

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 17 OF 2015

STATE

V

AKUILA KUBOUTAWA

Counsels : Ms. W. Elo for State
Mr. P. Lomaloma for Accused

Hearing : 14 and 15 November, 2016

Ruling : 16 November, 2016

RULING on “VOIR DIRE”

- [1] In this case the accused was charged by the DPP for Unlawful Cultivation of Illicit Drugs, contrary to sections 5(a) of the Illicit Drugs Control Act 2004, with Tomasi Rabuka. It is alleged that the accused and the co-accused have cultivated Cannabis Sativa weighing 10.9 kilograms.
- [2] The prosecution intend to rely on the admissions made by the accused to prove this allegation. During the pre-trial stage, the accused has indicated that he wish to challenge the proposed admission of his caution interview and tendered his grounds for *voir dire* on 3rd October 2016. The prosecution has made *voir dire* disclosures on these grounds.

[3] The accused tendered the following *voir dire* grounds;

1. The accused was assaulted in the early morning on 21st March 2015 when a group of Police Officers showed up at the accused's home in Viani village to conduct a search for marijuana. There were about 8 police officers who searched the accused's house and failed to find any drugs.
2. The police officers found branches believed to be marijuana about 30 meters away from the accused's home, in a dump used by several houses in the area and interrogated the accused about it.
3. During interrogation, the accused was assaulted by Police and he could identify PC Opeti from Labasa Police Station.
4. At the said interrogation his rights were not given to him and he confessed that;
 - i. he had received some marijuana from his co-accused
 - ii. he helped his co-accused cultivate the farm
 - iii. the same confession is contained in the caution interview.

[4] The *voir dire* commenced on 14th November 2016 and the prosecution called the Interviewing Officer DC 3521 Saiyasi, PC 8083 Anasa, PC 5109 Bolabiu and DC 2924 Opeti whilst the accused offered evidence under oath.

[5] During the cross examination of Interviewing Officer DC 3521 Saiyasi, the accused suggested that answers to Q 33 and Q 34 of the caution interview were not given by the accused. The accused in his evidence stated that in answer to Q 33 in the original record of interview in iTaukei, he did not say that "Rabuka took me to the said farm ..." and at the conclusion of the interview he was not given an opportunity to read the record of the interview. In addition, it was not read back to him by the interviewing officer. At the closing submission stage of the *voir dire* the accused submitted that in addition to fabrication of the contents of his caution interview, he is also relying on the "general unfairness" in challenging the admissibility of his caution interview as per the judgment of ***Ganga Ram and Shiu Charan*** (unreported judgement of the Court of Appeal in the Criminal Appeal No. 46 of 1983 of 13th July 1984).

[6] It is clear from the allegations reproduced above; the accused's challenge on the admissibility of his caution statement is based, firstly on the abusive actions PC Opeti, and secondly on the ground of "general unfairness".

[7] In the authority cited by the accused, in determining voluntariness of a confessional statement; **Ganga Ram and Shiu Charan** (supra) the following two tests were formulated;

*"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 of prejudice or inducement by offer of some advantage in what has been picturesquely described as the flattery of hope or the tyranny 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** unfairness exists in the way in which the police behaved, perhaps by reach of the judges rules failing short of overbearing will, by trickery or by unfair treatment. Regina v Sang (1980) AC 4023"*

[8] It is appropriate to consider the evidence placed before by the prosecution and the accused at this stage.

[9] As already noted the accused challenged the admission of his caution interview statement on the basis that it was made involuntarily due to the assault of Opeti at the time of his arrest as he was frightened and was also under shock. In addition, he sought to challenge its admissibility on the broader ground of oppression.

[10] At this stage of the ruling, it is proposed to refer to the version of events since the arrest of the accused up to the point of the conclusion of his caution interview, as presented by the prosecution, at least in summary form.

[11] The prosecution claim is that the accused was arrested at his home when a Police party raided three houses in the Viani village upon information gathered from intelligence and also from the village headman. House of the accused was searched and no drugs were found. However, PC Anasa saw the accused's wife hiding a sack behind his house. This sack was recovered and it contained branches of marijuana.

[12] Then the officers have conducted a verbal interrogation, during which the accused made some admissions. Then he was arrested and taken to the place where the police

vehicles were parked. His co-accused was also brought in and the Police party then proceeded to the place where the co-accused had his farm. The accused remained in the Police vehicle with two officers while the others have proceeded to the bush with the co-accused leading way to the place where marijuana was planted.

- [13] The officers returned after the farm was shown to them by the co-accused, and these two were then taken to Savusavu Police Station for further investigations. The accused was interviewed by DC 3521 Saiyasi after giving his rights which included his right to counsel, legal aid, presence of family or church member or a social worker.
- [14] Interview of the accused was conducted by Saiyasi in iTaukei. At the commencement of the interview, the accused did not complain of anything. He was also cautioned of his right to remain silent.
- [15] There was no threat, intimidation, coercion or oppression on the accused to make a statement and he was given an opportunity to read, delete or alter the statement. The accused placed his signature on the caution interview, upon his own free will.
- [16] During cross examination of Opeti, the accused suggested that the officer "punched four times on both sides of his ribs" when he was taken to the parked Police vehicle, after the arrest. The officer denied the suggestion. The accused, in his evidence said that there were "two punches" on his of his ribs below his arm pits. Then he added that he was punched on both sides of his ribs and then said the officer came running at him when he dealt the 1st punch. He also states that another unidentified officer stopped Opeti continuing his assault on him. He was shocked and was frightened after this incident.
- [17] When cross examined by the prosecution, the accused said he was punched twice when they were on the road. He admitted that he did not complain of these punches to two officers who remained in the vehicle after the other officers gone with the co-accused to locate his farm. He did not complain about it to any other Police officer or to Saiyasi at the time of his interview.
- [18] Considering the claim of the accused that he was punched on his ribs on the aspect of relative probability of his version, it is clear that he was interrogated by Opeti at his house and he has already made some admissions. There was no re-interrogation at the parked vehicle and there was no reason for Opeti to assault a suspect who has already made admission of his complicity to cultivation of marijuana. It is strange that he did not remember the number of times he was punched on his ribs.

- [19] In assessing the failure of the accused to complain of the assault at the first available opportunity when he alone in the Police vehicle under two other officers, one of whom is an iTaukei, if he was actually punched the way he describes. He had another opportunity to complain to Saiyasi and he offers no reason as to why. It is reasonable to expect the accused to remember the details of the incident as he says this was the first time he faces such a situation. In considering the inconsistency and the inherent improbabilities of his version, it is the considered view of this Court that this claim is very likely an afterthought by the accused as it is reasonable to expect the accused to complain to someone of the brutal way he was treated with after arrest. The claim that the shock and fear he had after the punching incident, continued to linger in his mind during his interview is therefore a highly an unlikely possibility.
- [20] The claim that the accused was not allowed to read the record of his interview is also improbable since he himself admits he had signed it when Saiyasi gave the book to him to sign. The fact that record was given to the accused read before signing is recorded as the 4th question from the conclusion of the interview. When the accused was given the book to sign, even if he was not given the opportunity to read, he could have easily noted that it is recorded so. The accused did not say that he was only shown the places where he had to put his signature. He also admits that he was informed of the allegation against him and he understood it. Sayasi says that the accused read the interview record and he has recorded that fact with the timing.
- [21] Perusal of the record of interview reveals that it was conducted in reasonable hours with two breaks in between sessions.
- [22] During the cross examination, the accused admitted that he told truth in his interview and he gave answers voluntarily and placed his signature of his own free will.
- [23] In *R v Priestly* (1965) 51 Cr App Rep 1, the word "oppression" had been defined as "... something which tends to sap, and has sapped, ... free will" and this was later adopted in *R v Prager* [1972] 1 All ER 1114 at 1118.
- [24] In view of these considerations, this Court rejects the claim of the accused that there was general unfairness which had the effect of sapping his free will to make the statement voluntarily.
- [25] However, rejection of the claims of the accused that he was assaulted and oppressed in obtaining a statement containing admissions does not relieve of the prosecution of its burden to prove the voluntariness of the caution statement beyond a reasonable doubt.

- [26] The prosecution case is stated in an earlier stage of this ruling. There are contradictions and improbabilities between the oral testimonies of the Police witnesses. Opeti says that he went up to a creek with the accused and as there was a steep climb, he waited there with the accused. Anasa says that the accused went to the farm with them. Bolabiu admits in cross examination that the accused remained in the vehicle. Anasa admits that he stated about the fact that wife of the accused hiding a sack only in his statement made on 8th November 2016, mere six days before the voir dire began, although he made two previous statements. However, it appears that these inconsistencies are a result of poor memory of the witnesses who were involved in multiple raids and not due to the fact they were lying under oath to cover up mistakes.
- [27] The inconsistencies does not challenge the basic version of the prosecution evidence in relation to the circumstances under which the statement was recorded as they relate to the circumstances under which he was arrested and a detection is made. However, none of these raises a reasonable doubt of the claim by the prosecution that the accused voluntarily made this caution interview statement.
- [28] In relation to the claim by the accused, that the answers to Q 33 and Q 34 of his caution interview was fabricated by the interviewing officer Saiyasi, compels this Court to adopt a different approach, in view of the authorities which already considered this position.
- [29] A similar situation arose for consideration by the Court of Appeal in *Radininausori v State* (Criminal Appeal No. AAU 105 of 2007 of 26th November 2010. The Court of Appeal, followed the reasoning of the Privy Council judgment in *Adoya v State* (1981) 2 All ER 193 where it was held and where the accused claims that “... *incriminating answers were never given*” then “... *no issue as to voluntariness can arise and no question of admissibility falls for the judge’s decision. The use of fact whether or not the statement was made by the accused is purely for the jury*”.
- [30] This approach was followed by the Court of Appeal with further emphasis placed, in the case of *Guston Frederick Kean v State* [2013] FJCA 117.
- [31] In the circumstances, it is the considered view of this Court that in relation to the caution statement of the accused in iTaukei, tentatively marked as **P.E. No. 1A** and its English translation marked as **P.E. No. 1B**, could be led in evidence as it was made voluntarily by the accused, except for the answers to Q 33 and Q 34. However, in respect of these answers, where the issue of fabrication has been raised, this Court cannot decide it’s admissibility and accordingly it will be put to the assessors with appropriate directions. Accused moves this Court to disregard the admissions made by him during oral interrogation.

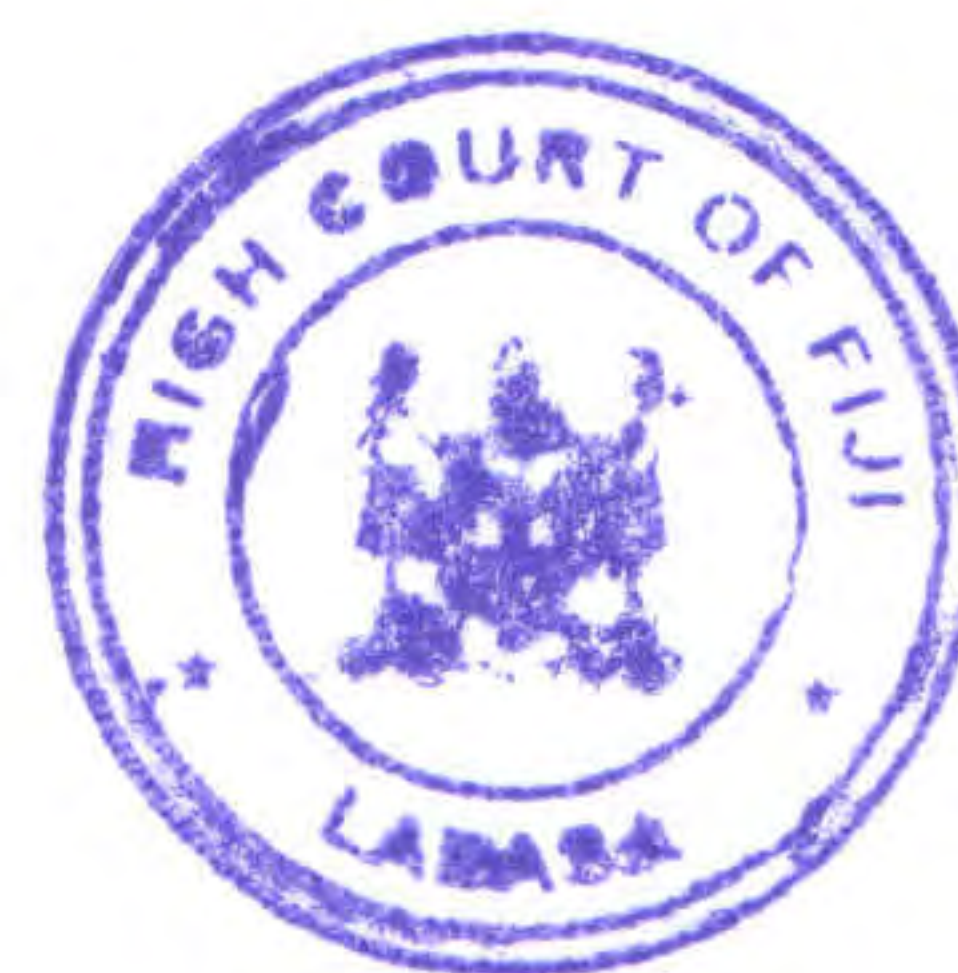
[32] The prosecution has clearly maintained even before the *voir dire* that they only rely on the admissions contained in the caution statement of the accused to prove the charge levelled against him and it will not rely on the oral admissions made by him during his interrogation at his own house. In view of this undertaking by the prosecution, the consideration of the admissibility of those oral admissions does not arise. The accused maintains that there was no caution against self-incrimination as per Rule 2 of the Judges Rules and therefore they are inadmissible and the prosecution has rightly decided not to lead that evidence.

[33] In the circumstances, the prosecution may lead the caution interview statement of the accused as an item of evidence against him, if they so desire.



ACHALA WENGAPPULI

JUDGE



At Labasa

16 November, 2016

Solicitor for the State : Office of the Director of Public Prosecution, Labasa
Solicitor for the Accused : Office of P. Lomaloma Esq., Barrister & Solicitor, Labasa