

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case. No. HAC 134 of 2017

BETWEEN : **THE STATE**

A N D : **SEREMAIA BATIALIVA**

Counsel : Ms. L. Latu for the State.
Ms. V. Narara for the Accused.

Dates of Hearing : 20 & 21 August, 2018

Date of Submissions : 23 August, 2018

Date of Ruling : 24 August, 2018

VOIR DIRE RULING

1. The accused has been charged with one count of sexual assault contrary to section 210 (1) (a) of the Crimes Act and one count of rape contrary to section 207 (1) and 2 (b) and (3) of the Crimes Act.

2. The prosecution wishes to adduce in evidence at trial the caution interview of the accused dated 28 June, 2017. The accused objects to the admissibility of the caution interview on the following grounds:
 - “a) The accused was assaulted on the mouth by one iTaukei officer and the same officer also threw a lemon which hit his head during the caution interview at Vatukoula Police Station; and*
 - “b) The accused felt intimidated and harassed in a manner that made him to confess to the said charges.”*
3. The accused identified the following Police Officer who had assaulted him during the investigations:
 - (a) Cpl. Sabino Duaibe.
4. The prosecution denies all the allegations. The burden is on the prosecution to prove beyond reasonable doubt that the caution interview of the accused was conducted fairly under just circumstances, the answers were given voluntarily, lack of prejudice, lack of oppression and in compliance with the Fijian Constitution where applicable. In this ruling the above principle of law has been kept in mind throughout.

LAW

5. The Court of Appeal in *Ganga Ram and Shiu Charan vs. R, Criminal Appeal No. AAU 46 of 1983* outlined the following two tier test for the exclusion of confessions at page 8 in the following words:

“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 which

has been picturesquely described as “the flattery of hope or the tranny 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 police behaved, perhaps by breach of the Judge’s Rules falling short of overbearing the will, by trickery or by unfair treatment. R v Sang (1980) AC 402; 436 at C-E. This is a matter of overriding discretion and one cannot specifically categorise the matters which might be taken into account.”

6. The Constitution of the Republic of Fiji at sections 13 and 14 have recognised and endorsed the above mentioned principles as well.
7. It is for this court to decide firstly, whether the caution interview of the accused was conducted freely and fairly without any threats, assault, inducements or any improper practices by the persons in authority namely the Police Officers who were involved in the investigations and that the accused had voluntarily given his answers on his own freewill.
8. Secondly, if there has been oppression or unfairness then this court can in its discretion exclude the interview. Further if the accused common law rights have been breached then that will lead to the exclusion of the confession obtained, unless the prosecution can show that the accused was not prejudiced as a result of that breach.

EVIDENCE

PROSECUTION CASE

9. The prosecution called three (3) witnesses to prove that the record of interview of the accused dated 28 June, 2017 was obtained without any force, pressure, inducement, threat or assault on the accused by the police officers during investigation.

10. The first prosecution witness PC 5260 Nemani Lutumailagi informed the court that he was the investigating officer as well as the interviewing officer in this matter. He has 4 years of experience as a police officer having joined the Fiji Police Force in the year 2014.
11. The witness confirmed he interviewed the accused at the Vatukoula Police Station in the charge room. The interview was conducted in the iTaukei language at the request of the accused. The witness prepared the English translation thereafter.
12. The original record of interview in the iTaukei language was marked and tendered as prosecution exhibit no.1. The English translation was marked and tendered as prosecution exhibit no. 2.
13. The accused had signed all the pages of the interview together with the witnessing officer WPC Makelesi Ranadi and the witness. Before, during and after the interview the accused did not make any complaints to him.
14. The accused was given his right to consult a lawyer of his own choice or a lawyer from the Legal Aid Commission or his wife, a friend and a religious counsellor to be present during the caution interview. The accused did not wish to exercise this right.
15. The witness stated that all the answers were given by the accused voluntarily, no threats or force or promise was made by the witnessing officer as well. The witness identified the accused in court.
16. In cross examination the witness stated that the charge room was accessible to any police officer and on the day in question he was wearing civilian clothes but could not recall wearing a t-shirt with a police logo on it.

17. The witness denied the interview was interrupted by a police officer and a lemon was thrown on the head of the accused by that police officer who was wearing a police t-shirt and had also sworn at the accused.
18. The witness also denied he threatened or intimidated or harassed the accused by saying that if he had confessed, the lemon would not have been thrown at him.
19. The witness stated that after each question was answered by the accused he read it back to the accused to confirm the same. The officer confirmed that he read back the caution interview to the accused. The witnessing officer was present throughout the interview and had signed the interview.
20. The second prosecution witness was Woman Corporal 3182 Makelesi Ranadi the witnessing officer who was present throughout the interview conducted by PC 5260 Nemani Lutumailagi. When the original record of interview was shown to the witness she confirmed signing all the pages of the interview. During the course of the interview the accused did not make any complaints he was fine and cooperative. The witness did not see the interviewing officer Nemani or any other police officer assaulting the accused. The witness also did not assault the accused. The accused was normal from the beginning of the interview till the end.
21. In cross examination the witness agreed that she did not leave the interview to go anywhere else. When the prosecution exhibit no. 2 was shown to the witness she agreed that after lunch the interview commenced at 1.35pm and that she was part of the interview from 1.35pm to 3pm.

22. The witness was referred to Vatukoula Police Station diary of 28 June, 2017 in particular to serial no's 40 and 48 which mentioned that this officer had been driven to Tavua at 13:45 hours (1.45pm) and had returned to Vatukoula Police Station at 15:21 hours (3.21pm).
23. When the above noting in the station diary was put to the witness she stated that even though she was the only officer by the name of Makelesi at Vatukoula Police Station at the time, the diary entries were incorrectly written by the Station Orderly. The witness maintained that she was present throughout the interview.
24. The witness denied the accused was intimidated and harassed by the interviewing officer during the interview and that one iTaukei police officer in t-shirt had punched the accused on his mouth and had thrown a lemon at him.
25. The final prosecution witness Police Corporal 3903 Sabino Duaibe informed the court that from September 2016 he is the Officer in Charge of the Nadarivatu Community Post till now.
26. On Wednesday 28 June, 2017 as part of their weekly lecture, sports and clean up the witness reached Vatukoula Police Station after 9am that morning. Since he had arrived late the lecture session had finished so he changed his uniform to do some cleaning.
27. The witness did not play any role in the investigation of this case and that he had never seen the accused before but only saw him in court premises before the trial began.
28. In cross examination the witness denied wearing a t-shirt, long pants and a cap that particular day. He denied intimidating and telling the accused to confess. The witness also denied when there was no

response from the accused he threw a lemon and punched the accused on his mouth.

29. This was the prosecution case. At the close of the prosecution case the accused opted to give evidence under oath.

DEFENCE CASE

30. The accused informed the court that in June, 2017 he was staying in Vatukoula with his niece Siteri Nabite. He was arrested and taken to the Vatukoula Police Station. During the interview the interviewing officer Lutumailagi was questioning him slowly and speaking softly. As the interview progressed police officer Sabino Duaibe came and told the accused to tell the truth and after that threw a lemon at him which hit his forehead and then punched his mouth which resulted in blood coming out. This happened in front of the interviewing officer who did not do anything but told the accused to tell the truth. The officer Sabino was wearing long pants, a round neck t-shirt and a cap.
31. The accused did not ask for medical assistance because he thought what had been done to him was right. The accused recalled signing all the pages of the interview he was able to read the question and answers before signing. He also agreed to the admissions that were in the interview. The questions and answers were read to him but he signed because he was frightened.
32. The accused informed the court that after the lemon was thrown at him and after being punched he got frightened. Furthermore, he was informed of his right to a legal aid lawyer and he had spoken to a legal aid lawyer over the telephone but he did not tell the lawyer about the assault because he thought what the police did was right so he did not say anything.

33. The accused recalled being taken to the Magistrate's Court at Rakiraki but the case was not called.
34. In cross examination the accused agreed that it was his first time to be taken to a Police Station under arrest and also to be taken to court. When the previous convictions list was shown to the accused he confirmed it was his previous conviction which was long time ago in 1980 and 1982.
35. When he appeared in the Magistrate's Court he did not ask for a medical to be done since he was not given a chance. Also in the High Court the accused did not complain about the police assault because he did not know what the police had done was wrong.
36. Before the reconstruction of scene the accused had met his son Jone and that his son was present with him throughout the reconstruction. He did not complain to his son about the police assault. After reconstruction he spoke with his son but still he did not complain to his son against the police. The accused denied the allegations against the police were made up by him.
37. In re-examination the accused stated that he did not tell his son about the police assault because he thought what the police had done to him was right. He further clarified that the police officers were wearing police uniform in the Police Station so he thought whatever they did was right.
38. This was the defence case.

DETERMINATION

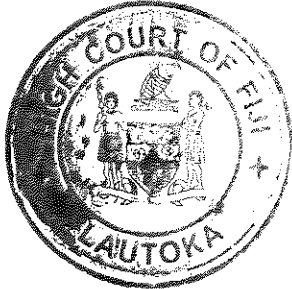
39. The State wishes to rely on the confession obtained by the police during investigation. The accused is objecting on the grounds that the confession was obtained after he was assaulted by a police officer who threw a lemon on his forehead and also punched his mouth which resulted in blood coming out of his mouth. As a result he was frightened so he signed his caution interview.
40. The accused had taken the position when cross examining the interviewing officer that this officer had intimidated and harassed him during the interview. However, the accused in his evidence did not allege any impropriety against this officer. In the words of the accused this officer had questioned him slowly and was soft spoken. Furthermore, the accused had read the questions and answers and he knew what was in his caution interview.
41. The other objection raised by the accused is against the Police Officer who according to the accused had thrown a lemon at him and punched his mouth when he was being interviewed. The law is very clear that the prosecution bears the burden to prove beyond reasonable doubt that the confession was given by the accused voluntarily in fair and just circumstances without any breaches of his Constitutional Rights as well.
42. It is also not in dispute that the interviewing officer Police Constable Nemani Lutumailagi had conducted the interview fairly and the accused had no complaints against this officer.
43. Police Corporal 3903 Sabino Duaibe has denied any wrong doing he informed the court that he was not involved in the investigation of this case and that he did not throw any lemon at the accused and also did

not punch the accused on his mouth. This version is also supported by the interviewing officer Nemani Lutumailagi and the witnessing officer Makelesi Ranadi.

44. The accused had the benefit of legal advice during the interview he was able to understand the questions and answers which was read to him as the interview progressed. At no time did he raise any complaints about the assault to the legal aid lawyer or to the interviewing or the witnessing officer. The son of the accused was present during the reconstruction of the scene. The accused had the opportunity to talk to his son yet he did not make any complaints to his son.
45. It is difficult to accept the reason given by the accused why he did not complain to anyone. The accused was 53 years of age at the time of the interview the reason given by the accused is not believable.
46. From the copy record of the Magistrate's Court at Tavua the accused was produced in the Magistrate's Court the very next day on 29 June, 2017. He did not complain to the learned Magistrate about the assault by the police the day before. This court does not accept the accused was not given a chance to express himself in the Magistrate's Court he was no stranger to the criminal justice although his previous convictions were a long time ago.
47. Counsel for the accused in cross examination of Makelesi Ranadi questioned the whereabouts of this witness from 1:35 pm to 3pm. The station diary was put to this witness and it was suggested that she was not present at the interview during this time. The presence or the absence of this witness at the interview is immaterial to the objections raised by the accused since no complaint was raised by the accused against this officer in his evidence.

CONCLUSION

48. I have taken note of the demeanour of all the prosecution witnesses and the accused. I prefer the evidence of the prosecution witnesses over that of the accused. It was obvious to me that the accused was not telling the truth in court and that he was not forthright in his evidence. The prosecution witnesses on the other hand were straight forward and consistent. I have no doubt they told the truth in court.
49. Considering the totality of the evidence adduced this court is satisfied beyond reasonable doubt that the accused had given his caution interview voluntarily which was not obtained by any improper practices such as assault, intimidation, oppression and harassment.
50. In view of the above I rule that the caution interview of the accused dated 28 June, 2017 is admissible in evidence and the prosecution may tender the same in evidence.



At Lautoka

24 August, 2018

Sunil Sharma

Judge

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.