

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 222 OF 2011

STATE

-v-

KALI DASS

Counsels : Mr. F. Lacanivalu for the State
Mr. Roneel Kumar for the accused

Date of Hearing : 6 February 2014 to 7 February 2014

Date of Ruling : 11 February 2014

Voir Dire Ruling

1. The State seeks to adduce into evidence the record of a caution interview of the accused on 9.9.2011 and charge statement dated 10.9.2011. The accused objects to the admissibility of this document on the grounds that this statement was obtained involuntarily through pressure, intimidation and threats by the police.
2. The test of admissibility of all confessional statement made to the Police officer, is whether that was made freely and not as a result of threats, assaults or inducements made to the accused by person or persons in authority. Further, oppression or unfairness also leads to the exclusion of the confession. Finally, where the rights of the suspects under Section 27 of the previous Constitution have been breached, this will lead to the exclusion of the confessions obtained thereby unless the prosecution can show that the suspect was not thereby prejudiced.

3. The preamble of the Judges Rules states as follows:

“That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.”

4. The Privy Council, In the case of *Wong Kam-ming v The Queen (1980) A.C. 247, P.C.*, observed that:

*“[t]he basic control over the admissibility of statements are found in the evidential rule that an admission must be voluntary i.e. not obtained through violence, fear or prejudice, oppression, threats and promises or other improper inducements. See decision of Lord Sumner in *Ibrahim v R (1914-15) AER 874 at 877. It is to the evidence that the court must turn for an answer to the voluntariness of the confessions.”**

5. The Fiji Court of Appeal in case of the *Ganga Ram and Shiu Charan v R (FCA Crim. App. 46/1983)* outlined the two-part test for the exclusion of confessions at page 8:

“It will be remembered that there are two matters each of which requires consideration in this area.

*First, it must be established affirmatively by the crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as use of force, threats or prejudice or inducement by offer of some advantage-what has been picturesquely described as ‘flatter of hope or thetyranny of fear.’ **Ibrahim v R (1914) A.C. 559; DPP v Pin Lin (1976)A.C. 574.***

*Secondly, even if such voluntariness is established, there is also need to consider whether the more general ground of unfairness exists in the way in which the police behaved, perhaps by breach of the Judges Rules falling short of over bearing the will, by trickery or by unfair treatment. *Regina v Sanag (1980) A.C. 402, 436CE*. This is a matter of overriding discretion and one cannot specifically categorize the matters which might be taken into account.”*

6. It is for me to decide whether interviews were conducted freely and not as a result of threats, assaults or inducements made to the accused by a person or persons in authority.

Secondly, if I find that there has been oppression or unfairness, then I can in my discretion exclude the interviews. Finally, if his rights under the Constitution or common law have been breached, then that will lead to exclusion of the confessions obtained thereby, unless the prosecution can show that the suspect was not thereby prejudiced. These rights include such rights as having a legal representative of his choice and having access to family, next-of-kin or religious counselor.

7. The burden of proving voluntariness, fairness, lack of oppression, compliance with common law rights, where applicable, and if there is non-compliance, lack of prejudice to the accused rests at all times with the prosecution. They must prove these matters beyond reasonable doubt. In this ruling, I have reminded myself of that.
8. Now I look at the evidence presented in respect of the caution interview and charge statement.
9. The first witness was DC Vishal Kumar. He is an officer with 10 years experience. He had gone in search of the accused with team of officers on 7.9.2011. When the police vehicle approached, the accused had run away. They had conducted a search. Later in the night he was informed by PC Sanjay Prasad that the accused was arrested. PC Sanjay Prasad had come in a police vehicle to pick him up. The accused was in the back seat of that vehicle. He had escorted the accused to the police station. There were no visible injuries on the accused.
10. He had charged the accused on 10.9.2011 at 0830 hours at the charge room of the Nadi police station. It was concluded at 1050 hours. It was done in question and answer format in Hindi language. The accused was not assaulted or forced before or during the charge. The accused did not make a complaint before or during the charge. The accused was given his rights. There was no inducement, threat or promise. At the conclusion, content was read back to the accused. Opportunity was given to add, alter or delete. He identified the original charge statement marked P1 and tendered the same. He also tendered the translation marked P2. He identified the accused in Court.
11. When cross examined, he denied punching the accused twice on stomach. He further denied assaulting the accused during the charge. He denied accused never made a statement or fabricating a statement. He denied the accused being assaulted by Sanjay in his presence. He was not aware that accused's pants were pulled down and his penis was burnt with a match stick.
12. The next witness for the prosecution was DC Shailend Sashi Krishna. He is an officer with 14 years experience. On 9.9.2011 he had received instructions to caution interview the accused. DC Arif Khan was the witnessing officer. It was conducted at the Fraud office at the Nadi police station. It was commenced at 9.40 a.m. and concluded at 4.50 p.m. It was conducted in Hindi language. Accused was given his rights. The accused was not assaulted,

threatened or forced to admit. No complaint was made by the accused. He had not seen any injury on the accused.

13. A reconstruction was done during the interview. No assault, threat or force was made by him or any other officer during the reconstruction. There was no inducement, threat or promise during the interview. At the conclusion, content was read back to the accused. Opportunity was given to add, alter or delete. The accused signed the statement. He and witnessing officer counter signed. He identified the original caution interview statement marked P3 and tendered the same. He also tendered the translation marked P4. He identified the accused in Court.
14. Under cross examination he said that the accused was not beaten up by Arif with the piece of wood during the reconstruction. He further denied officer Arif asking the accused to sit on the ground cross legged and standing on his knees. He admitted that the interview was conducted in Hindi language. He denied fabricating the admissions in the interview.
15. The third witness for the prosecution was DC Arif Khan. He is an officer with 16 years experience. He is the witnessing officer of the caution interview of the accused. He corroborated the evidence of DC Shailend Sashi Krishna.
16. Under cross examination he admitted that he does not know how to read or write Hindi. However, he could very well understand Hindi language. He denied assaulting the accused with a wooden stick at the time of reconstruction. He further denied asking the accused to sit on the ground cross legged and then standing on the knees of the accused. He denied pulling down the pants of the accused and burning his penis with match in the police station.
17. The next witness for the prosecution was DC Laitia. On 6.9.2011 he had taken part in search for the accused but could not find him.
18. After the close of the prosecution case, I found a case to answer from the accused in the trial within a trial and explained the accused his rights.
19. The accused gave evidence. He stated that he came to know that police was looking for him on 8.9.2011. He had gone to his brother's house in the night. Brother had called police to surrender him. Police officer Sanjay came lifted him and threw him to the police vehicle. Two other police officers got into the same vehicle at sea side. One of them was Vishal. He was assaulted by Sanjay on the way to the police station.
20. At the police station all the officers were waiting for him. When he entered the station they started beating him. He was hit on the stomach, sides and the back of the head by 4-5 police officers with fist. Then his clothes were taken off. He was hand cuffed and put into

the cell naked. There were other i-Taukei people in the cell. Following morning after breakfast his cloths were given and Shailend had interviewed him at a room close to the Nadi Court house. He was beaten on the stomach and chest during the interview by Arif Khan. He admitted the allegation against him as he was tortured. He was forced to sign the interview.

21. At the reconstruction at his house he was beaten with a stick by Arif Khan. He was made to sit on the ground cross legged and Arif Khan stood on his knee. He was beaten on shoulders, calf muscle and feet. When he was brought back to the police station he was made to unzip his pants by Arif Khan. Then his testicles were burnt with a lighted match by Arif Khan. He was forced to sign one last paper and then he was put into the cell.
22. When he was taken to Magistrate he had not complained about assault or injuries. He was threatened by police if he does so he will be taken back to police station and beat him more. When he was sent to remand he complained to remand officers. But he was sent back to Nadi police station cell.
23. In cross examination by the prosecution he admitted that he was evading arrest and there was no assault during the arrest. He further said that Sanjay was assaulting him while driving. He admitted that it was not put to Vishal when he came to give evidence. Further he admitted that it was never put to Arif Khan that Arif assaulted him before reconstruction. He admitted that breaks were given during the interview and lunch was provided to him. He admitted that he did not tell Magistrate about what happened in police station or did not make a complaint to anyone up to date.
24. I have carefully considered the available evidence in respect of the caution interview on 9.9.2011 and the charge statement on 10.9.2011 of the accused.
25. Accordingly, I have come to the view that in regard to any allegation of assault, pressure, intimidation and threats by the police, the state had satisfied me beyond reasonable doubt that it did not happen. I reject the evidence of the accused that he was assaulted and forced before, during and after these caution interview and charge statement. I am satisfied that the interviews were voluntary, that those were obtained in fair circumstances, that those were in no way oppressed or beaten out of the accused in contravention of his rights either under the Judges' Rules or of the Constitution which was not in operation.

26. The caution interview of the accused on 9.9.2011 and the charge statement of 10.9.2011, being voluntary made and not created out of oppression is therefore admissible in evidence.

Sudharshana De Silva
JUDGE

At Lautoka
11th February 2014

Solicitors: Office of the Director of Public Prosecutions for prosecution
Office of the Legal Aid Commission for the defence