IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 063 of 2018

[CRIMINAL JURISDICTION]

STATE

V

RUSIATE ROKOBULOU

Counsel	:	Mr. E. Samisoni for State Ms. N. Mishra for Accused
Hearing on	:	16 September, 2020
Ruling on	:	05 November, 2020

VOIR DIRE RULING

[On the admissibility of DNA evidence]

1. The above named accused ("accused") is charged with one count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act 2009.

2. The prosecution intends to rely on the Forensic DNA Report dated 12/11/18. According to the prosecution the only evidence against the accused is the said DNA evidence.

3. The accused objects to the admissibility of the said DNA report and has accordingly raised the following grounds;

    1. The Third Accused objects to the admissibility of the Forensic DNA Report dated 1 November 2018 on the following grounds:

a. The Third Accused was not informed or explained the reasons as to why his buccal sample was being taken.
b. At the time of the buccal sample collection on 31 January 2018, the Third Accused had refused to undergo the same at Nausori Police station.
c. At the time of refusing to undergo the DNA collection, the Third Accused was taken in a room and was grabbed by 3 – 4 itaukei Police Officers.
d. The aforementioned Police Officers then forcefully opened the Third Accused's mouth and took a buccal swab sample.
e. At all material times, the Third Accused did not consent to buccal sample collection.

2. Further, the Third Accused maintains that the signature on the Consent for Reference DNA Collection is not his as he had refused to sign the same at the time of DNA Collection.
3. For the trial within a trial, the Third Accused requires the following documents from the following Stations for the specified dates mentioned:
   a. **Investigating Officer's Diary**
   b. **Any documents to or from the Forensic Team pertaining to their movement, request for collection, collection and sampling of DNA from the Third Accused.**
   c. **Nausori Police Station (30 January – 2 February 2018):**
      i.) Station Diary entries;
      ii.) Cell Book;
      iii.) Vehicle Running Sheets.

4. The Third Accused maintains that there was a breach of his rights under the 2013 Constitution in particular sections 8, 9, 12, 13(1)(d), 14(2)(j) and (k) of the Constitution.

4. DNA is an acid in the chromosomes in the centre of the cells of living things. DNA determines the particular structure and functions of every cell and is responsible for characteristics being passed on from parents to their children. DNA is an abbreviation for 'deoxyribonucleic acid'.[1] Through DNA fingerprinting, a sequence or pattern unique to each individual could be generated and accordingly, this technique can be used to ascertain whether any biological evidence (blood, hair, skin, semen) found on a victim or a crime scene belongs to a particular suspect. DNA evidence could place a suspect at the crime scene.

[1] https://www.collinsdictionary.com/dictionary/english/dna

5. The presentation and evaluation of DNA evidence in trials is succinctly explained in Blackstone's Criminal Practice [2007 edition] at F18.31, page 2639 as follows;

> *DNA evidence is becoming increasingly specific and precise, but it still depends on statistical evaluation and juries must not be given the impression that it is more cogent than it really is. It is also essential that admissible evidence is given as to each stage of the process by which a DNA match was obtained. Evidence from an expert who has compared DNA profiles must be supported by admissible evidence as to the procedure by which those profiles were obtained and as to the sources of the samples themselves (Loveridge [2001] EWCA Crim 734).*
>
> *DNA extracted from blood or semen stains, or even from bodily hairs, etc., found at the scene of the crime or on the victim is compared with samples (typically derived from mouth swabs) taken from the suspect. The process has been refined in recent years, but the underlying principles are essentially similar to those described by Lord Taylor CJ in Deen (1994) The Times, 10 January 1994 and Gordon [1995] 1 Cr App R 290. It is not necessary that a court or jury fully understands the technicalities of the process, but it is vital that they understand the significance of matches or mismatches between DNA profiles taken from the crime stain and the accused. Some margin of error must be allowed for in the process, but a clear mismatch between specific bands will prove that the samples came from different persons. If it is certain that the crime stain contains the real offender's DNA, any such mismatch will be conclusive of the accused's innocence.*

6. In this case, the accused's complain in essence is that his buccal swab sample for the purposes of extracting his DNA was obtained from him in an unfair/unlawful manner and on that basis the accused claims that the DNA evidence in this case should be ruled inadmissible and therefore excluded.

7. When the admissibility of a particular piece of evidence is challenged on the basis of unfairness, a finding that the relevant evidence in question was obtained in an unfair or an unlawful manner would not *ipso facto* render that evidence inadmissible. The court is required to exercise discretion in deciding whether or not to exclude the relevant (unfairly/ unlawfully obtained) evidence as explained

in the case of ***Ganga Ram and Shiu Charan v. R*** (Criminal appeal 46 of 1983 delivered on 13th July 1984) when the Court of Appeal was dealing with the issue of determining the admissibility of a confession on the grounds of unfairness. The court in that case held thus;

> "...
>
> ***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 Judges' rules falling short of overbearing 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".* [Emphasis added]

8. As Shameem J pointed out in the case of ***State v Kumar*** [2002] FJHC 194; HAC0003D.2002S (11 July 2002), the discretion to exclude must be exercised after balancing the accused's rights and the public interest rights. In the said case of ***Kumar*** (supra) Shameem J observed 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]

9. Thus, a court exercising the discretion in deciding whether or not to exclude evidence on the basis of unfairness should consider whether the probative value of such evidence is outweighed by the prejudice caused to the relevant accused. Admittedly, the provisions of section 14(2)(k) of the Constitution of the Republic of Fiji 2013 ("the Constitution") also confirms the position that there is no general

principle in Fiji that unlawfully obtained evidence is inadmissible. The said section 14(2)(k) of the Constitution provides thus;

> *"Every person charged with an offence has the right . . . not to have unlawfully obtained evidence adduced against him or her* ***unless the interest of justice require it to be admitted****;"* [emphasis added]

10. Thus, according the clear provisions of the Constitution alluded to above, it is necessary for the court to consider the interests of justice even if the court finds that a particular piece of evidence in the relevant case was obtained unlawfully (or unfairly), in deciding whether such unlawfully obtained evidence should not be admitted or ruled inadmissible. I would reiterate that, in Fiji there is no general principle that unlawfully obtained evidence is inadmissible.

11. In fact, there is no such principle in commonwealth countries. As pointed out in the comprehensive written submissions filed on behalf of the accused in relation to this matter, in ***Attorney General's Reference No. 3 of 1999;*** [2000] UKHL 63 (14 December 2000), Lord Cooke of Thorndon had summarised the manner several jurisdictions deal with unlawfully obtained evidence as follows;

> *It may be worth adding that just as in European Community law, as Lord Steyn has pointed out,* ***there is no principle that unlawfully obtained evidence is not admissible, so there is no such general principle in Commonwealth countries****. Approaches differ somewhat among the jurisdictions. Thus in* ***Canada*** *evidence obtained in breach of the Charter will be excluded if its admission is likely to bring the administration of justice into disrepute (****R v. Collins*** *[1987] 1 S.C.R. 265); in* ***Australia*** *the leading cases recognize a judicial discretion in which the competing demands of the public interest in the prevention and punishment of crime, on the one hand, and fairness to the accused, on the other, have to be weighed (****Bunning v. Cross*** *(1978) 141 C.L.R. 54;* ***Ridgeway v. The Queen*** *(1995) 184 C.L.R. 19); and in* ***New Zealand****, while it has long been held that the judicial discretion to exclude unfairly obtained evidence is wider than that recognized in* England *at common law in* ***R v Sang*** *[1980] AC 402 and* ***Kuruma v. The Queen*** *[1955] AC 197, a line of cases has treated evidence obtained in breach of the semi-constitutional provisions of the Bill of Rights as prima facie inadmissible but subject to exceptions created by the overriding demands of justice. (****Howden v. Ministry of Transport*** *[1987] 2 NZLR 747;* ***R v. Grayson and Taylor*** *[1997] 1 NZLR 399). The cases in the various*

jurisdictions on this pervasive and perennial problem are legion. I have cited only a handful. The point of present significance is simply that, apart from express statutory provisions, nowhere in the Commonwealth does there appear to be any remorseless principle of the exclusion of evidence unlawfully obtained. In the instant case there is in paragraph (b) no such express statutory provision; and in my view, it would be astonishing if Parliament had intended the evidence eventually tendered to have been ruled out. [Emphasis added]

12. The defence counsel cited the decision of Justice R.D.R.T. Rajasinghe in ***State v Vakadranu*** [2019] FJHC 152; HAC276.2016 (5 March 2019) in support of her position that the DNA evidence in this case should be excluded for the reason that the relevant sample was obtained without the informed consent of the accused. It is clearly noted that ***Vakadranu*** (supra) has been decided without having regard to the applicable law as expounded in ***Ganga Ram and Shiu Charan*** (supra) and the clear provisions of section 14(2)(k) of the Constitution. Rajasinghe J in ***Vakadranu*** (supra) decided to exclude the relevant DNA evidence in that case solely based on the finding that the relevant accused's rights under section 8, 9, 13(1)(d), 14(2)(j) and 14(2)(k) were breached for the reason that the said accused's informed consent was not obtained before collecting the relevant samples, without considering whether it is in the interest of justice to admit the relevant evidence.

13. Rajasinghe J found the relevant rights in terms of the sections of the Constitution alluded to above were breached due to the reason that the relevant officers of Fiji Police failed to explain the purpose of obtaining the relevant clothes of the accused and the buccal swab sample and it is also noted that His Lordship was persuaded by section 6(2) of the Criminal Investigation (Bodily Samples) Act 1995 of New Zealand which stipulates the procedure to be followed by a police constable in New Zealand in making a request in terms of section 6(1) of the said Act in relation to the obtaining of bodily samples.

14. In ***Vakadranu*** (supra) Rajasinghe J adopted the argument put forward in the majority decision of ***R v Stillman*** (1997) 1 S.C.R. 607 that the right against self-incrimination extends to giving of a bodily sample for the purpose of DNA

profiling. This contention in fact can be identified as the main foundation for the conclusion reached in the case of ***Vakadranu*** (supra).

15. I have a difficulty in accepting this contention that the providing of a bodily sample *per se* would amount to self-incrimination. Invariably, such a sample is only used to extract the DNA fingerprint of a suspect and the providing of such a sample is not analogous to making a confession. This DNA fingerprint extracted from the sample collected from a suspect is then used to compare with the DNA fingerprint extracted from the relevant biological evidence found in the crime scene. Therefore, on one hand, this sample taken from the accused have the potential of establishing the suspect's innocence as well. On the other hand, even if the DNA extracted from the suspect matches with that extracted from the biological evidence found in the crime scene, the prosecution still need to establish beyond reasonable doubt the authenticity of the process and the procedure followed in obtaining the relevant DNA profiles through the relevant witnesses, in addition to adducing the evidence of the expert who compared the said profiles.

16. McLachlin J (who later became the Chief Justice of Canada), one of the three justices who dissented in ***Stillman*** (supra) in Her Ladyship's dissenting judgment has clearly demonstrated the infirmities in the aforesaid contention that the right against self-incrimination extends to giving of a bodily sample. At paragraph 205 of ***Stillman*** (supra) McLachlin J has made the following observations;

> *. . . To render illegal the compelled use of the accused's body in gathering evidence against the accused would be to render inadmissible many kinds of evidence which have long been routinely admitted. The identification witness who says, "I recognize the man in the prisoner's box as the person I saw at the scene of the crime", is using the accused's body against him. Standard police techniques such as photographing the accused or requiring him to appear in an identification line-up similarly depend on using the accused's body against him, usually without consent. The principle against self-incrimination provides no means to distinguish between the police photo and more serious incursions of the suspect's body. The principle of protection against unreasonable search and seizure, on the other hand, provides such means. The principle against self-incrimination applied to physical evidence is a blunt tool,*

requiring either distortion or supplementation if it is to operate fairly and practically. . . .

17. More importantly, it is pertinent to note that ***Stillman*** (supra) [and also the previous case of ***R v Collins*** (1987) 1 S.C.R. 265] was reviewed and revised subsequently in the case of ***R v Grant*** [2009 SCC 32; (2009) 2 S.C.R. 353] decided on 17/07/09. Thus, the reasoning adopted in ***Vakadranu*** (supra) based on ***Stillman*** (supra) has been overridden way back in 2009 in Canada. The majority in ***Grant*** (supra) found that there are justifiable criticisms against the approach in ***Stillman*** (supra) in determining the admissibility solely on the basis of the evidence's conscriptive character rather than all the circumstances. Moreover, ***Grant*** (supra) also points out why it was not proper to equate bodily evidence with the statements of an accused under the umbrella of conscription. At paragraph 105 in ***Grant*** (supra) it is stated thus;

[105] The second and related objection to a simple conscription test for the admissibility of bodily evidence under s. 24(2) is that it wrongly equates bodily evidence with statements taken from the accused. In most situations, statements and bodily samples raise very different considerations from the point of view of the administration of justice. Equating them under the umbrella of conscription risks erasing relevant distinctions and compromising the ultimate analysis of systemic disrepute. . . . Nor does the taking of a bodily sample trench on the accused's autonomy in the same way as may the unlawful taking of a statement. The pre-trial right to silence under s. 7, the right against testimonial self-incrimination in s. 11 (c), and the right against subsequent use of self-incriminating evidence in s. 13 have informed the treatment of statements under s. 24(2). These concepts do not apply coherently to bodily samples, which are not communicative in nature, weakening self-incrimination as the sole criterion for determining their admissibility.

18. The revised test established by the majority decision in ***Grant*** (supra) which is to be applied in determining whether to exclude evidence obtained as a result of violating an individual's Charter rights consists of three parts;

    a) Seriousness of the Charter-Infringing State Conduct

       An assessment whether the admission of the evidence would bring the administration of justice into disrepute.

b) Impact on the Charter-Protected Interests of the Accused

   Focusses on the seriousness of the impact of the Charter breach on the Charter -protected interests of the accused

c) Society's Interest in an Adjudication on the Merits

   Whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion.

19. A court should be mindful that the discretion to exclude unfairly or unlawfully obtained evidence should not be utilised as a measure to punish the police or the relevant investigative body for the relevant improper conduct. In this connection, Blackstone's Criminal Practice [2007 edition] at F2.16, pages 2292 - 2293 states thus;

> *In cases in which the court takes the view that there was serious or reprehensible conduct, and this results in exclusion, the decision should not be taken in order to discipline the police (Mason [1988] 1 WLR 139 per Watkins LJ and Delaney (1988) 88 Cr App R 338 per Lord Lane CJ at p. 341). The critical test under s. 78 is whether any impropriety affects the fairness of the proceedings: the court cannot exclude evidence under the section simply as a mark of its disapproval of the way in which it was obtained (per Auld LJ in Chalkley).*
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> *Thus if a sample of hair is obtained by an assault and not in accordance with ss. 63 and 65 of the 1984 Act and is then used to prepare a DNA profile which implicates the accused, the evidence will be admitted on the basis that the means used to obtain it have done nothing to cast doubt on its reliability and strength (see Cooke [1995] 1 Cr App R 318 and cf. Nathaniel [1995] 2 Cr App R 565). The same reasoning may also justify the admission in evidence of the fruits of an improper search (see Stewart [1995] Crim LR 500, where the entry involved a number of breaches of Code B; and see also McCarthy [1996] Crim LR 818). The evidence should be excluded, however, where there is a real risk that the improper means used to obtain it have affected its reliability, and therefore the fairness of the trial, for example a case involving a complete flouting of Code B in which the accused claims that the property allegedly found must have been planted.*

20. All in all, with due respect, I am unable to find the approach in ***Vakadranu*** (supra) in excluding the DNA evidence in the said case to be in order.

21. In Fiji, there is no specific procedure laid down by law or by any rules or regulations to regulate the manner in which a bodily sample should be obtained

from a suspect in order to extract DNA for the purpose of a criminal investigation. That does not mean that the police officers in Fiji could simply intrude upon a suspect's body in order to obtain bodily samples as they please or that they should not utilize DNA profiling as a forensic technique in criminal investigations. Invariably, reference samples for the purpose of DNA profiling could be obtained by observing the rights guaranteed under the Bill of Rights in the Constitution, especially the rights of a suspect. Thus, it would be important to obtain the informed consent of the relevant suspect before obtaining such bodily sample. That would mean in essence that the relevant suspect should be informed of the purpose the sample is required for, how it will be obtained and what are the possible consequences of providing that sample, especially the fact that if there is a match based on the results of the analysis, that evidence may be used as evidence against him/her.

22. The course of action to be taken by the police if a suspect refuses to provide such sample is a grey area in Fiji. In my view, section 11(3) of the Constitution does not apply to the obtaining of a bodily sample in the nature of a buccal swab for the purpose of DNA profiling. The said section 11 reads thus;

Freedom from cruel and degrading treatment

11. – (1) Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment.

(2) Every person has the right to security of the person, which includes the right to be free from any form of violence from any source, at home, school, work or in any other place.

(3) Every person has the right to freedom from scientific or medical treatment or procedures without an order of the court or without his or her informed consent, or if he or she is incapable of giving informed consent, without the informed consent of a lawful guardian.

23. I find it difficult to identify the obtaining of a bodily sample like a buccal swab from a suspect either as a scientific treatment/procedure or as a medical treatment/procedure. Circumstances would be different if a surgery is required to be performed in order to obtain the relevant bodily sample. In my view, what is subjected to a scientific procedure in a DNA analysis is the bodily sample which is obtained, but not the relevant person or the suspect. Therefore, in my view, the order of the court referred to in section 11(3) of the Constitution, given the construction of the section, cannot be construed as being applicable to a situation where a buccal swab is required to be obtained from a suspect when that suspect does not consent to provide same to the police for the purpose of DNA profiling. The intervention of the legislature is therefore required in this connection to provide clear and specific provisions in relation to obtaining of bodily samples for the purpose of DNA profiling because it is an essential tool for the present day criminal investigators in order to enable them to efficiently and effectively bring offenders to justice especially in serious and complicated cases.

24. Now I would turn to examine the evidence adduced in this case during the *voir dire*.

25. The sole witness for the prosecution was Scientific Officer Mr. Nacanieli Gusu. He said that;

   a) *He joined the Fiji police in 2013, and in 2018 he was appointed as a Scientific Officer of the Fiji Police Forensic Biology and DNA Lab. He has a bachelor's degree in biology and chemistry and he has undergone training conducted by the forensic counter parts in Australia and New Zealand. He said that he had collected more than 100 DNA samples from suspects and victims.*
   b) *On 31/01/18 he received instructions from his principle scientific officer to collect DNA reference samples from two persons of interest in relation to this case. The two persons were Mr. Androle and Mr. Rokobulou (the accused). First he went to the Nakasi Police Station and collected the reference sample from Mr. Androle.*

Then he went to the Nausori Police Station where the accused was detained. He said that only the driver of the vehicle accompanied him.

c) *As soon as he went to the charge room, police officers who were on duty brought the accused from the holding cell. He then explained to the accused why he was there and the reason he is collecting the reference sample. He said that he was there to collect a buccal reference sample which is collected by rubbing a swab on the inner cheek of a person. This is done for 20 to 30 seconds to ensure a good collection. He said that he explained the accused in the iTaukei Language.*

d) *He told the accused that the reference sample collected from him will be compared with a sample that was found at the crime scene. He said that the accused understood and agreed for the collection, where the accused said "okay, set" and was nodding.*

e) *He said that he gave the accused a consent form and the accused wrote his name on it and signed. However, he said that he did not further explain the consent form to the accused. The said consent form was tendered as VDPE1. He said that after the consent form was signed, he collected the sample from the accused without using any force. This was done at the corridor before the entrance to the charge room. When he took the sample from the accused, no one else apart from the two of them were there.*

f) *The collection of the sample required the accused to open the mouth and he had to carefully rub the swab on the accused's inner cheek. He said that either he or any other person did not use force on the accused either to collect the sample or to obtain his signature on the consent form. Thereafter he brought the sample to his office for analysis.*

g) *During cross-examination it was suggested to him that the relevant sample was collected on 02/02/18 and not on 31/01/18. He denied this suggestion and maintained that the sample was collected on 31/01/18. Then it was pointed out that in his police statement it is stated that "With reference to the case file entry dated 02.02.18 at 12.00 hrs, W/S/Sgt Paulini Saurogo received the reference samples from myself, . . .".*

h) *He denied the suggestion to the effect that force was used by other police officers on the accused in order for him to collect the sample. He denied the suggestion that the accused was never given the consent form and never signed.*

i) *During re-examination he said that a case file entry is the entry they make on the case file and they have a case file for each case. He said that the case file entry dated 02/02/18 was the entry done by W/Sgt Paulini Saurogo on 02/02/18.*

26. Thereafter the accused gave evidence. He said that;

   a) *He was arrested for this matter on 30/01/18. First he was taken to Nakasi Police Station and then to Nausori Police Station. He said that his sample was taken at the Nausori Police Station on 02/02/18.*
   b) *He said that on 02/02/18, a police officer opened his cell and informed him that his wife had come to visit him. So he came out of the cell voluntarily to go to the station. Before reaching the station, he saw 3 to 4 police officers and Mr. Gusu (PW1). The police officer who brought him from the cell then told him to go to the said police officers he saw.*
   c) *He asked those police officers 'what did they come to do?'. Then PW1 told him that he came to take his swab. He refused, because he did not know the reason. Then 3 to 4 police officers got hold of him by his pants from the back and dragged him into a small room which was below the staircase at the Nausori Police Station. Thereafter they pressed his mouth forcefully and PW1 slotted something like an ear bud. After that they went back.*
   d) *Upon being shown VDPE1, he said that he had never seen that form. He said that his signature is not there on the said form and he did not write his name on that.*

27. Given the evidence of PW1 alone, it is clear that the accused has not been properly informed of the consequences of providing the reference sample. That is, the accused has not been informed that if the DNA extracted from the sample obtained from the accused matches with the DNA extracted from the relevant biological evidence collected from the crime scene, that evidence will be used against him. But on the other hand, it is pertinent to note that the accused at that time knew that he was being investigated in relation to a criminal charge and therefore it is obvious that he also knew that the relevant sample is to be obtained for the purpose of the ongoing investigation and accordingly it cannot be said that he was unaware of the possibility that the relevant findings may be used as evidence against him.

28. In my judgment, PW1 was a credible and a reliable witness. He was forthright in his answers and no attempt to fabricate evidence was noticed. He clearly said that he did not further explain to the accused about the consent form. This leads me to believe PW1 when he said that no force was used on the accused in order for him to collect the buccal swab from the accused. I also noted the accused's (failed) attempt to claim that the relevant sample was collected on 02/02/18 simply based on the reference to the said date in the police statement of PW1, where PW1 clearly explained the reason to mention the said date in the statement and that it was not because the sample was collected on that date. Thus I am satisfied beyond reasonable doubt there was no use of force on the accused as claimed by him.

29. Nevertheless, the failure of PW1 to explain the consequences of providing the buccal sample as stated above and thereby not obtaining the informed consent of the accused suggests that the said sample was collected under circumstances unfair to the accused. Thus I would regard the evidence in this case in relation to the DNA analysis as evidence unfairly obtained. Accordingly, now it is required for this court to exercise the discretion in deciding whether to exclude the relevant DNA evidence. In doing so, I have to consider questions such as, whether the prejudice caused to the accused given the circumstances under which the relevant evidence was obtained outweighs the probative value of the evidence; whether the interests of justice require the said evidence to be admitted; and whether the circumstances under which the relevant evidence was obtained has such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

30. As noted above, the bodily sample for the DNA profiling was obtained by rubbing a swab on the inner cheek of the accused. There was a failure on the part of the officer who collected that sample to explain to the accused that the results of the test to be conducted based on the relevant sample may be used as evidence against him and therefore the consent obtained from the accused would not amount to an informed consent.

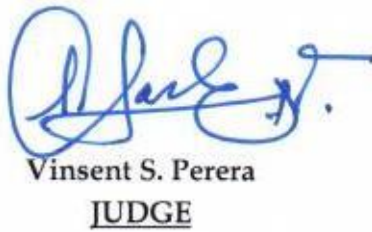
31. The accused is charged with the offence of aggravated robbery which is a prevalent offence in Fiji. Therefore, it is in the public interest to bring those who commit this offence to justice. Moreover, allowing the evidence in question to be adduced during the trial proper does not necessarily result in a conviction against the accused because the prosecution still has to establish through admissible evidence as to the authenticity of the procedure through which those profiles were obtained and as to the sources of the samples themselves. In other words, it is manifestly clear that the unfairness as observed in collecting the relevant buccal sample is not an impediment for the accused to have a fair trial. The prejudice caused to the accused in this case does not outweigh the probative value of the relevant evidence and it is clearly in the interest of justice to admit the evidence in question.

32. The manner in which the relevant sample was obtained as determined based on the evidence adduced in this *voir dire* does not breach the right to life guaranteed under section 8 of the Constitution. Given the language used in section 9 of the Constitution, the right to personal liberty as provided under the said section does not apply to obtaining of a buccal sample from a suspect for the purpose of an ongoing investigation. For the reason that the accused's consent though it is not regarded as an informed consent was obtained when the sample in this case was obtained and because there were reasonable grounds to collect the said sample, the manner in which the said sample was collected is not in breach of section 12 of the Constitution which guarantees the freedom from unreasonable search and seizure.

33. As it is explained above in this ruling, equating the providing of bodily sample with a confession of a suspect is a misconstruction. Therefore section 13(1)(d) [and 14(2)(j)] of the Constitution has no relevance to obtaining of a buccal sample. Section 14(2)(j) is any way applicable after a person is charged and therefore is not relevant to the issue at hand. Even if the obtaining of the relevant sample with consent but without informed consent, is regarded as unlawful, for the reasons explained above, section 14(2)(k) of the Constitution is not breached by admitting

the relevant DNA evidence for the reason that the interests of justice requires the said evidence to be admitted.

34. All in all, in view of the reasons discussed above, I would rule the evidence the prosecution seeks to adduce in relation to DNA profiling in this case based on the Forensic DNA Report dated 12/11/18 as admissible.



Vinsent S. Perera
JUDGE

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