

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case. No. HAC 40 of 2018**

**BETWEEN** : **THE STATE**

**A N D** : **MOHAMMED FAIYASH**

**Counsel** : Mr. A. Singh for the State.  
Ms. S. Ravai for the Accused.

**Date of Hearing** : 02 May, 2019

**Date of Submissions** : 22 May, 2019

**Date of Ruling** : 23 May, 2019

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**VOIR DIRE RULING**

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1. The accused is charged with one count of attempted murder contrary to section 44 (1) and section 237 of the Crimes Act and one count of damaging property contrary to section 369 (1) of the Crimes Act.
2. The prosecution wishes to adduce in evidence at trial the caution interview of the accused dated 15<sup>th</sup> February, 2018 to 17<sup>th</sup> February 2018 and the charge statement dated 17<sup>th</sup> February, 2018.
3. The accused objects to the admissibility of the caution interview and the charge statement upon the following grounds:

*"1. The caution interview and the charge statement were obtained by oppressive and unfair conduct of the arresting officer before the*

- caution interview and during the caution interview by the interviewing officer and the charging officer;*
2. *The mental state of the accused before and after the caution interview;*
  3. *No proper assessment made of the accused mental and physical condition by the interviewing officer before he signed his caution interview as well as the charge statement;*
  4. *Confusion caused by the interview in the Hindustani language and then the written material translated into English;*
  5. *Breach of the accused rights under the Judge's rule no. 4 (e);*
  6. *Failure to provide access to legal counsel at the time the caution interview commenced."*
4. Counsel for the accused withdrew ground 4 before the start of the voir dire hearing.
  5. The burden is on the prosecution to prove beyond reasonable doubt that the caution interview and the charge statement 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**

6. 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.”*

7. The Constitution of the Republic of Fiji at sections 13 and 14 have recognised and endorsed the above mentioned principles as well.
8. It is for this court to decide firstly, whether the caution interview and the charge statement of the accused was conducted freely and fairly without any threats, assault, inducements or any improper practices by the persons in authority namely the Police Officers who were involved in the investigations and that the accused had voluntarily given his answers on his freewill.
9. Secondly, if there has been oppression or unfairness then this court can in its discretion exclude the interview and the charge statement. 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**

10. The prosecution called four (4) witnesses. Detective Sgt. Silio informed the court that he was the arresting officer.

11. On 15<sup>th</sup> February, 2018 at about 3pm the witness was standing outside the Lautoka Police Station in the car park when he heard a loud noise coming from outside the fence. When he went near he saw that the phone booth outside the police station had been bumped by a car and a lady lying beside the phone booth.
12. The car was stuck on the cement basement of the telephone booth, the other police officers came to assist the lady, so the witness went to the car. The witness went and asked the driver to stop the car but the driver continued to move the car forward and backward to get it out of the cement basement of the telephone booth.
13. The driver of the car was asked to get out of the car but he did not do so. After a while the driver of the car reversed the car onto the road and left the scene. The witness identified the driver of the car as being the accused.
14. The witness with three Women Police Officers followed the accused towards Lautoka City. The accused stopped the car at RB Patel Supermarket car park and walked towards the taxi base. The witness got off the police vehicle and called out to the accused to stop at this time the accused started running towards the roundabout.
15. The witness gave chase with two female police officers behind him, the female police officers shouted in Hindi "*pakro*", "*pakro*" meaning "catch him", "catch him". There were some FIRCA officers who walked across the road and stopped the accused. The witness arrested the accused and explained to him that they have to go to the police station, the accused was told his rights relating to the arrest. According to the witness the accused was well.

16. At the time of the arrest nobody assaulted or threatened or pressured the accused. The accused did not complain of anything he was then escorted to the police station.
17. At the police station the witness handed the accused to the charge room where all entries were made. At the police station the accused did not complain of anything and till now the accused has not made any complaint against him or the three Women Police Officers.
18. In cross examination the witness was referred to his police statement dated 15<sup>th</sup> February, 2018 the witness agreed he had not recorded in his police statement that he had given the accused his rights relating to his arrest. The witness maintained he had given the accused his rights at the time of his arrest orally.
19. The witness denied there was a male police officer with them when they went to arrest the accused and he also denied assaulting the accused in the police station. According to the witness the accused did not request to see a doctor at any time.
20. The second witness was Detective Sgt. Salen Kumar on 15<sup>th</sup> February, 2018 he conducted the caution interview of the accused which commenced at 8.40pm at the crime office of the Lautoka Police Station. The accused was normal he did not complain of anything before the caution interview, also he did not request for medical assistance during the interview. The witnessing officer was Detective Inspector Simione.
21. Before the commencement of the interview the witness and the other police officers did not assault, threaten, oppress or abuse or put pressure on the accused. The accused was treated well the late interview was because the accused had been arrested in the afternoon

of the alleged incident so he was given time to rest before the interview commenced.

22. The interview was conducted in the English language since the accused had opted to be interviewed in the English language.
23. According to the witness the accused did not request for medical assessment he did not complain about any injuries received or that he was not mentally stable or traumatised. During the interview the accused's solicitor had visited him on 16<sup>th</sup> February, 2018 that is on the second day of the interview.
24. The accused's solicitor Ms. Ravai did not make any complaints against any of the police officers about anything from the time of the arrest till the accused was interviewed. Ms. Ravai also did not complain that the accused needed medical assistance or was not mentally fit to be interviewed. The caution interview of the accused dated 15<sup>th</sup> February, 2018 was marked and tendered as prosecution exhibit no. 1.
25. The witness explained that at the beginning of the caution interview the accused was given his right to consult a lawyer or a family member but the accused did not wish to exercise this right. The accused was asked whether he was fit for the continuation of the interview or suffered from any illness the accused wished to continue and he did not complain of anything. The accused voluntarily signed the caution interview and he did not make any complaints before and during the caution interview. The accused was given sufficient breaks and meals, on the second day of the interview the accused solicitor had visited the accused. The reconstruction of the scene was also conducted without any threat, pressure or assault or abuse of the accused.

26. At Q. 155 of the caution interview the accused was given the opportunity to read his record of interview, he wanted it to be read to him which was done thereafter the accused had confirmed it was a correct record of the conversation and that the accused did not wish to correct, add or alter anything in the interview.
27. In cross examination the witness stated that he was told by the accused his level of education was up to Class 6 and that during the duration of the interview questions and answers were asked in English. The accused did not ask to be interviewed in the Hindustani language.
28. The witness denied that before the interview the accused had asked to be medically examined. According to the witness the caution interview was conducted in the English language and at no point did the witness relate to the accused in the Hindustani language.
29. The witness stated that no one had forced the accused to admit the offences by threatening and abusing him. The accused had volunteered the answers and was not put in fear by the witness.
30. The third witness was the witnessing officer Detective Inspector Simione Ralovo. This officer informed the court that he was the witnessing officer during the caution interview of the accused. He was present throughout the interview prior to the commencement of the interview the witness met the accused who appeared normal, and he did not complain about anything.
31. The witness stated during the interview nobody assaulted, threatened, abused, oppressed or had put pressure on the accused. The witness signed the caution interview with the accused. Before the commencement of the interview the accused did not ask for a medical check-up or complain that he was not mentally stable for the

interview. According to the witness the interview was conducted in the English language since the accused had asked to be interviewed in this language.

32. The witness does not have any idea that the accused wanted to be interviewed in the Hindustani language. From the time of the caution interview till now the accused has not lodged any official complaint against the witness or any other police officers for assaulting, threatening, abusing or being unfair to the accused.
33. In cross examination the witness denied threatening the accused and maintained that the caution interview was read back to the accused before signing.
34. The final prosecution witness was Corporal Salesk Kumar the charging officer. This witness informed the court on 17<sup>th</sup> February, 2018 he had charged the accused at the Lautoka Police Station in Crime General Office. When the witness met the accused he saw the accused was normal, physically and mentally fit. The accused did not complain about anything. The accused was charged in the English language at the request of the accused.
35. The accused signed the charge statement and during the charging process neither the witness nor any other police officer had assaulted, threatened, abused or put pressure on the accused to make a statement. During the charging the accused did not complain about anything, before the commencement of the charge the accused did not request for a medical check up to be done or complain about not being mentally stable at the time.
36. The charge statement of the accused dated 17<sup>th</sup> February, 2018 was marked and tendered as prosecution exhibit no. 2.



37. In cross examination the witness agreed the charge statement was given to the accused to read. The witness stated the accused was asked in which language he wanted to be charged and the accused had opted to be charged in the English language. The witness maintained the accused had given a statement which the witness had written. The accused had initialled soon after the recording of his statement.

### **DEFENCE CASE**

38. The accused opted to give evidence. He informed the court that on 15<sup>th</sup> February, 2018 he was called to the Lautoka Police Station by a Police Officer Bimlesh Naidu at around 2pm. Later in the afternoon the accused was arrested by Simione at around 2.10pm. At the time of arrest his mental state was not good because he had a car accident and soon after the accident he was arrested near the RB Patel Supermarket. At the time of his arrest there were three male police officers.
39. When the accused was taken in the police van he was made to sit in the corner of the van and one iTaukei officer assaulted him throughout the journey until they arrived at the police station. After getting off from the police van the accused was taken to the back of the police station Sgt Silio then assaulted the accused on his head and stomach in front of Inspector Simione.
40. The accused agreed Ms. Ravai his counsel had visited him on 16<sup>th</sup> February, 2018 he did not inform his counsel about the assault because his head and hip were paining and he was afraid to tell his lawyer.
41. The accused stated that he was talking to the interviewing officer in the Hindustani language and the officer was typing in the computer.

The questions and answers were in Hindustani language but the interviewing officer was typing in English in the computer he had told the interviewing officer that his level of education was Class 6. According to the accused he cannot write or read English but is able to understand little bit English.

42. At the commencement of the interview the accused told the interviewing officer that he was assaulted by police officers and that none of his rights were given. Furthermore, he told the interviewing officer that he cannot read English the police officers told him to sign the statements which he did. During the interview the accused was very sick, he gets injections for his hip after undergoing an operation and his mental state was not good at the time. He told the interviewing officer about this but nothing was done. The accused explained that he had told the police officers that he had been assaulted on his head and stomach by police officers. Furthermore, he was asking for tablets but he wasn't given any tablets.
43. The accused stated that he was scared of the police officers who had assaulted and threatened him so out of fear he made admissions.
44. In cross examination the accused agreed on the second day of his caution interview he had met his counsel who had come to visit him at the Lautoka Police Station. The accused could not recall if he had spoken to his counsel for about 15 minutes.
45. He has been in remand for 15 months, he has been coming to court for extension of his remand period when suggested that he did not ask for an assessment of his mental stability the accused stated he forgot to tell his lawyer but he had informed the orderly when remanded, however, he never told the court.

46. The accused wrote to his counsel later to say that his mental state was not good. At the time of his arrest Sgt. Simione was driving the police van and the other two iTaukei male police officers assaulted him from the point of arrest near RB Patel Supermarket to the police station. The accused was sitting in the corner of the police van and he was assaulted on the left side of his hip where he had an operation and on his head. He was also sworn at by the two iTaukei police officers who were with him in the police van and throughout the journey he received 8 punches which were a bit forceful he was assaulted on his hip but he received injuries on his legs.
47. In respect of the assault in the police station the accused said he was assaulted by Sgt. Silio and three or four police officers they punched him he was mentally unstable and was saving himself until he was saved by the Women Police Officers.
48. The accused agreed he was badly hurt internally, he was scared so he did not tell his lawyer that he was assaulted by police officers on his stomach and head his mind was unstable but he later told the medical orderly at the remand and he was given pain killers. The accused did not sign his caution interview voluntarily he signed because he was scared and in fear. The accused also stated that he was sworn at by police officers. He told the interviewing officer that he wanted to go for medical examination but nothing happened.
49. In re-examination the accused was asked to explain why he kept saying he was not stable mentally he stated when he went to the police officers throughout the week seeking their assistance they did not help him, later he was assisted by a Woman Police Officer Luke.
50. This was the defence case.

## **DETERMINATION**

51. After the hearing both counsel were given time to file their written submissions. The counsel for the accused filed her written submissions for which this court is grateful unfortunately the state counsel did not file his submissions.
52. The prosecution wishes to rely on the confession obtained by the police during the caution interview and the charging process of the accused. The accused is objecting as per the grounds of voir dire filed. The allegation begins from the time of arrest to the charge statement.
53. All the police officers involved in the arrest of the accused from near the RB Patel Supermarket to the completion of the charge statement have denied any wrong doing. The interviewing officer and the charging officer have stated that the accused was normal and well before and during the caution interview and the charging.
54. None of the police officers had assaulted or threatened or forced or induced or pressured or oppressed the accused to make any admissions in either the caution interview or the charge statement. All the Constitutional rights were given to the accused including meals, rest time and breaks during the interview. The witnessing officer for the caution interview also supported the evidence of the interviewing officer.
55. The arresting officer denied assaulting the accused after the accused was arrested near RB Patel Supermarket and taken to the Lautoka Police Station or at the police station.
56. The charging police officer denied any wrong doing he also mentioned the accused had volunteered his answers.

57. The prosecution also exhibited the caution interview and the charge statement and submitted that the accused was allowed visitation by his current counsel Ms. Ravai on the second day of his caution interview.
58. The defence on the other hand says the accused was treated badly by the police officers after he was arrested and taken in the police van to the Lautoka Police Station. The assault by two iTaukei police officers began in the police van till they reached the Lautoka Police Station and in the police station he was assaulted by Sgt. Silio and other police officers until he was saved by Women Police Officers.
59. The accused also stated that he was in an unstable mind he was injured and in fear and under threat so he just signed the caution interview and the charge statement. A perusal of the grounds of voir dire filed does not mention any specific grounds of assault yet the defence brought this up as part of its evidence.
60. This court in fairness allowed the prosecution to cross examine the accused in respect of the claim of assault raised by the accused.
61. Be that as it may, this court has considered the evidence adduced by the prosecution and the defence and the submissions made by counsel.
62. There is no dispute that the accused was caution interviewed on 15<sup>th</sup> February, 2018 at 8.40pm. On this day the interview was suspended at 9.10pm after the accused wanted to rest. On day one of the interview the accused had not made any admissions.
63. The next day 16<sup>th</sup> the interview recommenced at 10.10am. At 12.05pm the interview was suspended for the accused to consult his

counsel Ms Ravai. At 12.16pm the interview recommenced until this time the applicant had not confessed.

64. It was after the counsel left, the accused during the latter part of the afternoon started to make admissions in his caution interview.
65. The accused stated that he was assaulted after his arrest on the way to the police station and at the police station. If the accused was assaulted in the manner he told the court then he would have received serious injuries. Furthermore, the accused had consulted his counsel on the second day of his caution interview yet no complaint was lodged by counsel on behalf of the accused in respect of the assaults.
66. The accused admits he forgot to tell his counsel that he had been assaulted by police officers because he was afraid of the police officers. In my judgment if the accused was assaulted by police officers he would not have forgotten to tell this important incident to his counsel which had happened a day before. In the least the accused would have told his counsel that he wanted to go for a medical check-up. I am also unable to accept that the accused did not tell his counsel about the assault because he was afraid of the police officers.
67. Leaving aside the issue of assault for a moment the accused also stated that he was in unstable mind before the caution interview yet he did not tell his counsel about this so that his counsel could have asked for the accused to be taken to the hospital. The accused was produced in the Magistrate's Court at Lautoka on 19<sup>th</sup> February, 2018 and thereafter in the High Court on numerous occasions, but no complaint of assault and impropriety by the police officers was raised or a referral sought for medical attention and/or psychiatrist

evaluation. The accused was represented by counsel yet he did not seek any such orders.

68. According to the accused when he stated he was unstable mentally he meant when he went to seek police assistance he was not assisted by them. In my judgment this shows the accused was frustrated by lack of police assistance.
69. After carefully weighing the evidence adduced by the prosecution and the defence, it is obvious to me that the claims made by the accused against the police officers are an afterthought. I do not accept the accused had forgotten to tell his counsel about his experience at the hands of the police when she had gone to visit him during day two of his caution interview.
70. In respect of the assertion by the accused that he cannot write or read English but can understand little bit of English it was noted in court when questions were asked in English the accused understood and replied without waiting for the interpretation/translation. Another interesting thing is that the accused when cross examined by the state counsel had stated that he had written to his counsel giving his instructions in respect of his voir dire grounds. This response by the accused suggests that the accused not only understands English but is able to read and write in English.
71. A perusal of the caution interview and the charge statement shows that questions had been put in such a way that could be comprehended by the accused and that the accused, had, in fact, answered the questions in a logical and consistent manner leaving no room to conclude that the interview and the charging process had been obtained as a result of any language problems.

72. The manner and the sequence of questioning appear to be plain and simple receiving rational answers, which suggest that the process of interview and charging had been comprehensible. Timely breaks were given at regular intervals for the accused to relax, refine and think over. The caution interview and the charge statement, in the circumstances, do not appear to have been forced upon the accused taking advantage of the lack of competence of the accused (if any) in English language.

### **JUDGES' RULES**

73. The counsel for the accused also relied on the Judges' Rules in particular rule 4 (e) that he was not given the opportunity to correct, alter or add anything in his caution interview and charge statement and that there was nothing to state that the statement given by the accused was the truth and that the accused had given his statement on his freewill. The accused in his evidence did not mention anything in respect of this ground of voir dire. A perusal of the caution interview from Q. 156 to Q. 159 and charge statement at Q.15 make specific reference to the above which I accept.
74. It is important to note that judges rules are not rules of law but rules of practice drawn up for the guidance of police officers obviously a system of rules will ensure fair and consistent questioning of suspects, and to exercise control over how police questioning is to be done. They lay down a procedure that a police officer should take into account during various stages of an investigation. It is a code of conduct that the police should adhere to should the rules be breached then police risk that any evidence obtained there from may be excluded at trial upon the court's discretion.



## OBSERVATIONS

75. Although not raised by any counsel this court has noticed that the caution interview of the accused contains some questions and answers which are unfair and prejudicial to the accused. These questions and answers are as follow:

*Q. 58: Why not in full relation as before?*

*A: From the time I was charged for assaulting and kidnapping her.*

*Q. 59: When you were charged for assaulting and kidnapping Sital?*

*A: In 2017*

*Q.61: What happened to the case?*

*A: The case is still going on in court*

*Q. 65: Was there any condition made by the court regarding the case in which you were charged?*

*A: There was a restraining order by the court for me not to ring and meet Sital.*

*Q. 66: So did you follow the court order?*

*A: No, I did not follow the court order.*

*Q. 67: Why didn't you follow the court order?*

*A: Sital use to ring me asking for her house rent.*

*Q. 70: Didn't you at any time inform her that there is a court order for you not to ring and meet her?*

*A: I told her but she said no one knows it.*

*Q. 81: Why you went to prosecution office?*

*A: To inform the prosecutor that Sital use to talk to me as I am on a restraining order.*

*Q. 82: Did you manage to meet any prosecutor?*

*A: Yes I met an Indian prosecutor who is in charge of my kidnapping case.*

*Q. 93: Did you meet Salen police when you came to the station?*

*A: Yes, Salen told me to sit down on the bench which is inside the Station. **He told me that I have breached the court order and also did forgery which was reported by Sital.***

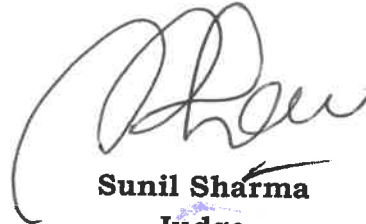
76. In respect of the answer given at Q. 93 it is only the second sentence of the answer (highlighted) which needs to be deleted.
77. The above answers are prejudicial and unfair to the accused suggesting that he already had a case in court involving the complainant and there was court order against him which he had breached.
78. In exercise of my discretion the above questions and answers in the caution interview including the second sentence of the answer to Q. 93 is to be blacked out. This means Q.93 and the answer given in the first sentence is admissible.

### **CONCLUSION**

79. Taking into consideration the evidence adduced by the prosecution and the defence and the submissions of counsel this court is satisfied beyond reasonable doubt that the accused had given his answers in the caution interview dated 15<sup>th</sup> February, 2018 to 17<sup>th</sup> February, 2018 and the charge statement dated 17<sup>th</sup> February, 2018 voluntarily on his freewill without any threat, intimidation, assaults, inducement, oppression or breach of his Constitutional Rights enshrined in the Constitution of Fiji or in breach of any common law rights. The caution interview and the charge statement were also conducted in circumstances which was fair to the accused. I prefer the evidence of all the prosecution witnesses in this regard.
80. In view of the above, I rule that the caution interview of the accused dated 15<sup>th</sup> February, 2018 to 17<sup>th</sup> February, 2018 and the charge statement dated 17<sup>th</sup> February, 2018 are admissible in evidence and the prosecution may tender the same subject to order 1(a) below.

## **ORDERS**

- 1). The caution interview dated 15<sup>th</sup> February, 2018 to 17<sup>th</sup> February, 2018 and the charge statement dated 17<sup>th</sup> February, 2018 of the accused are admissible and the prosecution may tender the same at trial subject to the following:
  - a) Q. & A. 58, 59, 61,65,66,67,70,81, and 82 are to be blacked out and/or deleted from the caution interview;
  - b) Q. 93 to remain but the second sentence in the answer starting with "*He told me that I have breached the court order and also did forgery which was reported by Sital*" is to be deleted.

  
**Sunil Sharma**  
**Judge**

**At Lautoka**

23 May, 2019

### **Solicitors**

**Messrs Fazilat Shah Legal for the Accused.**

**Office of the Director of Public Prosecutions for the State.**

