

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 200 of 2018

[CRIMINAL JURISDICTION]

STATE

V

ROZLEEN RAZIA KHAN

Counsel : Ms. S. Serukai and Ms. S. Tivao for the State
Mr. G. O'Driscoll for the Accused

Ruling on : 09 July 2019

RULING

1. The accused is charged with the offence of murder contrary to section 237 of the Crimes Act. It is alleged that the accused murdered her youngest daughter who was 04 years old at the time.
2. The prosecution intends to rely on the cautioned interview statement of the accused.
3. Before the commencement of the trial, the defence counsel informed that the accused is not challenging the voluntariness of the said cautioned interview statement.
4. The first prosecution witness was the interviewing officer and the said witness started reading the cautioned interview statement after tendering same as PE1. Upon

hearing the question 9 and the relevant answer, I directed the assessors and the witness to stand out as I was concerned whether the right to remain silent was properly explained to the accused. The said Q &A reads thus;

Q9: Mrs Rozleen Razia Khan under the provisions of the Constitution, you have a right to remain silent but in that case we would not be able to get your side of the story and as such we may have to proceed further and prosecute you for the allegation with the evidence currently on hand. You shall feel free to make your choice now, are you willing to remain silent or you will answer to the questions?

A: I will answer the questions.

5. Section 13(1)(a) and 13(1)(b) of the 2013 Constitution provides thus;

*13. – (1) Every person who is arrested or detained has the right –
(a) to be informed promptly, in a language that he or she understands, of –
(i) the reason for the arrest or detention and the nature of any charge that may be brought against that person; (ii) the right to remain silent; and (iii) the consequences of not remaining silent;
(b) to remain silent;*

6. In terms of the above provisions of the 2013 Constitution, not only that every person who is arrested or detained has the right to remain silent, he/she has the right to be promptly and properly informed of that right.

7. The right to remain silent as provided in 2013 Constitution is not subject to any qualification. I share the same view expressed by Goundar J when His Lordship was dealing with a similar situation in the case of *State v Matia* [2019] FJHC 188; HAC260.2018 (13 March 2019). In the said judgment Goundar J said;

Section 13 (1) of the Constitution states that every person who is arrested or detained has the right to remain silent and that the right must be administered promptly, in a language that the accused understands. In Fiji the constitutional right to remain silent must be administered in unqualified terms. Otherwise, the right will become a dead letter. In the present case, the right to remain silent was qualified by an incentive to

tell his side of the story to avoid being charged based on the allegation. The qualifications placed on the right to remain silent are inappropriate and objectionable. The qualifications were placed by an experienced police officer without any justification. The qualifications breached the Accused's constitutional right against self-incrimination.

8. Given what is stated in Q 9 above, firstly, it is clear that the interviewing officer has not properly explained the accused the right to remain silent according to the applicable law in Fiji. Secondly, it is in fact a misrepresentation of facts to give the accused an impression that she may be prosecuted on the available evidence if she decides to remain silent as it suggests that there is a likelihood of her not being prosecuted if she does not remain silent. If there was sufficient evidence to prosecute the accused before the commencement of the cautioned interview, there cannot be a possibility for her not to be prosecuted based on the answers given during the cautioned interview.
9. The issue I have to deal with in this case is whether to allow the cautioned interview statement to be used as evidence or not. The accused has clearly indicated that she is not challenging the voluntariness of the cautioned interview. If it is found that the answers in the cautioned interview are not given voluntarily, the relevant statement should be ruled inadmissible. There is no discretion available to the judge.
10. Breach of a right leads to unfairness. Needless to say, even where the right to remain silent was not explained an accused can still give answers voluntarily. I have perused the cautioned interview of the accused and I find that it is a mixed statement. Given the fact that the defence counsel has informed this court that the accused is not challenging the voluntariness of the cautioned interview statement and the fact that it is a mixed statement, I have no difficulty to accept that the accused had given the answers voluntarily during her cautioned interview.

11. If the court finds that the cautioned interview statement is made voluntarily but general ground of unfairness exists in the manner the cautioned interview was conducted, the court has the discretion whether or not to exclude such cautioned interview statement. [See *Ganga Ram and Shiu Charan v. R* (Criminal appeal 46 of 1983 delivered on 13th July 1984)]


12. In the case of *State v Kumar* [2002] FJHC 194; HAC0003D.2002S (11 July 2002) Shameem J held thus;

The effects of non-compliance with section 27(1)(c) of the Constitution, or of a finding of an ill-informed waiver, may be the exclusion of any statements obtained thereby (State-v-Mool Chand Lal Crim. Case 3/99 Labasa High Court). The discretion to exclude must be exercised after a balancing of the accused's rights, and public interest rights to the efficient investigation of crime. [Emphasis added]

13. Considering the facts and the circumstances of this case and the public interest, I consider it appropriate not to exclude the cautioned interview statement tendered as PE1 based on the fact that the right to remain silent was not properly explained to the accused. I would exercise my discretion to allow PE1 to be tendered in evidence.

14. However, the issues as to whether the accused gave the answers recorded in PE1 and whether those answers are true are to be decided at the trial.




Vinsent S. Perera
JUDGE

Solicitors;

**Office of the Director of Public Prosecutions for the State
O'Driscoll & Associates, Suva for the Accused**