IN THE MAGISTRATES' COURT OF FIJI
AT NASINU
EXTENDED CRIMINAL JURISDICTION

High Court Criminal Case No. 394 of 2016
Magistrates' Court Criminal Case No. 1344 of 2016

STATE

v.

MOSESE VUINAKELO

For the State: Mr. E. Samisoni, *of counsel,* for the Director of Public Prosecutions

For the Defendant: Mr. J. Korotini, *of counsel,* of the Legal Aid Commission

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RULING

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1. The State wish to rely on declarations against interest they say the Defendant had made to the Police after his arrest. These so called 'declarations against interest' were made to the Police during the course of the Defendant's interview under caution with them. At paragraph 2.5 of the State's Submissions, Mr. Samisoni, *of counsel,* explains that:

> "2.5. In the instant case, the State wishes to rely on the Record of Interview of the accused as a mixed statement as he had admitted being present in the taxi with three others when the complainant taxi driver was robbed. It is the accused's evidence that he was present in the taxi, seated behind the front passenger seat however he denies taking part in the robbery of the taxi driver. The reliance on the Record of Interview is for the purposes of proving identification at trial as it places the accused at the scene."

2. It was just such a submission, made orally in open court that moved me to call for submissions on admissibility. In **Subramanian v. Public Prosecutor** [1956] 1 WLR 956 at 970, the Privy Council said this of hearsay:

"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement."

3. We can extrapolate this common law principle from **R v. Pierce**, 69 Cr.App.R 365, CA (following **R v. Storey**, 52 Cr. App. R, CA, and **R v. Donaldson**, 64 Cr.App.R 59, CA):

> "(1) *A statement which contains an admission is always admissible as a declaration against interest and is evidence of the facts admitted. With this exception a statement made by an accused is never evidence of the facts in the statement."*

4. We find this helpful summation in **R v Hodgson** 2 R.C.S 449 per Lamer C.J. and Gonthier, Cory, McLachlin, Iacobucci, Major and Binnie JJ (delivered by Cory J.):

> *"Historically the insistence that a confession must be voluntary related to concerns about the reliability of the evidence. Indeed, the basis for the admission of a statement of the accused as an exception to the rule against hearsay is that what people freely say which is contrary to their interest is probably true. However, where a statement is prompted by a threat or inducement held out by a person in authority, it can no longer be presumed to be true..."*

5. This is helpful because it points to two key principles:

    1. Declarations against interest are an exception to the rule against hearsay.
    2. To be accepted in evidence at trial, the State must prove beyond reasonable doubt that the declaration against interest was made voluntarily.

6. To that, I add one further point. In Fiji, and across the common law world, it is a requirement that the State prove beyond reasonable doubt that the circumstances in which the statement was obtained was fair even in circumstances where they have been able to satisfy the Court that the statement made was voluntary.

7. I need not concern myself with the second and third points now. At this moment, I must first determine whether the statements that the State rely on can properly be characterised a declaration against interest.

The Law

8. I wish to put on record my gratitude to Mr. Samisoni, *of counsel* and Mr. Korotini, *of counsel* for their helpful submissions.

9. In **Naicker v. State** [2018] FJSC 24; CAV0019.2018 (1 November 2018), Keith J. observed:

> *"The Defence of Self-Defence*
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> ...
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> 42. *In that context, it is important that what Naicker told Dr Lasaro and the police was both inculpatory and exculpatory. It was inculpatory in the sense that he admitted that Mishra had died in a violent encounter with him. It was exculpatory in the sense that Mishra's death had occurred while he, Naicker, was defending himself from attack. What is the evidential status of each? There is no problem with the inculpatory parts of what he said. They were a declaration against interest, and therefore constituted an exception to the rule against hearsay. The problem comes with the exculpatory, i.e. self-serving parts...*
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> 43. *There have been two schools of thought about the evidential status of the exculpatory parts....One is that they are not evidence of the truth of the facts to which the exculpatory parts relate: they are merely material which may be of use to the fact-finder when the defendant's inculpatory statements are being evaluated. The other school of thought is that the whole of the statement is admissible as an exception to the rule against hearsay, and so the whole statement, including the self-serving parts of it are admissible as evidences of all the facts stated therein."*

10. His Lordship, Keith J. then went on to hold in that same paragraph and immediately after the last sentence of the previous quote:

> *"The issue was settled by the decision of the House of Lords in R v. Sharp* [1988] 1 WLR 7. *It decided that the latter approach was the correct one. Its decision applied to those cases in which the defendant, unlike Naicker, elected not to give evidence. But as Blackstone's Criminal Practice 2016 stated at para F17.94, "there is no logical reason why the status of the statement should be any different if the accused testifies." I agree with that."*

11. And so, as at 1 November 2018, the position in Fiji is that a "mixed statement", i.e. a statement that is both inculpatory and exculpatory, constitutes an exception to the rule against hearsay. More, if admitted because it contains inculpatory material then both the inculpatory *and* exculpatory parts of the statement are admissible *as to the truth of what was said.* In case it is not already clear, an important predicate is that it must be a "mixed statement" i.e. it must have both inculpatory *and* exculpatory material.

12. Quite obviously then and for sound reason, a purely exculpatory statement would not be an exception to the rule against hearsay. It can be used to show prior inconsistency, or to indicate the attitude of the Defendant at the time the statement was made: *see* **Tukai v. State** [2019] FJHC 659; HAA059.2018 (3 July 2019) and **R v. Pierce**, 69 Cr. App. R 365, CA (following **R v. Storey**, 52 Cr. App. R 334, CA, and **R v. Donaldson,** 64 Cr.App.R. 59, CA); but it cannot be used to establish the truth of what it contains: **R v Aziz** [1996] AC 41. The following passage from the speech of Lord Steyn is particularly apposite:

> "(a) *Wholly exculpatory statements*
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> *Counsel for the Crown submitted that Lord Taylor ....in effect ruled that wholly exculpatory and self-serving statements by a defendant are admissible and should be the subject of directions in accordance with* **Vye**. *The very passage in* **Vye** *relied upon by counsel ....contains an express reference to* **Duncan** ... *It is clear beyond any doubt that* **Vye** *is only concerned with mixed statements. And the position remains that a wholly exculpatory statement is not evidence of any facts asserted."*[1]

[1] See ***R v Garrod*** [1997] Crim L.R 445

13. With that in mind, one must be careful to examine the out of court statements to ensure that they indeed contain declarations against interest. So much was set out in ***Archbold 2019*** at ***15 – 447***:

> "It is important to distinguish between statements which are entirely self-serving and those which are only partly adverse to the accused. It is also important to distinguish between the issues of admissibility and evidential status if admitted."

14. The latter caution we take heed of by virtue of this exercise and if it passes this test, we will take heed of it at trial. The first caution, I turn my mind to hear and now.

Analysis

15. The State refer me to ***Archbold 2019*** at ***15 – 449*** and urge me to find that because the Defendant places himself at the scene of the crime, his statement in that regard constitutes a declaration against interest and therefore, part of a "mixed statement" that ought to go in for voir dire if it is challenged or trial proper, if it is not. The portion that counsel relies on is as follows:

> "In *R v. Garrod* [1997] Crim L.R 445, the Court of Appeal stated that where a statement contained an admission of fact which was significant to any issue in the case meaning capable of adding some degree of weight to the prosecution case on an issue which was relevant to guilt, the statement must be regarded as "mixed." This must be applied by reference to what happens at trial and can therefore only be finally resolved at the close of the evidence; …"

16. In **R v. Garrod**, supra, the English Court of Appeal was called upon to "identify the kind of interview which contains enough in the nature of admissions to justify calling it is a "mixed" rather than an "exculpatory" statement. Precisely the type of exercise we are undertaking here and now.

17. Applying the principle summarized in ***Archbold*** at ***15 -449*** to the specifics of that case, the English Court of Appeal held:

> "*We return to the present case in order to consider what are alleged to be admissions in this particular interview, which results in the interview properly*

being regarded as "mixed". The particular passages relied upon are, first, four at pages 10, 11, 17 and 19 which were concerned with the preliminary correspondence where the appellant had been concerned with the obtaining of a quotation from 3iC, another from Arthur Anderson, and deciding whether these should be accepted. The effect of statements by the appellant was to indicate that he had been involved in those processes. He said at one stage that he had "banged" the table with 3i with regard to them obtaining this job, and it can be said that he thereby admitted that there was that degree of involvement so far as he was concerned at that stage of the AMT grant application. But any reading of these passages overall shows beyond doubt that what the appellant was saying was that although he was the Chairman, although he played a Chairman's role in relation to these matters, although he had some little knowledge of the detail he had no idea of the precise figures, he had no personal involvement in the administration of the scheme, and he was totally unaware of anything which could be called dishonesty. It seems to us that taking those passages first, in so far as they are admissions, they were admissions merely of what was obvious, and admissions which the defendant could hardly fail to make, even for the purposes of what he was saying, which was that he had no personal knowledge of the matters which were the basis subsequently of the charge.

Similarly the next passage referred to at page 23 of the interview involves an admission by him that he had been present at a particular meeting. But again he went on to say that he had no recollection it; he had no detailed knowledge at the time. The theme of what he was saying was wholly exculpatory rather than otherwise so far as any matter relevant to the charge subsequently brought against him was concerned.

On page 24 he accepted that the "buck in terms of decisions stops with me and I appreciate that." That, it is submitted, is an admission that he had at least the responsibility of Chairman. To that extent it supports the prosecution case. But the same answer continues immediately as follows:

"But if I have been given or feel that I've been given misrepresentation of information, then that does not make me guilty of any crime. I have no intention to defraud the DTI."

It seems to us that that is clearly to be regarded as an exculpatory answer. The limited admission contained in the first sentence is not the kind of admission which qualifies the answer."

The next matter referred to involves a passage in the interview which covers three to four pages. The police officer produced a manuscript document, which was not strictly admissible in evidence against the appellant, although a note on it appeared to have been addressed to him. It set out details of the scheme sufficient to show that there was dishonesty of the kind that was subsequently alleged. When asked about that document the appellant volunteered that he had found a copy of the same document in his own file and, what is more, it was a copy which contained a note written by himself. He went on to say:

> *".... I've obviously seen it because I've written a note on it, but it didn't register as being, it didn't alert me, it didn't ring any blinking bells. I wish it had. There are other people I pay to, you know, to have information and correlate ....*
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> *I've admitted I've seen the wretched document and if I hadn't found that document through searching in my files, in Mandy Simons' memo files of which there are thousands of the things, I would have said to you 'Never seen it before'. Can I make that clear?*
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> *Whatever it implies, a document like that has not got a lot of meaning to me ...."*

At the same time, however, he accepted that what the document said was something in the nature of a plan which would be suspicious. He said:

> *"Yes, it does look like some sort of a plan almost, but it would mean nothing to me."*

The fact that he volunteered a copy of the document and admitted having seen it at the time were certainly admissions of fact which might perhaps be

sufficient to bring this statement within the "mixed" category. But overall, even those passages read in their context show that the appellant essentially was making an exculpatory statement. This was because not only was the emphasis placed upon his lack of understanding of the document, but in fact the comment which he had made was precisely that. His manuscript note was "I don't understand this", plus some further reference to the figures.

It seems to us overall that what the appellant was saying in that interview notwithstanding that he had volunteered the fact that he had seen the document, was that he did not understand the contents at the time any more than he did when these matters were put to him by the police. It seems to us that to regard that as anything other than an exculpatory statement, or as part of an overall denial, would not be correct. It seems also that little, if anything, was made of that particular answer and admission at the trial."

18. What I glean from **Garrod**, supra is this: if the statement does not go to an element of the offence, the statement is not inculpatory. In circumstances like this, it is not enough for a Defendant to have said, "I was there." The statement must go further, he or she must have said, "I was there and I did such and such a thing, or failed to do such and such a thing, or thought such and such a thing, or knew such and such a thing, or meant such and such a thing."

19. I find that the statements made to the Police under caution by this Defendant were purely self-serving.

Result

20. In the result and for the reasons set out above, I rule that the State is not permitted to tender it in trial for the purposes of establishing the truth of its contents.

MAGISTRATE'S COURT NASINU

Seini K Puamau
RESIDENT MAGISTRATE

Dated at Suva this 23rd day of January 2020.