

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 69 OF 2013

BETWEEN : STATE

AND : 1. JOSEPH KING
2. JOSATEKI LABALABA

Counsel : Ms J. Fatiaki for Prosecution
Ms V. Narara for 1st Accused
Miss S. Nasedra for 2nd Accused

Date of Hearing : 8th of June, 2016

Date of Voir Dire Ruling : 9th of June, 2016

RULING ON VOIR DIRE

Introduction

1. The Prosecution proposes to adduce the respective caution interviews of the first and second accused persons in evidence. The two accused persons objected the admissibility of their respective caution interviews on the following grounds, *inter alia*;

i) *That the Accused was assaulted by Officer Avinesh and Officer Kaliova prior to the interview. He was punched on his stomach, threatened, verbally abused and chilies was rubbed in his private parts. With the said assaults and threats, the accused was*

oppressed and sapped of his freewill and consequently, the statements given during the interview were obtained in circumstances that were unfair to the Accused. The statements therefore were obtained in breach of the principle (e) of the Judges Rules.

ii) That inculpatory statement were obtained prior to the Caution Interview. As such the implicated officer had breached Rule II of the Judges Rules in failing to caution the Accused.

iii) That the statements were obtained in breach of Section 13(1)(c) of the Constitution of the Republic of Fiji.

Second Accused person;

i) That his confessions were obtained involuntarily through intimidation, verbal threats and physical assaults by the police officers present during his caution interview,

ii) That he was only told to sign his caution interview and was not given the chance to read it and alter any part of it;

iii) That his confessions were obtained involuntarily through intimidation, verbal threats and physical assaults by the police officers present during his charge;

iv) That his charge statement has been incorrectly recorded and he was just asked to sign it without being given the chance to read it and alter any part of it;

- v) *That he was verbally abused, intimidated and physically assaulted and also verbally threatened at the time of his arrest and during his transportation from the place of arrest to the Namaka Police Station.*
 - vi) *That he was not given his rights at the time of his arrest nor was he informed of the reasons of his arrest.*
 - vii) *That he was verbally abused, intimidated and assaulted and also verbally threatened both by the interviewing officer and also other officers that were present before the commencement of the interview and during the interview and was assaulted and threatened to confess to the offending or else he would continue to be physically assaulted.*
 - viii) *That he was not properly and fully informed of his rights at the commencement of his caution interview as a result did not understand his rights and could not exercise the same effectively.*
 - ix) *That as a result of being verbally abused, verbally intimidated and threatened and also assaulted and also the accused subsequently succumbed to it all and admitted to the allegations involuntarily as he could not take the assaults any further.*
2. The voir dire hearing was conducted on 8th of June 2016, where the prosecution called four witnesses. The first and the second accused persons neither gave evidence on oath nor called any other witnesses for the defence. I then directed the learned counsel for the prosecution and the defence to file their respective written submissions, which they filed as per the directions. Having carefully considered the evidence adduced during the hearing and respective written submissions of the parties, I now proceed to pronounce my ruling as follows.

Background

3. In respect of the caution interview of the first accused person, the prosecution called the evidence of DC Avinesh and DC Kaliova. DC Avinesh has conducted the caution interview of the first accused person. DC Kaliova was present at the crime office at Namaka Police Station when the first accused person was interviewed on the 16th of February 2010, DC 4444 Timoci was the arresting officer of the second accused person. He explained the manner in which he arrested the second accused person on the 14th of February 2010 at Lautoka. D/ Sgt Timoci was the interviewing officer of the second accused person.

The Law

4. The scope of the hearing of *voir dire* is extended only to the admissibility of the confessional statement of the accused in evidence. The probative value of it still remains for the assessors during the trial proper. (G vs UK (9370/81, 35 DR 75)).
5. Justice Gounder in State v Akanisi Panapasa (Criminal Case No 34 of 2009) has outlined the general rule on admissibility of confession, where his lordship found that;

"As a matter of general rule, a confession made by an accused person to a person in authority out of court is admissible only if the confession was made voluntarily. The rule which was developed by the English common law is the state of law in Fiji".

6. The principle of rejection of an improperly obtained confession is founded on three main principles,

- i) Unreliability of the confession,
- ii) Rights against self-incrimination,
- iii) To prevent undesirable police conduct on the person in their custody,

7. Sections 13 and 14 of the Constitution of the Republic of Fiji Islands have recognised and endorsed the above mentioned three main principles.

8. The Privy Council in Wong Kam -Ming v The Queen (1982) A.C. 247 at 261 has discussed the basic control over admissibility of statement, where it was held that;

"The basic control over admissibility of statement 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."

9. The Fiji Court of Appeal in Shiu Charan v R (F.C.A. Crim. App. 46/83) and Fraser v State [2012] FJCA 91; AAU24.2010 (30 November 2012) has discussed the applicable test of admissibility of caution interview of the accused person at the trial.

10. The Fiji Court of Appeal in Shiu Charan (supra) held that;

"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 the use of force, threats or prejudice or inducement by offer of some advantage - what has been picturesquely described as "the flattery of hope or the tyranny of fear." Ibrahim v R (1914) AC 599. DPP v Pin Lin (1976) AC 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 overbearing the will, by trickery or by unfair treatment. Regina v Sang (1980) AC 402, 436 @ c - E." (State v Rokotuiwai - [1996] FJHC 159; Hac0009r.95s (21 November 1996).

11. The Fiji Court of Appeal in **Fraser v State (Supra)** held that

"The court shall not allow a confession to be given in evidence against him unless the prosecution proves beyond reasonable doubt that the confession was not obtained (a) by oppression of the person who made it (b) in consequence of anything said or done which was likely, in the circumstances existing at the time to render unreliable any confession which might be made by him in consequence thereof"

12. The test enunciated in **Shiu Charan (supra)** and **Fraser (Supra)** constitutes two components. The first is the test of oppression. The court is required to satisfy that the statement in the caution interview had been taken without any form of force, threats, intimidation, or inducement by offer of any advantage. The second component is that, even though the court is satisfied that the statement was given voluntarily without any form of threat, force, intimidation or inducement, it is still required to satisfy that no any general grounds of unfairness existed before or during the recording of the caution interview.

13. It is the onus of the prosecution to prove beyond reasonable doubt that the caution interview of the accused persons were recorded voluntarily and under fair and just circumstance.

Analyses

14. Having considered the evidence adduced during the hearing, it appears that the first accused person's contention against the admissibility of the caution interview in evidence is founded on following main grounds, inter alia
 - i) The first accused person was not explained that he could obtain legal aid assistance,
 - ii) The first accused person was not cautioned during the interrogation that was taken place prior to the recording of his caution interview,
 - iii) Witnessing Officer has not signed the caution interview,
 - iv) The First Accused person was assaulted on his head, back and stomach by the interviewing officer and DC Kaliova.
15. In view of the evidence presented by the prosecution and the nature of the cross examination of the counsel of the second accused person it appears that the main contentions of the second accused person are founded on following grounds;
 - i) The second accused person was not explained about the free legal service provide by the legal aid commission,

ii) The second accused person was assaulted on his head, back and stomach during the arrest and also during the recording of his caution interview.

iii) No witnessing officer for the caution interview,

iv) The second accused was not given an opportunity to sign immediately after certain questions and answers in the caution interview.

16. DC Avinesh in his evidence stated that he explained the first accused person about his right to consult a lawyer or his family. DC Avinesh stated in his evidence that he explained the accused about his right to consult a lawyer and also about the legal aid. However, he has only recorded in the caution interview about the right to consult a lawyer of his choice. He has not recorded about Legal Aid. Having considered all the circumstances of this case, I do not find the failure to explain the accused about the legal aid has caused any form of unfairness. The accused has not indicated that he wanted any legal assistance. His answer was that "no, it's ok". Hence, I find that the accused person has not expressed any form of interest to obtain legal assistance from a lawyer.

17. The learned counsel for the first accused person questioned DC Avinesh during the cross examination about the interrogation that took place prior to the recording of the caution interview. DC Avinesh admitted that he interrogated the first accused. According to DC Avinesh, the first accused was cautioned during the said interrogation. However it has not been recorded. Moreover, there is no evidence that the first accused person made any confession during the interrogation. Neither the learned counsel for the first accused person suggested to any of the prosecution witness that the first accused person made a confession

during the said interrogation without cautioned. Hence I do not find that this ground has no merit.

18. It was revealed during the hearing that the witnessing officer has not signed the caution interview. DC Avinesh stated that the witnessing officer is deceased now. DC Avinesh stated that he might have over sighted to sign the caution interview. There is no record of the presence of a witnessing officer in the record of the caution interview. However, the mere absence of the witnessing officer does not constitute an unfair and unjust circumstances.
19. The learned counsel of the first accused person questioned DC Avinesh and DC Kailova during the cross examination, whether they assaulted the first accused person on his head, back and stomach prior to and during the recording of the caution interview. Both the witnesses denied such assaults.
20. The learned counsel for the second accused person questioned DC Timoci and D/Sgt Timoci during the cross examination, whether they assaulted the second accused person during his arrest and also during the recording of his caution interview. Both witnesses denied the allegation of assaulting on either occasions. Neither the first accused person nor the second accused person gave evidence to the effect that they were assaulted by the police officers prior to and during the recording of their respective caution interviews.
21. The Fiji Court of Appeal in **Fraser v State (supra)** has discussed the different of cross examination of the witnesses and its evidential value, where Justice Calanchini held that;

"No matter how astutely leading questions may be asked by Counsel cross-examining prosecution witnesses, the material in the leading questions does not become evidence unless adopted or accepted by the witness".

22. The witnesses of the prosecution denied that they assaulted the first and second accused persons during the arrest, and also prior to and during the recording of their respective caution interviews. No evidence before this court to suggest otherwise. Having considered the consistence nature of the evidence of DC Avinesh, DC Kailova, DC Timoci and D/ Sgt Timoci, I accept their evidence as truthful and credible. Hence, I find that the prosecution has proven beyond reasonable doubt that the first and second accused persons were not assaulted during the arrest, and also prior to or during the recording of their respective caution interviews.
23. The learned counsel for the second accused person questioned D/Sgt Timoci during the cross examination whether he informed the second accused person that the legal aid is free. It appears that the interviewing officer has explained the second accused person about his right to counsel including the legal aid. Hence, I am satisfied that the mere omission of stating the free nature of legal aid assistance has not caused any unfairness to the second accused person in his caution interview.
24. It was revealed that there was no witnessing officer for the caution interview of the second accused person. I reiterate my finding which I discussed in paragraph 18 above, and find the absence of witnessing officer has not caused any unfairness to the caution interview of the second accused person. However, I

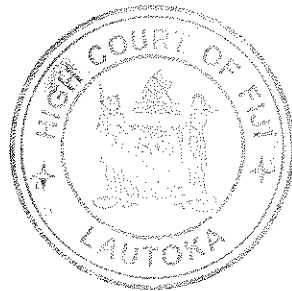
propose that the presence of the witnessing officer would have provided a more secure environment to the accused person in his caution interview.

25. Having considered the reasons discussed above, It is my opinion that the prosecution has proven beyond reasonable doubt that the first and second accused persons have given their respective caution interviews voluntarily and under fair and just circumstances. Hence, I hold that the respective caution interviews of the first and second accused persons are admissible in evidence.


R. D. R. Thushara Rajasinghe

Judge

At Lautoka
9 June 2016



Solicitors : Office of the Director of Public Prosecutions
Office of Legal Aid Commission