

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case. No. HAC 205 of 2016

BETWEEN : **THE STATE**

A N D : **JONE KALE**

Counsel : Ms. L. Latu for the State.
Ms. K. Vulimainadave [LAC] for the
Accused.

Dates of Hearing : 27 February and 7 March, 2019

Date of Submissions : 07 March, 2019

Date of Ruling : 07 March, 2019

VOIR DIRE RULING

[1] The accused is charged with eight counts of rape contrary to section 207 of the Crimes Act.

[2] The prosecution wishes to adduce in evidence at trial the caution interview of the accused dated 8th and 9th October, 2016. The accused objects to the admissibility of the caution interview upon the following grounds:

1. *THAT on the night of his arrest, when he came out of the shed, he was handcuffed by a police officer.*

2. *THAT whilst in the police vehicle, one Police Officer Sikeli and one Police Officer Moro, started punching him on his ribs on both sides and at the same time asking him questions.*
3. *THAT when they reached Nukuloa, he was told to get out of the vehicle.*
4. *THAT he was beaten on his back and knees with the police baton and torches were shone onto his face by the police officers.*
5. *THAT he was still in handcuffs when the police officers were assaulting him.*
6. *THAT when they reached Ba Police Station, one police officer Sikeli and another both kicked his left knee.*
7. *THAT at Ba Police Station, the same group of police officers came and sat with him and one police officer Simi slapped his head and punched his right jaw then kicked his left knee.*
8. *THAT he fell down on the cement floor and lay there for nearly more than an hour and no one assisted him.*
9. *THAT he was in handcuffs at the back during his interview and after his interview then the handcuffs were removed.*
10. *THAT one police officer Miri who was interviewing [officer] complained to the other police officers that he was denying everything in the interview, then he was further physically and verbally assaulted by those police officers.*
11. *THAT his request at the Ba Police Station to be taken to the hospital was denied.*

12. *THAT he was not given any water or toilet breaks whilst in police custody at Ba Police Station.*

- [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 six (6) witnesses, the first witness Sergeant Simione Tuvuiya informed the court that he was the arresting officer. On 6th October, 2016 at about 20:30 hours he was informed about the receipt of a report of rape at the Ba Police Station. Shortly after, the witness accompanied by Constable Moro and police vehicle driver went to Balevuto Village. As a matter of protocol the witness first went to see the Turaga ni Koro and relayed to him the reason why they were at the village.
- [9] The Turaga ni Koro granted his permission, the witness told Constable Moro to wait outside the shed where the accused was sitting. After about 20 minutes the accused came out of the shed.
- [10] At this time the witness instructed Constable Moro to arrest the accused. The accused was informed about the allegation against him and then escorted to the Ba Police Station and handed over to the officers in the charge room.

- [11] According to the witness there was no assault or verbal abuse on the accused on their way to the Police Station or at the Police Station. The accused was cooperative he was handed over to the investigating officer at the Police Station.
- [12] In cross examination the witness stated that after Constable Moro had arrested and brought the accused to him he informed the accused the reasons for his arrest. The accused had come out of the shed voluntarily so the witness told Constable Moro not to handcuff the accused.
- [13] The accused was referred to his police statement dated 24th August, 2017, the witness agreed it was not written in his police statement that at the time of his arrest the accused was explained the reasons of his arrest but disagreed since it was not in his police statement meant he had not explained to the accused the reasons of his arrest.
- [14] The witness disagreed that the accused was handcuffed and taken to the police vehicle. He denied there was another Police Officer Sikeli in the police vehicle and that both Sikeli and Moro had punched the accused on both sides of his ribs and were questioning him on the way to the Police Station.
- [15] The witness denied the police vehicle was stopped at Nukuloa where the accused was told to get out of the vehicle and then beaten on his back and knees with the police baton while handcuffed and at the same time torch lights were shown on the face of the accused.
- [16] The witness also denied that upon reaching Ba Police Station Sikeli and another Police Officer kicked the left knee of the accused. He also denied some Police Officers came and sat with the accused and the witness slapped the head of the accused, punched his right jaw and kicked his left knee. As a result the accused fell down and was lying on the floor for more than an hour without any assistance.

- [17] The witness disagreed with the suggestion that during the interview the interviewing officer Miriama had complained that the accused was denying everything as a result the witness and other Police Officers verbally abused and assaulted the accused.
- [18] The witness denied the accused had requested him and his team to be taken to the hospital which was refused.
- [19] In re-examination the witness clarified he forgot to mention in his police statement that he had explained to the accused the reasons of the arrest. The witness stated that he was not requested by the accused that he wanted to go to the hospital the request was made to the interviewing officer.
- [20] The second witness Detective Constable Sikeli Tokovou informed the court that he was not involved in the investigation of this case.
- [21] In cross examination the witness denied being on duty on the night of 6th October, 2016 or part of the team that went to arrest the accused at Balevuto Village.
- [22] The witness denied being in contact with the accused during the investigations or committing any impropriety on the accused as alleged from the time of his arrest to the Police Station and at the Police Station.
- [23] The third witness Police Constable Mosese Maraiwalu on 6th October, 2016 was doing afternoon shift he was the station orderly. At about 22:46 hours the accused was brought in and handed to the charge room. The witness physically searched the accused and all his properties were noted in the cell book.
- [24] After this the accused was escorted to the cell and locked in. The accused did not make any complaints to him, while noting the properties no one assaulted the accused. The accused behaved normally.

- [25] In cross examination the witness stated that a torch was recovered from the accused which was noted in the cell book register. The witness denied when the accused was handed over to him he was not well and not walking properly.
- [26] The fourth witness Cpl. Miriama Nadumu informed the court that she was the investigating officer as well as the interviewing officer. The accused was interviewed by the witness in the iTaukei language on the 8th and 9th October which was marked and tendered as prosecution exhibit no. 1. The witness also prepared an English translation of the caution interview which was marked and tendered as prosecution exhibit no. 2. The witnessing officer Cpl. Tomasi Nakeke was present throughout the interview. The accused had signed all the pages of the interview together with the witnessing officer and the witness.
- [27] According to the witness before the interview the accused was well and cooperative he did not make any complaints, he voluntarily answered all the questions asked.
- [28] Nobody including the witness forced or verbally abused the accused to answer the questions asked. The accused was asked on the 8th if he wished to consult a doctor at Q. 7 of the interview. The answer given by the accused was *"No I want to have pain killer"*. On the 9th the accused was again asked at Q. 64 if he wished to see a doctor the answer given by the accused was *"It's enough I am taking a pain killer tablet."*
- [29] The right to counsel was also given to the accused on both days of the interview at Q. 12 and Q. 67.
- [30] The witness also informed the court that the accused was cooperative whatever answer he gave was written down including his denials.
- [31] In cross examination the witness denied on the 8th she had seen the accused lying on the floor before the interview. The witness agreed the

accused was arrested on the 6th but interviewed on the 8th. During the interview the accused had complained of headache so he was rested for 3 minutes after taking pain killers. The interview recommenced since the accused appeared normal and he did not wish to see a doctor.

[32] According to the witness when the accused was brought over for interview he was not handcuffed, however, when she was about to interview the accused she had asked that the accused be handcuffed reason being she was of the view the accused might run away, however, half way into the interview the accused was cooperative so the handcuff was removed before lunch.

[33] On the 8th the witness stated the accused had not complained about having headaches she had asked if he was suffering from any sickness and whether he wanted to see a doctor to which the accused had asked for a pain killer which was given. The witness denied the accused had asked to see a doctor but she had refused. On the 9th the accused was not handcuffed at all.

[34] The witness denied the suggestion that the accused had asked for pain killers due to assault on him by Police Officers. She also stated it was not true that after the accused denied everything during the initial stages of the interview other Police Officers came and further physically assaulted and verbally abused the accused. The accused was given breaks to go to the toilet, drink water, coffee and given biscuits to eat.

[35] The fifth witness was Cpl. Tomasi Nakeke the witnessing officer. He was present throughout the interview to see that the interview was conducted fairly. Before the interview the accused was well, okay and ready for interview. The accused was not assaulted by him or any other Police Officers. The accused gave his answers voluntarily, was cooperative and in good health. The accused did not make any complaints.

- [36] In cross examination the witness stated that the accused was interviewed at the crime office which was not a room but an open space. Before the interview started the accused was handcuffed at the request of the interviewing officer. The witness was sitting beside the accused whereas the interviewing officer was sitting on the opposite side of the table.
- [37] There were other Police Officers in the crime office doing their usual work. The crime office was a secured place. The handcuff of the accused was removed on the 8th after the interviewing officer requested it to be removed before lunch. The accused had informed the interviewing officer that he had a headache before being asked whether he wanted to go to the hospital. The witness disagreed the accused was not well and in pain before the commencement of the interview. He also disagreed the accused had asked for pain killer because his request to be taken to the hospital was denied by the interviewing officer.
- [38] The witness stated it was incorrect that when the accused had denied everything up to Q.46 the witnessing officer complained to the other Police Officers who came and assaulted the accused and verbally abused him.
- [39] The final witness Morotikei Vocevoce informed the court that he has now left the Fiji Police Force but in October, 2016 he was a Police Officer and he had accompanied Sgt. Simi to arrest the accused at Balevuto Village. The witness was not sure of the time he had left Ba Police Station for Balevuto Village but it was in the afternoon a bit dark. The Turaga ni Koro showed them where the accused was. The accused was drinking grog in the village.
- [40] The Turaga ni Koro brought the accused to where they were. The accused was explained the reasons for his arrest who went on his own freewill to the vehicle and then all came to the Police Station. The accused was not threatened or assaulted by Sgt. Simi or by him on

the way from Balevuto Village to the Police Station or at the Police Station. The accused did not complain about anything.

[41] In cross examination the witness stated that three officers had gone to Balevuto Village to arrest the accused including the driver. Detective Constable Sikeli was not with them. After the accused was brought from the shed by the Turaga ni Koro the witness escorted the accused to where Sgt. Simi was waiting. Sgt. Simi explained the reasons for the arrest and gave the accused all his rights.

[42] The witness denied the accused was handcuffed by him without anything being said. He also denied Detective Constable Sikeli was in the vehicle and both had assaulted the accused on both sides of his ribs while questioning him in the vehicle. The witness also denied the vehicle was stopped at Nukuloa where the accused was told to get out of the vehicle and further assaulted by Detective Constable Sikeli and him on his back and knees with police batons and also the witness did not shine any torch light on the face of the accused at this time whilst the accused was handcuffed.

[43] At the Ba Police Station Detective Constable Sikeli and another Police Officer had not kicked the left knee of the accused. Sgt Simi had also not slapped the accused on his head and right jaw or kicked his left knee at the Police Station. On 8th October the interviewing officer Miriama had not informed him and the other Police Officers present in the crime office that the accused was denying everything in the interview and that he and other Police Officers had assaulted and verbally abused the accused.

[44] This was the prosecution case.

DEFENCE CASE

- [45] At the close of the prosecution case the accused exercised his right to give evidence and be subjected to cross examination.
- [46] The accused informed the court that on 6th October, 2016 during the night whilst drinking kava at his village, the village headman came and informed him that the police were waiting outside the shed for him. As soon as he came out of the shed, Police Officer Moro handcuffed him at the back.
- [47] Police Officer Moro then started punching the accused and then took him towards the police vehicle. Three other Police Officers also came, they were Sgt. Simi, Cpl. Moro and another Police Officer the accused did not know.
- [48] Inside the vehicle the Police Officers started questioning the accused about the case. The accused told the officers that he did not know anything about the case.
- [49] In the twin cab, the accused was seated in the middle with one officer on both sides. Police Officer Moro who was sitting on his right started questioning the accused followed by the other officers as well.
- [50] After the accused denied any involvement in the case, both the officers started jabbing the accused on his ribs in particular the right side of his ribs. At Nukuloa Primary School, the accused who was handcuffed at his back was told to get out of the vehicle. The accused was pulled out of the vehicle and a torch light was shone on his face.
- [51] Also the accused was beaten and kicked on both his legs with a stick, he was assaulted for almost half an hour. Thereafter, the accused was brought to the Ba Police Station. On the way the accused was

questioned by the Police Officers, the accused again denied any involvement.

[52] At the Ba Police Station, the same group of Police Officers also questioned the accused and assaulted the accused by kicking, stomping his legs and in the words of the accused "*they beat me like an animal*". The accused was also assaulted by Sgt. Simi who came and punched the right side of his face. At this time the accused fell on the floor, he was lying there for almost 20 minutes. The Police Officers were telling the accused to stand up but the accused had difficulties since his hands were cuffed behind his back.

[53] Both his legs were paining, he kneeled first and then stood up. The accused was then taken to the cell and locked up for the night.

[54] The accused was interviewed by Miriama Nadumu since he kept denying Sgt. Simi came and slapped him to say "*yes*". On the morning of the interview, the accused right shoulder, ribs, his legs and hands were paining. Miriama had asked the accused if he wanted to see a doctor.

[55] The accused was not handcuffed in the cell or anytime thereafter after the night he was arrested, he was given water and toilet breaks during the interview.

[56] In cross examination, the accused agreed when he was arrested, the Turaga ni Koro was there. The accused maintained he was threatened and/or assaulted by Police Officers as stated by him. The accused recalled appearing in Ba Magistrates Court escorted by Police Officers other than those who had arrested and interviewed him.

- [57] When the accused appeared in the Magistrate's Court, he did not complain to the Magistrate that he was assaulted by the Police and that he wanted to go for a medical check-up.
- [58] According to the accused, Miriama was only questioning him, when he denied she told the other Police Officers that he was not admitting the question asked. The accused agreed the answers he gave in his caution interview were given voluntarily by him, he was given breaks and food during his interview.
- [59] The accused had asked for pain killer during his interview since he was frightened throughout his custody due to the assault and pain.
- [60] In re-examination the accused clarified he did not complain to the Magistrate about the assault by the Police Officers or ask to be taken to the hospital since the Magistrate did not give him a chance or ask him if he wished to say anything. Furthermore, the accused stated that as soon as Miriama told the other Police Officers he was denying the questions asked in his caution interview, the accused was beaten by Sgt. Simi to say "yes". During the interview the accused was assaulted by Sgt. Simi twice.
- [61] The accused also clarified he said "yes" that he gave his answers in his caution interview voluntarily because he was hurt by what the Police Officers had done to him and he was forced to give his answers.

DETERMINATION

- [62] 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 as a result of threat, intimidation and assault by Police Officers.

[63] There is no dispute that the accused was arrested at Balevuto Village at about 9.50pm on 6th October, 2016 then brought to the Ba Police Station and kept in custody. The caution interview was conducted on 8th October, 2016 at about 11.15 am which concluded on 9th October, 2016 at about 3.40 pm. According to the copy record of the Ba Magistrate's Court the accused was produced in court on 11 October, 2016.

[64] Section 13 (1) (f) of the Constitution of Fiji provides that an arrested person is to be brought before a court not later than 48 hours after the time of arrest. There is no evidence before this court why this provision of the Constitution had not been complied with by the Police Officers.

[65] Section 13 (1) (f) of the Constitution of Fiji states:

“Every person who is arrested or detained has the right –

(f) to be brought before a court as soon as reasonably possible, but in any case not later than 48 hours after the time of arrest, or if that is not reasonably possible, as soon as possible thereafter;

[66] Furthermore upon simple mathematics the 48 hours after the time of arrest of the accused had ended at 9.50pm on 8th October, 2016. This means the continuation of the caution interview on the 9th was in breach of the accused's Constitutional Right since he was not produced in court until 11th October, 2016. There is also no evidence before the court that there was a court order obtained by the police to keep the accused in their custody in excess of 48 hours.

[67] The Police Officers therefore kept the accused in their custody unlawfully beyond 48 hours after 9.50pm on 8th October, 2016. Accordingly, the caution interview of the accused dated 9th October, 2016 was vitiated and therefore cannot be relied upon by the prosecution.

[68] The accused has made serious allegations of assault on the part of the arresting Police Officers at the time he was arrested at his village, on their way to Ba Police Station. At Nukuloa Primary School when the vehicle was stopped while he was handcuffed and finally at the Ba Police Station on the 6th. Further the accused says he was assaulted on the 8th after he continued to deny the allegations made against him during the caution interview.

[69] In respect of the assault at the time of his arrest I do not accept this was the truth since the Turaga ni koro was present and there is no way the Police Officers would have behaved in the manner expressed by the accused. A perusal of the caution interview of the 8th suggests that the accused had not confessed to anything until much later in the afternoon. It was during late afternoon on the 8th after the interview recommenced at 5.40pm after Q.47 that the accused started to make inculpatory as well as exculpatory statements.

[70] If the accused version of assault is to be accepted then he would have sustained very serious injuries. When the accused was produced in Ba Magistrate's Court on 11th October, 2016 he did not inform the court about the police brutality or make any request to be medically examined.

[71] I also prefer the evidence of the Police Officers that the accused did not wish to go the hospital but preferred to take pain killers as a result of headache unrelated to any assault.

[72] This court also 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.

[73] 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 assault as mentioned by the accused in my judgment he would not have made any exculpatory statements. I accept the evidence of the interviewing and witnessing officers that the accused had given his answers voluntarily.

OBSERVATIONS

[74] Although not raised by any counsel, however, this court takes note that answers given from question 55 to 58 in the caution interview conducted on the 8th require some attention.

These are as follows:

“Q: 55 What did you go and do there?”

A: To go and steal the goat.

Q: 56 Whose goat were you going to steal?

A: Diru’s goat.

Q: 57 Did you steal the goat?

A: Yes.

Q: 58 What happened when you steal the goat?

A: We had sex.”

[75] The above answers are prejudicial and unfair to the accused suggesting that he was a thief hence attacking his character which ought to be removed from the interview. In view of the above and in exercise of my discretion questions and answers 55 to 57 are to be blacked out. Q. 58 is to be “What happened” the sentence after the word “happened” is to be blacked out. The answer to Q. 58 is to remain.

CONCLUSION

- [76] 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 of the 8th October, 2016 voluntarily on his own freewill without any threat, intimidation, assaults, 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 all the prosecution witnesses in this regard.
- [77] In respect of the interview of the 9th this court orders it to be inadmissible since it was obtained in breach of the Constitutional Right of the accused to be produced in court not later than 48 hours after the time of arrest which was unfair to the accused.
- [78] In view of the above, I rule that the caution interview of the accused dated 8th October, 2016 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 8th October, 2016 is admissible and the prosecution may tender the same at trial subject to the following:
- i) Questions and answers 55 to 57 are to be blacked out. Q. 58 to read as “What happened”. The sentence after the word “happened” is to be blacked out. The answer to Q. 58 remains.

(b) The caution interview of the accused dated 9th October, 2016 is inadmissible and therefore cannot be tendered in evidence by the prosecution at trial.




Sunil Sharma
Judge

At Lautoka

7 March, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.