

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 40 OF 2012

BETWEEN : STATE

AND : 1. ISEI KADRE
2. VILIKESA VULAI DRAWE
3. ILIASERI DAKUI
4. VILIAME NAVOKA
5. JOSAI A RADROVI

Counsel : Ms. Fatiaki for State
1st, 2nd & 3rd Accused in person
Ms. Nasedra for the 4th & 5th Accused

Date of Hearing : 8th to 11th of June 2015

Date of Ruling : 16th of June 2015

RULING ON VOIR DIRE

1. The five accused persons informed the court that they intend to challenge the admissibility of their respective caution interviews in evidence at the trial. The learned counsel for the five accused persons had informed the Prosecution by a letter dated 7th of March 2013 the grounds for the voir dire, that;

- i. *At the time of the arrest our clients were assaulted and witnessed acts of violence by the arresting police officers against the co-accused,*
 - ii. *The arresting officers threatened our clients to admit to the said allegation of rape or in the alternative face bodily harm,*
 - iii. *The said threats and assault continued during the course of the interview,*
 - iv. *That our clients were sexually abused and humiliated by the police officers.*
2. Accordingly, the voir dire hearing was conducted from 8th to 11th of June 2015. The State called nine witnesses for the prosecution. Subsequently, the five accused persons gave evidence on oath, but did not call any other witnesses for the defence. At the conclusion of the hearing, all parties filed their respective written submissions. Having carefully considered the grounds for voir dire, the evidence presented and the respective written submissions of the parties, I now proceed to pronounce my ruling as follows.
3. I will first discuss the applicable law on the admissibility of caution interview.
4. 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."*
5. 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).

6. 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, intimidation, 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 that no any general grounds of unfairness existed before or during the recording of the caution interview.

7. Justice Nawana in **State v Malelei (Criminal Case No HAC 147/ 2007)** has discussed the inherent frailties of the self- incriminating confession in caution interview and the need of cautionary approach of admitting them in evidence. His lordship observed that;

"A confession, as observed at the out-set of this ruling, is an objectionable item of evidence in view of its inherent infirmities. Its admission in evidence should,

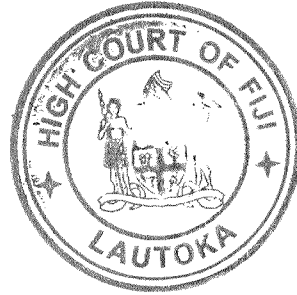
therefore, be scrupulously examined by court and apply the widest possible test that favours an accused person."

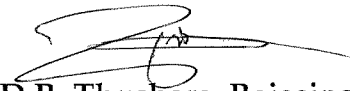
8. It is the burden of the prosecution to prove beyond reasonable doubt that the statement made in the caution interview was made voluntarily and without the existence of any form of general unfairness (*State v Rokotuiwai - [1996] FJHC 159; Hac0009r.95s (21 November 1996)*). This burden on the prosecution remains throughout the hearing.
9. 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.
10. I do not wish to reiterate the evidence adduced during the course of hearing. Accordingly I proceed with my analysis while referring the applicable law and the evidence as follows.
11. It appears from the allegation of the 2nd, 3rd, 4th and 5th accused persons that they were taken to the site of the reconstruction and were physically and sexually assaulted by the police officers. They alleged that they were forced to remove their pants and pork into the anus of one another. They were then beaten up with a stick on their backside. They were handcuffed at all the time of this torture.
12. The prosecution denied such allegation and stated that those accused persons were taken to the site of reconstruction separately. However, the records of caution interview tendered by the prosecution suggest otherwise. The 2nd, 3rd, 4th and 5th had been interviewed on 12th of November 2011. According to the caution interviews of these accused persons, it appears that all of them were taken to Nagoda village for the reconstruction between 1400 hours to 1900

hours on 12th of November 2011. Specially, all of them were at the site of reconstruction around 18.30 hours to 1900 hours. Had the four accused were taken separately and individually to the site of reconstruction as claimed by the prosecution, it would be the prosecution's onus to explain how they took four accused persons separately to the same place at the same time. Another conjecture is that the prosecution did not provide any station diary or any other official record to establish the movements of the accused in custody. In the absence of such evidence, it has created a reasonable doubt, whether the 2nd, 3rd, 4th, and 5th accused persons were physically and sexually assaulted and abused by the police during the reconstruction on 12th of November 2011.

13. One of the main allegations of the accused persons is that they were assaulted by the arresting officers at the time of arrest. However, there is no evidence adduced during the course of the hearing about the arrest of the 1st and 5th accused persons. It is the onus of the prosecution to prove beyond reasonable doubt that the accused persons were arrested without any form of assault or violence on them. In the absence of such evidence in respect of the arrest of 1st and 5th accused persons, the prosecution has failed to prove that these two accused were arrested without any form of force, assault or violence.
14. It appears from the evidence adduced during the course of the hearing that the caution interviews of the 5th and the 2nd accused persons were conducted in itaukei language, but had been recorded in English language. However, I do not wish to discuss this issue further, as I am satisfied as discussed above, that the five accused persons were assaulted and tortured prior to and during the recording of their respective caution interviews. Wherefore, it is my considered opinion that the five accused persons had not given their confessional statements in the caution interviews voluntarily and under fair

circumstances. I accordingly hold that the caution interviews of the five accused persons are not admissible in evidence at the hearing.




R.D.R. Thushara Rajasinghe
Judge

At Lautoka
16th June, 2015

Copies: **Office of the Director of Public Prosecution for the State**
 1st, 2nd & 3rd Accused in person
 Office of the Legal Aid Commission for the 4th & 5th Accused