IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY CR 102 of 2018

BETWEEN: R E X - Prosecution

AND: SITIVENI 'ESI MULI - Accused

BEFORE THE HON. JUSTICE CATO

Counsel: Mr. Kefu and Ms Fakatou for the Prosecution

Mr. Tu'utafaiva for the Prisoner

[1] The accused, Sitiveni Esi Muli, who was aged 17, at the time of his arrest, objected to the admissibility of his record of interview and associated documents being two written statements of charges form and his voluntary statement at the commencement of his trial for murder. His counsel, Mr Tu'utafaiva, had indicated in advance that he was objecting to the admission of his record of interview on two grounds; the first for failure by the interviewing officer, Inspector Taniela Vea, to give an appropriate warning to his client under section 149 of the Tonga Police Act that relates to an accused's right to communicate with relative, friend or law practitioner, and secondly, a warning under section 151 of the same Act which relates to questioning children.

[2] Section 149 (1) provides relevantly that;

> before a police officer starts to question a person that has been charged with an offence, the police officer shall inform that person that he may telephone or speak to a relative, friend or law practitioner.

[3] Section 151(2) provides that a police officer shall not question a child unless;

a. The police officer has, if practicable , allowed the child to speak to a relative , friend or law practitioner chosen by the child, in a place where the conversation will not be overheard; and

b. The relative, friend or law practitioner is present whilst the child is being questioned.

[4] Mr Tu'utafaiva submitted that Inspector Vea had omitted to comply with either of these provisions before interviewing the accused and that the record of interview should be excluded.

[5] I heard evidence for nearly two days from Inspector Vea who was cross-examined extensively by Mr Tu'utafaiva. Inspector Vea asserted that he had been an investigator for about twenty years and had been involved with homicide matters for about 6 years. He had conducted interviews of suspects and he said he was aware of the legal requirements relating to an interview. He understood that there had to be special arrangements made to interview a child who was he said a person under the age of 18. He said he had asked the accused whether he wanted anybody to be present when the interview was conducted. He said if the person did not want anybody present at the interview, he just called a reliable person to come in together with a police officer. He said the kind of person would be a Reverend or someone that works for government or someone he thought it was right to be brought in. He said he did this for the accused to have his rights and for the interview to be conducted freely. He later elaborated on this saying to me under re-examination that he meant by freely that otherwise they might think we forced him to speak. He said it was also for the suspect to feel safe because they were police officers. I then put to him the following questions;

> "are you suggesting that you thought it was important to ensure in the accused's mind he was secure from any kind of police pressure?
>
> Yes
> Open and transparent
> Yes."

[6] He said that he had asked the accused whether he had wanted his father brought over and he had said yes. He said that he had asked who he wanted to be brought over before the work commenced and he said his father. He told the father the

reason he was brought in was because work was to be conducted on his son and he is underage.

[7] He told the prosecutor, Mr Kefu, that the right he referred to, which was the only right he seemed to acknowledge, was to ask him if he wanted someone to be present. He said that the father was present at the interview which was conducted at a table with the father and countersigning officer also present. There was further evidence of the procedures in which the accused had signed answers and had no complaints regarding his answers and not did his father have any.

[8] It was evidenced that the homicides of the two Chinese deceased occurred on the Sunday the 25th February 2018, but it was not until the 1st March around 2pm, after a search warrant had been executed at the accused's residence and drugs found, that there had been an arrest of the accused, his father and other members of his family for drugs charges. Also found at this location was the deceased mobile phone and a number on it belonged to the Chinese.

[9] Under cross-examination, Inspector Vea said that the accused and others were taken to the Magistrates's court at 16.17 hours on the 1st March. It emerged also that the accused had made a witness statement denying involvement in the murder to Inspector Vea after his arrest on the 1st March. Later in the morning of the 2nd March, a second witness statement had been obtained from the accused in which he had admitted his involvement. The Crown did not seek to have this statement admitted in evidence but it was said to have been made under caution. Later that morning, Inspector Vea brought another person to court who was charged with murder as well as the accused. This person had charges withdrawn on the day of the trial by the prosecution and it is anticipated he will give evidence for the Prosecution. At this time, the accused and his father were place on remand at the Central Police station.

[10] It was suggested to the Inspector that he had made serious threats to the accused of violence on the walk from the Court house to the Central police station on the 2nd March. The inspector denied this. He said that there were about ten other policemen present on the walk. He said that the accused was present with Police officers from Nukualofa where as he worked at Nukunuku and had brought the other accused from there.

[11] It also was evidenced that the accused's father was present when he had made his witness statement admitting his involvement on the morning of the second of March 2018 before being taken to Court. Inspector Vea said before the interview commenced he had allowed them to talk privately but the father had told his son to tell the truth on that occasion. Before the record of interview he did not want to talk with his son. Inspector Vea when asked said that he had told the accused to choose anybody he wishes to come or a lawyer or any person of the family or anyone to come whilst his statement is taken. That arose on both occasions he said when the accused was interviewed on the second of March, 2018. Inspector Vea also said that he had asked the accused if he wanted to see anyone when he had walked him upstairs and he had said nothing. The Inspector said he took this to mean he did not want to see anyone and thought he should bring the father because he was underage. He had suggested his father and he had said yes. He said he would have taken the father and the accused to a private room but, when he had said they could, they had not said they wanted to so he just left them and commenced the interviewing. Mr Tu'utafaiva was critical of the Inspector for not making notes of these conversations in his diary.

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[12] I had the opportunity of seeing the Inspector give evidence for the best part of two days. I formed the view that he was an honest and reliable witness. The accused did not give evidence on the voir dire. I accept Vea's evidence that he did not threaten the accused in any way. By that stage, the accused had made admissions to police earlier in the morning in his witness statement. There were other police around during that walk. I reject any suggestion that Inspector Vea threatened the accused before he later commenced a formal interview with him in the late afternoon or evening of the 2nd March 2018. Mr Tu'utafaiva did not seem to press this suggestion in evidence further by way of submission but in any case I reject it.

[13] I agree with Mr Tu'utafaiva's criticism of Inspector Vea that he did not make notes of the fact that he had procedurally complied with sections 149 and 151 of the Police Act. Interviewing police officers should either incorporate such information into their records of interview as they do with the caution and have this acknowledged by the accused or at least record the fact in their personal diary or notebook and have the accused acknowledge this. By not doing so, Inspector Vea invited the criticism he received.

[14] However, I do not take from his omission to record that Inspector Vea has given dishonest evidence and did not comply with section 149 and section 151 as he said when he told the accused he could have anybody present. As an experienced investigator and an Inspector he was plainly mindful of his obligations particularly it seems under section 151 because the accused was underage. He allowed, I find, the accused access to his father before the interview commenced and I accept his evidence that they did not ask to speak privately but if they had he would have organized this. The father was present throughout the interview. It may well be that having complied with section 151 by allowing the accused access to his father, there was no further need to comply with the specific requirements of section 149, but I accept the evidence and answers of Inspector Vea to Mr Tu'utafaiva that he had also complied with section 149 when advising him he could have anybody, a relative, friend or lawyer attend.

[15] This disposes of the application and I rule the evidence of the record of interview admissible. However, I take the opportunity of revisiting the ruling I made in R v Halafihi CR 31of 2018 when I held there was no discretion in a court to admit a record of interview where there had been a breach of the requirements as to questioning under the provisions of sections 148 and section 149 of the Police Act. I was reminded by Mr Kefu that I had similarly ruled in Vailea CR 75/2017, 22nd May 2018. In Halafihi I had excluded the confession as a consequence of the failure to warn under section 149 and breaches of the requirement to caution after a cessation of an interview and before the a continuation, but there was other evidence in the case which influenced the jury to find the accused's guilty. I was concerned in Halafihi that there was no discretion in the Police Act to allow a Judge to admit a record of interview in his or her discretion and considered that without statutory authority a Judge could not simply assume or infer a discretion to admit a record of interview that failed to meet the statutory requirements. I expressed disquiet with this position.

[16] I have had placed before me in this case by Mr Kefu section 22 of the Evidence Act, which had not been referred to me in the earlier cases which is rather unusual in that it expressly provides that a confession is admissible if it was made;

a. under a promise of secrecy; or

b. in consequence of a deception practiced on the accused person for the purpose of obtaining such a confession; or

c. when the person making it was drunk; or

d. in answer to questions which the person making the confession need not have answered; or

e. without any warning having been given to the person making it that he was not bound to make such a confession and that evidence of it might be given against him.

[17] The section however continues with a proviso in these terms;

> " Provided always that where a confession is alleged to have been made to a police officer by the accused 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."

[18] In my view, police questioning which proceeds without compliance with relevant protective provisions such as are provided in section 149 can be said to involve a person answering questions which they need not have answered under section 22 (d) of the Evidence Act. That is because the obligation to provide advice is protective of a suspect and is intended to redress the coercive nature of a police interview of a suspect in custody. It is a precondition to lawful questioning being commenced by a police officer. There is no sanction given in the Police Act, as I have said, however, for breach of the provisions of sections 148 - 153. By ruling inadmissible confessions that have failed for compliance with those sections, even though perhaps a technical omission, a result would be achieved which is seemingly at odds with or in conflict with section 22 which provides expressly for the admission of such evidence, that is unless the proviso under section 22 is applied. This can be seen more obviously in the case of section 148 as to caution and section 22(e) of the Evidence Act which would admit a record of interview in the face of a failure to caution subject to the operation of the proviso. Niu J in R v Fa'uvao CR 38/2018 7th November, 2018 adopted the view that the provisions of section 149 were important and not amenable to the section 22 proviso which had been cited to him. I was informed by Mr Kefu that in R Tuifua 79/2018 Paulsen CJ also had section 22 before him and

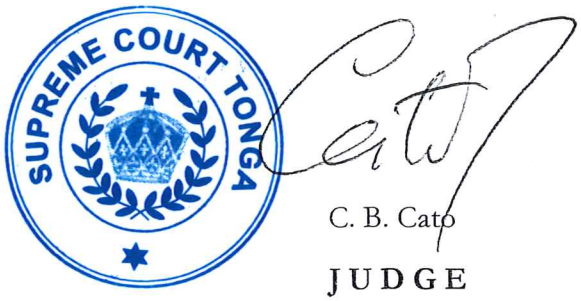
expressed reservation about total exclusion under section 148 and 149 and my conclusions in R v Vailea concerning the absence of a judicial discretion. It was unnecessary for him, however, to resolve the issue, in that case and the record of interview was ruled admissible because it had been regularly taken.

[19] I have reconsidered the approach I took in Vailea and Halafihi. in the light of section 22 now being placed before me. It is unfortunate that Parliament did not turn its mind to this question when the Police Act was passed namely as to how these provisions should relate to section 22. Because the protective provisions legislated for in 2010 in the Police Act, are as I said in Vailea and Halafihi important modern provisions that recognise the vulnerability of suspects in the coercive atmosphere of custodial questioning and are designed to reduce the risk of unreliable confessions these provision should be taken very seriously by police and breaches of them view should also be taken very seriously by the courts. Justice Niu in his judgment in R v Fa'uvao expressed a similar sentiment in the approach he took there, as did Paulsen CJ with the qualification he expressed concerning the need for some discretion, in Tuifua.

[20] I have closely considered the provisions in the light of the uncertainty that surrounds this issue with the assistance of submissions from Mr Kefu and being now made aware as I have said of section 22. I have concluded that I should adopt the approach that there exists a statutory discretion under section 22 which allows a court to admit records of interview even though there may be a breach of the provisions of the Police Act. I apply the approach advocated in Craies on Statute law, 7th edition, 1971 at page 373 to the effect that the operation of a statute should not be found by implication to be repealed "without some strong reason". I consider a sensible resolution is to be found in an interpretation which would include breaches of sections 148-153 of the Police Act within section 22 of the Evidence Act. This would mean that a failure to comply with the protective requirements of those provisions would not affect the admissibility of a confession unless the breach was so serious, egregious or deliberate that a court considered it could not in the interests of justice qualify for admission under the proviso. In coming to this view, I have differed from the view taken by Justice Niu in R v Fa'uvao but not without difficulty whilst at the same time, echoing his concern that interviewing police must scrupulously respect these provisions. I add that, in the light of this decision, I would likely have admitted the record of interview in Halafihi where a lengthy interview over several days was in my view conducted fairly, carefully and with no hint of any oppression and where I

had no doubt the suspect's statements were made voluntarily and she was well aware that she could remain silent. In contrast, I would likely have declined to admit as a matter of discretion the record of interview in Vailea because of the police approach in that case which had been to view the suspect as a potential police witness against the co-accused when, in my view, she should have been cautioned under the Act. When later cautioned she denied the offending. In my view, the police deliberately chose not to caution her before she made witnesses statements and when later they chose to proceed against her it was plainly unfair or oppressive in my view to use the witness statements against her. I would add that I heard nothing in the present case that gave me concern that the admissions secured here should be the subject of discretionary exclusion.

[20] The record of interview, and related documentation such as the two charge sheets, and the voluntary statement are admitted.



C. B. Cato

NUKU'ALOFA: 9 January 2019

JUDGE