

**IN THE HIGH COURT OF FIJI**

**CRIMINAL JURISDICTION**

**AT LAUTOKA**

**CRIMINAL CASE: HAC 43 OF 2014**

**BETWEEN** : STATE

**AND** : 1. IOWANE APISAI DRAIVA  
2. TREVOR MERVYN TAMBLYN

**Counsel** : Mr. A. Singh for Prosecution  
Ms. Malimali B for 2<sup>nd</sup> Accused  
1<sup>st</sup> Accused in person

**Date of Hearing** : 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 9<sup>th</sup> February 2015

**Date of Ruling** : 26<sup>th</sup> of February 2015,

**RULING ON VOIR DIRE**

1. The first and the second accused persons informed the court that they wish to challenge the admissibility of their respective caution interviews as evidence at the trial. Both of them tendered their grounds for voir dire in writing.
2. The first accused persons grounds for voir dire are that;
  - i. *Rights of arrested and detained persons, should be brought before a court not later than 48 hours after the time of arrest. In this case, the first accused was*

*arrested on the 2<sup>nd</sup> of April and spend 3 nights in the cell before taken to court on the 5<sup>th</sup> April. I believe is more than 48 hours time required.*

- ii. During the arrest, the border police took his mobile phones and till today they have not returned them back,*
- iii. On the 3<sup>rd</sup> of April had his breakfast around 11 a.m., first that it was too late and second it was too cold.*

3. The voir dire grounds of the second accused person are that;

- i. The Statements were obtained in Circumstances that were unfair.*
- ii. The Statements were obtained in Circumstances that were oppressive.*
- iii. The Accused was threatened by Police Officers.*

*These Grounds of Objections are based on:*

- i. The fact that the Police did not take Mr. Tamblyn for a Medical Check up prior to, during and after the interview given the various medical conditions that he has and of which the Police were informed and given his advanced age.*
- ii. The fact that the questioning took place over a period of 3 days in contradiction to the dates and times recorded in the statements.*
- iii. Some of the answers given by Mr. Tamblyn are not recorded in the typed interview that we were given.*
- iv. On the final day of the interview, when Mr. Tamblyn wanted to read his Statement, the Police hurried him up and told him to read it quickly and sign it. He was not given ample time to read his Statement*

4. The voir dire hearing was set down on 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, and 9<sup>th</sup> of February 2015. The prosecution called nineteen witnesses during the course of the hearing. The first accused and the second accused gave evidence on oaths. At the conclusion of the hearing all three parties tendered their respective written submissions. Having carefully considered the grounds for voir dire, the evidence presented by the prosecution and the defence, and the respective written submissions of the parties, I now proceed to pronounce my ruling as follows.
5. I first draw my attention to discuss the applicable law on the admissibility of caution interview during the hearing.
6. The Privy Council in WONG KAM-MING v THE QUEEN (1982) A.C. 247 at 261 has discussed the basic control over admissibility of statement, where it was held that *"The basic control over admissibility of statement are found in the evidential rule that an admission must be voluntary i.e. not obtained through violence, fear or prejudice, oppression, threats and promises or other improper inducements. See decision of LORD SUMNER in IBRAHIM v. R (1914-15) AER 874 at 877. It is to the evidence that the court must turn for an answer to the voluntariness of the confessions."*
7. The Fiji Court of Appeal in Shiu Charan v R (F.C.A. Crim. App. 46/83) has discussed the applicable test to determine the admissibility of caution interview of the accused person at the trial, where it was held that *"First, it must be established affirmatively by the Crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force, threats or prejudice or inducement by offer of some advantage - what has been picturesquely*

*described as "the flattery of hope or the tyranny of fear." Ibrahim v R (1914) AC 599. DPP v Pin Lin (1976) AC 574.*

*Secondly even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which the police behaved, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or by unfair treatment. Regina v Sang (1980) AC 402, 436 @ c - E." (State v Rokotuiwai - [1996] FJHC 159; Hac0009r.95s (21 November 1996).*

8. It appears that the test enunciated in Shiu Charan (supra) constitutes two components. The first is the test of voluntariness. The court is required to satisfy that the statement in the caution interview has been taken without any form of force, threats or prejudice or inducement by offer of any advantage. The second component is that, even though the court is satisfied that the statement was given voluntarily without any form of threat, force, intimidation or inducement, it is still required to satisfy further that there were no any general grounds of unfairness existed before or during the recording of the caution interview.
  
9. Generally, people find that the environment in a police station is more authoritative. In deed such an authoritative environment is required to obtain the respect from the public and keep the law and order of the society. However, sometimes this could create an unequal relationship between the police officers and the people who have been brought into the police station for questioning for alleged crimes. Wherefore, a statement, specially a self-incriminating statement, given to the police by a suspect in such an unequal situation is undoubtedly required an utmost judicial consideration before it use as evidence against the same person. Justice Nawana in State v Malelei

(Criminal Case No HAC 147/ 2007) expressing his view on the admission of caution interview has observed that ; *“A confession, as observed at the outset of this ruling, is an objectionable item of evidence in view of its inherent infirmities. Its admission in evidence should, therefore, be scrupulously examined by court and apply the widest possible test that favours an accused person.”*

10. Having understood the asymmetric relationship between the Police and the person under their detention, section 13 (1) (d) of the constitution of the Republic of Fiji has stated that no arrested or detained person should be compelled to make any confession or admission that could be used in evidence against that person.
11. Furthermore, section 13 (1) (f) of the Constitution of the Republic of Fiji has identified that all detained and arrested persons has a right to be treated with human dignity, where it states that;  
  
*“ to condition 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”.*
12. It appears that the rights given to the arrested and detained person under section 13 (1) have certainly enhanced and broaden the scope of the test enunciated in Shiu Charan (supra).
13. However, it is the responsibility of the court to apply and employ this protective regime while protecting and preserving the rights of the Police to question anyone in the course of proper investigation and in the public

interest. (ShameemJ in State v Vasuitoga & Quari, FHC Cr Case No HAC 08 of 2006).

14. It is the burden on the prosecution to prove beyond reasonable doubt that the statement made in the caution interview was made voluntarily and without the existence of any form of general unfairness (*State v Rokotuiwai - [1996] FJHC 159; Hac0009r.95s (21 November 1996)*). This burden on the prosecution remains throughout the hearing.
15. Having discussed the laws pertaining to the admissibility of caution interview and the standard of proof, I now draw my attention to this instant case.
16. It appears that the grounds of voir dire of the both accused persons are founded on the ground of unfair treatment prior to and during the recording of their respective caution interviews.
17. The first accused person's grounds for unfair treatment are founded on his allegations that he was served his breakfast late on 2<sup>nd</sup> of April 2014 and kept in detention more than 48 hours before he was produced in the Magistrate court.
18. The second accused person alleged that he was given poor accommodation and treated inhumanly without giving him basic facilities such as shower, proper cloths to change, and proper sleeping facilities. The condition of their detention is an important factor to determine the issue of fair treatment. The first accused was interviewed after nearly seventeen hours of his arrest and it lasted for nearly ten hours over a period of two days. In respect of the second accused person, his caution interview lasted for nearly 20 hours over a period of three days. Both accused persons were detained during the record of their

respective caution interviews. Accordingly, it is the onus of the prosecution to prove beyond reasonable doubt not only that the accused persons gave their respective caution interview voluntarily, but also they were fairly treated.

19. The second accused person alleged that he was not taken for medical check-up during the record of his caution interview. However, prosecution witnesses who interacted with the second accused person during the record of his caution interview affirmatively stated that the accused never requested or complained about that he wanted to have a medical check-up. The investigating officer and the interviewing officer specifically stated that there is no such requirement to take elderly suspects for medical check-up unless they made a request or a need arises. The second accused also in his evidence, admitted that he did not request for a medical check-up as he felt that his request would not be given a consideration.
20. Having considered the evidence presented during the hearing, I now draw my attention to the issue of treatment and the accommodation provided to the accused persons during their record of caution interviews.
21. The second accused alleged that he was not given any opportunity to have his shower and change his cloths during the entire period of the recording of his caution interview at the Border Police Station. He stated in his evidence that he finally felt rotten with filth and frustrated. The prosecution witnesses including the investigation officer denied this allegation and affirmatively stated that the second accused was taken for his shower at the domestic departure lounge at the Nadi International Airport. It was admitted by the prosecution witnesses that the accused was required to go out from the Boarder Police compound and walked in to the domestic departure lounge if he had taken for shower. Surprisingly, this movement of the accused person

has not recorded in the station diary or cell block diary; though the prosecution witnesses admitted it is a requirement to record every movement of the accused in detention. Apart from that, it is certain that the accused would not allow walking out from the border police station and going into the domestic departure lounge of the Nadi Airport without any escorting officer. Surprisingly, there is no such escorting officer called to give evidence during the hearing. In the absence of such evidence, it appears that there is a reasonable doubt that whether the second accused person was given an opportunity to have his shower during the period of his detention at the Border Police station.

22. The arresting officer and the investigating officer specifically stated that the second accused person had his cloths in a bag which he kept inside the crimes office of the Border Police station. However, again, there is no any record of such a bag either in the station diary or cell block diary. In the absence of such affirmative evidence, it appears that there is a reasonable doubt that the second accused person was not given his cloths to change during the time of his detention.
23. The second accused further complained about the poor sleeping facilities given to him during the detention. The accused alleged that the first night he had to spend in the small communication room inside the Border Police station. He had to sleep on a chair and coffee table. The Prosecution denied about the communication room, but admitted that he spent his first night on a table in the command room of the border police station. Prosecution admitted that sleeping on a table inside a command room with air condition was more luxurious than in the police cell. However, there is no proper record in the station diary that the accused person slept inside the command room. The second accused informed the interviewing officer that he had no proper sleep



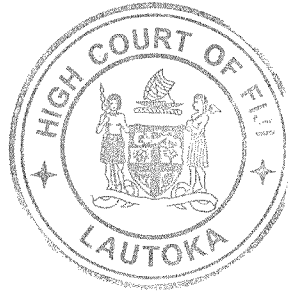
before the commencement of his caution interview on the next morning. The interviewing officer found that such allegation of lack of proper sleep as a usual mediocre complains of most of the suspects in police custody. Again, it appears that there is a reasonable doubt that whether the accused person actually slept inside the command room or on a chair and coffee table in a small communication room.

24. Moreover, the second accused alleged that the mattress and the blanket given to him at the Namaka cell block were dirty and rotten with vomit and urine. The prosecution stated that they do not provide any mattress and blankets but only a concrete bed and tiles in the cell.
25. In respect of the allegation of the first accused person, the prosecution witnesses stated that the accused was detained in Sabeto Police Station in the night of 1<sup>st</sup> of April 2014 and had to bring back to Border Police station on 2<sup>nd</sup> of April. That was the reason for his late breakfast. Moreover due to the complex nature of the charge, the police wanted more time to conclude the investigation and had to detain the accused persons beyond 48 hours. Accordingly, I am satisfied that the first accused person was not treated unfairly during his period of detention.
26. I do not find any unusualness with the protracted nature of the two caution interviews. The complex nature of the charge sometimes needs such long hours of interview. However, it is the responsibility of the Police to provide an environment of fairness during the record of caution interview.
27. Another allegation of the second accused is that he was not properly given an opportunity to exercise his right to counsel or contact Australian high commission prior to the commencement of his caution interview. The caution

interview of the second accused had started at 8.30 p.m on the 1<sup>st</sup> of April 2014 that was soon after he was arrested from the Traveller's lodge. The accused in his evidence stated that he asked the interviewing officer whether an officer from Australian High Commission or a lawyer from Legal Aid would be available at that time if he wanted to contact them, for which the officer answered negatively. There is a reasonable doubt that an accused who is detained in Nadi could obtain the service of a legal aid lawyer or an officer from the Australian High Commission in Suva at 8.30 p.m. The interviewing officer stated in his evidence that it is a requirement to commence the interview soon after the arrest of an accused. That was the reason for him to commence the interview at that time of the night. However, it appears that the interview of the first accused person started after nearly 17 hours of his arrest. In view of these evidence, it appears that there is a reasonable doubt that the second accused was actually given his right to a counsel or get assistance from the Australian High commission.

28. Having considered the reason set out above, it appears that there are reasonable doubt that whether the second accused person was properly given opportunities for his shower, to change his cloths, decent accommodation for sleep and rest and access to legal aid or an officer from the Australian High Commission during the four days of his detention. This reasonable doubt undoubtedly falls within the second component of the test of general fairness and fair treatment enunciated in *Shiu Charan v R* (supra). Accordingly, it is my considered opinion that the second accused person was not given proper and fair condition and treatment prior to and during the recording of his caution interview. I accordingly hold that the caution interview of the second accused person is not admissible as evidence. Furthermore, it is my opinion that the first accused person was not unfairly treated prior to or during the

recording of his caution interview, I accordingly hold that the caution interview of the first accused person is admissible as evidence.



**R. D. R. Thushara Rajasinghe**

**Judge**

**At Lautoka**

**26<sup>th</sup> February 2015**

**Solicitors : Office of the Director of Public Prosecutions for Respondent  
Mr Malimali B  
1<sup>st</sup> accused person,**