

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 052 OF 2020

BETWEEN : STATE

AND : DINESH KUMAR

Counsel : Ms A Vavadakua for the State
Mr K Prasad for the Accused

Date of Hearing : 31 October, 1 November – 3rd November 2022

Date of Ruling : 3 November 2022

RULING

- [1] On 22 January 2020, a team of three police officers arrested the accused from his home at Muaniweni on allegation of rape against his juvenile granddaughter. He was locked up in a cell overnight at the Nausori Police Station. The following day he was interviewed under caution by police and charged with two counts of rape.
- [2] The accused's record of interview (MFI 1) and charge statement (MFI 2) contains incriminating admissions, which the prosecution seeks to admit in evidence.
- [3] The accused objects to the admissibility on the grounds that he was compelled to make the admissions by police using force and fear following his arrest. The accused further submits that his statements should be excluded on a general ground of unfairness arising from the investigating officer also being the interviewing officer.
- [4] Section 13 (1) (d) of the Constitution states:

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 the person.

[5] Further, section 14 (2) (k) of the Constitution provides:

Every person charged with an offence has the right not to have unlawfully obtained evidence adduced against him or her unless the interests of justice require it to be admitted.

[6] The common law test of admissibility was set out in the speech of Lord Sumner in *Ibrahim v R* [1914] AC 599 when he said:

It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

[7] A more broader principle was adopted by the Court of Appeal in *Ganga Ram and Shiu Charan v R* FJCA CA 46 of 1983:

Such a test does not preclude a Court from looking however at the general fairness or oppression in the circumstances of production of the evidence in question. Even if found to be voluntary, a statement can still be excluded if it is thought that the voluntary statement was obtained unfairly or in breach of a suspect's rights. That oppression has been described by the House of Lords in *Priestly* (1965) Cr App R, 1 as "something which tends to sap, and has sapped, that freewill which must exist before a confession is voluntary.

[8] In *State v Vasuitoga & Qurai* Criminal Case No. HAC 008/06S (12 February 2007), Shameem J said:

When a suspect gives an inculpatory statement to a person in authority, it must be shown by the prosecution to have been obtained voluntarily and without unfairness or oppression. Further the prosecution must prove that the confession was obtained in accordance with the Constitution, and if there were breaches of the rights of suspects under the Constitution, that the suspect was not thereby prejudiced. The prosecution must prove all these issues to the satisfaction of the court, beyond reasonable doubt.

The test for voluntariness is whether the suspect gave his statement freely, without oppression or hope of advantage, or fear of disadvantage. The purpose of the rule of admissibility and of the suspect's rights under the Constitution is to remove the inherent imbalance of power which exists when a suspect is questioned in custody, whilst preserving the right of the police to question anyone in the course of proper investigations and in the public interest. In the determining of issues relevant to the admissibility of confession, these are the principles to be considered, and balanced.

- [9] A trial within trial was held to determine the admissibility of the accused's admissions. The prosecution led evidence from six witnesses (police officers) and the defence led evidence from three witnesses (accused and his two sons).
- [10] It is not in dispute that the accused was arrested from his home in the afternoon of 22 January 2020 (Wednesday) by Inspector Arvind Singh, DC Suraj Raj and WDC Ateshni Ram.
- [11] When the officers arrived at the scene, they parked their vehicle at the roadside and Inspector Singh and DC Raj walked to the accused's home which was about 20 meters away. WDC Ram remained at the vehicle.
- [12] When Inspector Singh and DC Raj arrived at the accused's home, they saw two men drinking kava on the verandah. When the accused identified himself,

Inspector Singh informed him that he was required to accompany them to a police station for questioning on an allegation of rape. The accused was given time to change his clothes and then accompany the officers. The accused was escorted to the police vehicle and placed at the back passenger seat.

[13] DC Raj drove the police vehicle while Inspector Singh sat in the front passenger seat. WDC Ram sat with the accused in the back seat. From Muaniweni they drove directly to Nausori Police Station where the accused was handed over to Corporal Irshad Ali.

[14] The accused was searched before being placed in the cell under the supervision of Cpl Ali. Cpl Ali's evidence is that the accused did not make any complaints of police assault when he was handed over to him.

[15] The accused was kept overnight in the cell and the following morning at about 10.15am PC Leca Yabaki escorted him from the cell to the crime office for a caution interview. PC Yabaki's evidence is that the accused did not appear to be distressed when he escorted him to the crime office for an interview.

[16] All three police officers denied assaulting the accused at any time after his arrest and while escorting him to the station in the police vehicle.

[17] On 23 January 2020, the accused was interviewed under caution by WDC Ram. The accused was advised of his constitutional rights and in particular his right to remain silent. The interview was witnessed by Inspector Singh who was WDC Ram's superior.

[18] The interview commenced at 10.20am and concluded at 2.55pm on the same day. The Record of Interview (MFI 1) was signed by the accused, WDC Ram and Inspector Singh. In his interview, the accused admitted to penile penetration but denied digital penetration using finger.

- [19] After the conclusion of the caution interview, Sgt Faiyaz Ali formally charged the accused with two counts of rape. Sgt Faiyaz also recorded a statement from the accused apologizing to the complainant and to his son (complainant's stepfather) for what he had done to the complainant (MFI 2). The recording of the charge statement commenced at 3pm and was concluded at 3.35 pm on the same day (23/01/20).
- [20] The defence version is that when the two male police officers approached the accused they did not inform him of the reasons for his arrest. The accused's evidence is that the officers told him to accompany them to the police station and when he was being escorted from his house to the police vehicle parked at the roadside, the officers punched his abdomen and kicked him in the presence of his family members.
- [21] While he was being driven to the station the female police officer sitting next to him slapped him on the back of his head several times and asked him what he had done. When the accused responded that he had not done anything, the driver stopped the vehicle, came out and punched his abdomen several times while he was sitting at the back seat. The accused said that he started having chest pain and was afraid. He started telling them whatever they were asking him.
- [22] When he arrived at the station he was locked up in a cell. While in the cell he complained to an Itaukei police officer about body pain but the officer told him to inform the intervening officer in the morning.
- [23] During the caution interview, he gave answers out of fear because of the assault by the police officers following his arrest. When he appeared before the magistrate after being charged he did not complain about the assault because he was afraid and confused.
- [24] His two son's evidence is that they witnessed the two male officers punching their father while they escorted him to the police vehicle from their home. Under cross

examination they accepted that they did not file any formal complaint against the police officers for assaulting their father following his arrest.

- [25] There are two versions before the court. Although the accused chose to give evidence and call evidence from two witnesses, he does not carry any burden to prove anything. If the defence version is true then the accused was assaulted and he was compelled to make admissions using force and threats. It would not be voluntary admissions. But even if the defence version is rejected as not true, that does not mean that the accused freely and voluntarily made the admissions. The burden is on the prosecution to prove beyond reasonable doubt that the accused made admissions freely, without oppression or hope of advantage, or fear of disadvantage.
- [26] The accused's account is that he complained to a police officer about being in pain as a result of the assault on him but nothing was done about his complaint. He said that he was afraid and confused. He said that he told the police whatever they were asking him.
- [27] In his caution interview, the accused only admitted to sexual intercourse. He denied penetrating the complainant's vagina with his finger. In his charge statement he offered an apology to the complainant and her father. A partial admission and an apology is not consistent with the account of the accused that he incriminated himself out of fear of police brutality. I believe the account given by the police officers that they did not assault the accused. I feel sure that the accused's admissions were freely and voluntarily made.
- [28] The second ground for objection based on unfairness to exclude the caution interview is also rejected. The law does not prohibit an investigating officer from taking a statement from a suspect under caution. Rather, it is the responsibility of the investigating officer to take a suspect's statement as part of police investigation (Duties of an investigating officer, FPM No. 293, p 714)

[29] When the accused was arrested on 22 January 2020 he was a suspect. He remained a suspect until he was formally charged with rape and presented in court. That is when he became an accused, and not during his caution interview. There was full compliance by police of their Standing Orders regarding taking of a statement from a suspect.

[30] Both the caution interview (MFI 1) and charge statement (MFI 1) are admitted in evidence.



A handwritten signature in black ink, appearing to read "D. Goundar", is written above a horizontal dotted line.

Hon. Mr Justice Daniel Goundar

Solicitors:

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