

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case. No. HAC 148 of 2016

BETWEEN : **THE STATE**

A N D : **PAULO TAKABWEA TAAKE KABWEA**

Counsel : Mr. J. Niudamu for the State.
Ms. P. Reddy [LAC] for the Accused.

Date of Hearing : 26 September, 2019

Date of Submissions : 11 October, 2019

Date of Ruling : 25 October, 2019

VOIR DIRE RULING

1. The accused is charged with two representative counts of indecent assault contrary to section 154(1) of the Penal Code Cap. 17 and five counts of rape out of which three counts are representative counts, one count is contrary to section 149 and 150 of the Penal Code and the other four counts (two being representative counts) are contrary to section 207(1) and 2 (a) of the Crimes Act.
2. The prosecution wishes to adduce in evidence at trial the caution interview of the accused dated 19th and 20th July, 2016.

3. The accused objects to the admissibility of the caution interview upon the following grounds:
- “(a) The interviewing officer, DC 3426 Inosi Ravouvou, during the caution interview kept badgering the Accused to give an answer to the allegations when questioned. Despite telling the interviewing officer that he did not have an answer to the allegations, the interviewing officer continuously badgered the Accused to at least give an answer.*
- (b) It was not put to the Accused when he was cautioned interviewed whether he wished to alter, add, amend or make changes to the answers in his caution interview. As a result it is unfair on the Accused when he was not given the right to alter, add, amend or make changes to his answers in his caution interview.*
4. The burden is on the prosecution to prove beyond reasonable doubt that the caution interview of the accused was conducted fairly under just circumstances, the answers were given voluntarily, lack of prejudice, lack of oppression and in compliance with the Fijian Constitution where applicable. In this ruling the above principles of law has been kept in mind throughout.

LAW

5. The Court of Appeal in *Ganga Ram and Shiu Charan vs. R, Criminal Appeal No. AAU 46 of 1983* outlined the following two tier test for the exclusion of confessions at page 8 in the following words:
- “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 which*

has been picturesquely described as “the flattery of hope or the tranny 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 a need to consider whether the more general ground of unfairness exists in the way in which police behaved, perhaps by breach of the Judge’s Rules falling short of overbearing the will, by trickery or by unfair treatment. R v Sang (1980) AC 402; 436 at C-E. This is a matter of overriding discretion and one cannot specifically categorise the matters which might be taken into account.”

6. The Constitution of the Republic of Fiji at sections 13 and 14 have recognised and endorsed the above mentioned principles as well.
7. It is for this court to decide firstly, whether the caution interview of the accused was conducted freely and fairly without any threats, assault, inducements, pressure or any improper practices by the persons in authority namely the police officers who were involved in the arrest, interview and the investigation and that the accused had voluntarily given his answers on his freewill.
8. Secondly, if there has been oppression or unfairness then this court can in its discretion exclude the caution interview. Further if the accused common law rights have been breached then that will lead to the exclusion of the confessions obtained, unless the prosecution can show that the accused was not prejudiced as a result of that breach.

PROSECUTION CASE

9. The prosecution called one witness DC 3313 Josua Cakausese who informed the court that on 19th July, 2016 he was instructed to be the witnessing officer when the accused was caution interviewed by the interviewing officer DC Inosi Ravouvou.

10. The interview was conducted in the English language at the Namaka Police Station, Crime Office. The interviewing officer has since migrated to Australia, the witness was present throughout the caution interview. Before the interview commenced the accused did not complain to him about anything or about anyone.
11. The interview was typed on the computer, before and during the interview the accused was not induced, threatened or promised or intimidated or coerced or assaulted or oppressed to make a statement. The interviewing officer did not pressure the accused to make a statement before or during the interview.
12. During the interview the accused was fine and healthy the interview commenced on 19th July, 2016 at 09:45 hours and ended on 20th July, 2016 at 14:20hrs. The first signature in the interview was that of the accused, the second signature was that of the witness and the last signature was that of the interviewing officer.
13. The witness signed all the pages of the caution interview except question 11 which he had overlooked to sign. At question 73 the accused was asked if he wished to read through his interview the accused said "no". According to the witness the interviewing officer had explained to the accused that he can add or alter or amend anything in the caution interview.
14. At question 74 of the caution interview the accused was asked "*Anything else would you like to say?*" the answer given by the accused was "*Yes, I just want to clarify that in the year 2013 I started penetration but not from year 2006 to 2010.*" The caution interview of the accused dated 19th and 20th July, 2016 was marked and tendered as prosecution exhibit no. 1.

15. In cross examination the witness agreed the accused was sitting beside the interviewing officer and also he was present throughout the interview. When it was put to the witness that he was sitting at his work station and therefore not present throughout the interview the witness disagreed.
16. The witness also disagreed that he was called by the interviewing officer to sign the interview. When it was suggested that the caution interview was brought to him that is the reason why he forgot to sign at question 11 of the caution interview the witness disagreed. He also stated the accused had told the interviewing officer that this was his first time at the police station to be interviewed and that was the reason why the interviewing officer had taken his time to explain to the accused his Constitutional Rights in detail.
17. At the time of the interview the witness was sitting on the side of the table where the interview was conducted, opposite the interviewing officer and the accused. He denied the accused was pressured or forced by the interviewing officer to answer the questions.
18. The witness denied that because of continuous force or pressure the accused had told the interviewing officer to write whatever he wants to write and he will agree to it. After the interview had concluded the accused was given the opportunity to read the caution interview but he had refused to do so.
19. The witness agreed the answers were not read back to the accused before signing. He also agreed it was not recorded in the caution interview specifically whether the accused wanted to add, alter or amend his statement, but the witness stated the accused was explained the above orally by the interviewing officer before being asked question 74.

This was the prosecution case.

DEFENCE CASE

20. The accused opted to give evidence and be subjected to cross examination.
21. The accused informed the court that he was caution interviewed on 19th July, 2016 at the Namaka Police Station. Whilst being interviewed he sat next to the interviewing officer. It was only the accused and the interviewing officer who were seated at the table. Before the interview commenced the interviewing officer called and signalled another officer (PW1) who was seated about two (2) metres behind them to be the witnessing officer.
22. The interview commenced in a question and answer format, as the interview progressed the accused told the interviewing officer that he did not know the answers to some questions, but the officer replied *“no, you have to answer every question, you have to.”* According to the accused this happened more than five times during the interview. During the interview the witnessing officer was on another desk about two (2) metres away. The accused stated that the interviewing officer had asked him if he wished to alter, amend or make changes to his answers in the middle of the interview and not at the end.
23. Towards the end of the interview, the interviewing officer had asked the accused if he wanted to read the interview but the accused told the officer he cannot read because he did not have his eye glasses with him. After this, the interview was printed and the accused was asked to read, he did not read since he could not see what was written he was asked to sign which he did because he believed all the questions and answers they had gone through was written down

correctly. When the hard copy was ready the interviewing officer called the witnessing officer to sign the interview and everyone signed.

24. During the caution interview, the witnessing officer did not sit close to the accused and the interviewing officer, at all times he sat at his desk about two (2) metres behind the accused. The accused did not give his answers on his freewill except his address. The interviewing officer kept forcing him to answer so to avoid remaining in the cell again he just answered the questions asked.
25. In cross examination by the state counsel the accused stated that no rights were explained to him during the arrest, and no force was used on him. In respect of the fact that he could not read anything on the computer or in the hard copy the accused said that he did not mention this to the interviewing officer.
26. The caution interview was not read to the accused, he agreed all the answers were his but he did not voluntarily answer those questions. However, the accused agreed he signed the caution interview because he knew the contents of the interview were his answers. The accused stated that after the interview session had completed he had clarified part of his answer that he had given earlier but when he was referred to question and answer 74 the accused said he did not answer that question. The accused stated that when the interviewing officer was telling him to answer the questions he had said "no" he does not have to.
27. This was the defence case.

DETERMINATION

28. After the hearing, both counsel filed written submissions for which this court is grateful.

29. The prosecution wishes to rely on the caution interview of the accused obtained by the police during the course of the investigations. The accused is objecting to the admissibility of the caution interview basically on two grounds:
- a) The interviewing officer namely DC 3426 Inosi Ravouvou had during the caution interview forced and/or pressured the accused to answer the questions asked;
 - b) The accused was not given the opportunity to alter, add, amend or make changes to the answers in the caution interview.
30. The interviewing officer against whom the allegation is raised was not called by the prosecution since this officer has left the country. The prosecution, however called the witnessing officer to give evidence about what had happened during the caution interview of the accused.
31. DC Cakausesse who was the witnessing officer denies the allegations made by the accused he maintains that the interviewing officer did not force the accused to answer any question he was present throughout and nothing of this sort had happened.
32. Furthermore, the accused was given a chance to say anything else after the interviewing officer had asked the accused whether he wished to alter or add or amend anything in his interview. The accused took the opportunity to make some clarifications which he did at question and answer 74 of the caution interview.
33. On the other hand the accused whilst giving evidence explained that there were probably more than five times during the interview the interviewing officer had told the accused to answer the questions

asked and that every question had to be answered so the accused had no choice but to find ways to answer those questions which was not voluntarily given by him.

34. A perusal of the caution interview shows that in answer to some questions the accused had stated that he cannot answer the question asked as follows:

“Q. 48: Apart from inserting your penis, what else you do?”

A: In that I cannot answer.

Q. 49: How often do you do that act to her?”

A: That question I cannot answer, it happens in a distance period.

Q. 52: Can you recall in what manner you did to her?”

A: I can't answer that question...”

35. The above answers suggest that the accused had during the interview refused to answer some questions.

36. In respect of the opportunity not given to add, alter, or amend anything in the caution interview the accused told the court that he was asked to alter, amend or change any of his answers in the middle of the interview and not at the end.

37. In this regard question and answer 74 is noteworthy:

“Q. Anything else would you like to say?”

A: Yes, I just want to clarify that in year 2013 I started the penetration but not from year 2006 to 2010.”

38. The above does confirm the evidence of the accused that he was given the opportunity to alter, amend or change his answers which he did. Although not raised by the defence as a ground of voir dire or by the

accused in his evidence I have directed my mind to the fact that the caution interview was not read to the accused before signing.

39. Considering the answers mentioned in the caution interview there can be no doubt that it was the accused who had given those answers. The fact that the accused had clarified his answer at Q. 74 does suggest to me that the accused was aware of his answers and hence he took advantage of the opportunity to clarify the same. The failure by the interviewing officer to read back the caution interview does not in my view cause any unfairness to the accused.
40. After carefully considering the evidence adduced by the prosecution and the defence it is obvious to me that the allegations made by the accused against the interviewing officer are an afterthought. I prefer the evidence of the prosecution witness over that of the accused. I also accept that the witnessing officer was present throughout the interview and had observed and seen what had happened before, during and after the interview.
41. The caution interview of the accused does not appear to have been forced upon him and he had given the answers in the caution interview voluntarily on his freewill. This court also accepts that the accused had signed the caution interview after he was satisfied the contents were a correct reflection of what he had told the interviewing officer.

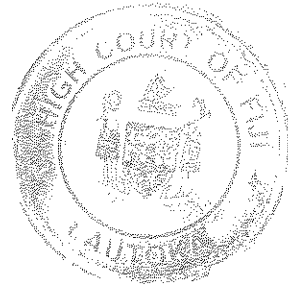
CONCLUSION


42. Taking into consideration the evidence adduced by the prosecution and the defence and the submissions made by both counsel this court is satisfied beyond reasonable doubt that the accused had given his answers in the caution interview dated 19th and 20th July, 2016,

voluntarily on his freewill without any threat, intimidation, assault, inducement, force or oppression or in breach of his Constitutional Rights enshrined in the Constitution of Fiji or in breach of any common law rights.

43. The caution interview was also conducted in circumstances which was fair to the accused. I prefer the evidence of the prosecution witness over that of the accused.

44. In view of the above, I rule that the caution interview of the accused dated 19th and 20th July, 2016 is admissible in evidence and the prosecution may tender the same during trial.




Sunil Sharma
Judge

At Lautoka

25 October, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.