

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case. No. HAC 100 of 2017

BETWEEN : **THE STATE**

A N D : **JOSEVATA TUIVIWA**

Counsel : Mr. S. Seruvatu for the State.
Ms. E. Radrole for the Accused.

Dates of Hearing : 09 and 13 July, 2020

Dates of Submissions : 10 August, 2020

Date of Ruling : 17 August, 2020

VOIR DIRE RULING

1. The accused is charged with one count of rape contrary to section 207 (1) (2) (a) and (3) of the Crimes Act.
2. The prosecution wishes to adduce in evidence at trial the caution interview of the accused dated 5th May, 2017 and the charge statement dated 6th May, 2017.
3. The accused objects to the admissibility of the caution interview and the charge statement on the following grounds as amended:

1. *That the accused was not properly explained the rights to remain silent and the consequences of not remaining silent during his Caution Interview;*
 2. *That the confessions in the Caution Interview was obtained through undue influence as a result of physical assault and intimidation during the Caution Interview;*
 3. *That the accused was physically assaulted by 4 Indian Police Officer's by using a stick and iron rod to hit his buttock area, stomach, back and other parts of the Accused's body in the presence of the Interviewing Officer and Witnessing Officer. Three of these Police Officers were young and fit looking officers whilst one was an old officer;*
 4. *That the accused was also physically assaulted by one of this Indian Police Officer who continually slapped him and punched his stomach;*
 5. *That the accused was taken around the Nadi back road area by the Police Officers whereby he was threatened and intimidated that if he does not point at the area they show him than they will insert a stick up his anus;*
 6. *That the accused was medically examined on the 8th day of May, 2017 by Dr Mousheen Khan of the Nadi Hospital due to the injuries he received whilst being assaulted at the Nadi Police Station;*
 7. *That the accused was only told to sign his Caution Interview and Charge without given a chance to read it;*
 8. *That the Caution Interview was obtained in breach of the Accused Constitutional Rights. Section 13 (b);*
 9. *A breach of the Judges Rules – Part II and IV;*
 10. *A breach of Article 9 (2), 10 (1) and 14 (3) (g) of the International Covenant on Civil and Political Rights.*
4. 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 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 principle of law has been kept in mind throughout.

LAW

5. 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.”

6. The Constitution of the Republic of Fiji at sections 13 and 14 have recognised and endorsed the above mentioned principles as well.
7. 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

interrogation and that the accused had voluntarily given his answers on his own freewill.

8. 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 confession obtained, unless the prosecution can show that the accused was not prejudiced as a result of that breach.

PROSECUTION CASE

9. The prosecution called four witnesses. The first witness was DC 3858 Saiasi Matarugu who had conducted the caution interview of the accused at the crime office of the Nadi Police Station on 5th May, 2017 for two days. At the request of the accused the interview was conducted in the ITaukei language.
10. DC Fabiano was the witnessing officer, on the 5th the interview commenced at 16.20 hours and concluded at 18.30 hours, on the 6th the interview concluded at 16.30hours.
11. On the 7th May, 2017 the witness had translated the caution interview into the English language. At Q.7 the witness had put the allegation to the accused and thereafter he was cautioned. The accused understood the allegation and the caution.
12. According to the witness during the interview on both days no one assaulted the accused. During the reconstruction of the crime scene DC Fabiano and WPC Limiva were present; no one forced the accused or threatened him to admit the allegation. The witness denied that during the reconstruction of the crime scene police officers had threatened and intimidated the accused that if he does not point at the area they showed him then they will insert a stick up his anus. The witness denied that

Indo-Fijian police officers were present during the interview he stated the interview was conducted in the ITaukei language so there was no need.

13. The witness was not aware that the accused was taken for a medical examination. From Q.9 to Q.13 the accused was accorded his Constitutional Rights in accordance with section 13 (1) (a) (iii) of the Constitution of Fiji which the accused understood. After the interview had concluded it was printed, the accused signed including the witness and the witnessing officer.
14. The interview was read to the accused who understood the contents. The witness had asked the accused if he wanted to read the interview but he did not wish to read it. Also before signing the accused agreed the answers given by him were correct. At Q's 121 and 122 of the caution interview the accused was given the opportunity to read and then he was given the opportunity to alter, add or correct the record of interview.
15. The witness denied the witnessing officer or he had forced or threatened or intimidated the accused to admit to the allegations during the caution interview or at the reconstruction of the scene. The accused had given his answers on his own freewill, the caution interview of the accused in the ITaukei language and the English translation were marked and tendered as prosecution exhibits 1A and 1B.
16. In cross examination the witness stated that the accused was properly explained in the ITaukei language his right to remain silent. The witness denied that Q.10 of the caution interview did not comply with the right to remain silent and the consequences of not remaining silent.
17. The witness denied that on 6th May, four Indo-Fijian police officers were present in the CID room where the accused was caution interviewed and these police officers had assaulted, slapped, punched and hit the

accused with a stick and an iron rod on his buttocks in the presence of the witnessing officer and him.

18. The witness maintained the accused was not assaulted and none of the Indo-Fijian police officers were present. He stated that it was not true that at the reconstruction of the scene he had told the accused if he did not show the place of the alleged incident he would insert a stick up his anus. According to the witness the accused had refused to read the interview and the witness did not read the interview to the accused.
19. In re-examination the witness clarified that he had read back the accused's rights and the place that he had to sign.
20. The second witness DC 5075 Fabiano Roko stated that in 2017 he was based at the Nadi Police Station, in respect of this case he was the witnessing officer. The caution interview was conducted in the crime office of the Nadi Police Station in a room. The interviewing officer and the accused were present with the witness.
21. The interview was conducted in the ITaukei language at the request of the accused, when the interview was shown to the witness he was able to recognize his signature. The interview commenced on 5th May at 16.20hrs. The accused was given a break at about 17.06 hours and recommenced at 17.18 hours, on the second day the interview was suspended at 12.45 hours for reconstruction of scene.
22. According to the witness the accused was given his constitutional rights, informed of the allegations and cautioned as well in the ITaukei language. The witness understood the above and he signed the interview after he was explained and shown where to sign and the reason to sign. All the explanation was done by the interviewing officer. Nobody assaulted, threatened or intimidated the accused, there were no Indo-Fijian police officers who had assaulted the accused.

23. At the reconstruction of the scene it was the witness, the interviewing officer, WPC Limiva and the accused and no one else.
24. At the alleged crime scene the accused was not threatened and intimidated to point to the area of the alleged incident otherwise a stick would be inserted up his anus. Also during the interview the accused was not threatened, assaulted, intimidated or induced into making an admission in the caution interview.
25. In cross examination the witness agreed that Q.10 rendered a right to the accused required by section 13 (i) (a) (iii) of the Constitution. The witness disagreed that the words "*Your answers may assist police to look at the case*" influenced or affected the whole caution interview. The witness stated that it will assist the police to work in the case from the accused point of view.
26. When it was suggested that there were four Indo-Fijian police officers present during the interview the witness denied this. He also denied the accused was hit with a stick and iron rod on his buttocks, slapped on his face, and punched on his stomach by the police officers when the accused was hand cuffed.
27. The accused was not threatened or intimidated during the reconstruction of the crime scene that if he did not point out to the crime scene a stick would be inserted up his anus.
28. Before the accused signed the caution interview he was again explained his rights, the allegation and the reason for signing. The accused was given a chance to read the interview but he refused.
29. The third witness WDC 6778 Limiva Vue was a crime writer in 2017 at the Nadi Police Station. She had accompanied DC Saiasi and DC Fabiano

for the reconstruction of the scene with the accused. No other police officers were present apart from them. It was the accused who had taken the police officers to the scene of the alleged crime and had showed the place where the incident had happened.

30. The witness denied that any of the police officers at the reconstruction of the crime scene had threatened or intimidated the accused to the extent that if he does not point to the area in question they will insert a stick up his anus. The accused was treated well and escorted by the two police officers nicely.
31. In cross examination the witness agreed she was not able to recall the date of the reconstruction and the name of the police officer who had driven the police vehicle that day. However, the witness agreed she was able to recall what had happened to the accused despite the fact that she was not able to recall who had driven the police vehicle and the date of the reconstruction of the crime scene.
32. The final witness was WDC 3795 Virisila, in 2017 she was based at the Nadi Police Station she was the charging officer in this case, on 6th May she had charged the accused. At the request of the accused he was charged in the ITaukei language the witness did the translation in the English language.
33. The charge statement of the accused in the ITaukei language was marked and tendered as prosecution exhibit no. 2A and the English translation was marked and tendered as prosecution exhibit no. 2B.
34. Before the commencement of the charge the accused did not complain about anything he was given his right to have a counsellor or a family member present, the accused understood the rights given and he had stated that he wished to exercise the above rights later.

35. At the end of the allegation the accused was informed of his right to remain silent, when the charge statement was complete the accused was given a copy to sign which he did.
36. The accused was given the opportunity to read the charge statement but he refused. According to the witness the accused never mentioned anything about being assaulted.
37. In cross examination when it was suggested that the witness had not specifically asked the accused whether he was assaulted, threatened or intimidated by police officers the witness responded by saying that it was mentioned at Q.13 of the charge statement.
38. According to the witness there were no visible injuries on the accused and at no time had he complained that he was assaulted by the police officers.
39. This was the prosecution case.

DEFENCE CASE

40. At the close of the prosecution case the accused opted to give evidence on oath.
41. The accused informed the court that on 5th May, 2017 he was arrested from his home in Navosa by four police officers, he was told that he had committed the offence of rape. The accused was taken to the Nadi Police Station where he was told by officers Saiasi and Fabiano that his statement will be taken.
42. When the accused was questioned by the police officers he denied the allegation and told them that he did not know anything about the rape of the girl since he did not know her and he had not met her. During the

afternoon of the 5th in the crime office his hands were cuffed to the ceiling and then he was punched.

43. He was punched by four Indo-Fijian police officers and told to admit the offence. He was punched till he became breathless. Apart from being punched he was hit on the head with a stick. He was also threatened that if he did not admit the offence a stick will be inserted up his anus. He was also hit with the stick on his head, back and buttocks which was very painful.
44. The accused was taken for reconstruction of the crime scene, he was assaulted to show the places they wanted to know. After this he was taken back to the CID office. At the CID office the accused had requested to be taken to the hospital which was not allowed by the police officers, he also asked his parents to assist him by taking him to the hospital since the pain was unbearable.
45. According to the accused he only admitted to the allegation because he was assaulted by the police officers. The caution interview was read back to him but he did not admit to what the police officers were reading to him. After this, he was told to sign the interview which he did.
46. During the charging he was again assaulted to sign, after charge statement was read to him the accused denied committing the offence. When the accused was produced in court he did not know what to tell the court after the court appearance the accused's uncle requested one of the police officers to take the accused to the hospital. The accused was taken to the Nadi Hospital and from there he was brought to the cell block.
47. In cross examination the accused agreed that on the 5th only police officers Saiasi and Fabiano were present and during the caution interview he was informed of all his rights and explained about his rights

as well which he understood. The accused was not given his right to remain silent but told to speak and answer the questions. He was also not cautioned, however, police officer Saiasi had explained this to him.

48. On the first day of the caution interview the accused was not assaulted, but on the second day he was assaulted and told to go for the crime scene visit.
49. For the crime scene visit the accused was accompanied by Saiasi, Fabiano and WPC Limiva. At the crime scene reconstruction the accused was assaulted by the Indo-Fijian police officers and also he was assaulted before being brought to the alleged crime scene.
50. The accused stated when his right hand was cuffed to the ceiling he was punched on his stomach and buttocks by four Indo-Fijian police officers in the presence of Saiasi and Fabiano who were sitting in the office.
51. The accused maintained he was assaulted by police officers he agreed the police officers had explained the interview first and then they gave him the opportunity to sign, before signing the caution interview was read back to him and he was explained everything before signing.
52. In respect of the charge statement the accused had signed the charge statement voluntarily he understood what he was signing. During the time he was charged by Virisila there was no assault on him.
53. When the accused was produced in the Nadi Magistrate's Court he did not tell the court that he had been assaulted by four Indo-Fijian Police officers. The accused maintained he was assaulted by four Indo-Fijian police officers during the caution interview.

54. In re-examination the accused stated that he was accompanied by one ITaukei police officer, and three Indo-Fijian police officers for the crime scene reconstruction and one of them was the driver.
55. The second defence witness was Mousheen Khan who graduated with MBBS degree from the University of Fiji this was his 7th year of practice. On 8th May, 2017 the witness had examined the accused at the Nadi Hospital. The Fiji Police Medical Examination Form of the accused was marked and tendered as defence exhibit no. 1.
56. Upon his examination of the accused's buttocks on both sides he saw red marks but there was no bleeding. The doctor only saw injuries on the buttocks and not on the other parts of the accused body. According to the doctor the injuries could have been caused by a blunt object.
57. In cross examination the doctor stated that the injuries he had seen were recent most certainly about two days ago.
58. This was the defence case.
59. After the hearing, both counsel filed written submissions for which this court is grateful.

ANALYSIS

60. The prosecution wishes to rely on the confessions obtained by the police during the caution interview and charging, however, the accused is objecting to its admissibility as per the voir dire grounds filed.
61. The objections raised by the accused are directed to his caution interview and the charge statement. 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.

62. There is no dispute that the accused was caution interviewed on 5th and 6th May, 2017 in the ITaukei language at the Nadi Police Station and then charged on 6th May, 2017.
63. The caution interview was conducted by DC Saiasi Matarugu with PC Fabiano being the witnessing officer. The charging officer was WDC Virisila. All the police officers have denied any wrong doing they have informed the court that the accused was treated well he was given all his rights which he understood and exercised. The accused had voluntarily given the answers to the questions asked in the caution interview and charge statement. The accused had signed both the documents on his own freewill and he did not make any complaints about any ill treatment by the police officers. The accused was not threatened as alleged as well.
64. The accused has filed numerous grounds of objection in respect of the admissibility of the caution interview and charge statement.
65. The defence called the accused and a doctor who had attended to the accused when he was taken to the Nadi Hospital after court on 8th May, 2017.
66. The primary objection taken by the accused is that he was assaulted by the police officers whilst in custody particularly during the second day of the caution interview.

DETERMINATION

67. Upon considering the evidence adduced by the prosecution and defence I prefer the evidence of the accused and the doctor called by the defence. I accept the accused told the truth when he said that he had denied the allegation on the first day of his caution interview and that he was

assaulted on the second day of his interview. The assault on the accused is quite serious the medical report of the accused is self-explanatory.

68. The doctor had examined the accused under police escort after his court appearance. The specific medical findings in the medical examination form of the accused shows that the accused had received extensive injuries on his buttocks.
69. The medical evidence of the accused is sufficient to show that the accused was assaulted by the police officers during interrogation more particularly on the second day of his caution interview. Although the accused in his cross examination had said that he was not assaulted during the charging I accept that the assault was on the 6th May which was the second day of the caution interview as well as the day of the charging. In any event the assault although carried out for the purpose of caution interview in my view had an effect on the accused during the charging as well.
70. On the other hand the police officers did not tell the truth when they denied any assault had taken place on the accused. Due to the assaults the accused had lost his freewill to answer the questions asked, the assaults and the threats made to the accused during his time in custody had overcome his freewill to voluntarily answer the questions asked.

CONCLUSION

71. Considering the totality of the evidence adduced by the prosecution and the defence it is obvious to me that the accused has suffered at the hands of police officers in respect of his second day's caution interview and the charging.
72. The fact that the accused did not make any complaints to the police officers or the Resident Magistrate during his court appearance is not

convincing. The accused was unrepresented in court and being an unsophisticated villager he cannot be expected to express his grievances unless asked. The court record does not show whether the accused was asked if he had any complaints to make.

73. The prosecution has not been able to satisfy this court beyond reasonable doubt that the accused had voluntarily admitted to the allegations on the second day of his caution interview and his charging. The effect of the beatings by the police officers during the second day of the caution interview had an impact on the charging of the accused as well which had overborne the freewill of the accused to give his answers voluntarily.
74. For the above reasons, I rule that the second days caution interview of the accused dated 6th May, 2017 and the charge statement are inadmissible in evidence.



Sunil Sharma
Judge



At Lautoka
17 August, 2020

Solicitors

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