

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 171 of 2019

BETWEEN : **THE STATE**

AND : **ERONI BARI KATONISAU**

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

Dates of Hearing : 14 and 15 June, 2022

Date of Submissions : 14 July, 2022

Date of Ruling : 14 July, 2022

VOIR DIRE RULING

BACKGROUND INFORMATION

1. The accused is charged with three counts of rape contrary to section 207 (1) and 2 (a) and 2 (b) of the Crimes Act respectively with the first count being a representative count.
2. The prosecution wishes to adduce at trial the caution interview of the accused dated 19th April, 2019. The accused objects to the admissibility of this document upon the following amended grounds of voir dire filed herein:

1. *That prior to the accused's caution interview the Police officers at the Sigatoka Police Station had pressured, intimidated and threatened the accused by forcing him to "admit to the allegations and not lie about it and if he does not admit to the allegations he will get it".*
2. *That during the caution interview the accused chose to be interviewed in the Itaukei language, however, some parts of his caution interview was conducted in the English language, a language he barely understands.*
3. *That the accused's request to visit a counsel from the Legal Aid was not facilitated by caution Interviewing Officer which is a breach of section 13 (1) (c) of the Constitution of the Republic of Fiji.*
4. *The accused's request to visit a Doctor due to illness during the caution interview was not facilitated by the caution Interviewing Officer which is a breach of section 13 (1) (i) of the Constitution of the Republic of Fiji.*
5. *That no witnessing officer was present during the caution Interview resulting in the caution interview not being conducted in a fair manner.*
6. *That the accused was not given proper caution during the interview, the accused was not informed and explained of his right to remain silent nor was he informed and explained that whatever he stated would be used in a court of law.*
7. *That the accused maintained that he did not commit the offence during the caution interview, he was locked in the cell and an Itaukei police officer further threatened him in Itaukei language saying "kevaka o na sega ni vakadindinataka na veika o beitaki kina o na sega ni bula" in English meaning "if you do not admit to the allegations you will not live."*

8. *The interviewing officer had acted unfairly when he told the accused to sign the caution interview without having to read it first.*
 9. *That the accused's confessions were involuntarily obtained through pressure, threats, intimidation and unfairness by the Itaukei police officers at the Sigatoka Police Station.*
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 of the accused was 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 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 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. 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 three witnesses to prove that the accused had given his answers in the caution interview voluntarily on his freewill without any pressure, unfairness or threat by police officers.
9. The first witness DC 5141 Benedito Balecakau informed the court that on 19th April, 2019 he had caution interviewed the accused at the crime office of the Sigatoka Police Station. The interview was conducted in the Itaukei

language as preferred by the accused on a computer. WPC 5277 Lavenia was the witnessing officer who was present throughout the interview.

10. Every page of the interview was printed and signed, the witness had also prepared an English translation. The caution interview of the accused was conducted over three days, he was cautioned after the allegations were put to him on each day. The accused had understood the allegations and the caution put to him and had signed accordingly. The accused was also given his right to remain silent and the right to seek legal aid lawyer or to see his relatives.
11. The accused had wanted to seek legal aid assistance but when asked "*would you like to consult your lawyer*" the accused response was "later". During the interview the accused was given four breaks, for the first day the interview was suspended at 18:52 hours for the accused to have his rest.
12. The next break during the interview on day two was for the accused to have some refreshments after Q.84. After the break the accused was cautioned again. The next break was after the interview was suspended for scene reconstruction after Q.118. However, they were unable to go due to bad weather. The interview was then suspended for the day.
13. When the interview recommenced on day three the accused was told of the allegation and cautioned the last break was after Q.134 so that the interview could be read back. The witness had read the whole interview to the accused who did not wish to alter or change anything.
14. The witness denied there was any pressure, intimidation or threat on the accused prior to the caution interview. Also the accused had not complained of anything before the interview commenced on the 19th.

Furthermore, the witness also stated that when he was conducting the interview in the Itaukei language he had written and explained everything in Itaukei language and it was only during the translation that he had used English language.

15. The witness could not recall whether he had taken the accused to the hospital or not, however, he stated that in answer to Q.4 the accused had wanted to visit the hospital.
16. Moreover, the witness on the first day of the interview at Q.10, then on the 20th second day of the interview at Q.37 and finally on the 21st third day of the interview at Q.123 had asked the accused if he was fit to be interviewed and the accused had said yes.
17. The witness denied the allegations raised by the accused in his amended grounds of voir dire. He maintained that there was no force or threat or inducement to the accused during the caution interview.
18. The accused did not make any complaints about anything to the witness. The witness had done the translation of the interview from Itaukei language to English language. The caution interview of the accused in the Itaukei language was marked and tendered as prosecution exhibit 1A and the English translation as prosecution exhibit 1B. The witness identified the accused in court.
19. In cross examination, the witness agreed that the caution interview was conducted in the Itaukei language, however, at Q. 10 and 37 the following is recorded in the English language: *“Are you fit to be interviewed?”*
20. The witness agreed that the above was not in Itaukei language, but in the English language, he also agreed that he breached the Constitutional

Right of the accused to be questioned in his preferred Itaukei language. At Q.3 the witness had questioned the accused in the Itaukei language whether he was suffering from any illness and the response received was yes.

21. When it was suggested that the witness had not allowed or taken the accused to the hospital the witness said *“I cannot recall did I take him to the hospital or not”*. The witness also agreed that the above sentence in English was not understood or chosen by the accused and he had breached the accused Constitutional Right to be interviewed in the language of his choice.
22. The witness agreed it was his duty to be aware of anything that happened in this case since he was the investigating as well as the interviewing officer. At questions 12 and 13 the witness had given the accused the right to legal aid counsel as follows:

“Q.12 ... if you cannot afford one the state will provide you one through the Legal Aid Commission which is free of charge. Do you understand these rights?”

Ans: Yes.

Q. 13. Do you wish to exercise your right above?

Ans: Yes, I wanted to seek legal aid assistance.”

23. When questioned further, the witness stated that it was a weekend and the office of the Legal Aid Commission was closed so he asked at Q. 14 whether the accused wanted to consult a legal aid lawyer. The response from the accused was later. A perusal of the Itaukei version indicates a

different meaning to what has been mentioned in the translation. The correct translation in the English Language should have been:

Q. 14. Would you like to consult your lawyer?

Ans. Later.

24. The witness agreed that the time mentioned in the caution interview was incorrect. He denied that during the commencement of the caution interview the accused was threatened by an Itaukei police officer that he should admit to the allegation if not he will not live. The witness maintained that the witnessing officer was present throughout the interview.
25. The witness stated that the accused was given his right to remain silent, he was not threatened, intimidated and pressured. At the conclusion the interview was read to the accused.
26. In re-examination, the witness stated that although it was written in English "*are you fit to be interviewed*" he had explained the meaning of this sentence to the accused in the Itaukei language. The witness also explained that he did not contact the Legal Aid Commission because it was a weekend and also the accused had said he wished to exercise his right to counsel later. In respect of the fact that the accused was not taken to the hospital the witness stated that he is unable to recall whether the accused was taken to the hospital or not.
27. The second witness WPC Lavenia Nakala informed the court that she was the witnessing officer during the caution interview of the accused. The interview was conducted in the crime office of the Sigatoka Police Station

in the Itaukei language. The interview was conducted by DC 5541 Benedito Balecakau.

28. The role of the witness was to see that the interview was conducted fairly without any threat or assault on the accused person. According to the witness the accused did not complain that prior to the caution interview he was pressured, intimidated and threatened by police officers to admit to the allegations. The witness also stated that some parts of the caution interview were conducted in the English language but the explanation was done in the Itaukei language particularly questions 10, 37 and 123.
29. The witness stated that the accused was cautioned properly by the interviewing officer, however, she was unable to recall whether the accused was taken for a medical examination. The witness maintained she was present throughout the interview and in her presence the accused was informed of his right to remain silent.
30. The witness also stated that the accused did not complain that he had been threatened by an Itaukei police officer in the police cell after the interview had been suspended for the day. After the interview was suspended on the last day the interviewing officer had read the interview to the accused in the Itaukei language. According to the witness the accused had answered all the questions on his freewill. During the interview there were no other police officers present it was only the interviewing officer, witnessing officer and the accused.
31. In cross examination, the witness stated that she was present during the caution interview but was not able to recall whether the accused was taken for medical examination or not. She maintained that the accused was properly cautioned during the interview which was read back to the

accused. There was no force, intimidation or threat on the accused during the interview and she was present throughout.

32. The final witness DC 3980 Peni Vunisa informed the court that he had charged the accused on 21st April, 2019. Before, during and after charging the accused did not complain about anything. According to the witness the accused appeared healthy and he responded well to the questions asked.
33. In cross examination the witness stated that he did not question the accused as to his health or condition. He further agreed that he was not able to confirm whether the accused was in a healthy state or sickly during the charging.
34. This was the prosecution case.

DEFENCE CASE

35. The defence called one witness.
36. The accused informed the court that on 19th April 2019, he was at the Sigatoka Police Station where the police officers spoke rudely and intimidated him at around midday. The police officers said "*if you don't admit to the allegation you will face problems*" this was before he was caution interviewed. According to the accused, he was frightened after the police officers threatened him, after this the accused was caution interviewed. During the interview the interviewing officer was seated with him and another officer was seated at the other table.
37. The accused chose to be interviewed in the Itaukei language so that he would know what he was asked. He is not familiar with the English

language and during the interview he had opted for legal aid assistance. He was not taken to see a Legal Aid counsel but he was advised by a legal aid counsel.

38. Furthermore, the interviewing officer did not allow him to see a doctor despite his request, he was sick with joint pains and headache and felt like fainting.
39. When the accused was locked in the cell another police officer came and spoke harshly saying that if he does not admit to the allegation he will be in trouble. This made the accused really frightened. After the interview was concluded the interview was not read to him. According to the accused there was no problem with the interviewing officer but he was not given his right to remain silent.
40. In cross examination, the accused agreed that he is educated up to class 4 and he was not taught English, however he has some level of understanding of English. When the Itaukei version of the caution interview was shown to the accused he agreed he had signed after he was told to do so. Although he was told of the allegation he was never cautioned, however, he was given the right to have his spouse or social worker or legal aid to assist him and that he had chosen for Legal Aid assistance. The accused denied that he had mentioned that he would seek legal aid assistance later.
41. The accused stated that although he was threatened by police officers to admit to the allegations he did not complain to DC Benedito because he did not know this could be done. The accused upon further questioning stated that the only reason why he signed the caution interview was because he was really frightened, so frightened that he did not care about other things when he was told to sign he did so.

42. The accused agreed the answers he had given to DC Benedito during the caution interview were given voluntarily by him. However, he denied when suggested that this was the reason why he had said in his evidence that he was treated properly by Benedito. According to the accused Lavenia was not present during the interview and DC Benedito did not properly explain everything to him. Moreover, he did not understand what was said to him by the interviewing officer, although it was in the Itaukei language. The accused could not recall whether the interview was read back to him or not.
43. The accused did not complain to the charging officer or to the Resident Magistrate about the threats made to him, reason being he did not know it was supposed to be done that way. The accused agreed on the first day of the interview he had asked for medical assistance because he was feeling sick. On the second day he was asked if he had any sickness to which he had replied yes and told the interviewing officer about his sickness.
44. The accused agreed he was okay to continue with the caution interview on the second day but the sickness did not go away. On the third day he was okay he had felt his sickness only on the first two days. In the Magistrate's Court during his first appearance the accused did not seek an order to see a doctor because he did not know he could do this.
45. In re-examination, the accused clarified he only understands very little English. In respect of his sickness the accused stated that he still carries the sickness with him. He could not remember if he was asked on the third day of the caution interview if he was okay to continue with the interview. The accused stated he had agreed with the state counsel that he had voluntarily given the answers in his caution interview because he was frightened at that time.

46. This was the defence case.
47. After the hearing this court ordered both counsel to file their written submissions for which this court is grateful.

ANALYSIS

48. The prosecution wishes to rely on the admissions obtained by the police during the caution interview of the accused at trial. On the other hand, the accused is objecting to the tender of this document on the grounds that the admissions were obtained as a result of unfairness, force, pressure, intimidation and in breach of his Constitutional Right to remain silent.
49. There is no dispute that the accused was caution interviewed at the crime office of the Sigatoka Police Station over three days from 19th April, 2019 to 21st April, 2019.
50. The prosecution states that all the police officers who gave evidence told the court that the accused was treated fairly before, during and after the interview. At all times, the accused was fit and healthy to participate in the caution interview. Before the interview began the accused was asked in the Itaukei language whether he was fit to be interviewed and the accused replied he was.
51. The accused was asked whether he was fit to be interviewed on each day of the interview at questions 10, 37 and 123. There was no pressure, intimidation, unfairness or assault on the accused including any breach of his Constitutional Rights before, during and after the caution interview. All the answers given by the accused were voluntarily given by him. When

the accused was produced in the Magistrate's Court he did not raise any complaints or seek an order to be taken to the hospital.

52. There was no force or pressure on the accused to answer the questions during the caution interview. He even told the court that the interviewing officer had properly conducted himself during the interview. The accused was treated well before, during and after the caution interview.
53. The prosecution further states that the allegations raised by the accused in his amended voir dire grounds that he was threatened by Itaukei police officers before and during the interview does not make sense. If this was the truth the accused would have complained to the interviewing or the witnessing officer or to the Resident Magistrate.
54. Both the interviewing and the witnessing officers maintained that they were the only police officers who were present during the interview and no other police officer came into the crime office. Moreover, the accused has not raised any complaint against the charging officer yet he did not tell this officer about any threats made to him by any police officer at the police station or during the caution interview.
55. The accused was given all his rights which he understood, acknowledged and signed in his caution interview. The accused did not complain of any wrong doing by any of the police officers before, during and after the interview.
56. The prosecution witnesses have denied any wrong doing, no one had forced or threatened the accused. The accused was well looked after and given timely breaks and was spoken to in his preferred Itaukei language which the accused understood.

57. On the other hand, the accused informed the court that the threat by the police officers at Sigatoka Police Station before the interview made him really frightened that he did not care about anything but proceeded to admit to the allegations. The accused also states that he had preferred Itaukei language during the caution interview but the interviewing officer at Q's. 10, 37 and 123 had questioned him in English. The accused did not understand these questions but he just said yes. The accused is only educated up to class 4 and he does not understand English that well.
58. Furthermore, the accused on the first day of the interview had specifically told the interviewing officer that he was not feeling well hence he wanted to see a doctor but was not taken to the hospital. The defence submits that it was the right of the accused to be taken to the hospital but was not taken is a serious breach of his right under section 13 (1) (j) of the Constitution. The accused was also not given his right to remain silent during the interview on all the days.
59. The interviewing officer had also agreed that the accused Constitutional Right in respect of not being taken to the hospital had been breached and that he cannot recall whether the accused was taken to the hospital or not.
60. The reason why the accused did not complain to the interviewing or the witnessing or the charging officer or to the Resident Magistrate is because he did not know he could lodge his complaint about the threats made to him by police officers.
61. The defence is asking this court not to believe the police officers who gave evidence in court.

DETERMINATION

62. 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 before the interview commenced. The accused was given his right to remain silent and in his own evidence the accused accepted that he had consulted a legal aid counsel but it is not known exactly when since the accused did not elaborate on this.
63. I also accept the evidence of the accused that the interviewing officer had treated the accused properly during the interview and that WPC Lavenia was present throughout the interview.
64. In respect of the caution interviews exhibited in court, I am unimpressed by the English translation done by the interviewing officer. It is important for counsel when documents are in the vernacular to thoroughly check the translations done with the original version for accuracy. None of the counsel had compared the original Itaukei version with the English version in this case. There are crucial misgivings or shortfalls in the English translation.
65. I have endeavoured to mention the important ones in this ruling in respect of the offences alleged. The following are mentioned for sake of completeness:

Itaukei Version

66. Q. 58. *Na cava ko a cakava vua?*

English translation should be: *What did you do to her?*

67. Ans. *I climbed on her and not I have sexual intercourse with her.*

Itaukei Version

68. Q. 64. *Na cava iko qai cakava e na gauna iko kauti Leba mai kina?*

English translation should be: *What did you do to Leba when you brought her?*

Ans. *I told Leba for us to climb each other and not I told Leba for us to have sexual intercourse with each other.*

Itaukei Version

69. Q. 65 *Cava qai yaco tarava?*

English translation should be: *What happened next?*

Ans. *She did not say anything so I climbed on her and not ...then I have sexual intercourse with her.*

Itaukei Version

70. Q. 72 *Na cava ko a qai cakava e na gauna iko davori koya kina?*

English translation of the answer should be: *What did you do when she laid down?*

Ans. *I then climbed on her and not I have sexual intercourse with her.*

Itaukei Version

71. Q. 74 *Drau a cakava tiko e vei na cakacaka qo?*

English translation of the question and answer should be:

Q. 74. *Where were you two doing such acts? Not which place did you both having sex into.*

Ans. Inside my house not inside the house.

Itaukei Version

72. *Q. 76 Na cava qai yaco e na gauna drau a veikaba tiko kina?*

English translation of the question and answer should be:

Q. 76 What happened when you were climbing each other and not what else happened while having sexual intercourse.

Ans. I climbed on her until I ejaculated and not I just have sex with her until I ejaculate.

73. From the above, it is obvious to me that the interviewing officer did not do a correct translation of the caution interview from Itaukei language to English language in respect of the answers given by the accused. There are also some crucial shortfalls in the questions asked in the Itaukei language and the English translation namely Q's. 68, 70, 75, 76, 78, 81, 82, 95, 97, 98, 101, 113, 114, 118.
74. Furthermore, the accused was not taken to the hospital despite his request to see a doctor at the start of the interview at question 4 is concerning. The accused had told the interviewing officer that he wanted to go to the hospital for his body pains and headache. I accept the accused evidence that he was suffering from a sickness. Although on the third day the accused was okay in my view needs to be balanced with his right to receive medical attention at the first request. I also do not accept the evidence of the interviewing officer that although he had written in English whether the accused was fit to be interviewed he had explained this in Itaukei as unbelievable.

75. DC Balecakau in his evidence had very confidently said that he did not use any English words during the caution interview, however, at questions 10, 37 and 123 he had asked the accused whether he was fit to be interviewed which is written in English. After much consideration, I do not accept the evidence of the interviewing and the witnessing officers that DC Balecakau had explained the English sentence in Itaukei.
76. Furthermore, section 13 of the Constitution of Fiji is specific about the rights of arrested and detained persons. In this case, the accused wanted to visit the hospital and there is no reason given by the interviewing officer why this was not done. The interviewing officer was not of any assistance when he told the court that he could not recall whether the accused was taken to the hospital or not. The interview does not show that the accused was taken to the hospital at all. The right to be taken to the hospital accrues to a suspect in custody of the police should not be fettered or interfered with by people in authority here it was the interviewing officer.
77. The failure by the interviewing officer to take the accused to the hospital is fatal to the admissions given by the accused. I accept that the accused was sick and that he should have been accorded medical assistance. The final prosecution witness DC 3980 Peni Vunisa was honest when he told the court that he cannot confirm whether the accused was sick or not at the time of the charging. Section 13 (1) (j) of the Constitution states:

“Rights of arrested and detained persons

13.—(1) Every person who is arrested or detained has the right—

...

(j) to conditions of detention that are consistent with human dignity, including at least the opportunity to exercise regularly and the provision, at State expense, of adequate accommodation, nutrition, and medical treatment;..

78. It is also noted that on the second and the third day of the interview the interviewing officer had not asked the accused whether he was suffering from any sickness or not. This in my view was again a fatal omission when the interviewing officer knew that the accused at the commencement of the interview on day one had wanted to visit the hospital.
79. The interviewing officer in this case was mandated under the law to take into account the welfare of the accused he was interviewing and any deviation from this procedure is fatal to the admissions obtained.
80. This court is not satisfied with the explanation given by the interviewing officer that he had at questions 10, 37 and 123 asked the accused if he was fit to be interviewed in the Itaukei language when the original exhibit 1A states the same is written in English. For the reasons given above, I do not prefer the evidence of DC Balecakau and WPC Nakala.
81. As a result of the above failures by the interviewing officer the accused was prejudiced. Furthermore, the accused being an unsophisticated farmer and villager has also been unfairly treated when he was not taken to the hospital for medical assistance by the interviewing officer.

CONCLUSION

82. 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. This court does not accept the evidence of DC Balecakau and WPC Nakala that the accused was fit for caution interview.
83. In view of the above, I rule that the caution interview of the accused dated 19th April, 2019 is not admissible in evidence.

84. Before I leave, it is noted that the accused has not raised in his amended grounds of voir dire that he was kept in custody for over 48 hours from the time of his arrest till he was produced in court on 22nd April, 2019. Accordingly, I have not directed my mind to this issue in this ruling.



Sunil Sharma
Sunil Sharma
Judge

At Lautoka

14th July, 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.