

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 049 of 2010

STATE

v.

1. ARE AMAE
2. LAISENIA BESE

Counsel: Ms. S. Tivau and Ms. N. Sharma for State
Mr. L. Qetaki for Accused 1
Ms. V. Filipe for Accused 2

Hearing: 5th, 8th to 12th May 2017

Ruling: 15th May 2017

VOIR DIRE RULING

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 ground that they were assaulted and treated badly by the Police Officers at the time of their arrest. They further allege that they were assaulted and intimidated by the Police Officers during the recording of their respective caution interviews.
2. The *voir dire* hearing was commenced on 5th of May 2017 and concluded on the 12th of May 2017. The prosecution called two witnesses. Subsequently, the first and second accused gave evidence for the defence. At the conclusion of the hearing, the learned counsel for the prosecution and the defence made their respective oral submissions.

Having carefully considered the evidence adduced during the hearing and respective submissions of the parties, I now proceed to pronounce my ruling as follows.

Factual Background

3. The first prosecution witness is D/ Cpl Pita Tuvusa. He is the interviewing officer of the first accused person. The second witness of the prosecution is Sgt. Epli Vamosi. He is a member of the arresting team of the first accused. He has then conducted the caution interview of the second accused.

The Law

4. The scope of the hearing of *voir dire* is extended only to the admissibility of the confessionary 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 Goundar 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 controls 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 voluntariness. 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.

Analysis

14. D/ Cpl Tuvusa in his evidence said that two days were taken to complete the caution interview. The caution interview was started at 11. 30 a.m. on the 21st of April 2009. Cpl. Tuvusa said that he only conducted the caution interview and did not involve in the arrest of the first accused. However, the Station Diary of the Police Station states that Cpl. Tuvusa brought the first accused under arrest to the Police Station at 11.05a.m. on the 21st of April 2009.

15. Moreover, Cpl. Tuvusa said that he did not give any break to the 1st accused during the caution interview on the 21st of April 2009. In contrast, the Station Diary of the Police Station states the caution interview of the first accused was suspended at 12.50 p.m. and he was taken back to the cell.
16. Cpl. Tuvusa admitted in his evidence that the commencement of the caution interview has not been recorded in the Station Diary.
17. Sgt. Epeli Vamosi in his evidence confirmed that his team arrested the first accused early in the morning around 5-6 a.m. on the 21st of April 2009. It took about 10 to 15 minutes for them to come back to the Police Station.
18. It appears that there is no proper and detailed record in the caution interview about the break given to the 1st accused at the conclusion of the first days' interview.
19. The first accused in his evidence said that he was not taken to the Police Station after his arrest. He was taken to somewhere before he was taken to the Police Station. He was questioned and assaulted by the Police at that place. When he was taken to the Police Station, he was further assaulted by the arresting team. He was then locked in the cell. In a while, he was taken for the caution interview.
20. The two witnesses of the prosecution failed to sufficiently provide any explanation about the contradictory nature of their evidence with the records of the Station Diary. They said the first accused was not assaulted during the arrest or recording of his caution interview. They both admitted that everything takes place in the Police Station is required to be recorded in the Station Diary.

21. The prosecution failed to provide any evidence to establish what happened to the first accused from his time of arrest in the early morning until he was taken to the Police Station at 11.05 a.m.
22. In view of these discrepancies and contradictory nature of the evidence presented by the prosecution in respect of the first accused, I find there is a reasonable doubt whether the first accused was properly treated and his caution interview was recorded under fair and just circumstances.
23. The evidence of Sgt. Epeli Vamosi confirms the second accused was brought into the Police Station at 6.20 a.m. on the 26th of November 2009. He was locked in the cell at 6.59 a.m. Sgt. Epeli does not know what happened to the accused during that 39 minutes.
24. According to the evidence given by Sgt. Epeli Vamosi, the caution interview of the second accused was commenced at 9.15 a.m. It was then suspended for the reconstruction at 10.45 a.m. The caution interview was recommenced at 11.45 a.m. and concluded at 12.20 p.m.
25. However, the Station Diary of the Police Station states the second accused was released from the cell at 11.20 a.m. for his caution interview. It has been further recorded that he was released by the interviewing officer at 11.35 a.m. after the conclusion of the caution interview. According to the entries of the Station Diary, the caution interview of the second accused has lasted only 15 minutes.
26. In view of these contradictory natures between the evidence given by the two prosecution witnesses and the records of the Station Diary, I find the prosecution failed to satisfy the court beyond reasonable doubt that the two respective caution interviews of the two accused were recorded voluntarily and fairly.

Conclusion

27. Having considered the reasons discussed above, It is my opinion that the prosecution has not proven beyond reasonable doubt that the first and second accused 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 not admissible in evidence.



A handwritten signature in blue ink, appearing to be "R.D.R.T. Ragasinghe".

R.D.R.T. Ragasinghe
Judge

At Suva
15th May 2017

Solicitors
Office of the Director of Public Prosecutions for the State
Office of the Legal Aid Commission for the Accused