

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**

**Crim. Case No: HAC 223 of 2017**

STATE

v.

SIONE FUSI

**Counsel:** Mr. T. Tuenuku for State  
Ms. N. Mishra with Mr. K. Verebalavu for Accused

**Hearing:** 12<sup>th</sup> November 2018

**Ruling:** 15<sup>th</sup> November 2018

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**RULING**  
*[Voir Dire]*

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**Introduction**

1. The Prosecution proposes to adduce the caution interview of the accused in evidence, for which the accused challenges on the following ground, *inter alia*;

*“At the time of the accused’s caution interview, the right to remain silent as given at question & answer 9 was unfair that it induced / threatened the accused to admit to the offence as it he did not then the police would proceed further and prosecute him.”*

2. The trial within a trial (*voir dire*) hearing was commenced on the 12th of November 2018 and concluded it on the same day. The prosecution only presented the evidence of DC Isoa, who had conducted the caution interview of the accused. The accused opted not to give evidence. Subsequently, the learned counsel for the prosecution and the defence made their respective oral submissions. Having carefully considered the evidence presented during the hearing, I now pronounce my ruling as follows.

### The Laws

3. 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."*

4. The Fiji Court of Appeal in Shiu Charan v R (F.C.A. Crim. App. 46/83) has discussed the applicable test of admissibility of caution interview of the accused person in evidence at the trial. The Fiji Court of Appeal in Shiu Charan (supra) 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)."*

5. The Fiji Court of Appeal in Fraser v State ([2012] FJCA 91; AAU24.2010 (30 November 2012)) held that:

*"The court shall not allow a confession to be given in evidence against him unless the prosecution proves beyond reasonable doubt that the confession was not obtained (a) by oppression of the person who made it (b) in consequence of anything said or done which was likely, in the circumstances existing at the time to render unreliable any confession which might be made by him in consequence thereof."*

6. The test enunciated in Shiu Charan (supra) and Fraser (supra) constitutes two components. The first is the test of voluntariness. The court is required to satisfy that the statement in the caution interview had 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 during the recording of the caution interview.
7. It is the onus of the prosecution to prove beyond reasonable doubt that the caution interview of the accused was recorded voluntarily and under fair and just circumstance.

### Analysis

8. The contention of the accused is based upon the ground that the officer who interviewed the accused during the recording of the caution interview did not properly explained the accused of his right to remain silent and its consequences, thus breaching the rights given to the accused under Section 13 (1) (a) (ii), (b) and (d) of the Constitution, which state that:

- 1) *Every person who is arrested or detained has the right—*
  - a) *to be informed promptly, in a language that he or she understands, of—*
    - (ii) *the right to remain silent; and,*
    - (iii) *the consequences of not remaining silent;*
  - b) *to remain silent;*
  - d) *not to be compelled to make any confession or admission that could be used in evidence against that person;*

9. DC Isoa in his evidence admitted that he put the question number nine to the accused as in the same form as it has been recorded in the caution interview. He then explained the reason for putting that question. I will now reproduce the said question nine and the answer in verbatim as it was recorded in the caution interview, that:


*Q: Under the provisions of the constitution you have a right to remain silent but in that case we would not be able to get your side of the story and as such we may have to proceed further and prosecute you for the allegation with the evidence currently on hand. You shall feel free to make your choice now, are you willing to remain silent or will you make a statement now?*

*A: I will make a statement*

10. Having carefully considered the above questions, it is clear that the interviewing officer has not explained the accused the consequent of not remaining silent. Instead, he has told the accused that if he exercises his right to remain silent, he won't be able to tell his side of the story, and that would allow the Police to continue to prosecute him with the available evidence. This has created a condition that unless the accused made a statement, the police would prosecute him.

11. Accordingly, I am of the view that this question has compelled or rather forced the accused to make a statement. The accused was not properly explained of his right to remain silent. Hence, he was not in a position to make an informed decision about his right to remain silent. Therefore, it has created a reasonable doubt whether the accused made his statement in the caution interview voluntarily. Moreover, the failure of the interviewing officer to properly explain the accused his right to remain silent and the consequences of remain silent as required under Section 13 (1) (a) (ii) and (b) of the Constitution has created a reasonable doubt whether the caution interview was conducted under a fair and just circumstances.
12. Accordingly, I find that the prosecution has failed to prove beyond reasonable doubt that the accused voluntarily gave his statement in the caution interview and it was recorded under fair and just circumstances.
13. In conclusion, I hold that the record of the caution interview of the accused is not admissible in evidence at the trial.



  
R.D.R.T. Rajasinghe  
**Judge**

**At Suva**  
15<sup>th</sup> November 2018

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