

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 343 of 2018

STATE

V

SAIMONI NABUKAVOU

Counsel : Ms. Bhavna Kantharia for the State
Ms. Namrata Mishra for the Accused

Date of Hearing : 24 January 2020

Date of Ruling : 26 March 2020

RULING

[1] As per the Information filed by the Director of Public Prosecutions (DPP) the Accused in this case is charged with the following offences:

[COUNT 1]

Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (a) of the Crimes Act 2009.

Particulars of Offence

SAIMONI NABUKAVOU, with others, on the 24th day of August 2018, at Nasinu, in the Central Division, in the company of each other, robbed **SUREN**

KUMAR of 1 x Samsung J1 mini mobile phone and 1 x green army bag, the property of **SUREN KUMAR**.

[COUNT 2]

Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (a) of the Crimes Act 2009.

Particulars of Offence

SAIMONI NABUKAVOU, with others, on the 24th day of August 2018, at Nasinu, in the Central Division, in the company of each other, robbed **SATISH KUMAR** of 1 X Toshiba laptop, \$2, 760.00 – cash, 1 x silver chain, 1 x men’s wrist watch, 1 x Samsung J3 mobile phone, 1 x J1 mini mobile phone, 1 x rip curl men’s wallet and 4 x 1.25 litres whisky, the property of **SATISH KUMAR**.

[COUNT 3]

Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (a) of the Crimes Act 2009.

Particulars of Offence

SAIMONI NABUKAVOU, with others, on the 24th day of August 2018, at Nasinu, in the Central Division, in the company of each other, robbed **AMRITA DARSHANI** of \$2050.00 cash, Toyota Prado Black vehicle registration number 4U2NV, 1 x gold mangal sultra, 1 x bracelet, 2 x diamond ring, 1 x earring, 1 x ladies citizen wrist watch, 1 x Samsung S7 mobile phone, 2 x ladies handbag and 1 x rip curl ladies wallet, the property of **AMRITA DARSHANI**.

- [2]** Following his arrest, the Accused was caution interviewed by Detective Constable 4647 Pita Gaunatalei, at the Valelevu Police Station, on 31 August 2018.
- [3]** The State is relying on the caution interview statement made by the Accused. The Accused is challenging the admissibility of the said caution interview statement.
- [4]** In the Grounds for Voir Dire, which he filed in Court, on 12 August 2019, the Accused objects to the admissibility of his caution interview statement, on the following grounds:

- a. At the time of the Accused's Caution Interview, the right to remain silent as given at Question & Answer 8 was unfair insofar the Accused was informed that there were consequences to remaining silent.
- b. Moreover, at the time of such right being put, the Accused was not properly informed of what exactly the consequences of not remaining silent were.

[5] The Question and Answer No. 8 of the caution interview statement, which is the subject of contention, is reproduced below:

Q8: Before we proceed further with your interview, I wish to advise you of your constitutional rights stipulated under Section 13 of the Constitution which gives you the right to seek advice from a lawyer of your own choice and at your own cost or one from the Legal Aid Scheme if you can't afford one. You also have the right to communicate with your spouse, relative of your own choice, religious or social councillor to be present during the interview. **You also have the right to Remain Silent but I must also advise you that there are consequences of remaining silent or not to remain silent.**

Do you understand your Constitutional Rights put to you?

A: Yes

[Emphasis is mine].

The Law

[6] In ***Ganga Ram and Shiu Charan v. Reginam***; Criminal Appeal No. 46 of 1983 (13 July 1984) (unreported) the Fiji Court of Appeal outlined the two grounds to be considered for admissibility of confessions;

*"It will be remembered that there are two matters each of which requires consideration in this area. 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 - what has been picturesquely described as the flattery of hope or the tyranny 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 the police behaved, perhaps by breach of the Judges Rules falling short of overbearing*

will, by trickery or by unfair treatment. Regina v. Sang (1980) AC 402. This is a matter of overriding discretion and one cannot specifically categorize the matters which might be taken into account."

- [7] His Lordship, Justice Daniel Goundar in the case of the **State vs. Maikeli Rawaaqa and Segran Murti** Criminal Case No. HAC 42 of 2004 (16 February 2008); held as follows:

"The principal governing the admissibility of confessions are well settled. Confessions could not properly be given in evidence unless it was shown that they were made voluntarily, that is, not obtained through violence, fear of prejudice, oppression, threats and promises or other improper inducements (Ibrahim v R [1914] AC 599). Even if such voluntariness is established, the trial Judge has the discretion to exclude the confessions on a general ground of unfairness (R v Sang [1980] AC 402). In addition, confessions could be excluded for breaches of Constitutional rights."

- [8] Accordingly, in order for a confession made by an Accused person to a police officer to be admissible as evidence against the maker of that confession, the confession should have been made by that Accused voluntarily, meaning it should have been made by the Accused on his own free will, with full appreciation of the legal consequences. If the said confession is made as a result of oppression, such confession would not be admissible and should be excluded. Oppression is anything that undermines or weakens the exercise of free will. However, even if such voluntariness is established, the trial Judge has the discretion of ruling such confession inadmissible, if it is obtained in an unfair manner (on general grounds of unfairness).

- [9] The onus of proving voluntariness/lack of oppression and fairness is on the prosecution and they must prove these matters beyond reasonable doubt. If there has been a breach of any of the Accused's Constitutional rights, the prosecution must prove that the Accused was not thereby prejudiced.

- [10] Section 13 of the 2013 Constitution (Constitution) sets out the rights of arrested and detained persons. Section 13 (1) (a) of the Constitution provides that:

"(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.”

[Emphasis is mine].

[11] In terms of Section 13 (2) of the Constitution it is stated *“Whenever this section requires information to be given to a person, that information must be given simply and clearly in a language that the person understands.”*

[12] Furthermore, Section 13 (1) (d) of the Constitution stipulates that *“Every person who is arrested or detained has the right not to be compelled to make any confession or admission that could be used in evidence against that person.”*

[13] In this case, the objection taken up by the defence is that at the time of the caution interview the Accused was not properly explained of his right to remain silent and had been informed that there were consequences to remaining silent. Moreover, that there was a failure on the part of the Interviewing Officer to properly highlight that there were consequences of not remaining silent and to explain the said consequences.

[14] In ***State v. Fusi*** [2018] FJHC 1083; HAC223.2017 (15 November 2018); His Lordship Justice Rajasinghe held:

“9. DC Isoa in his evidence admitted that he put the question number nine to the accused as in the same form as it has been recorded in the caution interview. He then explained the reason for putting that question. I will now reproduce the said question nine and the answer in verbatim as it was recorded in the caution interview, that:

Q; 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 will you make a statement now?

A: I will make a statement.

10. Having carefully considered the above questions, it is clear that the interviewing officer has not explained the accused the consequent of not remaining silent. Instead, he has told the accused that if he exercises his right

to remain silent, he won't be able to tell his side of the story, and that would allow the Police to continue to prosecute him with the available evidence. This has created a condition that unless the accused made a statement, the police would prosecute him.

11. *Accordingly, I am of the view that this question has compelled or rather forced the accused to make a statement. The accused was not properly explained of his right to remain silent. Hence, he was not in a position to make an informed decision about his right to remain silent. Therefore, it has created a reasonable doubt whether the accused made his statement in the caution interview voluntarily. Moreover, the failure of the interviewing officer to properly explain the accused his right to remain silent and the consequences of remain silent as required under Section 13 (1) (a) (ii) and (b) of the Constitution has created a reasonable doubt whether the caution interview was conducted under a fair and just circumstances.*

12. *Accordingly, I find that the prosecution has failed to prove beyond reasonable doubt that the accused voluntarily gave his statement in the caution interview and it was recorded under fair and just circumstances.*

13. *In conclusion, I hold that the record of the caution interview of the accused is not admissible in evidence at the trial."*

[15] His Lordship Justice Rajasinghe in ***State v. Ravutasau & Another*** [2019] FJHC 1100; HAC377.2017 (31 October 2019); arrived at a similar finding.

[16] In ***State v Ratu Sela Dradra Matia*** [2019] FJHC 188; HAC260.2018 (13 March 2019); His Lordship Justice Goundar that the right to remain silent as provided in the 2013 Constitution is not subject to any qualification. In the said judgment Goundar J stated:

"[6] 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. For these reasons, the admissions are disregarded and given no weight."

[17] In ***State v. Rozleen Razia Khan*** [2019] HAC 200 of 2018 (9 July 2019); His Lordship Justice Vinsent Perera held:

“9. The issue I have to deal with in this case is whether to allow the caution interview statement to be used as evidence or not. The accused has clearly indicated that she is not challenging the voluntariness of the caution interview. If it is found that the answers in the caution 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 caution 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 caution 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 caution interview.

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

- [18] In this case, Detective Constable 4647 Pita Gaunatalei had commenced the recording of the caution interview statement of the Accused, at 8.48 hours, on 31 August 2018, at the Valelevu Police Station. Detective Sergeant Ofati had been present as the Witnessing Officer. The recording of the caution interview had concluded at 14.00 hours the same day. A total of 103 Questions had been asked from the Accused during the course of the interview.
- [19] The Accused has clearly indicated that he is not challenging the voluntariness of the caution interview statement. The objection taken up by the defence is that at the time of the caution interview the Accused was not properly explained of his right to remain silent and had been informed that there were consequences to remaining silent or not remaining silent.
- [20] In my opinion, what would be most objectionable is the fact that the Officer who recorded the caution interview statement stating that there are consequences of remaining silent. In law there are no consequences of remaining silent. This is a constitutional right guaranteed under Section 13 (1) (a) (ii) of the Constitution.
- [21] In addition, the consequences of not remaining silent has not been explained to the Accused at the time Question No. 8 was put to him. Commonly this is done in the

following manner *"You are not obliged to say anything unless you wish to do so, but what you say may be put into writing and given in evidence."*

- [22] Although, the right to remain silent may not have been appropriately explained to the Accused at the time Question No. 8 was put to him, the cautionary words *"You are not obliged to say anything unless you wish to do so, but what you say may be put into writing and given in evidence"*, have been put to the Accused on two different occasions during the recording of the interview (After Question and Answer 5 and 68 respectively). This in fact, are the consequences of not remaining silent.
- [23] Furthermore, the manner in which the said right was given to the Accused person in the instant case can be clearly distinguished from the manner in which it was done in *State v. Fusi (Supra)*, where it was stated that *"...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."*
- [24] Even in *State v. Matia (Supra)* the right to remain silent was qualified by an incentive to tell the Accused's side of the story to avoid being charged based on the allegation.
- [25] In *State v. Rozleen Razia Khan (Supra)* too the right to remain silent was put to the Accused in the following manner: *"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 will you answer to the questions?"*
- [26] It is clear that a breach of constitutional right may cause prejudice to an Accused person and thus may lead to unfairness. In such a situation, the Court has the discretion whether or not to exclude such caution interview statement.
- [27] However, having perused the caution interview statement made by the Accused in its totality, I cannot see that any real prejudice has been caused to the Accused by

the failure of the Interviewing Officer to properly explain the right to remain silent at the time Question No. 8 was put to him.

[28] In the circumstances, this Court does not deem it appropriate to rule that the caution interview statement made by the Accused is inadmissible at this stage of the proceedings.



Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 26th Day of March 2020

Solicitors for the State : **Office of the Director of Public Prosecutions, Suva.**
Solicitors for the Accused : **Office of the Legal Aid Commission, Suva.**