

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

**Criminal Case. No. HAC 196 of 2019**

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

**A N D** : **MALELI NAIBE**

**Counsel** : Ms. L. Latu for the State.  
Ms. A. Bilivalu for the Accused.

**Date of Hearing** : 27 November, 2020

**Date of Submissions** : 01 December, 2020

**Date of Ruling** : 07 December, 2020

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**VOIR DIRE RULING**

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1. The accused is charged with one count of rape contrary to section 207 (1) and (2) (b) of the Crimes Act.
2. The prosecution wishes to adduce in evidence at trial the caution interview of the accused dated 27<sup>th</sup> October, 2019.
3. The accused objects to the admissibility of the caution interview on the following grounds:
  1. *The police vehicle driver during the arrest of the accused had aggressively intimidated the accused by swearing at him in the ITaukei language to admit to the offence;*

2. *During the caution interview the accused was not given his right to remain silent as required under section 13 (b) of the Constitution.*
4. For completeness the accused through his counsel had filed his amended grounds of voir dire on 2<sup>nd</sup> March, 2020 based on five grounds. However, on the date of the hearing counsel for the accused only proceeded with the abovementioned two grounds.
5. The prosecution denies all the allegations raised in the voir dire grounds. 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 principle 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 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 investigation and interrogation and that the accused had voluntarily given his answers on his own freewill.
9. 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 confession obtained, unless the prosecution can show that the accused was not prejudiced as a result of that breach.

#### **PROSECUTION CASE**

10. The prosecution called two witnesses. The first prosecution witness Cpl. 3663 Jone Kolinio informed the court that on 26<sup>th</sup> October, 2019 he was asked to report to the Ba Police Station and attend to driving duties. On this day he drove the police vehicle from the Police Station to Rarawai with the police team that arrested the rape suspect.
11. The witness was accompanied by the Crime Officer Ana and Constable Josefa. At Rarawai the vehicle was stopped at the driveway of the alleged crime scene. The Crime Officer and Constable Josefa got out and went to the house where the accused was staying. The witness stayed in the vehicle.

12. After a while the accused was escorted to the vehicle by the two police officers. The witness later came to know the name of the accused was Maleli Naibe. When the accused sat in the vehicle the witness asked the accused where he was from.
13. The accused responded by saying that he was from Nadarivatu upon hearing this, the witness said he was from Ra. The witness stated that due to traditional links they were "Kais" meaning closely related. The witness told the accused the allegation against him was serious in response the accused said that people respected him.
14. According to the witness when he met the accused and asked him where he was from, both shook hands. When the witness was talking to the accused, the accused kept quiet so he did not say anything else.
15. The witness denied he had intimidated, aggressively sworn or verbally abused the accused. He also stated that the other police officers had not intimidated or aggressively spoken to the accused. The witness also stated that the accused was cooperative and he was not handcuffed. The witness drove the vehicle back to the police station where Constable Josefa escorted the accused out of the police vehicle while the witness was in the police vehicle.
16. In cross examination the witness denied that he had aggressively told the accused in the ITaukei language that he had committed the offence. The witness stated that the accused was friendly so there was no need for the witness to get wild. The witness denied he had sworn at the accused in the ITaukei language meaning "*fuck your mother*" and "*fuck your father.*"
17. The witness maintained that he had a conversation with the accused but the accused did not reply to him so there was nothing more to be said. When it was suggested that the accused did not respond to the witness because he had spoken to the accused in an intimidating manner the witness denied this.

18. Upon the application of the defence counsel this court recalled this witness for further cross examination.
19. The witness denied that he was part of the team that had gone for the crime scene reconstruction only. He maintained that he had only gone to the scene of the alleged crime to arrest the accused.
20. The witness was referred to the station diary of Ba Police Station of 26<sup>th</sup> October, 2019 as follows:

Ref:	Time:	Cross-reference	Entry
242	18:33hrs	266	Cpl. Jone reported in for duty.
243	18:34hrs	250	Cpl. Jone drove out F/360 towards Raviravi.
250	19:10hrs	243	Ref. to SD, said driver drove F/360 back into the yard.

21. Based on the station diary it was suggested to the witness that he had not travelled to Rarawai but had gone to Raviravi the witness denied this.
22. In re-examination the witness said that he did not write the station diary it was written by the station orderly. On the day in question he was requested to drive the police vehicle and get the suspect to the police station and that he was not part of the reconstruction of the crime scene. On 26<sup>th</sup> October he had gone to Rarawai to arrest the accused and not to Raviravi.
23. The final witness PC 5623 Josefa informed the court that he was with the team that had arrested the accused. He was accompanied by the Crime Officer Ana Nai and the driver Cpl. Jone.

24. On 26<sup>th</sup> October, the team had left the Ba Police Station for the alleged crime scene in the evening. The witness was told by the owner of the property where the accused was, the crime officer had informed the accused the reasons for his arrest.
25. The accused was cooperative he was not threatened or intimidated. The witness confirmed that Cpl. Jone was the driver of the police vehicle on this day and that he did not see Cpl. Jone swear, intimidate or threaten the accused.
26. At the police station the accused was handed over to the station orderly. There were no complaints from the suspect, the next day the witness had interviewed the accused in the iTaukei language as requested by the accused.
27. The accused, the witnessing officer Meredani and the witness had signed the caution interview the accused was not forced to sign. The caution interview of the accused dated 27<sup>th</sup> October, 2019 in the iTaukei language was marked and tendered as prosecution exhibit no. 1. The witness had translated the caution interview in the English language which was marked and tendered as prosecution exhibit no. 2.
28. According to the witness the accused did not make any complaints before, during and after the interview. He was cooperative and answering the questions well. No one had threatened or abused the accused during the interview. The allegation and the cautionary words were put to the accused, the accused understood the cautionary words put to him and also he was given his rights under section 13 of the Constitution of Fiji but the accused did not wish to exercise these rights. The accused was treated well he was not forced or threatened or intimidated during his interview.

29. In cross examination the witness stated that Cpl. Jone was the driver, he was present when Cpl. Jone was talking to the accused in the police vehicle. Cpl. Jone had asked the accused where he was from and they were saying to each other that they were "*kais*".
30. The witness denied Cpl. Jone had aggressively spoken with the accused he heard Cpl. Jone say to the accused "*look at your age*". The witness maintained that Cpl. Jone did not swear at the accused or intimidate him. According to the witness Cpl. Jone was talking to the accused in a polite manner.
31. The witness agreed at Q.7 of the caution interview he did not state that the accused had a right to remain silent. However, he remembered explaining this right to the accused although it was not written down. The witness denied the suggestion that the interview was not fair due to the absence of the right to remain silent. The witness also stated that the conversation the accused had with Cpl. Jone had nothing to do with his caution interview.
32. This was the prosecution case.

### **DEFENCE CASE**

33. At the close of the prosecution case the accused opted to give evidence on oath.
34. The accused informed the court that he was arrested from his home by PC Josefa who had handcuffed him. Apart from PC Josefa, there was a tall police officer and the driver. The driver had sworn at him in the iTaukei language to the effect "*fuck your father*" and "*fuck your mother*". He was asked by the driver whether he had other cases. The accused responded by saying "*drunk and disorderly and damaging property*". The driver did not come to court to give evidence he was a fat, dark complexion, iTaukei police officer.

35. The accused got scared after the swearing, he was again sworn the next day by the same police officer (who was the driver). The accused remembered signing the interview, he was not forced to sign and he was not given his right to remain silent.
36. In cross examination the accused stated that he had chosen to be interviewed in the ITaukei language because he understands and can explain well in the ITaukei language. The accused was answering questions but he cannot be sure what was written since he cannot read.
37. He did not complain because there was no need to complain, he had voluntarily answered the questions asked, however, he was not given his right to remain silent. He was arrested by two police officers, Ana came when he was photographed.
38. The accused denied on 26 October, 2019 Cpl. Jone had driven the police vehicle to the Ba Police Station and he did not have any conversation with Cpl. Jone that day, however, the driver had intimidated and sworn at him. When he had appeared before the Ba Magistrate's Court he was only asked whether he wanted to be represented by a lawyer when he said no the next date was given he was not given the opportunity to complain.
39. In re-examination the accused said he answered the questions because he was told if you agree you will be sent home. When he sat in the police vehicle he was sworn by the driver.
40. This was the defence case.
41. After the hearing, both counsel filed written submissions for which this court is grateful.



## **ANALYSIS**

42. The prosecution wishes to rely on the confessions obtained by the police during the caution interview, however, the accused is objecting to its admissibility as per the voir dire grounds mentioned by the counsel for the accused.
43. The objections raised by the accused are directed to his caution interview. The law is very clear that the prosecution bears the burden to prove beyond reasonable doubt that the confessions were given by the accused voluntarily on his own freewill in fair and just circumstances without any breaches of his Constitutional Rights.
44. There is no dispute that the accused was arrested on 26<sup>th</sup> October, 2019 in the evening at Rarawai, Ba and caution interviewed the next day at 7.30am.
45. The first ground of the complaint is that the driver of the police vehicle had intimidated and sworn at the accused in an aggressive manner and which made the accused scared so he had made the admissions when he was interviewed the next day.
46. The driver of the police vehicle Jone Kolinio had informed the court that he had a brief conversation with the accused after he was arrested and brought to the waiting police vehicle. The accused was cooperative so there was no reason to get wild.
47. This version of the driver is supported by the interviewing officer Josefa who stated that he overheard the conversation between the accused and Cpl. Jone.
48. The accused on the other hand stated that the witness called by the prosecution was not the person who had driven the police vehicle on that

day. According to the accused Cpl. Jones was the driver for the crime scene reconstruction.

49. Counsel for the accused points to the station diary noting which states that on 26<sup>th</sup> October, 2019 Cpl. Jones at 18.34hours had taken the vehicle to Raviravi and not Rarawai.

50. In the interest of justice Cpl. Jones was recalled at the request of the defence and he maintained that he had gone with the team to arrest the accused at Rarawai and not Raviravi.

51. In respect of the final ground of complaint the accused states he was not given the right to remain silent hence he made admissions in his caution interview.

52. The interviewing officer PC Josefa stated that he had given the cautionary words to the accused during the caution interview at Q.6 as follows:

*“You are not obliged to say anything unless you wish to do so but whatever you say may be put into writing and given in evidence. Do you understand the nature of the cautionary words put to you?”*

*Ans: Yes”*

53. The accused says he was not given his right to remain silent when he was given his Constitutional Rights at Q. 7 of the caution interview. The thrust of his argument is that when he was given his rights under section 13 of the Constitution the officer did not say anything about his right to remain silent.

### **DETERMINATION**

54. Upon considering the evidence adduced by the prosecution and the defence I prefer the evidence of both the prosecution witnesses. I accept


that it was Cpl. Jone Kolinio who had driven the police vehicle to Rarawai with Constable Josefa and Crime Officer Ana. The noting in the station diary that the vehicle was driven to Raviravi was written by another officer.

55. In any event, if there was any aggression shown by the driver of the police vehicle it was in the evening of the 26<sup>th</sup> and it was on the following day the accused was interviewed that is on the 27<sup>th</sup>. In my judgment I do not accept that the aggression of the driver as alleged was strong enough to make the accused admit the allegation when this officer was not even present during the interview.
56. I reject the assertion of the accused that the driver had also sworn at him before the interview is an afterthought which was not part of the ground of objection. I also do not accept that Cpl. Kolinio was not the driver of the police vehicle when he went with the arresting team to Rarawai. The station diary supports the reporting to duty of Cpl. Kolinio on the 26<sup>th</sup> and I accept that it was Cpl. Kolinio who had driven the police vehicle to Rarawai on this date.
57. Moreover, the argument that the accused was not given his right to remain silent when he was given his other Constitutional Rights is not convincing in light of the caution administered at Q. 6 of the interview.
58. In my view the caution was properly and correctly administered which was acknowledged and understood by the accused. The cautionary words take into account the accused's right to remain silent and the consequences of not remaining silent. The accused also told the court that he was not forced during the interview and that he gave the answers voluntarily on his own freewill. The accused struck me as person of strong character who cannot be forced into doing things he would not wish to.
59. Based on the above, this court prefers the evidence of all the prosecution witnesses over that of the accused. The accused gave his answers in the

caution interview voluntarily on his freewill without any threat, intimidation, assault, inducement, oppression or breach of the constitutional rights enshrined in the Constitution of Fiji or in breach of any common law rights. The caution interview was conducted in circumstances which were fair to the accused.

60. I rule that the caution interview of the accused dated 26<sup>th</sup> October, 2019 is admissible in evidence and the prosecution may tender the same at trial.



  
**Sunil Sharma**  
**Judge**

**At Lautoka**

07 December, 2020

**Solicitors**

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

**Office of the Legal Aid Commission for the Accused.**