

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 04 of 2020

BETWEEN : **THE STATE**

AND : **NOUMAN PATEL**

Counsel : Ms. P. Lata for the State.
: Mr. S. Heritage for the Accused.

Dates of Hearing : 2, 4, 5 May, 2022

Date of Submissions : 12 May, 2022

Date of Ruling : 25 May, 2022

VOIR DIRE RULING

BACKGROUND INFORMATION

1. The accused is charged with one count of rape contrary to section 207 (1) and 2 (a) and 3 of the Crimes Act.

2. The prosecution wishes to adduce at trial the caution interview and the charge statement of the accused dated 3th January, 2020. The accused objects to the admissibility of both these documents on the following grounds:
 - a) *The accused was not 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;*
- b) *To remain silent;*
- c) *To communicate with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly and, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission;*
- d) *Not to be compelled to make any confession or admission that could be used in evidence against that person;*
- e) *To communicate with, and be visited by,-*
 - i. *His or her spouse, partner or next of kin; and*
 - ii. *A social worker or religious counsellor.*
- f) *The accused was denied his right to consult a Solicitor when arrested and after arrest;*
- g) *That the statements were obtained in circumstances that were unfair to the Accused;*
- h) *That the statements were obtained in circumstances that were oppressive;*
- i) *That the statements were obtained in breach of section 13(1) of the Constitution of Fiji.*

3. The prosecution denies all the allegations raised by the accused. The burden is on the prosecution to prove beyond reasonable doubt that the caution interview and the charge statement of the accused were conducted fairly under just circumstances and the answers were given voluntarily without any impropriety by persons in authority namely the police officers, lack of prejudice, lack of oppression and in compliance with the Fijian Constitution where applicable. In this ruling the above principles of law has been kept in mind throughout.

LAW

4. 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 categorize the matters which might be taken into account.”

5. The Constitution of the Republic of Fiji at sections 13 and 14 have recognized and endorsed the above mentioned principles as well.

6. 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 police officers who were involved in the investigation and that the accused had voluntarily given his answers on his freewill.
7. Secondly, if there has been oppression or unfairness then this court can in its discretion exclude the caution interview and the charge statement. Furthermore, if the accused common law rights have been breached then that will lead to the exclusion of the confessions obtained, unless the prosecution can show that the accused was not prejudiced as a result of that breach.

EVIDENCE

PROSECUTION CASE

8. The prosecution called five witnesses to prove that the answers given in the caution interview and the statement made in the charge statement was given by the accused voluntarily and on his freewill.
9. The first witness PC 5160 Abdul Shazil Rahiman informed the court that on 2nd January 2020 at about 18:15 hrs he was part of the team that had gone to arrest the accused. The witness was accompanied by PC Ali, PC Faiyum, the father of the complainant and the complainant.
10. The team went to the house of the accused which is the Nadi Mosque quarters. Upon meeting the accused the witness instructed PC Ali to

give the accused his rights and arrest him. At the time of the arrest the accused was given his rights and there was no assault on him.

11. The accused did not make any complaint during the arrest and he was escorted to the Nadi Police Station. At the police station the accused was handed over to Cpl. Malolo.
12. In cross examination, the accused agreed the arresting officer told the accused the reason for his arrest. When it was suggested the arresting officer never informed the accused his rights to a lawyer the witness stated that at the time of arrest the reason for the arrest is given and the right to counsel is given at the time of the caution interview.
13. The father of the accused was present but he did not say anything. The witness denied he had made a promise to the accused that if he seeks forgiveness from the complainant the matter will end there.
14. The next witness DC 5887 Mohammed Fazeel Faiyum informed the court that upon receipt of a report PC Shazeem Ali, PC Abdul and the witness went to arrest the accused. PC Ali arrested the accused and he gave the accused his right to remain silent and explained the reasons for his arrest. During the arrest the accused did not raise any complaints.
15. Thereafter, the accused was escorted to the Nadi Police Station and handed over to the charge room. The witness maintained the accused was given and explained his rights and at the time of arrest was told of the reasons of arrest. The witness stated the accused was also given his right to remain silent and at the Police Station PC Ali gave the accused his right to a lawyer.

16. In cross examination, the witness stated that PC Ali had asked the accused whether he wanted to exercise his right to remain silent or not. The witness said the father of the accused did not tell them the accused had some mental impairment. The accused was given his right to counsel at the police station but not at the time of the arrest and he was informed of the reason of his arrest and also explained the consequences of not remaining silent.
17. The third witness PC 5753 Shazeem Ali informed the court that he was the one who had arrested the accused. According to the witness, he gave the accused his rights and also told him about the offence and why they had come to his house. Thereafter, the accused was escorted to the Nadi Police Station he was okay and had cooperated. The accused was told of his right to remain silent and during the arrest the accused did not make any complaints.
18. In cross examination, the witness stated that the father of the accused had not told him about the accused mental disability before he arrested the accused. The witness maintained he had told the accused about his right to remain silent and the reasons for his arrest. Upon further questioning the witness explained he had told the accused why he was at his house, he was given his rights and afterwards he was taken to the police station. The accused was given his right to remain silent but not his right to consult a lawyer at the time of arrest.
19. In re-examination, the witness said the right to a lawyer is given in the caution interview that is why he did not mention this to the accused at the time of his arrest.

20. The fourth witness PC 5780 Sanjesh Prasad informed the court that he had caution interviewed the accused on 3rd January, 2020 in the Hindi language at the Crime Office of Nadi Police Station. The witness had translated the interview in the English language which contained some errors. The witness explained he used a template to translate the interview which was not deleted for example after every break rights are noted which is not in the original Hindi version.
21. The witness informed the court that the following questions were incorrectly mentioned in the English translation:
 - (a) Questions 9 to 12;
 - (b) Questions 40 to Question 43;
 - (c) Page 7 after the break;
 - (d) Page 8, Question 9 to Question 16.
22. The witness also stated that the numbering in the translated version of the caution interview was also incorrect. The witness once again explained that because he used the template to translate the interview in English he had mistakenly copied and pasted.
23. The witnessing officer was WPC Deepanjali Kumar. The entire caution interview was conducted in a day which was commenced at 12:45 hours and concluded at 15:23 hrs.
24. The witness had explained the allegation to the accused which he had understood. The accused was cautioned at question 5 which was understood and signed by the accused. Furthermore, the accused was given his right to remain silent, and right to consult a lawyer. The accused did not wish to exercise any of these rights.

25. The accused was given three breaks namely for lunch, visit the washroom and then for scene reconstruction. The team left out for reconstruction at 14:18hrs and they came back at 14:56hrs. The witness was accompanied to the scene reconstruction by the accused, witnessing officer, CSI Officer and the vehicle driver.
26. According to the witness, the accused was denying the allegation but suddenly at question 52 and question 59 the accused started admitting. The accused appeared normal and was treated well and there was no force or threat made to the accused. This was confirmed by the accused in answer to question 85.
27. The witness denied all the allegations raised by the accused in his Voir Dire grounds and he stated that the accused was given all his rights, which were explained accordingly. There was no force on the accused to admit anything.
28. There was no unfairness or oppression on the accused and there was no breach of section 13(1) of the Constitution. The accused had signed the caution interview voluntarily and he was given the opportunity to add, alter or make any changes in the interview.
29. The original caution interview of the accused in Hindi was marked and tendered as prosecution exhibit number 1 and the English translation as prosecution exhibit number 2. The witness identified the accused in court.
30. In cross examination, the witness agreed that he did not ask the accused whether he wanted to exercise his right to remain silent and the

consequences of not remaining silent. After the first break, when the interview recommenced the accused was not asked whether he wished to remain silent or not.

31. After the second break, when the interview recommenced the allegation was not put to the accused and the accused was also not asked whether he wished to remain silent. The witness agreed the accused had confessed without being informed of his right to remain silent.
32. Before the reconstruction commenced the allegation was not put to the accused including his right to remain silent. When the interview commenced after the reconstruction, the accused was not given his right to remain silent. After the interview had ended the witness did not ask the accused whether he wanted to read the caution interview. When it was put to the witness that the accused could not have altered or corrected anything in the interview without reading, the witness stated that while the interview was conducted the accused was sitting beside him and reading through. When asked to explain the sitting arrangement the witness said, "*there was a table where I was sitting, the suspect was sitting on the other side and the witnessing officer was on my right*". According to the witness the table was about one meter by one meter.
33. In re-examination, the witness explained after the initial part of the interview the right to remain silent was not put to the accused because this right was explained to him and he had understood the same.
34. Furthermore, the accused was not given his right to remain silent after all the breaks and after the scene reconstruction because he was given this right at the beginning of the interview. In respect of the allegation

being not put to the accused after the breaks and before the scene reconstruction the witness stated that the allegation was put at the start of the interview. The interview was a short one which lasted only 3 hours so he did not put the allegation again.

35. The final witness PC 5754 Avinash Prasad informed the court that on 3rd January, 2020 he had charged the accused at the Nadi Police Station in the Hindi language as preferred by the accused. The witness also prepared a translation in the English language to the best of his ability.
36. There was no witnessing officer present since there was no one available at the time. The accused was given his rights during the charging and was also explained the charge who understood the same and was also cautioned. The accused understood the caution as well.
37. The charging commenced at 18:16 hours and ended at 18:49 hours. The accused had made a statement, there was no force or oppression on the accused, assault or any ill-treatment to make a statement. The accused did not make any complaints before or after the charging. The witness denied all the allegations contained in the grounds of voir dire. The accused had signed the charge and then it was counter signed by the witness. According to the witness the answers were given by the accused voluntarily. The original charge in Hindi was tendered as prosecution exhibit no.3 and the English translation as prosecution exhibit no.4.
38. In cross examination, the witness agreed that he never asked the accused whether he wants to remain silent or not. The witness stated that the accused had made a statement which is recorded at question 11 of the charge but the accused had not signed to confirm the same.

39. The witness further stated that he did not ask the accused whether he wanted to read the charge and also he did not ask the accused whether he wanted to alter or correct anything in the charge statement. Finally, the witness agreed he had not informed the accused about the consequences of not remaining silent.
40. In re-examination, the witness stated that there is no signature of the accused after the statement due to his oversight. Furthermore, he had not asked the accused to read the charge statement because the accused was reading when he was conducting the charge.
41. The witness also stated that he overlooked to ask the accused whether he wanted to add or alter anything in the charge statement. He also overlooked telling the accused about the consequences of not remaining silent.
42. This was the prosecution case.

DEFENCE CASE

43. The defence called two witnesses.
44. The accused informed the court that his level of education is up to class 8 and he attended Special School. On 2nd January, 2020 he was at home sleeping when the police came to his house. There were three police officers he was told by one police officer to say yes to everything and they will solve the matter.
45. The accused denied doing anything to the victim and he further stated that was not informed of the reason why the police officers had come to

his house. He was arrested in front of his father, mother, sister and his two brothers.

46. The accused stated that he was not informed of anything such as his right to remain silent, and right to consult a lawyer. The accused was taken to the police station by his two brothers.
47. The accused was kept at the police station overnight and on the next day he was interviewed at the Crime Office of the Nadi Police Station. Before the interview commenced he was told of his right to remain silent but he was not asked about this right by the police officer. Upon further questioning, the accused stated he wasn't told of this right.
48. In respect of his right to contact a lawyer the accused said that he was asked whether he wanted a lawyer or not, however, he was not given his right to be visited by a family member and also after the breaks he was not given these rights.
49. The accused also stated that at the scene reconstruction at Nadi Mosque, he was not informed of his right to remain silent and right to a lawyer. After the interview had ended he was not given a chance to read his interview or to alter or correct anything in it.
50. After the interview finished the accused was charged, he was not given his right to remain silent and right to counsel. The statement that he made was after he was forcefully asked to do so.
51. In cross examination, the accused agreed the police officer spoke to him in Hindi at his home but they did not talk nicely to him or his father, they were forcing the accused to say yes to the allegation and they will

solve the matter. At this time he told the police officer he had not done anything to the complainant.

52. The accused was able to understand what the police officer was saying to him during the interview but during the charging he only understood some of the things. The accused did not ask the charging officer to explain what he had not understood. Furthermore, when the police officers had come to arrest him at his house, he was explained the reasons for his arrest.
53. The accused agreed he was given his right to remain silent by the interviewing officer but not during the charging. The accused denied he was explained the nature of the charge during the interview. When asked what the interviewing Officer had told him the accused said he could not recall. When it was put to the accused that he was given his right to counsel during the interview the accused said, *"I was told but I wasn't asked"*.
54. The accused maintained that he was forced by the Interviewing and the Charging Officers to admit. The accused stated that his admissions were obtained unfairly by the police officers because they had asked him angrily. When it was put to the accused that the admissions were not obtained in circumstances that were oppressive either by the Interviewing Officer or the Charging Officer, the accused said *"I wasn't forced"*. The accused denied making admissions in the caution interview and the charge statement on his freewill. At the scene reconstruction he was treated well by the police officer.
55. The final defence witness Bashir Patel informed the court that the accused is his son. On 2nd January, 2020 the witness was at his home

when three police officers came. The witness was shocked to see them so he asked them why they had come. The witness was told that his son, Nouman did something and assaulted the complainant.

56. At this time his wife, two sons and daughter were present, since the accused was sleeping the witness went and woke him. The witness did not like the behaviour of the police officers they were forcing his son to admit to the allegation. The witness told the police officers that the accused was not normal or mentally stable. The police officers were forcing Nouman to say “yes” and they will solve the matter there. The witness then told the police officers not to force him since he was saying “no’ to the allegation.
57. The police officers wanted to take the accused with them but the witness said the accused will go separately, the police officers agreed.
58. In cross examination, the witness stated that the police officers did not force the accused to go to the police station but were forcing the accused to say “yes” and they will solve the matter. The witness agreed that he was attached to his son who he cared for and loved.
59. This was the defence case.
60. After the hearing this court ordered both counsel to file their written submissions which they attended to.

ANALYSIS

61. The prosecution wishes to rely on the admissions obtained by the police officers during the caution interview and the charging of the accused at trial. On the other hand, the accused is objecting to the tender of these

two documents at trial on the grounds that the admissions were obtained by the police officers as a result of unfairness, force, and in breach of the accused Constitutional right to remain silent and the consequences of not remaining silent.

62. There is no dispute that the accused was caution interviewed and charged at the Crime Office of the Nadi Police Station on 3rd January, 2020.
63. The prosecution submits that all the police officers who gave evidence told the court that the accused was treated fairly at the time of his arrest, before and during the interview and during the charging. All the answers given by the accused were voluntarily given by him. The accused was cooperative from the outset that is from the time of his arrest.
64. The police officers could not have possibly forced the accused in front of his family members. The police officers trusted the accused father that his two sons will drop the accused at the police station which was done.
65. There was no force or pressure on the accused to answer any questions in the caution interview. He did so on his freewill and voluntarily. In respect of the charge statement the accused made a statement without any force or pressure on his freewill. The caution interview and the charge statement complied with the mandatory rights of arrested and detained persons as per section 13 of the Constitution of Fiji.
66. The accused was given all his rights which he understood, acknowledged and signed in his caution interview and charge statement. The accused did not complain of any wrong doing by any of the police officers from the time of his arrest, before and during the interview and charging.

67. The prosecution witnesses have denied any wrong doing, no one had forced or threatened the accused either during the arrest or caution interview or the charging. The questions in the caution interview were answered by the accused voluntarily on his freewill and he also made a statement freely and voluntarily. The accused was looked after well given timely breaks and was spoken to in his preferred Hindi language which the accused understood.
68. On the other hand, the accused and his father informed the court that the behaviour of the police officers when they came to arrest the accused from his house was not good. The accused was forced by PC Abdul to admit the allegation in full view of his family and that the matter will be resolved. The accused denied the allegation and then his father told the police officers not to force the accused since he was not normal and was not mentally stable.
69. The accused was not given his rights, he was not told of the allegation and the reasons of his arrest. To make things worse the accused was not given the opportunity to consult a lawyer. Furthermore, the caution interview of the accused was not properly conducted by the interviewing officer.
70. PC Sanjesh did not ask the accused after the first break, whether the accused wished to remain silent or not. After the second break, when the interview recommenced the allegation was not put to the accused and the accused was also not asked whether he wished to remain silent. PC Sanjesh had agreed in cross examination that the accused had confessed without being informed of his right to remain silent.

71. Moreover, before the scene reconstruction commenced the allegation was not put to the accused including his right to remain silent. When the interview commenced after the reconstruction, the accused was not given his right to remain silent.
72. After the interview had ended the officer did not ask the accused whether he wanted to read the caution interview. In this regard the accused could not have altered or corrected anything in the interview without reading.
73. In respect of the charge statement the defence is asking this court to consider the fact that PC Avinash did not ask the accused whether he wanted to remain silent or not. The statement made at question 11 by the accused was not signed by the accused to confirm his admission.
74. The officer had not asked the accused whether he wanted to read the charge and also he did not ask the accused whether he wanted to alter or correct anything in the charge statement. The officer had also agreed in cross examination that he had not informed the accused about the consequences of not remaining silent.
75. Furthermore, PC Avinash Prasad had mentioned that it was due to his oversight there is no signature of the accused after he made the statement. The charging officer also stated that he overlooked to ask the accused whether he wanted to add or alter anything in the charge statement. He also overlooked to tell the accused about the consequences of not remaining silent during the charging.
76. The defence is asking this court not to believe the police officers.

DETERMINATION

77. After considering the evidence adduced by the prosecution and the defence I am of the view that there was no impropriety by the police officers on accused at the time of his arrest. The accused was arrested at his house in front of his family members. I do not accept that the police officers had behaved badly in front of his family members.
78. The evidence before the court is that the accused had denied the allegation. I find the arresting officers had properly arrested the accused from his house. I am convinced that the accused was told the reasons for his arrest, the nature of any charge that may be brought against him, his right to remain silent and the consequences of not remaining silent. The accused in cross examination admitted that he was told about the reasons for his arrest which he understood.
79. I wish to also mention that it was out of respect for the accused father who is a Priest in Islam (a Maulana) that the police officers allowed the accused to be dropped at the police station by his two brothers. This was done after the accused was arrested supports the prosecution case that there was nothing untoward done by the police officers towards the accused in front of his family.
80. In view of the above, I am satisfied beyond reasonable doubt that the accused was properly arrested by the police officers as required by law.
81. In respect of the caution interview I am unimpressed by the English translation done by PC Sanjesh. Firstly, it is unbelievable that the English translation (prosecution exhibit no. 2) if done properly and correctly should have contents more than the original Hindi version of the interview. I do not accept the officer told the truth when he said that

the translation errors were due to the use of a template which had resulted in additional contents in the translation due to copy and paste is unconvincing and irrational.

82. The officer should have cross checked the document thoroughly before dispatch to the office of the Director of Public Prosecutions. Secondly, the officer admitted in court that he had failed to give the accused his right to remain silent and the consequences of not remaining silent amongst other oversights such as after every break, before and after reconstruction the accused was not cautioned.
83. In my judgment it was incumbent upon the interviewing officer to remind the accused of the caution that was given to the accused at the commencement of the interview after every break and before the crime scene reconstruction had commenced and after the interview had recommenced.
84. Section 13 of the Constitution of Fiji is specific about the rights of arrested and detained persons in this case particular emphasis is placed in respect of the accused right to remain silent and the consequences of not remaining silent. This right accrues to a suspect which should not be fettered or interfered with by people in authority in this case the interviewing police officer.
85. The failure by the interviewing officer to remind the accused of the caution is fatal to the admissions given by the accused.
86. The caution during a caution interview must be administered properly so that the suspect understands the caution and is able to make a considered decision whether to exercise that right or not. Another point to note is that the accused was not given the opportunity to read his

interview and yet the interview mentions the accused had refused to add, alter, or change anything in his caution interview does not make sense in this context.

87. The interviewing and the charging officers are mandated under the law to administer the caution or any rights accruing to a suspect promptly and correctly in a language which is understood by the suspect and any deviation from this procedure could be fatal to the admissions obtained.
88. This court is not satisfied with the explanation given by the interviewing officer in respect of his failure to remind the accused about his caution after every break, before the crime scene reconstruction and after the interview recommenced. When the mandatory provision of the law is not complied with by the people in authority they take the risk of getting the admissions obtained by him or her to be disregarded by the court. On this basis, I do not prefer the evidence of PC Sanjesh.
89. In respect of the charge statement of the accused I do not accept that the charging officer PC Avinash had properly carried out the charging of the accused. I accept that the charging officer had not told the accused about his right to remain silent and the consequences of not remaining silent.
90. This court rejects the assertion by PC Avinash that he had made a mistake whilst writing the charge. As an experienced police officer he knew or ought to have known what he was doing when conducting the charge. This officer also did not get the accused to sign an acknowledgment after he had made a statement against his interest is fatal to the admission in the charge.

91. As a result of the above failures by the interviewing and the charging officers the accused has been prejudiced to the extent that he made admissions without being properly told of his rights as mandated by section 13 of the Constitution of Fiji.
92. Although the accused had admitted in his evidence that he was told of his right to remain silent and his right to counsel does not in any way affect my view of the admissions obtained by the police officers that they had not put to the accused his rights properly during the caution interview and the charging.

CONCLUSION

93. During the hearing it was obvious to me that the interviewing and the charging officers had carried out their role in this case in a rush to secure an admission by neglecting the rights of the accused.
94. My suspicion is confirmed by the admissions made by these officers in court during cross examination. The evidence of the interviewing and the charging officers are not plausible on the totality of the evidence before this court. Their narration about the conduct of the caution interview and the charging in accordance with the established principles of law cannot be relied upon.
95. Based on the above, this court is not satisfied beyond reasonable doubt that the answers in his caution interview were given by the accused voluntarily in accordance with section 13 of the Constitution of Fiji. The statement in the charge was also not properly obtained as well particularly in the absence of any acknowledgment by the accused in signing the admission he had supposedly made.

96. This court does not prefer the evidence of PC Sanjesh and PC Avinash as reliable and credible.
97. In view of the above, I rule that the caution interview and the charge statement of the accused dated 3rd January, 2020 are not admissible in evidence.

Sunil Sharma
Judge

At Lautoka
25 May, 2021

Solicitors

Office of the Director of Public Prosecutions for the State.
Messrs. Iqbal Khan and Associates for the Accused.