

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

**Criminal Case. No. HAC 136 of 2015**

**BETWEEN** : **THE STATE**

**A N D** : **SAINIVALATI SENILEBA**

**Counsel** : Mr. J. Niudamu for the State.  
Ms. J. Singh and Ms A. Bilivalu [LAC] for the  
Accused.

**Dates of Hearing** : 20 & 21 February, 2019  
**Date of Submissions** : 25 February, 2019  
**Date of Ruling** : 26 February, 2019

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**VOIR DIRE RULING**

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1. The accused is charged with two representative counts of rape contrary to section 207(1) and 2(a) of the Crimes Act and one count of attempted rape contrary to section 208 of the Crimes Act.
2. The prosecution wishes to adduce in evidence at trial the caution interview of the accused dated 7<sup>th</sup> August, 2015. The accused objects to the admissibility of the caution interview upon the following grounds:

- “1. *That he was not explained the right to consult a lawyer nor the right to have contact with someone to be present with him during the interview.*
  2. *There was no witnessing officer present during the caution interview of the accused person;*
  3. *During the arrest his rights were not given to him and he was brought to the Police Station;*
  4. *The accused was threatened, intimidated and verbally abused by the interviewing officer and other Police Officers who were present at the Police Station at that time, however, he cannot name the Police Officers and he was subjected to itaukei swears; and*
  5. *The interviewing officer did not allow him to read the caution interview and he was indicated to place his signatures without being explained the contents of the caution interview.*
3. 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**

4. 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.”*

5. The Constitution of the Republic of Fiji at sections 13 and 14 have recognised and endorsed the above mentioned principles as well.
6. 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.
7. 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**

8. The prosecution called two (2) witnesses to prove that the record of interview of the accused dated 7<sup>th</sup> August, 2015 was obtained voluntarily without any force, pressure, intimidation, inducement, threat or assault or in breach of any common law rules or the accused Constitutional Rights or unfairly by the Police Officers during investigation.
9. The two witnesses were the arresting officer Police Constable Akei Uluibau and the interviewing officer Detective Constable Sailosi Bawaqa.
10. Police Constable Uluibau informed the court that on 7<sup>th</sup> August, 2015 he was stationed at the Rakiraki Police Station, the Crime Officer had instructed him to arrest the accused and bring him to the Police Station.
11. At about 6.00am the witness accompanied by the Crime Officer and PC Sanjay left Rakiraki Police Station for Vatusekiyasawa Village. At about 6.30am they arrived at the house of the accused. The witness called the name of the accused who came out of his house.
12. The witness explained the reason why they were at his house and also informed him that there was a complaint received against him. The accused understood and surrendered himself. The witness escorted the accused to the police vehicle. The accused was not handcuffed. According to the witness the accused was not ill-treated in the vehicle and they arrived at the Rakiraki Police Station at about 6.50am.
13. At the Police Station the accused was handed over to the charge room in charge. The witness identified the accused in court.

14. In cross examination the witness stated that there was no communication between him and the accused after his arrest and on the way to the Police Station. At the Police Station the witness told the accused about his right to engage or consult a lawyer.
15. The witness agreed he did not tell the accused about his right to remain silent and that whatever he says at the time of his arrest could be used against him.
16. The final prosecution witness DC 3920 Sailosi Bawaqa the interviewing officer told the court on 7<sup>th</sup> August, 2015 he was instructed to interview the accused. The original interview was conducted in the iTaukei language at the Rakiraki Police Station Crime Office. The witnessing officer was Sergeant Aminiasi Tuvura who was moving in and out of the office during the interview.
17. The accused did not complain about anything before the commencement of the interview. The interview was conducted in question and answer format. The accused was given the opportunity to consult a lawyer or a relative before the interview started. Before, during and after the interview the accused was not threatened, induced or promised anything or intimidated or coerced or forced or oppressed in any way to make a statement.
18. The witness also stated that the accused was not threatened or sworn at in the iTaukei language either by him or any other Police Officers. The accused appeared normal and was confident in giving his answers.
19. The accused was given sufficient breaks throughout the interview and at the conclusion of the interview the accused was asked whether he

wished to add or delete or alter anything in the interview but the accused did not exercise this opportunity.

20. At the end of every page the witness would give the page to the accused to read after which the accused would sign and the witness counter signed. The original caution interview of the accused in the iTaukei language was marked and tendered as prosecution exhibit no. 1.
21. The interview commenced at 11.05am on 7<sup>th</sup> August, 2015 and ended the same day at 5.05pm.
22. The witness confirmed that he prepared the English translation correctly. The English translation of the caution interview was marked and tendered as prosecution exhibit no. 1(A). Furthermore, the witness stated that the witnessing officer was present during the interview but was moving in and out of the office since at that time there was a lack of manpower at the Police Station.
23. The witness identified the accused in court.
24. In cross examination the witness agreed that the station diary recorded every movement of Police Officers and that whatever is recorded in the station diary was correct. The witness agreed that the witnessing officer was present during the caution interview and that the presence of this officer would be reflected on the station diary.
25. The witness was referred to the following diary entries namely:

	<i>Entries</i>	<i>Description</i>
1.	105	"DC 3920 Sailosi commence interview of Sanivalati."

2. 119 *“DC 3920 Sailosi suspend interview of Senivalati to contact Legal Aid.”*
  3. 126 *“DC 3920 Sailosi suspend interview of Senivalati to have his lunch.”*
  4. 130 *“Further reference to SD 126 DC Sailosi recommence interview of Sainivalati after having his lunch.”*
  5. 152 *“S/Cpl Dhiren drove out F/134 for reconstruction of scene at Vatusekiyasawa conveying DC 3920 Sailosi with suspect Sainivalati.”*
  6. 167 *“Ref to SD 159 DC Sailosi conclude interview of Sainivalati.”*
  7. 168 *“DC Sailosi escort Sainivalati back into the charge room.”*
26. The witness agreed that in all the station diary entries mentioned there was no noting of the witnessing officer Aminiasi Tuvura’s presence. However, the witness maintained that Aminiasi was present in the Crime Office but he could not recall whether Aminiasi was present when signatures were taken since Aminiasi was moving in and out of the office. Aminiasi did not sign the caution interview. The witness also did not mention in the interview that Aminiasi had left the interview.
27. The witness denied threatening the accused or getting upset with him during the interview. The witness maintained that after every question he would read out the question and the accused would give his answer which was written in the interview. The accused was allowed to read every page of the interview after it was completed.

28. The witness denied that the accused was told to sign at places pointed by him he also denied threatening, intimidating and verbally abusing the accused during the caution interview.

#### **DEFENCE CASE**

29. At the close of the prosecution case the accused exercised his right to silence.

#### **DETERMINATION**

30. The prosecution wishes to rely on the confession obtained by the police during investigation. The accused on the other hand is objecting on the grounds stated earlier that he did not confess voluntarily and on his own freewill.

#### **WITNESSING OFFICER NOT PRESENT DURING INTERVIEW**

31. It is important to note that the accused has not raised any complaint of any impropriety against the witnessing officer Aminiasi Tuvura. What the accused is saying is that no witnessing officer was present during the caution interview of the accused. The interviewing officer informed the court that the witnessing officer was present during the interview but had to move in and out of the Crime office due to the shortage of manpower that day.
32. The reference made to the station diary entries by the defence counsel during cross examination of the interviewing officer Sailosi Bawaqa does suggest that there was no witnessing officer present from the commencement of the interview to its conclusion.



33. Counsel for the accused in her submissions referred to the case of *State v Jack Fraser HAC 22 of 2010 (25 September, 2014)*. In Fraser's case neither the accused nor the interviewing officer had signed several pages of the caution interview. The movement of the accused was also not recorded. The court was of the view that the Police had not followed proper procedures to record the caution interview which created a serious doubt as to the voluntariness of the confessions obtained.
34. Here the situation is very different the accused is stating that no witnessing officer was present during his caution interview.
35. The accused opted to remain silent hence this court did not get the benefit of hearing from him as how the absence of the witnessing officer had affected his voluntariness during the interview, however, the burden is on the prosecution to prove that the confession obtained was given by the accused voluntarily.
36. I accept the evidence of the interviewing officer that the witnessing officer did not sign the interview but was moving in and out of the office during the interview. There is no requirement of the law that during caution interview a witnessing officer must be present throughout the interview. Although it is a matter of good practice but it may not be possible in some situations. There was no suggestion made by the accused that the absence of the witnessing officer had caused any prejudice or had affected him during the interview.

#### RIGHT TO CONSULT A LAWYER/RELATIVE

37. According to the interviewing officer the accused was given his right to consult a relative or a lawyer. The accused had opted to consult a lawyer from the Legal Aid Commission which was allowed.

38. In *R v Mallinson (1993) 1 NZLR 528* the New Zealand Court of Appeal held that the onus was on the prosecution to show firstly that the suspect had been told of his right to consult a lawyer and secondly the suspect understood the substance of the right and that the exercise of the right would have been implemented if he chose to exercise it. However, evidence that his right had been advised, normally led to an inference that the suspect understood the nature of the right.

39. The relevant excerpts from the caution interview are as follows:

*Q9: Under section 13 of the Constitution of Fiji, you have the rights to consult your lawyer or Legal Aid assistance or a Pastor, your spouse, close relatives or department of Social [Welfare]. Do you understand?*

*A: Yes.*

*Q10: Do you wish to exercise your rights?*

*A: I wish to communicate with the Legal Aid Lawyer.*

*1145hrs – Interview suspended for SAINIVALATI SENILEBA to contact Legal Aid Commission on phone 6694008.*

*1150hrs - Interview recommence...”*

40. From the above recordings in the caution interview there is no doubt that the accused was given his right to consult a lawyer or a relative and after understanding this right the accused opted to consult the Legal Aid Commission.

### RIGHTS NOT GIVEN DURING ARREST

41. Police Constable Akei Uluibau stated that when he arrested the accused at his home he informed the accused the reasons for his arrest and also told him that there was a complaint against him.
42. According to this officer the accused understood what was told to him and he volunteered to accompany the officer and his team to the Police Station. The accused and the arresting officer did not communicate after arrest until they arrived at the Police Station where the officer told the accused about his right to consult or engage a lawyer.
43. This court accepts that the accused was promptly informed of the reasons for his arrest and he understood the same in compliance with section 13(1) (a) of the Constitution of Fiji.

### THREAT, INTIMIDATION AND VERBAL ABUSE

44. The witnessing officer informed the court that before, during and after the caution interview the accused was not threatened, intimidated or orally abused or sworn at by him or the other Police Officers who were present at the Police Station at that time.
45. A perusal of the caution interview shows the accused has not only made inculpatory statements but exculpatory statements as well. If there were any threats, intimidation or oral abuse made the accused in my view would not have made any exculpatory statements. I accept the evidence of the interviewing officer in this regard.

NOT GIVEN OPPORTUNITY TO READ THE CAUTION INTERVIEW

46. The interviewing officer informed the court that the accused was allowed to read every page of the interview after it was completed and that each page was signed by the accused after reading.
47. This officer also maintained that he would read out the question and the accused would give his answer which was written in the interview.
48. The following questions and answers in the caution interview are relevant:

Q. 81 - *Is this your true statement?*

A: *Oh yes.*

Q. 82 - *Did at anytime you were force, threaten or false promises done to obtain your statement*

A: *No*

Q. 83 - *Do you wish to alter or add anything?*

A: *Yes I just want to say that according to TITILIA story on the 8.5.15 she said that in 2012 she have sexual relationship with one of his cousin namely SEKOVE from Rewa.*

Q. 84 - *Did you give your statement in your own freewill?*

A: *Yes.*

Q. 85 - *Can you sign to say that you gave statement in your own freewill without any force done*

A: *Yes.*

49. The above indicates that the accused knew the contents of the caution interview and that he signed to acknowledge the same.

## OBSERVATIONS

50. Although not raised by any counsel, however, this court takes note that there is one question in the caution interview that requires some attention.

*“Q. 83 - Do you wish to alter or add anything?”*

*A: Yes, I just want to say that according to TITILIA story on the 8.5.15 she said that in 2012 she have sexual relationship with one of his cousin namely SEKOVE from Rewa.”*

51. The above answer speaks of the previous sexual history of the complainant which is contrary to section 130 of Criminal Procedure Act. In view of the above and in exercise of my discretion the sentence after the word “yes” in answer to question 83 shall be blacked out. It should now be read as:

*“Q. 83 – Do you wish to alter or add anything?”*

*A: Yes.”*

## CONCLUSION

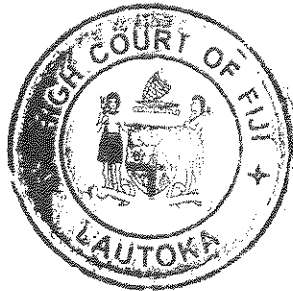
52. Taking into consideration all the evidence adduced and the submission of both counsel this court is satisfied beyond reasonable doubt that the accused had given his answers in the caution interview voluntarily on his own freewill without any inducement, oppression or breach of his Constitutional Rights enshrined in the Constitution of Fiji or in breach of any common law rights. The caution interview was also conducted in circumstances which was fair to the accused. I prefer the evidence of both the prosecution witnesses.

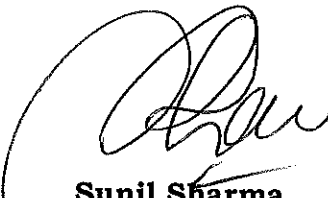
53. In view of the above, I rule that the caution interview of the accused dated 7<sup>th</sup> August, 2015 is admissible in evidence and the prosecution may tender the same subject to order (i) below.

**ORDERS**

(a) The caution interview of the accused dated 7<sup>th</sup> August, 2015 is admissible and the prosecution may tender the caution interview at trial subject to the following:

- i) The answer to question 83 should be only “yes” the sentence that continues thereafter is to be blacked out and/or removed.



  
**Sunil Sharma**  
**Judge**

**At Lautoka**

26 February, 2019

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused.**