

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 199 of 2017

STATE

V

UMENDRA KUMAR

Counsel : Ms. Mehzabeen Khan for the State  
Ms. Lavinia David with Mr. Krisheel Chang for the Accused

Dates of Hearing : 17-19 January and 22-25 January 2018

Date of Ruling : 26 January 2018

*The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "RRD".*

### VOIR DIRE RULING

1. The Accused in this case is charged with the following Information:

#### COUNT 1

*Statement of Offence (a)*

**ABDUCTION OF YOUNG PERSONS:** Contrary to Section 285 of the Crimes Act 2009.

***Particulars of Offence (b)***

**UMENDRA KUMAR** on the 11<sup>th</sup> day of January 2014, at Nasinu, in the Central Division, unlawfully caused **RRD**, a young person being under the age of 18 years, to be taken out of the possession and against the will of her mother **RANITA DEVI**.

**COUNT 2**

***Statement of Offence (a)***

**RAPE:** Contrary to Section 207 (1) and 2 (a) of the Crimes Act 2009.

***Particulars of Offence (b)***

**UMENDRA KUMAR** on the 11<sup>th</sup> day of January 2014, at Nadi, in the Western Division, penetrated the vagina of **RRD** with his penis, without her consent.

**COUNT 3**

***Statement of Offence (a)***

**RAPE:** Contrary to Section 207 (1) and 2 (a) of the Crimes Act 2009.

***Particulars of Offence (b)***

**UMENDRA KUMAR** on the 12<sup>th</sup> day of January 2014, at Nadi, in the Western Division, penetrated the vagina of **RRD** with his penis, without her consent.

**COUNT 4**

***Statement of Offence (a)***

**RAPE:** Contrary to Section 207 (1) and 2 (a) of the Crimes Act 2009.

***Particulars of Offence (b)***

**UMENDRA KUMAR** on the 13<sup>th</sup> day of January 2014, at Rakiraki, in the Western Division, penetrated the vagina of **RRD** with his penis, without her consent.

2. The Accused was arrested by officers of the Rakiraki Police Station. Thereafter, he had been brought to the Nasinu Police Station. Investigations into this case had been conducted by officers of the Nasinu Police Station.
3. The Accused was caution interviewed by Detective Constable (DC) 3538 Parnesh Dayal at the Nasinu Police Station, on 17 January 2014. Detective Constable (DC) 2790 Rakesh Prasad, is named as the Witnessing Officer. On the same day, DC Rakesh Prasad, had recorded his charge statement. DC Rakesh Prasad, is also the Investigating Officer in this case.
4. The Accused is challenging the admissibility of the said caution interview statement and charge statement. In the Amended Grounds of Voir Dire, which he filed in Court, on 8 November 2017, pursuant to Section 288 of the Criminal Procedure Act No. 43 of 2009, he states:

The Accused objects to the admissibility of his caution interview and charge statement, dated 17 January 2014, on the following grounds:

- 1) That the Accused requested to have his de-facto wife present during the interview, however, the police refused to have her present at the time of interview and the police officers told the de-facto wife of the Accused to wait outside.
- 2) That during the interview the witnessing officer, DC Rakesh and the interviewing officer DC 3538 Parnesh Dayal slapped the Accused on the face and head. The Accused was then further assaulted as the police officers hit his legs with wood and he was threatened that should he not admit, they would put and rub chillies on his anus.
- 3) That the Accused was surrounded by five (5) police officers of which 2 were Indo-Fijian police officers and 3 i-Taukei officers.

- 4) That during the interview, the mother of RRD pulled his shirt, slapped the Accused and swore at him saying, "maichod, magaitinana, your face looks like a dog".
- 5) That the Accused only admitted to having sexual intercourse with RRD to prevent further assault from the police.
- 6) That the Accused requested to be seen by a doctor, however, he was not taken to the hospital.
- 7) That there was a breach of his rights under the Constitution under Section 13(1) (d) (k) and Articles 14 (3) (d) of the International Covenant on Civil and Political Rights during his interview by the Police.

The Accused had also requested to be furnished with a copy of the Station Diary and Cell Book of the Rakiraki Police Station, for the 15 January 2014 or the date he was arrested; and also the Station Diary, Cell Book and Meal Book of the Nasinu Police Station, from the date he was arrested in January 2014, till the date he was released from the Nasinu Police Station and bailed out.

The prosecution was able to provide the Accused with copies of the Cell Book and Meal Book of the Nasinu Police Station for the relevant period. It has been reported that the Station Diary of the Nasinu Police Station could not be located. The Station Diary is said to have been dispatched or sent out of the Nasinu Police Station. However, the Police have no records as to where the Register had been dispatched to or for what purpose. Similarly, it is reported that the Station Diary and Cell Book of the Rakiraki Police Station had been destroyed in flooding that had affected the area.

### The Law

5. In *Ganga Ram and Shiu Charan v. Reginam*; Criminal Appeal No. 46 of 1983 (13 July 1984) (unreported) the Fiji Court of Appeal outlined the two grounds to be considered for admissibility of confessions;

*"It will be remembered that there are two matters each of which requires consideration in this area. 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. Ping Lin (1976) AC 574. Secondly even if such voluntariness is established there is also a 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 will, by trickery or by unfair treatment. Regina v. Sang (1980) AC 402. This is a matter of overriding discretion and one cannot specifically categorize the matters which might be taken into account."*

6. His Lordship, Justice Daniel Goundar in the case of the **State vs. Maikeli Rawaqa and Segran Murti** Criminal Case No. HAC 42 of 2004 (16 February 2008); held as follows:

"The principal governing the admissibility of confessions are well settled. Confessions could not properly be given in evidence unless it was shown that they were made voluntarily, that is, not obtained through violence, fear of prejudice, oppression, threats and promises or other improper inducements (*Ibrahim v R* [1914] AC 599). Even if such voluntariness is established, the trial Judge has the discretion to exclude the confessions on a general ground of unfairness (*R v Sang* [1980] AC 402). In addition, confessions could be excluded for breaches of Constitutional rights."
7. Accordingly, in order for a confession made by an Accused person to a police officer to be admissible as evidence against the maker of that confession, the confession should have been made by that Accused voluntarily, meaning it should have been made by the Accused on his own free will, with full appreciation of the legal consequences. If the said confession is made as a result of oppression, such confession would not be admissible and should be excluded. Oppression is anything that undermines or weakens the exercise of free will. However, even if such voluntariness is established, the trial Judge

has the discretion of ruling such confession inadmissible, if it is obtained in an unfair manner (on general grounds of unfairness).

8. The onus of proving voluntariness/lack of oppression and fairness is on the prosecution and they must prove these matters beyond reasonable doubt. If there has been a breach of any of the Accused's Constitutional rights, the prosecution must prove that the Accused was not thereby prejudiced.
9. The Accused is alleging that his rights in terms of Section 13 (1) (d) and Section 13 (1) (k) of the Constitution and Articles 14 (3) (d) of the International Covenant on Civil and Political Rights 1966 (ICCPR) (adopted by the United Nations General Assembly, on 19 December 1966, and in force from 23 March 1976) have been breached.
10. Section 13 (1) of the Constitution stipulates that "Every person who is arrested or detained has the right –
  - (a) .....
  - (b) .....
  - (c) .....
  - (d) not to be compelled to make any confession or admission that could be used in evidence against that person;
  - (e) to (j) .....
  - (k) to communicate with, and be visited by, -
    - (i) his or her spouse, partner or next-of-kin; and
    - (ii) a religious counsellor or social worker."

11. Article 14 (3) (d) of the ICCPR states:

*3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*

*(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing, to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him,*

*in any case where the interest of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.*

12. From a reading of the above, it is clear that Article 14 (3) (d) of the ICCPR refers to rights to be given to the Accused during criminal proceedings. These rights have been duly granted to the Accused during these proceedings.
13. During the voir dire hearing the prosecution led the evidence of four witnesses, namely Inspector Jone Banuve, DC 3538 Parnesh Dayal, and DC 2790 Rakesh Prasad and Ranita Devi, in order to prove beyond a reasonable doubt that the caution interview statement and charge statement was made voluntarily by the Accused and that it was not obtained in an unfair manner.
14. The following exhibits were tendered by the prosecution during the hearing:
  - Voir Dire Exhibit **P1** - The caution interview statement of the Accused, dated 17 January 2014.
  - Voir Dire Exhibit **P2** - The charge statement of the Accused, dated 17 January 2014.
  - Voir Dire Exhibit **P2 (A)** - The typed charge statement of the Accused, dated 17 January 2014.
  - Voir Dire Exhibit **P3** - Cell Book of the Nasinu Police Station for the period 12 March 2013 to 29 January 2014.
  - Voir Dire Exhibit **P3 (A)** - Cell Book entry 19/14 (17 January 2014; 09.30 hours).
15. The defence called two witnesses: the Accused and his de-facto wife Vineeta Devi.

### The Prosecution Case

16. Inspector Jone Banuve testified that he has served in the Fiji Police Force for the past 30 years. Currently, he is based at the Valelevu Police Station. In 2014, he was stationed at the Nasinu Police Station. He was Acting Inspector at the time and was the Station Officer at the Nasinu Police Station.

17. On 17 January 2014, he had gone to the Nayavu Community Police Post to take over two Accused who were been escorted from the Rakiraki Police Station. The names of the Accused were Umendra and Ron, who were suspected of abducting a young girl. He had left the Nasinu Police Station at 5.30 a.m., in a Police vehicle, together with the driver Constable Ifereimi. They had reached the Nayavu Community Police Post at 6.30 a.m. This Police Post is located close to the Government Station at Nayavu on the Kings Road.
18. Upon reaching Nayavu, they had to wait for about an hour for the Accused to be brought. The two Accused were brought to the Police Post at around 7.50 a.m. He cannot recall the names or the number of officers from the Rakiraki Police Station who had accompanied the Accused.
19. Thereafter, the two Accused were handed over and transferred to their Police vehicle. The two Accused were sitting at the back seat of the twin cab Police vehicle, while he was sitting in the front seat. The witness testified that he had a conversation with Umendra and his appearance at the time was normal. He stated that he could not recall whether the Accused had made any complaints to him or whether he had any noticeable/visible injuries at the time. The witness and Ifereimi had then brought the two Accused to the Nasinu Police Station. They had reached Nasinu Police Station around 9.00 a.m.
20. Upon reaching Nasinu Police Station, he had handed over the two Accused to DC Parnesh Dayal. After handing over the Accused, the witness had left the station and gone home.
21. When the witness was asked as to how he remembers these times, he testified that he can recall with certainty leaving Nasinu Police Station at 5.30 a.m. and arriving back at the station at 9.00 a.m. The rest of the times, he recalled by the duration of the travel (one hour to go to Nayavu, one hour to return and one hour waiting at the Police Post until the Accused arrived). However, he testified that he had not maintained any records of these times. Since it was in the early hours of the morning, he had not taken his pocket note book along with him.



22. DC 3538 Parnesh Dayal was the caution interviewing officer in this case. He is currently based at the Totogo Police Station attached to the Criminal Investigation Department (CID). In the year 2014, he was based at the Nasinu Police Station. He testified that the Accused person was brought to the Nasinu Police Station and handed over to him by Station Officer, IP Jone Banuve. The handing over of the Accused had taken place in the Charge Room. Constable Ifereimi had also been present at the time. He recalled that the time had been around 8.00 in the morning.
23. The witness had been instructed by the Crimes Officer to search and lock the Accused in the Cell. Accordingly, he had searched and locked the Accused in the Cell. The Accused had been informed that he will be later interviewed under caution. At the time the Accused had been searched, no visible injuries were seen on him. DC Dayal testified that the Accused had not made any complaints to him at the time and had been very co-operative.
24. The witness agreed that the purpose of the Station Diary is that it keeps a record of all the events which takes place at the Police Station. The other books maintained at the Station are the Cell Book, the Report Book, the Meal Register and normal Police Inventory. In the Cell Book the names, address and other relevant details of all the prisoners that are locked in the cell are recorded. The Report Book is a register where all the official complaints are written. The Meal Register contains the names and the report number for the meals that are ordered for the prisoners.
25. The Cell Book of the Nasinu Police Station for the period 12 March 2013 to 29 January 2014, was tendered to Court as Prosecution Voir Dire Exhibit **P3**. As per Cell Book entry 19/14 (Prosecution Voir Dire Exhibit **P3A**), it is confirmed that the Accused was brought to the Station at 9.30 a.m., on 17 January 2014 (the corresponding Station Diary entry is 58). It is also recorded that the Accused had been searched and locked in the cell by DC Parnesh (Dayal) at 9.45 a.m. (the corresponding Station Diary entry is 61). The Accused had been released from the cell to be taken to Court at 11.29 hours, on 20 January 2014 (the corresponding Station Diary entry is 66).
26. It must also be noted that in the same Cell Book entry, under the column fresh marks of violence, there appears a notation similar to a dollar sign (\$).DC Dayal was unable to

identify what was depicted by this notation. In the entry just above, which is in relation to the other Accused Ron Kumar (who was brought to the Nasinu Police Station at the same time), under fresh marks of violence it is noted as 'nil'.

27. DC Dayal testified that he had commenced recording of the Accused's caution interview at 15.00 hours, and concluded at 17.00 hours, on 17 January 2014. The interview had been conducted at the Crime Office of the Nasinu Police Station. The witness could not recall as to who brought the Accused from the cell to the interview room. Only DC Rakesh Prasad and Inspector Jone Banuve were present during the interview. However, both of them were not present throughout the interview.
28. The caution interview had been conducted in the English language and was hand written. The Accused had been duly given all his constitutional rights, including the right to consult the Doctor of his choice if he was suffering from any illness, any lawyer, under the Legal Aid Scheme, any barrister, solicitor, religious counsellor, family member or friend. The Accused having fully understood his rights, did not wish to exercise any of the above rights. The Accused had signed to acknowledge that he understood his rights and that he did not wish to exercise them.
29. DC Dayal testified that the Accused had been treated very fairly during the recording of the caution interview. He did not force or threaten or make any false promises to him to obtain any of the answers which he had asked. The caution interview statement of the Accused, dated 17 January 2014, was tendered to Court as Prosecution Voir Dire Exhibit **P1**. The Accused had signed his caution interview, and the interview has been counter-signed by DC Dayal.
30. Although DC Prasad was the Witnessing Officer for this interview, he has not signed the record of interview. DC Dayal explained that DC Prasad was present when the interview started. However, he was not present throughout the interview as he had to attend to some other work. This is the reason why DC Prasad had not signed the record of interview.

31. DC Dayal categorically denied that he or any other Police Officers assaulted the Accused during the recording of the interview or threatened to rub chillies on his anus if he did not admit to the allegations.
32. The witness also denied that the Accused was surrounded by 5 Police Officers at any time during the recording of the interview or that the mother of RRD had come into the room or pulled his shirt or slapped or swore at the Accused.
33. DC Dayal testified that the Accused had specifically requested that his de-facto wife not be present during the recording of the interview. The reason for this was that the Accused did not want his de-facto wife to be involved in this case as she might create problems at the Police Station. Furthermore, at no time did the Accused request to be seen by a Doctor or to be taken to hospital for medical examination.
34. DC 2790 Rakesh Prasad testified that he is an officer attached to the Nasinu Police Station. He has been serving at Nasinu Police Station for the past 5 years. He had been instructed by the Crime Officer of the Nasinu Police Station, Detective Corporal Ilai, to be the Investigating Officer in this case.
35. He had first made contact with the Accused when he was brought to the Nasinu Police Station, on 17 January 2014. The witness cannot recall the exact time the Accused was produced, but according to him it may have been between 8.30 and 9.15 in the morning that day.
36. Later in the day, the Accused had been brought to the Crime Office for the recording of his caution interview. At the time the Accused had been 'normal' and had been talking freely to the Police officers present (DC Dayal, Inspector Jone Banuve and himself).
37. The witness testified that during the recording of the caution interview statement he was present as Investigating Officer, to ensure that everything was in place, so that DC Dayal can interview the Accused. Later, the witness stated that he was the Witnessing Officer during the recording of the caution interview statement, but that he was not present the whole time. The reason being that he had to attend to other investigations in relation to

this case, such as recording of witnesses' statements and obtaining medical reports. The witness admitted that he had not signed the caution interview statement.

38. DC Prasad testified that he had also recorded the charge statement of the Accused from 19.30 hours to 20.09 hours. The charge statement had been recorded at the Crime Office. The statement was recorded in the English language and was hand written by him. The Accused had been given the right to consult a lawyer of his choice and if he could not afford one that he may consult with the Legal Aid Scheme which was free of charge. However, the Accused, did not wish to exercise any of the above rights. The charge statement of the Accused, dated 17 January 2014, was tendered to Court as Prosecution Voir Dire Exhibit **P2**; and the typed copy of same was tendered to Court as Prosecution Voir Dire Exhibit **P2A**.
39. It is clear when reading the charge statement that the Accused had not been given the right to consult a family member or religious counsellor during the recording of his charge statement. Neither was there a Witnessing Officer present at the time the charge statement was recorded.
40. The complainant's mother Ranita Devi testified that she had come to the Nasinu Police Station at around 12.30 in the afternoon on 17 January 2014. When asked the purpose of her visit, she stated that she had called the Police Station and asked whether the person who had kidnapped her daughter had been brought to the Police Station or not. She said "I wanted to go and see his face". On being informed that the Accused had been brought she went to the Nasinu Police Station.
41. Ranita Devi testified that when she reached the Police Station, the Police Officers were taking the Accused's statement inside a room. They did not allow her to go near the Accused. DC Rakesh had informed her that she was only allowed to see the Accused from the window. When asked as to who was inside the room at the time, the witness said that it was Umendra, another boy who kidnapped her daughter (she did not know his name), and two Police Officers, Rakesh and Sharon. She had been at the Police Station for 7 to 8 minutes and had left. Later, in cross examination she testified that there was another officer who was standing in the room (an Indian male officer).

42. Ranita Devi denied that she had pulled Umendra Kumar's shirt and slapped him or that she swore at the Accused at the Police Station.

### The Defence Case

43. The Accused, Umendra Kumar, testified that he is 37 years old and is in a de-facto relationship with Vineeta Devi for the past 19 years.
44. He said that he (together with his brother Ron) was brought to the Nasinu Police Station by Inspector Banuve. Inspector Banuve and the team that brought them half way from Rakiraki, punched and kicked them. Thereafter, he had been locked in the cell.
45. The Learned State Counsel objected to this evidence being led on the basis that this was not part of the voir dire grounds and also that this position was not put to Inspector Jone Banuve during his cross examination. However, Court permitted this evidence to be led subject to the aforesaid infirmities.
46. The Accused testified that he had been caution interviewed by DC Dayal. At the time his brother, Banuve, Rakesh and another officer were present. Later, he identified the officer as DC Dayal, the Interviewing Officer (as he had given evidence during the inquiry). There were two other officers present in the interview room and there were some other persons coming and going from the room. He testified that DC Dayal, DC Rakesh and Inspector Banuve had assaulted him and he described in detail how the assault took place. As a result of this assault, he had received injuries on his head, both sides of abdomen (stomach) and lower back. The Accused said that there were injuries in nearly all parts of his body. He had been in a lot of pain.
47. The Accused testified that DC Rakesh brought the girl (complainant) and her mother inside the room to identify him. At that time, the complainant's mother had spat at him. She had pulled his shirt and swore at him saying "maichod, your face looks like a dog".
48. The Accused had made a request to be examined by a Doctor; however, his request was denied.
49. Vineeta Devi testified that she is the de-facto partner of Umendra Kumar. They have been together for 18 years. She said that on 16 January 2014, she got to know from the

Rakiraki Police that Umendra was in custody. She had then gone to the Nausori Police Station and had been informed that this matter is being investigated by the Nasinu Police Station.

50. On the next date (Friday 17 January 2014), she had gone to the Nasinu Police Station to find out about Umendra. However, the Police had not given her any information that day. She had remained at the Police Station for about one hour (she had been sitting near the mango tree outside). She could see Umendra sitting with Police Officers. There were four of them – the Police Officer who caution interviewed the Accused and three other iTaukei male officers.
51. Vineeta Devi testified that she had gone back to the Police Station the next morning (Saturday). She had been able to see Umendra that day. He was in the cell. She had observed injuries on his body. Injuries were seen on his head, his legs, and at the back. Umendra had been wearing a demin short and a T-shirt. He had removed the T-shirt and showed the injuries on his back. There were blood clots on both his legs and back muscles. His head was swollen and there were blood clots. When asked to explain further, the witness said, that by blood clots, she meant bruises. The Accused had said that the Police had assaulted him.
52. The witness testified that the Accused had trouble moving around. He could not walk properly with his feet. His condition was really bad. His legs were in a really bad condition.
53. On seeing the Accused in this condition, she had told the Police Officer at the counter that Umendra is injured and needed medical attention. However, the Police Officer had said that it is a very serious matter (the case against the Accused) and they could not allow a medical to be done. The witness had then left the Police Station.
54. She had gone back to the Police Station around 7.00 on Monday morning. She had taken some clothes to be given to the Accused. The Accused was produced at the Nasinu Magistrate's Court that day. She too, had gone to Court. Vineeta Devi testified that even on Monday there were visible injuries on the Accused.

## Analysis

55. Inspector Jone Banuve has testified that he, together with Constable Ifereimi, had brought Umendra (the Accused) and Ron to the Nasinu Police Station, and arrived around 9.00 a.m. on 17 January 2014. He had handed them over to DC Parnesh Dayal. DC Dayal has testified that he recalled the time had been around 8.00 in the morning. DC Rakesh Prasad has testified that he cannot recall the exact time the Accused was produced, but according to him it may have been between 8.30 and 9.15 in the morning that day.
56. As per Cell Book entry 19/14 (Prosecution Voir Dire Exhibit P3A), it is confirmed that the Accused was brought to the Station at 9.30 a.m., on 17 January 2014. The corresponding Station Diary entry is 58. Unfortunately, the Station Diary is not available to further verify this fact.
57. The Accused has testified that Inspector Banuve and the team that brought them (the Accused and Ron) to the Nasinu Police Station had punched and kicked them. However, as pointed out by the Learned State Counsel this was not part of the voir dire grounds filed by the Accused and also this position was not put to Inspector Banuve during his cross examination.
58. Inspector Banuve stated that he could not recall whether the Accused had made any complaints to him or whether he had any noticeable/visible injuries at the time. DC Dayal said in his evidence that at the time the Accused had been searched, no visible injuries were seen on him and that the Accused had not made any complaints to him at the time.
59. However, it is to be noted that in the Cell Book entry 19/14, under the column fresh marks of violence, it does not say 'no injuries' or 'NIL'. Instead, there appears a notation similar to a dollar sign (\$), and DC Dayal was unable to explain as to what it depicted.
60. DC Dayal testified that he had commenced recording of the Accused's caution interview at 15.00 hours, and concluded at 17.00 hours, on 17 January 2014. Only DC Prasad and Inspector Banuve were present during the interview. However, both of them were not

present throughout the interview. DC Prasad was the Witnessing Officer during the recording of the caution interview statement.

61. Although DC Prasad was the Witnessing Officer for this interview, he has not signed the record of interview. DC Dayal explained that DC Prasad was present when the interview started. However, he was not present throughout the interview as he had to attend to some other work. This is the reason why he had not signed the record of interview.

62. The Learned State Counsel submitted that there is no mandatory requirement that a Witnessing Officer must sign during the recording of the caution interview statement. She referred to the following case authorities where the caution interviews were made admissible even without the presence of the Witnessing Officer or where the Witnessing Officer was present but failed to sign:

-*State v. Khan* [2015] FJHC 542; HAC 70 of 2012 (10 July 2015)-where the Witnessing Officer was present but failed to sign.

-*State v. Esava Tuivodo* [2015] FJHC 432; HAC 54 of 2014 (11 June 2015)-where there was no Witnessing Officer present.

-*State v. Bokadi* [2015] FJHC 745; HAC 321 of 2013 (1 October 2015)-where there was no Witnessing Officer present.

-*State v. Manasa Talala and Others* [2016] FJHC 1023; HAC 30 of 2015 (7 October 2016)-where Witnessing Officer was not present throughout the interview and also failed to sign the interview.

63. I agree with the contention of the Learned State Counsel. However, in addition to the Witnessing Officer being present, as to why Inspector Banuve, who was also the Station Officer at the Nasinu Police Station, had to be present during the recording of the Accused's caution interview statement has not been adequately explained by the prosecution.

64. In his voir dire grounds the Accused takes up the position that he was surrounded by five (5) police officers of which 2 were Indo-Fijian police officers and 3 i-Taukei officers during the recording of his caution interview. In his testimony in Court he said that he



had been caution interviewed by DC Dayal. At the time his brother Ron, Inspector Banuve and DC Rakesh (Prasad) were present. In addition, there were two other officers present in the interview room and there were some other persons coming and going from the room.

65. Defence witness Vineeta Devi testified that she could see the Accused sitting with Police Officers. There were four of them – the Police Officer who caution interviewed the Accused and three other iTaukei male officers.
66. Prosecution witness, Ranita Devi testified that she had come to the Nasinu Police Station at around 12.30 in the afternoon on 17 January 2014. When she reached the Police Station, the Police Officers were taking the Accused's statement inside a room. When asked as to who was inside the room at the time, the witness said that it was Umendra, another boy who kidnapped her daughter (she did not know his name), and two Police Officers, Rakesh (Prasad) and Sharon.
67. The evidence of Ranita Devi clearly contradicts the evidence of DC Dayal and DC Prasad who testified to the effect that only DC Dayal, DC Prasad and Inspector Banuve were present during the recording of the Accused's caution interview statement. Ranita Devi not only refers to Police Officer Sharon being present, but she has also stated that the other Accused Ron had also been present at the time. This is consistent with the version given by the Accused that Ron was also present at the time.
68. Furthermore, according to Ranita Devi the recording of the Accused's statement was taking place at 12.30 in the afternoon. However, the evidence of DC Dayal and DC Prasad is that the recording of the Accused's caution interview statement had only commenced at 15.00 hours, which was over two hours later.
69. In his voir dire grounds the Accused has asserted that during the interview, Ranita Devi pulled his shirt, slapped the Accused and swore at him saying, "maichod, magaitinana, your face looks like a dog".
70. In her testimony Ranita Devi denied that she had pulled Umendra Kumar's shirt and slapped him or that she swore at him at the Police Station. She had not been allowed to

go near the Accused as DC Rakesh had informed her that she was only allowed to see the Accused from the window. When asked as to the purpose of her visit to the Nasinu Police Station that day Ranita Devi testified that she had called the Police Station and asked whether the person who had kidnapped her daughter had been brought to the Police Station or not. She said "I wanted to go and see his face".

71. It is quite ironic that Ranita has testified that "*I wanted to go and see his face*" and that the Accused alleges that she had sworn at him and said "*.....your face looks like a dog*".
72. In his voir dire grounds the Accused states that he had requested to have his de-facto wife present during the interview, however, the police refused to have her present at the time of interview and the police officers told the de-facto wife of the Accused to wait outside.
73. DC Dayal testified that the Accused had been duly given all his constitutional rights, including the right to consult a family member or friend. The Accused had specifically requested that his de-facto wife not be present during the recording of the interview. The reason for this was that the Accused did not want his de-facto wife to be involved in this case as she might create problems at the Police Station. This explanation given by DC Dayal seems quite plausible.
74. However, consequent to giving the Accused his constitutional rights the following two questions were put to the Accused:-

Question 4: "Do you fully understand your rights?"

Answer 4: "Yes"

Question 5: "Do you want to exercise your rights?"

Answer 5: "No. I'll see in Court"

75. Although, DC Dayal has testified that the Accused had specifically requested that his de-facto wife not be present during the recording of the interview, this is not reflected in the answer given by the Accused to question 5.

76. The Accused alleges that he was assaulted by the Police during the recording of his caution interview statement. In his testimony in Court he described in detail how the assault took place and the injuries he sustained as a result of the said assault. He has also alleges that his request to be seen by a Doctor or to be taken to hospital for medical examination had not been granted by the Police.
77. Vineeta Devi corroborates the evidence of the Accused in this regard. The Accused had informed her that the Police had assaulted him and she has testified to the injuries she observed on the Accused. She too had requested for the Police to provide medical assistance to the Accused. However, her request had not been granted.
78. The Police Officers who testified during this hearing totally deny that they assaulted the Accused in any manner whatsoever.
79. In his voir dire grounds the Accused has also alleged that he only admitted to having sexual intercourse with the complainant to prevent further assault from the Police.
80. The Learned State Counsel has referred to the case of *Lulu v. State* [2017] FJSC 19; CAV 35 of 2016 (21 July 2017); where the Supreme Court of Fiji stated:

*"The partial confession if accepted could be treated as a piece of evidence identifying the petitioner with the crime and with the evidence of him being found at the scene. The fact that it is a partial confession only would tend to confirm it was not fabricated by the Police....."*

### Conclusion

81. As stated before, the onus of proving the voluntariness and fairness of a caution interview statement and charge statement is on the prosecution and they must prove these beyond reasonable doubt.
82. Taking into consideration the totality of the evidence led at the hearing, I am of the opinion that the prosecution has failed to discharge this burden beyond reasonable doubt.

83. In the circumstances, I hold that the caution interview statement of the Accused (Prosecution Voir Dire Exhibit P1) and the charge statement (Prosecution Voir Dire Exhibit P2) are not admissible in evidence.



Riyaz Hamza

**JUDGE**

**HIGH COURT OF FIJI**



Dated this 26<sup>th</sup> Day of January 2018

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.  
Solicitors for the Accused : Office of the Legal Aid Commission, Suva.