IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 129 OF 2015

STATE

-v-

1. Ratu Epeli Niudamu
2. Sereima Adidave Rokodi
3. Sailasa Wairoaroa Malani
4. Nanise Kasami Nagusuca
5. Waisea Duailima
6. Samuela Ligabalavu
7. Mikaele Gonerara
8. Emosi Toga
9. Waisake Racaca
10. Josefa Natau
11. Isikeli Waisega Kabakoro
12. Suluweti Lotu Waqalala
13. Laisiasa Mocevakaca

14. **Ulaiyasi Rabua Tuivomo**

15. **Apolosi Qalilawa**

16. **Elisapeci Natau**

Counsel: **Mr. Lee Burney with Mr. S. Babitu for the State**

Mr. K. Tunidau for 1st Accused

Mr. A. Ravindra Singh for 2nd to 16th Accused

Dates of Hearing: **06th February 2017 – 16th February 2017**

Date of Ruling: **17th February 2017**

RULING ON VOIR DIRE

1. The Prosecution seeks to adduce into evidence the records of caution interviews of each of the Accused. All Accused object to the admissibility of those records on the grounds that their rights guaranteed under the Constitution have been violated and that the interview process is flawed due to lack of fairness.

The legal test

2. The test for admissibility of all confessional statements made to the police, is whether they were made freely and not as a result of threats, assaults, or inducements made to the Accused by a person or persons in authority. Further, oppression or unfairness also lead to the exclusion of confessions. Finally, where the rights of suspects under the Constitution have been breached, this will lead to exclusion of the confessions obtained thereby unless the Prosecution can show that the suspect was not thereby prejudiced.

3. The preamble to 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. In ***Ganga Ram and Shiu Charan v Reg*** 1983, the Fiji Court of Appeal outlined the two grounds for the exclusion of confessions at p.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 the use of force, threats of 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 Ping 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 police behaved, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or by unfair treatment. Regina v Sanag (1980) AC 402, 436 @ C-E. This is a matter of overriding discretion and one cannot specifically categorize the matters which might be taken into account."

5. Further, the rights of suspects who are arrested or detained are protected by section 13 of the Constitution. A breach of the Constitution may also be a ground for excluding admissions if it was shown that the Accused were prejudiced by such breach.

6. The burden of proving voluntariness, fairness, lack of oppression, compliance with the Constitution and (if there is non-compliance) lack of prejudice to the suspect, rests at all times with the Prosecution. They must prove these matters beyond reasonable doubt.

7. Grounds for *voir dire* are as follows:

1st Accused

i. The first Accused was not promptly informed during his arrest and detention of his right to remain silent and of the consequences of not remaining silent pursuant to Section 13(1)(a)(ii) and (iii) of the Constitution of the Republic of Fiji 2013.

ii. The first Accused was not advised of his right to remain silent pursuant to Section 13(1)(b) of the Constitution of the Republic of Fiji 2013.

iii. The Police breached the first Accused's right pursuant to Section 13(1)(d) of the Constitution of the Republic of Fiji 2013.

iv. The Police breached Section 13(1)(a)(i) of the Constitution of the Republic of Fiji 2013 by recording in the English a record of the first Accused's caution interview which was conducted in the iTaukei dialect peculiar to the province of Ra.

v. The Police breached the Judge's Rules by failing to record the caution interview statement of the first Accused in the original iTaukei dialect of the province of Ra according to how the interrogation was conducted.

vi. The Police Interviewing Officer failed to ask the first Accused whether he wished to remain silent after the caution was given.

2nd to 16th Accused

1. That Accused persons were denied their right to legal counsel in breach of Section 13(1)(c) of the Constitution of the Republic of Fiji 2013.

2. (i) Accused persons were denied their right to remain silent during the recording of their record of interview statement as provided for under Section 13(1)(a)(ii).

(ii) Accused persons were not explained the consequences of not remaining silent as provided for under Section 13(1)(a)(iii).

(iii) Accused persons were not given the option to remain silent after having Sections 13(1)(a)(ii) and Section 13(1)(a)(iii) been explained to them as provided for under Section 13(1)(b).

Analysis

8. Prosecution called a total of 9 police witnesses to establish voluntariness, fairness and constitutionality of the interview process. I find the evidence by the witnesses called by the Prosecution is plausible and believable. There is no evidence before this court to find that the Accused were assaulted, threatened or forced to give a confession to police offices. There is no evidence of unfair treatment at the arrest, during caution interview or charging. There is also no evidence that the Accused's constitutional rights had been violated in such a way

so that recording of the caution interview and charging had been prejudicial to the accused.

9. As far as grounds of *voir dire* are concerned, there is no challenge to the voluntariness of caution interviews by the Defence. None of them claims that caution statements were procured by improper practices such as the use of force, threats of prejudice or inducement of some advantage.

10. However, in the course of cross-examination, Counsel for the 1st Accused put some questions on the basis that the interviewing officer had made his client to answer and self-incriminate. Therefore, in light of the legal burden on the Prosecution of proving voluntariness, fairness and lack of oppression and compliance with the Constitution, it is prudent to scrutinize the voluntariness of his caution statement also.

11. There is no dispute that the Caution pursuant to Judge's Rule No. 2 was administered to each Accused before the interview process started.

12. Prosecution maintains that the Caution is an adequate protection *vis-a-vis* the right to remain silent and to be warned of consequences of not remaining silent guaranteed under Section 13 of the Constitution. Defence Counsel on the other hand cross-examined police witnesses on the basis that the Caution given to the

Accused is not adequate and does not meet the standards expected of the constitutional protection against self-incrimination. Counsel for 1st Accused further submitted that the Judges Rules are only directed at police officers and are subordinate to the Constitution and therefore this Court is bound to give effect to the Constitution.

13. Firstly, I have to determine whether the rights guaranteed to an arrested and detained person under the Constitution, particularly the right to remain silent and the right to be warned of consequences of not remaining silent had been violated by giving the Caution in terms of Judges Rule No.2. If there is any rights breach, then I have to determine whether that breach had caused any prejudice to the accused and therefore the admission of the caution statements is unfair in the circumstances of each Accused's case.

14. Records of interviews marked through police witnesses indicate that the following Caution had been administered to all the Accused:

> *"I wish to remind you that you are not obliged to say anything unless you wish to do so but what you say may be taken down in writing and given in evidence".*

15. English translations of original interviews recorded in the iTaukei dialect indicate that those who were interviewed in iTaukei dialect had been properly cautioned in conformity with Judges Rule No. 2.

16. Accused persons do not deny that the Caution was administered. All of them had signed the record acknowledging that they were cautioned and that they understood the nature of the Caution.

17. Madigan J in ***Ratu Inoke Tasere & Others*** HAC 140 of 2015 (16 October 2105) held that the Caution in Judge's Rule No. 2 is mandatory and is in full compliance with rights of arrested or detained persons formulated in Section 13 of the Constitution.

18. In ***Ratu Inoke Tasere & Others*** *(supra)* Madigan J observed:

> *"Judges Rule No. 2, a caution applied to Accused persons and suspects detained nicely encompasses the right to silence and the consequences of remaining silent. It is in simple and easily understood terms in compliance with Section 13(i) (a) (ii) and (iii) of the Bill of Rights".*

19. Having heard evidence led in this trial within trial I'm in full agreement with Madigan J's observation. In my opinion, the constitutional provision only articulates or describes the right to be safeguarded and, save as Section 13 (2) of the Constitution, it does not specifically provide for the manner in which those rights are to be afforded to a particular person.

20. Section 13 (2) of the Constitution provides:

> *"Whenever this section requires information to be given to a person, that information must be given simply and clearly in a language that the person understands".*

21. As Mr. Tunidau rightly submitted, *'what must govern is the substance of what the suspect can reasonably be supposed to have understood, rather than the formalism of the precise words'*. In my opinion, Judge's Rule No. 2 provides for an appropriate manner of affording the right to remain silent in an ordinary intelligible language and is completely in compliance with the rights guaranteed under Section 13 of the Constitution.

22. The case law cited by Mr. Tunidau (which I reproduce at paragraphs 24 & 25 below) does not lend support to his argument that the Caution given under Judges Rule is an inadequate protection *vis a vis* right to remain silent. Rather it strengthens the position that where the caution has been given, possibility of exercising judicial discretion in favour of admitting the statement in evidence increases.

23. The Fiji Court of Appeal in ***Jagendra Sharma v. Reginam*** [1970] 16 FLR 5 at p.10 said:

"In considering the Judge' Rules which were adopted in Fiji as from 1st March, 1967, it is pertinent to note the comments of the Court of Criminal Appeal in R. v. Ovenell [1968] 1 All E.R. 933 at p. 938 where Mr Justice Blain in delivering the judgment of the court said:

> *"Now three things need require to be said about the Judges' Rules. First of all, they are not mandatory or not even directed to the court at all. They are rules of conduct directed to the police and no more; indeed, they are directed to no one but the police, though it is understandable that investigating officers of other services might be thought to be comparably placed with police officers. Secondly, where a statement has been made without caution in circumstances where compliance with the rules would have necessitated a caution, it is a matter for the trial Judge to exercise his own discretion as to whether the statement should be admitted or not. No doubt in exercising that discretion so long as the statement is not inadmissible he will apply his mind, inter alia, to such factors and principles as the balance between probative value and potential prejudice."*
>
> [emphasis added]

24. In **Beese and Anor v Governor of Asford Remand Centre** [1973] 3 All ER 689 (HL); [1973] 1 WLR 1426 Lord Diplock said at 693 and 1430 of the respective reports:

> *"The Judges' Rules are not rules of law. They are rules laid down by the Judges of the Queen's Bench Division for the guidance of English police officers when taking and recording statements made by persons who are suspected of having*

committed criminal offences. Non-observance of the Rules by a police officer to whom a confession is made does not render it inadmissible at common law if it was 'voluntary' i.e not made in consequences of an unlawful inducement or threat of a temporal nature held out or made by a person in authority. The only sanction for the observance of the Judges' Rules is that the Judge before whom the case is tried may, if he thinks fit, refuse to admit in evidence a confession obtained in contravention of them. It lies within his own discretion which he must exercise judicially whether to admit the confession or not" [emphasis added]

25. This Court recognizes the importance of guaranteeing the rights to a person including his or her right to remain silent and will do all within its power to safeguard those rights. I am in full agreement with Mr. Tunidau when he submitted that Chapter 2 of the Constitution binds all three branches of Government and, as a branch of the Judiciary, the High Court is bound by the Bill of Rights. Said that, this Court is fully confident that the caution given to Accused persons in terms of Judges Rule No. 2 is adequate to safeguard the right not be compelled to make any confessions or not to be self-incriminated articulated in the Constitution.

26. If the detainee chooses after such a warning to make a voluntary statement, without any prompting from police, and that statement is inculcatory, then it is admissible in evidence. [***State v Matacagi*** [2003] FJHC 166; HAC0011D.2002S (1 February 2003)]. Once the caution has been properly afforded, and once the suspect, having understood the caution, elects to answer the questions, then it

cannot be argued that the right not to be compelled to make any confession has been violated.

27. Furthermore, records of caution interview of 2nd, 3rd, 4th, 7th, 8th, 9th, 13th, 15th, and 16th Accused clearly indicate that, in addition to the Caution, the right to remain silent and consequences of not remaining silent had been expressly explained.

28. I am satisfied that the right to remain silent guaranteed under Section 13 has not been violated in the interviewing process.

29. Ground 2 filed on behalf of 2nd to 16th Accused challenges the admissibility of caution statements on the basis that their right to seek legal representation was violated in the interview process.

30. It is apparent from the records of interview that each of the Accused had been informed of their right to consult a legal practitioner. Indeed, each of the Accused giving evidence accepted that they were informed of these rights. Each of them had signed the record of interview acknowledging that these rights were afforded and that they understood the same.

31. The right question then to be asked is whether these acknowledgments constitute a valid and informed waiver of the right to counsel. None of the Accused says

that this part of the record is a police fabrication and that they were never told of their right to counsel. Therefore, I have no problem in accepting that they have unequivocally waived their right to counsel.

32. There is no evidence that signatures of accused were obtained by force, trickery, or under circumstance of duress or misrepresentation of facts. Although the 2nd Accused blamed the police of fabricating part of her answers, her allegation was not substantiated. Her counsel never cross examined police witnesses on the basis that any of the records had been fabricated by police.

33. Some of the Accused even admitted that they consulted a legal practitioner and some of them had waived their right for various reasons. None of them said that they were not informed of these rights. Right to Counsel is not absolute. Once afforded it is a matter of their election. I am satisfied that the right to consult a legal practitioner had not been violated in each Accused's case.

34. Having held that no right violations had taken place, I now turn to examine the case of each Accused to see if they had been prejudiced in the interviewing process.

35. When considered the records of caution interviews and the evidence adduced by the Prosecution witnesses, it is not difficult to determine whether or not a particular right had been violated. But rather difficult question of whether or not

an accused had been prejudiced can satisfactorily be determined only upon consideration of the evidence adduced by that particular accused.

36. All the Accused gave evidence despite that the burden was on the Prosecution to prove that the interviews had been conducted fairly and that no prejudice was caused. I made use of each Accused's evidence to consider if any doubt is created in the Prosecution case that no prejudice was caused to any of the accused.

37. Before coming to the issue of prejudice and lack of fairness in the interview process, I would like to probe the allegation made against Stg. Bari that the 1st Accused Mr. Niudamu was compelled to answer and make incriminatory statements.

38. Evidence of the interviewing officer Stg. Bari that the 1st Accused was not assaulted, threatened or forced to answer the question or to sign the caution statement was never challenged. Two witnessing officers confirmed that the 1st Accused gave answers voluntarily. 1st Accused himself did not dispute the fact that the answers were given voluntarily. Exculpatory remarks or excuses made in his caution statement indicate that the 1st Accused was not under any pressure to incriminate himself as was suggested by the Defence Counsel. Therefore, I am satisfied that the caution statement of the 1st accused was given voluntarily.

39. 1st Accused's main challenge was to the alleged denial of his rights under the Constitution and to the lack of fairness in the interview process.

40. The 1st ground advanced by the 1st Accused was that he was denied his right to remain silent at the time of his arrest. According to Stg. Bari's evidence 1st Accused was an arrested person by the time of the interview. However, Defence Counsel never asked from the arresting officer Bari nor was it elicited from the 1st Accused whether he (1st Accused) was informed of his right to remain silent at the time of arrest. 1st Accused himself admitted that he attended the police station and the interview voluntarily with the view to assist the police investigation. Even if the allegation that 1st Accused was not informed of his right to remain silent at the time of arrest is true, there is no statement purportedly made by the 1st Accused during arrest to be scrutinized in these proceedings. Nature of the allegation and the right to remain silent in the form of Caution had been explained to the 1st Accused at the beginning of the interview. Therefore, as far as the caution interview is concerned, no prejudice was caused to the 1st Accused.

41. This Court in a *voir dire* proceeding is not sitting in Constitutional Redress jurisdiction and therefore its scrutiny will only endeavor to answer the question whether the alleged constitutional right infringement had caused any prejudice to the Accused in the interview process. Case authorities exist in this jurisdiction to show that mere constitutional right violations would not result in exclusion of a caution interview if the Prosecution can show that no prejudice was caused to

the Accused thereby. See: ***State v Matacagi*** [2003] FJHC 166; HAC0011D.2002S (1 February 2003)

42. In ***Siga Lesumailau & Sikeli Tamani v State*** Criminal App. No. AA00023 of 2000S, a suspect who had been in custody for over 26 hours in violation of the Constitution and who had suddenly confessed after several hours of denial, was held to have made a voluntary admissible confession. His conviction was upheld by the Court of Appeal.

43. 2nd 3rd and 6th grounds of the 1st Accused were based on alleged infringements of rights under Section 13 of the Constitution, particularly the right to remain silent. According to the record of interview, 1st Accused was properly cautioned by the interviewing officer in the language he preferred to be interviewed. The record of interview tendered in evidence speaks for itself. He does not dispute his signature admitting that the caution was given and that it was understood.

44. D/Stg. Bari however admitted that he 'overlooked' to afford the right of silence as per 'constitutional jargon'. In light of my finding elsewhere in this Ruling, the caution properly given is sufficient to communicate the constitutional right of silence to a detained ordinary person. In the absence of any complaint during or after the interview, I am satisfied that the 1st Accused understood the caution given to him hence no prejudice was caused to him.

45. 4th and 5th grounds were based on alleged infringement of 13 (1) (a) (1) of the Constitution. The record of interview shows that the 1st Accused had been given his right to choose the language to be interviewed. He selected English as the preferred language and signed the interview notes voluntarily to acknowledge that he was given an option to be interviewed in the language of his own choice. The interview record was read back to him and he himself read it. He never complained during or after the interview that the record had been prepared in a language other than the language of his own choice or that he did not understand the caution or the allegation or the questions put to him in the interview.

46. 1st Accused served in Fiji Military Force and was twice engaged in peace keeping duties in Lebanon. He was a Senator for 10 years. He admitted that he, having completed Form 3 school education, was proficient in English and iTaukei. He read a portion of his own English plain statement without any difficulty when he was invited to do so by the State Counsel. It is hardly believable that a man of his caliber was confused as to the meaning of the caution which was phrased in simple English.

47. 1st Accused further maintained that his interview was conducted in the Ra dialect. The interviewing officer and two witnessing officers completely denied that 1st Accused was interviewed in iTaukei or Ra dialect. It is clear from other interviews conducted by the same interviewing officer that some of the interviews had been conducted in iTaukei and some in English. Interviews conducted in iTaukei had later been translated into English. I do not see any

reason why the interviewing officer in this case should take an interview in a language against interviewee's choice. Evidence of the 1st Accused is not plausible and substantiated. I am satisfied that the caution interview was conducted fairly and no prejudice was caused to the 1st Accused.

2nd to 16th Accused

48. 2nd to 16th Accused relied on two grounds of *voir dire*. I have already found that the right to consult a legal practitioner and right to remain silent had been duly communicated to each Accused and therefore no breach had occurred. I will limit this part of the discussion to see if any prejudice was caused to the Accused.

49. Some of the Accused purported that they did not understand or that the interviewing officers failed to properly explain their rights. Records would show that their rights had been communicated in simple language of their choice whether it was in English or iTaukei. All of them are school educated mature people. If they did not understand or was confused of their rights or of the interview process, they could have complained to the interviewing officer when called upon to do so. All of them admitted that they understood their rights and signed to confirm that they had understood.

50. At least two Accused had exercised their right to counsel and one Accused had managed to consult a legal practitioner. That shows that this right had been

explained to the Accused in an intelligible language. Police officers cannot be blamed for not providing telephone facilities to consult a legal practitioner when they have waived their right to counsel.

51. When the 16th Accused found that the counsel of her own choice was not available she could have consulted a lawyer from the Legal Aid Commission, but she waived her right and permitted the interviewing officer to proceed.

52. Some Accused persons said they did not want to consult a legal practitioner because they thought they were only assisting the police investigation and did not know they were suspects in a criminal investigation or of the seriousness of the interview process.

53. Records of interview indicate that the nature of the allegation had properly been explained to each Accused at the outset. There is no reason for them to believe that the interview process to be one of friendly conversation or information gathering exercise.

54. In ***Kerponay v Attorney-General of Canada*** (1982) IS CR 41 the Court said that any waiver of such a right –

".....is dependent upon it being clear and unequivocal that a person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on these rights." (per Lamer CJ p. 202).

55. I find on the basis of the interview notes, and the evidence of Prosecution and also that of the Defence that the right to counsel was explained to each Accused and that they understood the right, and its significance, and that they clearly and unequivocally waived that right.

56. Mr. Singh argues that the failure by the police not to inform each Accused person if he or she was a suspect or under arrest undermined their constitutional rights.

57. It may be true that if they were not informed of their status their rights would have been undermined. I am however certain that by the alleged police inaction Accused were not prejudiced in their respective interviews.

58. The Judges Rules 1 states:

"When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not from whom he thinks that useful information may be obtained. This is so whether

or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it."

59. It is clear that a police officer is entitled to question any person, whether suspected or not from whom he thinks that useful information may be obtained. The crucial question is whether the person subjected to the interrogation was prejudiced by the conduct of the police in the circumstances of this case.

60. Shameem J in **State v Matacagi** stated:

" It appears therefore that despite the absence of specific statutory authority given to the police to question detainees, judges may decide not to exclude the records of confessions having taken into account the custody and the circumstances of it"

61. The position therefore appears to be that an interview taken by a police officer from a person whether that person was in custody or not will not automatically be excluded in evidence. However, the State must show that the circumstances under which the interview was taken were not unfair or oppressive. A judge should exclude such confessions if they are obtained in unfair and oppressive circumstances. All the Accused admitted they were treated well by the police and the statements were given voluntarily. I do not consider the circumstances of the interview in this case to be oppressive or unfair.

62. It is clear from the records that each of the Accused had been informed of the purpose or the reason of the interview at the beginning of the interview. Each of them admitted that they knew why they were being interviewed. They gave answers to questions quite willingly without any pressure. There is no allegation that the answers were obtained by trickery or misrepresentation of facts.

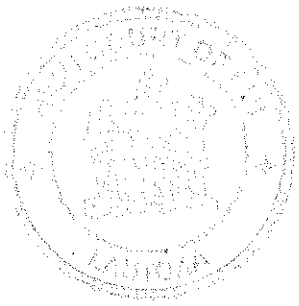
63. The fact that a number of Accused had remained silent and refrained from answering some of the questions indicates that they had understood the caution and enjoyed a greater degree of freedom in the exercise of their rights. I find the circumstances under which the interviews were conducted neither oppressive nor unfair.

64. When the Accused admitted having been afforded their rights, there was a remarkable shift in the nature of the challenge away from not having been given these rights towards not having understood these rights. There was no evidence adduced on behalf of the Accused that any of them was suffering from any mental impairment or was below average intelligence. An unsubstantiated claim of lack of understanding of rights accepted to have been given can have no bearing on the admissibility of records of caution interview.

65. Having considered the case of each Accused separately, I am satisfied that the police interviews were lawfully conducted and the Accused were not prejudiced in the interviewing process.

Conclusion

66. I conclude that the statements made under caution by all Accused are admissible in that they were voluntary, not made after the oppressive or unfair questioning by the police nor made as a consequence of breaches of the Constitution. They may be led in evidence.



Aruna Aluthge

JUDGE

At Lautoka

17th February, 2017

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