

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 98 OF 2013

STATE

-v-

1. JOSAI A NABOU
2. WAISALE NAMOKONINO
3. DANIEL VARO SMITH

Counsels : Mr. J. Niudamu for the State
Ms. L. Jiuta for the 1st accused
Mr. Anil J. Singh for the 2nd and 3rd accused

Date of hearing : 7 July 2014 to 9 July 2014

Date of Ruling : 10 July 2014

Voir Dire Ruling

1. The State seeks to adduce into evidence the record of the caution interviews of the three accused on 11.5.2013 and 12.5.2013. The three accused object to the admissibility of this document on the grounds that this statement was obtained involuntarily through assaults, physical pressure, intimidation and threats by the police.
2. The test of admissibility of all confessional statements made to the Police officers, is whether those were 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 the tyranny 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 each 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 interview. Finally, if his rights under the Constitution or common law have been breached, then that will lead to exclusion of the confession 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 noncompliance, 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. Further I am reminded that I have to consider evidence in respect of each accused separately.
8. The defence objected to the admissibility of the caution interviews on the following grounds:
 - a) That the statements were obtained in circumstances that were unfair to the accuseds;
 - b) The accuseds were systematically softened during the interview in that they were kept in custody in circumstances which was degrading and inhumane;
 - c) That the statements were obtained in circumstances that were oppressive;
 - d) That the statements were obtained in breach of Rule 2 and 4 of the Judges' Rules; and
 - e) That the statements were obtained in breach of the accuseds' right to counsel before their arrest, before their caution interview and whilst in custody.
 - f) That the accuseds were threatened and assaulted by Police Officers whilst in Police custody and as a result of the said assaults they made a confessional statement.
 - g) The accuseds were constantly threatened of further punishment if they didn't co-operate with them by admitting the offence.
9. Now I look at the evidence presented in respect of the caution interview of each accused.
10. The first witness was DC Semi Cakanibula. He is in Fiji police force for 14 years. On 11.5.2013 he had received instructions to caution interview the 1st accused. It was conducted in CID bure. The interview was under caution. The rights of the accused were given. He only contacted his family members. He was not under threat or influences to confess. He did not make a complaint before, during or after the interview. He looked well and comfortable. He is related to the accused. The accused is a nephew. The interview was in iTaukei language. The accused voluntarily signed the interview. He and witnessing officer counter signed. It was in question and answer format. He recognized and tendered the original marked PE1 and translation prepared by him marked PE1A.
11. He had arrested the accused earlier that day from where he was working in Naisoso. He was explained the reasons for arrest in iTaukei. No assault was done during the arrest. The accused did not make a complaint and voluntarily surrendered. PC Josua and DC Tevita had accompanied him. He identified the 1st accused in Court.

12. Under cross examination, he said that the accused did not resist during the arrest. He denied punching the accused during the arrest. He further denied verbally abusing the accused on the way to the police station. He denied that the witnessing officer was not present during the interview and came only to sign the papers. He denied threatening the accused during the interview to confess to the allegations. He denied that Con. Josua was present during the interview and was verbally abusing the accused. The accused was escorted to the wash room during the break by Con. Josua.
13. The second witness for the prosecution was WD Cpl. Salote. She was a police officer for a period of 9 years. She received instructions from Crime officer to be the witnessing officer of the caution interview of the 1st accused. She identified the 1st accused. The accused was normal before the interview. She did not see any injury on the accused. He did not make any complaint before, during or after the interview. His rights were given. He was not assaulted during the interview. He was not under duress or influences to confess. They acted fairly on him. The accused gave answers on his own freewill. She identified PE1. People outside could see what was happening in the interview room. It was also close to the main road.
14. Under cross examination she stated that she was present in the duration of the interview. Her signature is in every page. The accused was not threatened by the interviewing officer. She did not recall Con. Josua being present during the interview.
15. The third witness for the prosecution was PC Ravinesh. He had escorted the three accused to the charge room. He had handed them over to PC Apakuki to make relevant entries. One suspect had an injury in left eye (red eye).
16. Under cross examination by the counsel for the 2nd and 3rd accused, he stated that he did not have any conversation with the accused. He said that he made his statement after refreshing his memory from station diary entry.
17. The next witness for the prosecution was PC Apakuki. He was the station orderly on 11.5.2013. He had made an entry in the station diary when he received the three accused from PC Ravinesh. One of them had red eye in his left eye. When asked he said that he received the same while playing Rugby same day. He tendered this entry marked PE2. He had escorted the three accused to Nadi Magistrates Court on Monday. The accused had not made any complaint to him.
18. Under cross examination by the counsel for the 2nd and 3rd accused, he stated that he waited after 1500 hours for ½ hour to make some entries.
19. The next witness for the prosecution was WPC Mereoni. While being station orderly on 12.5.2013 she had made an entry about visitation to all three accused at 2010 hours.

20. Under cross examination by the counsel for the 2nd and 3rd accused, she stated that she also made other entries when the accused were brought by other officers at 1930 hours. She admitted that she failed to mention about these entries in her statement and she had stated that the accused did not want to go to hospital, which was not in her entry.
21. The prosecution called DC Viliame Waqalevu as the next witness. On 11.5.2013 he had received instructions to conduct the caution interview of the 3rd accused. It was in iTaukei language, conducted at the crime office. The accused did not make a complaint. It was in question and answer format. He was given opportunity to consult a lawyer. No inducement, threat or promise was made to him. He was not intimidated in any way. He was not coaxed or oppressed. He was given sufficient breaks. At the conclusion, interview was given back for him to read. He was asked whether he wants to add, alter or delete. It was signed by the accused and counter signed by him. He identified and tendered the original interview notes marked PE4. He also marked and tendered cell book entries made by him marked PE5 A-C.
22. Under cross examination by the counsel for the 2nd and 3rd accused, he denied that IP Sumesh cut some chilies and asked the 3rd accused to open his mouth. He also denied that chilies were put in and one police officer said 'kana, kana'. He said that all three accused were interviewed in the same office as that was the only office. He further denied that the 3rd accused was assaulted on his knees and shoulders using a door stopper. He also denied that 3rd accused was made to lie with handcuffs and an Indian officer stood on his chest. He denied shouting at the accused to sign the interview.
23. The next witness for the prosecution was DC Tevita. He was the witnessing officer of the caution interview of the third accused. He was present throughout the interview. He gave evidence confirming the evidence of DC Viliame.
24. Under cross examination by the counsel for the 2nd and 3rd accused, he denied that IP Sumesh cut some chilies and asked the 3rd accused to open his mouth. He also denied that chilies were put in and one police officer said 'kana, kana'. He said that all three accused were interviewed in the same office as that was the only office. He further denied that the 3rd accused was assaulted on his knees and shoulders using a door stopper. He also denied that 3rd accused was made to lie with handcuffs and an Indian officer stood on his chest. He denied shouting at the accused to sign the interview.
25. Prosecution called Inspector Sumeshwar Prasad as next witness. He is an officer with 33 years experience. He is the Crime officer at Namaka police station. The 2nd accused was interviewed in his office. He was the witnessing officer. The 1st accused was interviewed in the general office and the 3rd accused was interviewed in the office of the crime writer. All these offices were in 30' x 25' building. PC Josua was the interviewing officer. He was present throughout the interview. The accused looked normal. He did not force, threaten or make any inducement. He identified and tendered the original interview notes marked

PE6. Before accused were produced before Court, a pastor who had come to police station had prayed for them. The accused did not make any complaint.

26. Under cross examination by the counsel for the 1st accused, he denied verbally threatening the 1st accused. He also denied cutting and rubbing chilies on 1st accused's face. He further denied punching 1st accused's stomach and chest more than twice.
27. Under cross examination by the counsel for the 2nd and 3rd accused, he denied that he cut some chilies and asked 2nd and 3rd accused to open their mouth. He also denied that chilies were forced to their mouth. He further denied that 2nd and 3rd accused were assaulted on their knees and shoulders using a door stopper. He also denied that 2nd and 3rd accused were made to lie with handcuffs and he stood on their chests. He denied shouting at the accused to sign the interview.
28. The last witness for the prosecution was PC Josua Cakau. He had conducted the caution interview of the 2nd accused on 11.5.2013. It was in English language. Inspector Sumesh was the witnessing officer. The accused did not make any complaint. The accused was given opportunity to consult lawyer. No inducement, threat or promise made to the accused. He was not intimidated in any way. He was not coaxed or oppressed in any way. The accused appeared fit and okay. He was given sufficient breaks during the interview. He identified the original interview notes marked PE6. The accused was given opportunity to add, alter or delete. The accused signed the interview. He counter signed. He also had made a typed version of the interview of the 3rd accused. He identified and tendered the same.
29. Under cross examination by the counsel for the 1st accused, he denied that the 1st accused resisted arrest. He further denied that he handcuffed the accused to a lever in the twin cab. He denied assaulting or interrogating the suspect on the way to Namaka police station. He denied seeing Inspector Sumeshwar rubbing chilies on the face of the 1st accused.
30. Under cross examination by the counsel for the 2nd and 3rd accused, he admitted that the accused were handcuffed before the interview. He had not seen Inspector Sumeshwar cutting chilies or officers opening mouths of the 2nd and 3rd accused and forcibly putting chilies. He further denied that Inspector Sumeshwar assaulted on the knees and shoulders of the 2nd and 3rd accused using a wooden door stopper or step on their chests while they were lying on the floor.
31. After the close of the prosecution case, I found a case to answer from each accused in the trial within a trial and explained each accused his rights.
32. All three accused gave evidence.
33. First accused stated that he was arrested from Naisoso on 11.5.2013 after 2.00 p.m. by three police officers. He did not agree to go with them. He was forcibly put into a twin cab

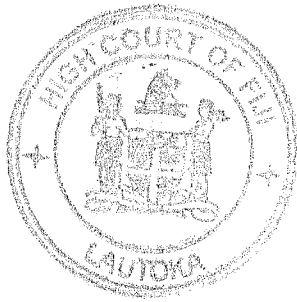
and brought to Namaka station. His hand was handcuffed to a handle on the top. On the way he was punched many times by DC Josua and verbally abused by DC Semi. At Namaka police station Indo Fijian police officer punched him from the back and he fell on the floor. Another Indo Fijian officer came and rubbed chilies on his face. They were asking questions and continued punching. After that, interview commenced.

34. Three officers interviewed him. During the interview Josua and another assaulted him. He signed the interview through force and threat. He met his family members in Court on Monday. He did not complaint to them or the Magistrate. He was not taken to a hospital. He did not ask anyone to take him to a hospital. He has no idea of what was written on the interview papers. He was only forced to sign.
35. Under cross examination by the state, he stated that he does not know Semi. He only came to know him after the interview. He was punched on stomach, back and chest by four police officers. He was treated like a punching bag that day. During the interview, he was not talking. Only police officers were threatening him to sign. They keep on assaulting him throughout the interview. He was still in pain and could not walk properly when he went to the Magistrates Court.
36. Second accused stated that he was arrested from his house in Naboutini village, Sabeto and taken to Sabeto police station by four police officers. He was punched inside the Sabeto police station and taken to Namaka police station. There an Indo Fijian officer assaulted him on his knees and shoulders using a piece of timber. Further chilies were brought and forcibly put to his mouth and he was told to eat. After that they were forced to sign the interviews. They were not allowed visits till they signed the interview papers. None of the answers in the interview was given by him.
37. Under cross examination he stated that he was assaulted on the way to Namaka from Sabeto. He was punched from shoulder to knee. At Namaka he was hit in front of the knee with a piece of wood 3 - 4 times. He could not stand or walk properly. He was pulled from back to the interview room. The Inspector was assaulting him during the interview. He did not reply to any of the questions. He did not complaint to visitors or the Magistrate. He was bit limping when he came to the Magistrates Court.
38. The 3rd accused stated that he was arrested on 11.5.2013 by four police officers at his house. He was taken to Sabeto police station. On the way he was punched on stomach and face, when he remained silent to their questions. Then he was taken to Namaka police station. His left eye was paining at that time. At Namaka police station Indo Fijian officer pulled his leg. He brought a piece of timber and assaulted him on his shoulders, knees and the ankle. Then he went and brought chilies. He cut those to pieces and gave them to eat. He told them to open their mouths and forcibly put those inside. This was done twice. Josua threaten to break his ribs if he does not admit the allegations. He was very scared. Then Indo Fijian officer made them to lie of the floor and stood on top of their bodies. Then

they were just told to sign. He had no idea what he was signing. This was done on the first day and on the second day. He did not complaint to Magistrate.

39. He had received one punch on left eye at Sabeto police station. That was the only injury visible.
40. Under cross examination he denied that the injury in the left eye was from a Rugby match. He said that he did not answer any question put to him by the police. He admitted that he did not make a complaint to the Magistrate, pastor or to the visitors who came to visit him. He was in pain in the left eye and on knees when his parents visited him.
41. I have carefully considered the available evidence in respect of the caution interviews on 11.5.2013 of the three accused.
42. It was alleged by the defence that it is not proper to conduct all three interviews at the same time and at the same place. The three interviews were conducted at the crime office of the Namaka police station at almost same time. According to evidence, there were only five officers serving at the crime branch of the Namaka police station at that time. Two officers were called from outside to conduct these three interviews. The interviews were conducted at the same building and at different places. The three accused needed to be produced before a Magistrate within 48 hours of the arrest. Considering the available resources and circumstances, I am of the view that procedure adopted by the police is correct and fair to the accused.
43. There are 92 questions and answers in the caution interview of the 1st accused. In the 2nd accused caution interview, there are 76 questions and answers. There are 100 questions and answers in 3rd accused's caution interview. The position of each accused was that they never answered any question put to them, although they were heavily assaulted and oppressed before and during the interview. I am of the view that this position taken up by each accused is highly improbable. Only visible injury was the red eye on the 3rd accused. Police officers have noted that injury in the station diary at 1521 hours on 11.5.2013 when he was brought to the Namaka police station.
44. None of the accused made any complaint to the Magistrate, pastor or relations. The position taken up by the 1st accused in cross examination of witnesses on the first day of this inquiry was different from the position taken up on the 2nd and 3rd days. The new position is in line with the position taken up by the 2nd and 3rd accused.
45. The position taken up by all three accused in their voir-dire grounds is that accused were threatened and assaulted by police officers whilst in police custody and as a result of the said assaults **they made a confessional statement**. For all these reasons, I am unable to accept the defence version when I apply the tests of consistency, probability and belatedness.

46. Having heard the evidence by prosecution and the defence, I accept the evidence of the police officers that caution interview statements of the three accused were recorded fairly, without any intimidation or fabrication. I have considered the demeanor of all the witnesses who testified before me. I have considered evidence in respect of each caution interview separately.
47. Accordingly, I have come to the view that in regard to any allegation of assault by the police, the state had satisfied me beyond reasonable doubt that it did not happen. I am satisfied that each interview was voluntary, that was obtained in fair circumstances, that those were in no way oppressed or beaten out of each accused in contravention of their rights either under the Judges' Rules or of the Constitution which was not in operation.
48. The caution interviews of the three accused on 11.5.2103, being voluntary made and not created out of oppression is therefore admissible in evidence.




Sudharshana De Silva
JUDGE

At Lautoka
10th July 2014

Solicitors: Office of the Director of Public Prosecutions for prosecution
Office of the Legal Aid Commission for 1st accused
Anil J Singh Lawyers for the 2nd and 3rd accused