

High Court of Solomon Islands  
(Palmer CJ)

Criminal Case Number 402-04

Hearing: 4<sup>th</sup> July - 5<sup>th</sup> July 2005

Ruling: 13<sup>th</sup> July 2005

H. Kausimac for the Crown

D. Hou for the defendant

Palmer CJ.: This is a *voir dire* application by the Defendant asking the court to exclude the statement taken supposedly under caution by the Police on 9<sup>th</sup> April 2000. The objection is fairly straightforward and has not been disputed by prosecution. It relates to the wording of the caution which did not warn the accused of his right to remain silent or to speak if he so wished.

The recording and witnessing officers have given evidence in this *voir dire* application and do not dispute, it seems may not have really appreciated that the caution given did not comply with the requirements of the Solomon Islands Judges Rules which provide as follows:

*"If you want to remain silent you may do so. But if you want to tell your side you think carefully about what you say because I shall write what you say down and may tell a court what you say if you go to court. Do you understand?"*

In Pidgin:

*"Sapos iu laek fo stap kwet no moa iu sarwe duim. Bat sapos iu laek fo tell aot stori blong iu, iu tink beu nao long wanem nao iu tellem. Bae ni nitem kam sarning nao iu tellem. Sapos iu go long court bae maet mi tellem disfalla court toktok blong iu. Iu minim?"*

The caution given read as follows:

*"Before me askem you some falla question, me must caution you first time and you must think good before you answerem olketa question by me askem you and everything something by me writem down long paper for go long court. Suppose you go long court. Wasue you sarwe wanem now me tellem long you?"*

It is obvious that the caution given omitted to inform the accused of his right to remain silent if he so wished or to speak. Apart from that the defendant himself gave evidence in court on this matter and acknowledged that whilst no force or threats had been applied to him he was never told his rights to remain silent. This has never been disputed by the recording and witnessing officers.

The issue then for determination in this application is whether the defect in the process of interview fatal to the admissibility of an otherwise voluntary statement.

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The Judges' Rules are not rules of law, but only rules for the guidance of the police<sup>1</sup> when carrying out investigative and interrogatory work. The Solomon Islands Judges Rules were drawn up after Independence and issued by the then Chief Justice for the benefit of police officers in the discharge of their work in interviewing suspects and for the benefit of the courts who need to be satisfied as well that the statements had been obtained without the use of force, threats, promises of any reward and that the accused knew what he was doing.

The common law right to silence has been enshrined as a fundamental right under our Constitution. Sections 10(2)(a) – (f), reflect this right in the following provisions:

*“(2) Every person who is charged with a criminal offence –*

*(a) shall be presumed to be innocent until he is proved or has pleaded guilty;*

*(b) shall be informed as soon as reasonably practicable, in detail and in a language that he understands, of the nature of the offence charged;*

*(c) shall be given adequate time and facilities for the preparation of his defence;*

*(d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice;*

*(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and*

*(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge,...*”

See also subsection 10(7) of the Constitution which provides that:

*“(7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.”*

An accused therefore is not a compellable witness in his own trial, which indirectly reinforces the right to silence which can be maintained right through to close of prosecution case. That right is also reflected in sections 198-199 of the Criminal Procedure Code in the conduct of trials before the Magistrates Courts. Section 199 reinforces that right by recognising the possibility that a new matter not disclosed (where right of silence is maintained) may be raised by the accused and giving prosecution the right to adduce evidence in rebuttal.

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<sup>1</sup> Archbold Criminal Pleading Evidence and Practice 36<sup>th</sup> Edition by Butler and Garsia at para. 1120.

In *Regina v. Nelson Keaviri, Julius Palmer, Patrick Mare Kilatu, Keto Hebala and Willie Zomoro*<sup>2</sup>, Muria CJ. dealt with a similar issue where the caution was defective as not containing a warning of the rights of the accused to remain silent.

*“When one compares the rule as I outlined with the warning given by the police to the accused one sees the obvious difference. There is a clear omission of the warning that the accused has a right to remain silent. This part of the warning is important in this country for three reasons. Firstly, it must be remembered that our Judges Rules were made after 1978 and clearly the fundamental rights of a person suspected of a criminal offence as protected under the Constitution must be borne in mind. Secondly the right to seek legal assistance is also protected by the Constitution. Access to legal advice and assistance in this country is something that does not come easily in view of the limited manpower resources that we have. A suspect or an accused person must be given the opportunity to obtain legal advice or assistance. It is important therefore to advise a suspect of his right to remain silent in order that he be given the opportunity to make use of his constitutional right to seek the assistance of a lawyer. Thirdly, an accused person who is in official custody is in an environment which is not familiar to him. There may not be any threat or actual violence exerted upon him while in that custody. But the potential for such an occurrence in such an environment cannot be simply ignored as far as the person in custody is concerned. In such a situation he must still be given the opportunity to appreciate his right to remain silent despite being in such an unfamiliar environment.*

*It was the warning given to these accused upon which the fate of their caution statement now turns. The breach of the Rule as I see it in this case is not just a defect in the wording of the warning but a fundamental omission in the warning itself which has an impact on the fundamental rights of the accused to remain silent. The interviewing officer or authority must ensure that such a right should not be overlooked. It is both in the interest of the suspect of accused as well as the interviewing authority.*

*... This court however is required by law to ensure that the rights of an individual, including those accused of committing crimes are protected. This it will do by ensuring compliance with the rules and other legal provisions in this regard. In this case the provisions of the Judges Rules to which I have already referred had not been complied with. That non compliance in this case clearly offends section 10 of the Constitution and is therefore fundamental and as such it renders the caution statements though admissible taken in respect of each of these accused liable to be excluded in the exercise of the courts discretion.”*

I concur with his Lordship's views.

In a Papua New Guinea case, *Kiki Hapea v. The State*<sup>3</sup> a similar issue was raised before McDermott J in which his Lordship excluded a statement on the ground that the caution issued was defective as not containing the crucial warning to the accused inter alia that he had right to speak or to remain silent. At page 7, his Lordship said:

*“But in the matter before me, I am dealing with a formal interview situation – an interview recorded in the presence of another policeman as well. I consider the defect in the administered caution in this*

<sup>2</sup> CRC 20-95 27<sup>th</sup> June 1997 per Muria CJ (unreported) at page 8-9

<sup>3</sup> [1985] PNGLR 6

*situation to be so basic as to affect the proper exercise of the accused's free choice to speak or to remain silent. I do not consider the narrow interpretation of the English courts (the Common Law in this jurisdiction) now appropriate in view of the Rights provisions in the Constitution and in view of the other interpretations of voluntariness to which I have referred. I reject the confession on this ground as a matter of law" (emphasis added).*

The situation in Solomon Islands is similar. The common law right to silence has been incorporated into the Rights provisions of our Constitution as set out above to the extent that where such warning is defective, it entitles the court to exercise its discretion to exclude such statement. The Rights provisions in my respectful view elevates the common law right to silence to a right which cannot simply be overlooked by Police Officers in formal interview situations. They are obliged to disclose fairly and fully to the accused when interrogating him that his rights include the right to remain silent or to speak and tell his side of the story or to answer questions. Where an accused has not been given the opportunity to exercise his discretion whether to speak or to remain silent, then such statement is liable to be excluded unless it is clear the accused decides to waive such rights.

Having considered the evidence before me, it is clear he was never informed of his rights and therefore never given opportunity to decide whether to remain silent or speak. That is a clear breach of his Rights protected under the Constitution and accordingly although it was given voluntarily, it was obtained unfairly, improperly and prejudicial to his rights and therefore should be excluded.

Orders of the Court:

Rule that the Statement obtained on 9<sup>th</sup> April 2000 be excluded as inadmissible.

  
The Court.