by a persistent cross-examination by a Police Officer, in violation of Rule 7 of the Judges' Rules. That being so, I have a discretion as to whether or not I admit the statement in evidence, or give to it its full face value. I may admit it as evidence against the accused if the prosecution proves to my satisfaction that it is the free and voluntary statement of accused. As Lord Sumner says in Ibrahim's case -

> "the matter is one for the Judge's discretion, depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case."

A careful consideration of the evidence leaves me in some doubt as to whether the statement was in fact free and voluntary. I do not find that any inducement was held out by the officer to the accused, but it has not been proved beyond reasonable doubt that the statement was free and voluntary in the sense used in the Cornelius case. There is a definite possibility that the accused, who for some time had been labouring under great mental distress - perhaps because he as cashier was at least technically responsible for the shortage - had been induced by the Sub-Inspector's harassing cross-examination to make statements which were not accurate and could not in any event be described as free and voluntary.

That being so I think that I am bound to reject the accused's statement, or at least to hold that no great weight can be given to it as

evidence. As the rest of the evidence against the accused, though arousing the gravest suspicion, is in my view insufficient to support a conviction for the offence charged, the information will be dismissed.