

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 377 of 2017

STATE

vs.

1. NOA RAVUTANASAU
2. MELACI TIKOMAIRARATOGA

Counsel: Ms. Kantharia B for the State
Ms. Prakash A for Accused 1
Ms. Ratidara L for Accused 2

Date of Hearing: 29th and 30th October 2019

Date of Ruling: 31st October 2019

RULING

[Voir Dire]

1. The Prosecution proposed to adduce in evidence the caution interviews of the first and second accused, for which the two accused objected on the following grounds, that:

First Accused

Caution Interview commencing on 08/12/2017 and concluding on 09/12/2017.

At the time of the Accused's Caution Interview, the right to remain silent as given at Question & Answer 9 was unfair in so far that it attached a condition to remaining silent which was that the Court may not believe him.

Second Accused

That Melaci Tikomairaratoga's caution interview was not conducted fairly because of the following reasons:

a) That question 13 of the Caution Interview states:

"I would also advise you that you have the right to remain silent during your interview, but the consequences of remaining silent is that the court may not believe you as you have not answering to the question. Do you understand?"

2. The hearing of the *voir dire* commenced on the 29th of October 2019 and concluded on the 30th of October 2019. The prosecution presented the evidence of two witnesses. The first and the second accused did not give evidence. The learned counsel for the prosecution and the defence made their oral submissions on the 30th of October 2019. The counsel for the prosecution and the defence were then directed to file their respective written submissions, which they filed as per the directions. Having taken into consideration the grounds of the *voir dire*, the evidence presented by the prosecution, the respective oral and written submissions of the parties, I now proceed to pronounce my ruling as follows.
3. Having carefully considered the grounds of *voir dire* filed by the two accused persons, I find their objections are mainly founded on the ground that the two accused were not properly explained the rights to remain silent and the consequence of not to remaining silent during the recording of their respective caution interviews, thus making the statements they have made in their respective caution interviews inadmissible in evidence.
4. A suspect, who is in the police custody does not generally have an asymmetrical relationship with the police officers who conduct the investigation. The position of the suspect in police custody is hindered by the power, the authority, and the influence extracted not only by the police officers but also the environment within the police station.

5. In recognition of such an asymmetrical relationship, the civilized society reluctant to accept any incriminating confession made by a suspect while in police custody as reliable and admissible evidence against the person who made it, unless it is proven that such confession was made voluntarily and under a fair and just circumstances. Hence, the main objective of the hearing of *voir dire* is to determine the admissibility of the caution interview of the accused person in evidence. The probative value of the statement if admitted in evidence, is still for the assessors to determine during the hearing of the substantive charges. **(G vs UK (9370/81, 35 DR 75).**
6. I will first take my attention to discuss the purpose and the scope of the *voir dire* hearing.
7. Lord Carswell in **R v Musthaq (2005) All ER 885, at 908** has discussed the importance of adopting a cautionary and dynamic approach in admitting confessions of accused persons in evidence, where his Lordship found that:

“It has long been recognised that the content of a confession made by an accused person has to be evaluated with great care in order to determine whether it can safely be accepted as an admission against his interest. The approach of the law to that evaluation has varied over the years and the rules applied by the courts have to be kept under review to ensure that they reflect the standards accepted by each generation.”

8. The Fiji Court of Appeal in **Heinrich v State [2019] FJCA 41; AAU0029,2017 (7 March 2019)** has expounded the basis of excluding an involuntary confession, where Prematilaka JA held that:

“Involuntary confessions are supposed to be excluded on the basis of The Reliability Principle, The Disciplinary Principle, and The Principle of Non-Incrimination. The justification of the Reliability Principle is that a confession not made voluntarily may not be reliable, or that a confession proved to be voluntary is more likely to be reliable than an involuntary one. Though, a confession not made voluntarily may be unreliable, it does not necessarily

follow, that all involuntary confessions are unreliable but presently an involuntary confession remains inadmissible even though it may be true. Thus, threats, inducements, or oppression make a resulting confession inadmissible, but it may not apply to all threats or inducements but only to those likely to produce an unreliable confession. Similarly, self-induced confessions are not excluded.

The justification of the Disciplinary Principle is in terms of discouraging improper police methods of obtaining confessions and the justification of the Principle of Non-Incrimination is that a person should not be put under pressure to incriminate himself. However, it is accepted that these principles should be accepted with their own limitations."

9. Accordingly, an involuntary or an unfairly obtained confession can be excluded on the following three reasons, that are:

- i) Unreliability of the confession,
- ii) Rights against self-incrimination,
- iii) To prevent undesirable police conduct on the person in their custody,

10. I now turn onto discuss the applicable approach in determining the admissibility of the caution interview in evidence.

11. 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 controls 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."

12. 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 voluntariness of caution interview, 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 Rokotuivai - [1996] FJHC 159; Hac0009r.95s (21 November 1996)."

13. The test enunciated in **Shiu Charan (supra)** constitutes two components. The first is the test of voluntariness. The court is required to be satisfied 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 oppression, the court is still required to be satisfied that not any general grounds of unfairness existed before or during the recording of the caution interview to render the confession unreliable.
14. Edmund Davies LJ in **R v Prager (1972) 1 ALL ER 1114** has defined the "oppressive questioning", as follow:

"The only reported judicial consideration of 'oppression' in the Judges' Rules of which we are aware is that of Sachs J in R v Priestley where he said:

'... to my mind, this word in the context of the principles under consideration imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary ... Whether or not there is oppression in an individual case depends upon many elements. I am not going into all of them. They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person has been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world.'

In an address to the Bentham Club in 1968^d, Lord MacDermott described 'oppressive questioning' as—

'questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the suspect that his will crumbles and he speaks when otherwise he would have stayed silent.'

15. If the nature of the questioning, the duration of the questioning or any other circumstances, have created a hope, such as the hope of release or expectation of not to be prosecuted, in the mind of the suspect, or fear, or any other effects in the mind of the suspect that makes him crumple and/or speak when otherwise he would have stayed silent, such questioning amount to oppressive questioning.
16. As I discussed in paragraph three, the main contention of the two accused is that they were not properly explained the right to remain silent and the consequences of not to remaining silent during their respective caution interviews. In question number 9 of the caution interview of the first accused, the interviewing officer had told the first accused that if he exercises the right to remain silent, the court may not believe him. The second accused was

told by the interviewing officer in the question number 13 of the caution interview that if the second accused exercises her right to remain silent, the court may not believe her.

17. Hence, the court is now required to determine, firstly whether question 9 of the caution interview of the first accused and question 13 of the caution interview of the second accused have properly explained the two accused about their right to remain silent. If not, then the court has to determine whether those two questions have affected the voluntariness of the statements made by the two accused in their respective caution interviews.
18. The common law criminal justice system is founded on the principle of *ei incumbit probatio qui dicit, non qui negat*. It means that the burden of the proof lies upon him who affirms, not he who denies. The concept which is widely known as presumption of innocent is founded on this principle of '*ei incumbit probatio qui dicit, non qui negat*'.
19. According to the adversarial system that is used in Common Law Criminal Justice System, an accused cannot be compelled to give evidence unless he chooses to do so. Moreover, the decision of the accused to remain silent must not be used to form any adverse inference against the accused. The rights to remain silent and not to be compelled to give self-incriminating evidence have been embedded into the constitution of Fiji through the Section 14 (2) (j) of the Constitution, where it states that:

“Every person charged with an offence has the right - to remain silent, not to testify during the proceedings, and not to be compelled to give self-incriminating evidence, and not to have adverse inference drawn from the exercise of any of these rights.”

20. The rights to remain silent and not to be compelled to give self-incriminating evidence has also been given to the arrested and detained persons. Pursuant to Section 13 (1) (b) of the Constitution every person who is arrested or detained has the right to remain silent. Moreover, it is a right of the arrested or detained person to be informed promptly that he or she has a right to remain silent and also the consequences of not remaining silent. (*vide*: Section 13 (1) (a) (ii) and (iii) of the Constitution).

21. Section 13 (1) (d) of the Constitution deals with the right not to be compelled to give self-incriminating evidence. The section 13 (1) (d) of the Constitution states that:

"Not to be compelled to make any confession or admission that could be used in evidence against that person."

22. Accordingly, it is a duty of the interviewing officer of the caution interview, to properly explain the suspect the right to remain silent and the consequences of not remaining silent before the commencement of the caution interview. It would assist the suspect to make an informed and independent decision whether he wants to exercise his right to remain silent or not during the recording of the caution interview.
23. In Fiji, the police officers and other investigating officers usually use a caution along the lines of *"You do not have to say anything but anything you do say will be taken down and may be given in evidence"* which is much similar to the Miranda warning (*Miranda v. Arizona, 384 US 436 (1966)*). The courts in Fiji have accepted this line of warning to the suspect as an adequate explanation since it discloses sufficiently the scope of the right to remain silent and the consequences of not remaining silent. Hence, any waiver of the right to silence by the suspect, after he is being sufficiently cautioned along the aforementioned line, is considered as properly, knowingly and voluntarily made decisions by the suspect.
24. Recently, the Fiji Police has adopted a different approach in informing the suspect of their right to remain silent and the consequences of not to remaining silent along the lines of *"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"* or *"you have the right to remain silent during your interview, but the consequence of remaining silent is that the court may not believe you as you have not answered to the question."*
25. In this matter, the two interviewing officers have adopted the second form of the new approach by informing the two accused, if they exercise the right to remain silent, the consequence would be that the court may not believe them.

26. The right to remain silent during the investigation and its consequences were one of the focal points in the 11th Report of the Criminal Law Revision Committee 1972 in England. The Criminal Law Revision Committee suggested that it was wrong to prevent the jury or the Magistrates to draw whatever inferences are reasonable from the failure of the accused to mention his defence, which he puts forward at his trial, when he was interrogated. However, the proposed changes were not adopted and the law was not changed immediately in England.
27. Viscount Dilhorne in R v Gilbert (1977) 66 Cr App R 237, pg 245) has discussed the changes proposed by the Criminal Law Revision Committee in its 11th Report, but still found the applicable law in England was that if the accused elected to exercise his right of silence during the investigation, that must not be the subject of any comment adverse to the accused.
28. The propagators for the proposed changes argued that the existing law was being exploited by "professional" criminals, while innocent people would rarely exercise their right to remain silent. They suggested that changing the law could improve police investigations and adequate safeguards to prevent police abuse. Opponents to the proposed changes claimed that innocent people usually exercised the right to remain silent for many reasons. The proposed changes to the law would introduce an element of compulsion and was in clear conflict with the existing concepts of the presumption of innocence and the burden of proof.
29. The Criminal Justice and Public Order Act 1994 of UK has enacted the changes proposed by the Criminal Law Revision Committee in its 11th Report into the law. Section 34 of the Criminal Justice and Public Order Act 1994 enunciates the effect of accused's failure to mention facts when questioned or charged. Section 34 of the Act states that:
 - i) *Where, in any proceedings against a person for an offence, evidence is given that the accused:*
 - a) *at any time before he was charged with the offence, on being*

questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, or

c) at any time after being charged with the offence, on being questioned under section 22 of the Counter-Terrorism Act 2008 (post-charge questioning), failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.

ii) Where this subsection applies—

a) a judge, in deciding whether to grant an application made by the accused under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998,

b) the court, in determining whether there is a case to answer; and

c) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper.

iii) Where the accused was at an authorised place of detention at the time of the failure, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed as mentioned in subsection (1) above.

30. Accordingly, if the accused failed to mention any fact, which he relies on his defence in the trial, when he was questioned under caution by the police and the accused could reasonably have been expected to mention that fact when he was questioned under caution, the court is allowed to make appropriate inferences from such failure when determining the guilty of the accused.
31. With the introduction of Section 34 of the Criminal Justice and Public Order Act 1994 of UK, the police in England are now required to caution the suspects about the consequences of remaining silent during the interview under caution.
32. The Question 9 of the caution interview of the first accused and the question 13 of the caution interview of the second accused have explained the two accused that if they decided to exercise their right to remain silent, the court may not believe them if they chose to give evidence in court. This explanation of the right to remain silent is in line with the laws of England that came into force subsequent to the enactment of the Criminal Justice and Public Order Act 1994 of UK.
33. Needless to state that the courts in Fiji are not binding to the laws in England. However, the courts in Fiji usually look at the laws in England as persuasive guidance and assistance to interpret the laws in Fiji if only the laws in England are in line with the domestic laws.
34. Having understood the laws in England in relation to right to remain silent during the investigation, I now take my attention to determine whether the position in England could be adopted in Fiji.
35. Obtaining of a statement of the suspect before he is formally being charged, is considered as the first procedural step again an accused under the adversarial criminal justice system. Any statement made by the suspect during the course of the caution interview could be used in evidence. If there is a confession/admission or a mixed statement in the caution interview, that could be used as evidence of the truth of the facts in relation to the alleged offence. If the accused gives evidence at the trial explaining his defence which is not consistent with the explanation given by the accused in his caution interview, then the caution interview

could be used in evidence as evidence of inconsistent denial. (R v Pearce (1979) 69 Cr. App. R 365 CA)

36. Section 13 of the constitution has not specifically stated that the arrested or detained person has the right not to make any adverse inference drawn from the exercise of the right to remain silent.
37. There is a clear distinction between Section 13 and 14 (2) of the Constitution. Section 14 (2) of the Constitution deals with the rights of the accused who is already being charged with an offence. However, Section 13 of the Constitution deals with the arrested or detained person.
38. The caution interview is usually conducted by the investigators before the suspect is being charged with an offence. Hence, a suspect, who has not been charged with an offence, is not entitled to the rights as stipulated under Section 14 (2) of the Constitution.
39. According to Section 14 (2) (j) of the Constitution a person who is being charged with an offence has the right to remain silent, not to testify during the proceedings, not to be compelled to give self-incriminating evidence and also has the right not to have adverse inference drawn from the exercise of any of the above three rights. However, arrested or detained person has not been given the right of not to have adverse inference drawn from the exercise of the right to remain silent.
40. There is no domestic law, allowing the court to make any inferences if the accused failed to mention about a fact which he subsequently relies at the hearing, when he was questioned or charged under caution.
41. Section 13 (1) (b) of the Constitution states that every person who is arrested or detained has the right to remain silent. Moreover, the arrested or the detained person has the right to be informed promptly about his right to remain silent and also the consequences of not remaining silent. Accordingly, the arrested or the detained person has a freedom to remain silent and he or she cannot be asked to speak unless he or she decides to do so. It is the duty of the police to inform the suspect promptly the right to remain silent and the consequences

of not remaining silent. This would enable the suspect to make an informed and proper decision on whether he would exercise the right to remain silent or not. There is no requirement under Section 13 of the Constitution to inform the suspect the consequences of remaining silent.

42. In the absence of any laws in Fiji as similar to Section 34 of the Criminal Justice and Public Order Act 1994 of UK and the Section 13 of the Constitution, it is my considered view that the existing laws of Fiji do not allow the court to make any appropriate inferences if the suspects failed to mention any fact, which he subsequently relies on his defence in the trial, when he was questioned under caution by the police. Therefore, the interviewing officer who conduct the caution interview is not allowed to explain the consequences of remaining silent to the suspect.
43. According to Section 13 (1) (d) of the Constitution, arrested or detained person cannot be compel to make any confession or admission in order to use it in evidence against them. Hence, the suspect must make an informed and voluntary decision not to exercise his right to remain silent in order to make any confession or admission.
44. I now take my attention back to question 9 of the caution interview of the first accused and the question 13 of the caution interview of the second accused. The two accused were explained the consequences of remain silent by the two respective interviewing officers by informing them that if they exercise the right to remain silent, the court may not believe them.
45. Therefore, it appears that the accused were induced not to exercise the right to remain silent. The nature of the question 9 of the caution interview of the first accused and the question 13 of the second accused have excited some hope or expectation or a fear in the minds of the two accused, which might have made them to speak when otherwise they would have stayed silent. As per the definition of oppressive questioning given by Edmund Davies LJ in **R v Prager (supra)** the questions 9 of the caution interview of the first accused and the question 13 of the caution interview of the second accused fall into the definition of oppressive

questioning, thus creating a reasonable doubt whether the two accused made their answers in their respective caution interviews voluntarily or not.

46. The learned counsel for the prosecution contended that the interviewing officer of the caution interview of the first accused has put the right to remain silent and the consequence of not remaining silent to the first accused in the correct manner on several times during the course of the recording of the caution interview, other than Question 9 of the caution interview. Likewise, the second accused was also explained the right to remain silent and the consequence of not remaining silent in the correct manner on several times during the course of her caution interview. However, the two interviewing officers have not specifically explained the two accused which version of the explanation of the right to remain silent is correct, thus creating an ambiguity in understanding the said right to remain silent properly. Therefore, I find this ambiguity has created a reasonable doubt whether the two accused made their answers in their respective caution interviews under a fair and just circumstances.
47. In conclusion I find that the prosecution has failed to prove beyond reasonable doubt that the first and second accused have made their respective statements in the two respective caution interviews voluntarily and under fair and just circumstances. I accordingly, hold that the caution interviews of the first accused and the caution interview of the second accused are not admissible in evidence.




R.D.R.T. Rajasinghe
Judge

At Suva

31st October 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the 1st Accused.

Office of the Legal Aid Commission for the 2nd Accused.