

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 156 of 2018

BETWEEN : **THE STATE**

AND : **NACANIELI BAKATA**

Counsel : Mr. S. Seruvatu for the State.
: Ms. A. Bilivalu for the Accused.

Dates of Hearing : 03, 04, 05, 06 February, 2020

Date of Submissions : 19 February, 2020

Date of Ruling : 20 February, 2020

VOIR DIRE RULING

BACKGROUND INFORMATION

1. The accused is charged for one count of aggravated robbery contrary to section 311 (1) (a) of the Crimes Act.
2. The prosecution wishes to adduce at trial the caution interview of the accused dated 2nd August, 2018. The accused objects to the admissibility of the caution interview on the following ground:
 - (a) *The accused was assaulted before, during and after the caution interview was conducted. The accused received punches to his head, body, chest and was thrown to the ground by the intel and recap unit police officers namely Saimoni Qasi, Opeti Lolo and some*

other police officers. The accused was assaulted by these police officers for more than an hour. Furthermore, the accused was made to bend over, chillies were rubbed on his buttocks and a police baton was pushed into his anus whilst his hands were cuffed to his back.

3. The prosecution has denied the allegation. The burden is on the prosecution to prove beyond reasonable doubt that the caution interview of the accused was conducted fairly under just circumstances and the answers were given voluntarily without any assault by persons in authority namely police officers, lack of prejudice, lack of oppression and in compliance with the Fijian Constitution where applicable. In this ruling the above principles 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 categorize the matters which might be taken into account.”

5. The Constitution of the Republic of Fiji at sections 13 and 14 have recognized 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 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 four (4) witnesses to prove beyond reasonable doubt that the confession obtained by the police during investigation was given by the accused voluntarily without any duress, assault, torture, inducement or any breaches of the accused Constitutional or common law rights.
9. The first prosecution witness Inspector Opeti Lolo informed the court that from June to September, 2018 he was amongst 20 police officers who were part of the recap team formed to recapture escaped prisoners. The accused and another had escaped from the Nadi Police Station. The recap team was led by Insp. Saimoni Qasi. The witness was not part of

the investigation team but he was part of the intel and recap team. As soon as the accused and another were recaptured in Valelevu the witness and the other team members of the recap team were stood down.

10. The team was camping at the Namaka Police Station bure which was about 40 to 50 meters away from the crime office at the Namaka Police Station. The witness stated that on 2nd August, 2018 he was not around the Namaka Police Station but was at the camp site so when the accused was brought in and taken to the crime office he wasn't aware.
11. The witness denied the allegation that he and Saimoni Qasi had punched the accused on his head and body and had thrown the accused to the ground. The witness further stated that he did not inflict any harm or injury on the accused as alleged. He also denied the accused was made to bend over, chillies were rubbed on his buttocks and a police baton was inserted in his anus. The witness could not recall whether on the 2nd of August he had come into contact with the accused but he did see the accused being escorted from the crime office to the Namaka Police Station.
12. In cross examination the witness stated that their reporting on and off duty was done by Lautoka Police Station. The witness could not recall if from 1st August to 3rd August, he had entered the Namaka Crime Office. After the accused was recaptured the witness and the team stayed at the camp site since there were other cases that needed follow up.
13. The witness denied on 2nd August, 2018 he was present at the crime office when the accused was caution interviewed. Moreover, the witness and his team were instructed not to go into the crime office after the accused was brought in because the investigation had started namely the accused was caution interviewed and the process of charging.

14. The witness denied the allegation of assault as suggested by the accused counsel. The witness agreed that he had no written confirmation with him in court that he was not at the Namaka Crime Office on 2nd August, 2018. The witness agreed that the accused was charged with aggravated robbery in 2018 which was one of the crimes the witness and his team were investigating in Nadi although he was part of the recap operation.
15. The accused was brought into Namaka Police Station on the 1st of August and that the witness had seen the accused on the 2nd but was unable to recall if the accused was limping or was injured in anyway.
16. In re-examination the witness clarified that they were tasked with all the intel gatherings and were also conducting operations in regards to serious cases for the entire Western Division.
17. The second witness Cpl. 4202 Timoci Tavurunaqiwa informed the court that on 2nd August, 2018 he had interviewed the accused at the Namaka Police Station with Detective Corporal Anil Kumar being the witnessing officer. The interview commenced at 1400hrs which was conducted in the English language at the request of the accused.
18. The record of interview was marked and tendered as prosecution exhibit no.1. According to the witness the accused was given all his Constitutional rights and the interview had lasted for about 2 ½ hours. During the caution interview the accused was given a break to have a cigarette, all the pages of the interview were signed by the accused, the witnessing officer and the witness. After one page was completed, it was printed and read by the accused and signed.

19. At no time before or during the record of interview was the accused assaulted, threatened or given any false promises either by the witnessing officer, the witness or any other officers. The witness denied the allegations made by the accused.
20. The witness stated that since the interview was conducted in the crime office there were other police officers and some suspects in the room.
21. In cross examination the witness stated that the accused was brought in by the recap team before he was caution interviewed. Also during the cigarette break it was the witness and the witnessing officer who were with the accused and no one else. The witness did not see the accused limping before the interview began and also he did not see any visible injuries on the accused.
22. The witness agreed that he had asked the accused at Q.14 whether he wanted to seek medical assistance, the answer received was "later". The witness did not ask whether the accused wanted to make any complaints. When the witness was questioned whether he had asked the accused if he was assaulted by any police officer, the witness replied he had done so at Q.90 of the caution interview in the following words "*was there any force, threat, inducement made to you before or during the course of interview.*"
23. The witness further stated the phrase "force" in Q. 90 included assault he denied that during the cigarette break Sergeant Saimoni Qasi and Sergeant Opeti Lolo and other police officers had assaulted the accused. The witness denied witnessing any assault by any of the police officers on the accused.

24. After the interview, the accused was handed over to the investigating officer who was informed that the accused wanted medical attention.
25. In re-examination the witness clarified that during the interview the accused was physically fit and there were no visible injuries seen. The accused was walking normally and seated properly during the interview.
26. The third witness Detective Sergeant 2019 Anil Kumar, informed the court that on 2nd August, 2018 he was instructed to witness the caution interview of the accused. It was his duty to see that the accused was given all his rights that he was not ill-treated, threatened and to ensure that the caution interview was conducted properly.
27. According to the witness, the accused was given all his Constitutional rights and the accused confirmed that he understood the rights put to him by signing the caution interview. Furthermore, the accused did not complain about anything during the interview.
28. During the cigarette break at the back of the crime office the accused was with the interviewing officer and the witness and nobody had come to talk to the accused. There were other police officers in the crime office who were conducting their own investigations, people were moving in and out of the crime office and nobody had interfered with the caution interview process.
29. The witness also mentioned that during the interview there was no interference or communication by any police officer. From the time the witness had come in contact with the accused he did not witness any threat or force or any sort of ill treatment on the accused.

30. The witness denied the allegation raised by the accused in his voir dire ground.
31. In cross examination the witness agreed that it was the recap team that had arrested and brought the accused to Namaka. According to the witness he had given clear instructions to the CID officers that the recap team members were not supposed to come into the crime office. The witness denied the accused hands were cuffed to his back throughout the record of interview. The witness further stated that the accused was comfortable, sitting properly, answering questions, was jovial, laughing, and making jokes from his answers.
32. The witness was present during the interview and in his presence nobody had assaulted the accused. The witness had left the Namaka Police Station after the interview, he was not aware if the accused was taken to the hospital. According to the witness the accused had complained of toothache during the caution interview.
33. The witness reiterated that he did not observe any assault on the accused by any of the police officers as alleged. Furthermore, the accused had voluntarily answered the questions put to him on his own freewill. The accused had taken them to the crime scene and also to the place where he had abandoned the stolen vehicle and the accused was also demonstrating and making fun of the 72 year old victim as to how scared the victim was after the accused had threatened the victim.
34. The final witness, Saimoni Qasi informed the court that in 2018 he was the head of the task force unit known as the recap unit which was formed to recapture some escapees, about 20 police officers were part of this team. Opeti Lolo was the second in command in charge of the operation side of the team. The recap team was operating from the

Namaka Police Station recreation bure. Furthermore, the two escapees including the accused were from the Namaka area so the team was operating from Namaka Police Station.

35. When the accused was recaptured in Suva he was brought to the Namaka Police Station by the team from Suva, when this happened the recap team was stood down. The witness was briefed that the accused had been arrested but he did not come in contact with the accused, when the accused was arrested and brought to the Namaka Police Station, interviewed and charged.
36. The witness stated that the recap team was not involved in the arrest or interrogation of the accused, he denied assaulting the accused as alleged in the voir dire ground with Opeti Lolo and other police officers.
37. In cross examination the witness stated that he was not briefed about everything that had happened to the accused but was informed that the accused had been charged and taken to court. The witness mentioned that on 2nd August, he had not entered the crime office at Namaka Police Station also he could not recall seeing the accused. The witness agreed that the accused was classified by the Crime Intelligence Unit as a high risk criminal.
38. The witness maintained that he did not assault the accused on 2nd August, 2018.
39. This was the prosecution case.

DEFENCE CASE

40. The defence called two witnesses including the accused.

41. Dr. Shalvin Chand informed the court that he graduated with an MBBS degree in the year 2013, after completing his internship he was transferred to Nasau and Nanukuloa Health Centre. In 2016, Dr. Chand was transferred to the Nadi Hospital where he is currently based.
42. The doctor confirmed on 6th August, 2018 he had examined the accused at the Nadi Hospital. The accused was accompanied by police officers.
43. The Fiji Police Medical Examination Form of Nacanieli Bakata dated 6th August, 2018 was marked and tendered as defence exhibit no.1. According to the doctor the accused had alleged that some police officers had assaulted him by using a police baton on his anal opening. Upon examination the doctor noted that there was a small area of red raised swelling at the anal opening which was painful to touch but there was no bleeding. According to the doctor the injury was not recent probably a few days or a week old.
44. In his professional opinion, the doctor stated that whatever he saw could have been consistent with the allegations made. The doctor had illustrated the injury on the diagram in defence exhibit no.1, which was ½ inch red raised swelling tender to touch, meaning painful when touched.
45. In cross examination the doctor stated that bleeding depended on the degree of penetration if the force used had been vigorous and deep then there would have been bleeding even after 4 days.
46. The doctor gave example of other possible causes of the injury such as anal sex, use of own fingers or hand in a rough manner or use of foreign object and constipation.

47. The doctor did not see any visible marks or other injuries on the accused. The doctor agreed the small area of red raised swelling could have been from other causes as well.
48. The accused informed the court that in mid-July, 2018 he had escaped from Nadi Police Station and was at large for about 10 months. On 31st July he was arrested in Suva, it was late night when he was picked up by the recap team from Nadi and brought to the Namaka Police Station.
49. On 2nd of August, the accused was taken to the crime office at Namaka Police Station where he was surrounded by the case officers and the recap team officers and his hand was cuffed to his back. When the accused denied the allegation it was police officer Qasi and other police officers who punched his head, his body and he was thrown on the floor. They also pulled the head of the accused towards his knee, his pants were pulled down and chillies were rubbed on his private parts.
50. As the accused was struggling he saw Opeti bring a baton pulled his buttocks apart and placed the baton on his anus and started pushing it. The accused was screaming, shouting, yelling and crying and was going through a lot of pain.
51. After this, the accused had his shower when he was cleaning himself he felt a burning sensation on his body and he saw blood coming out of his anus. After this, the accused signed the documents that were printed from the computer.
52. On the 3rd the accused appeared in the Sigatoka Magistrate's Court he informed the court that he had been assaulted by the police officers. The

court made an order for the accused to be medically examined. The police officers took him to the hospital after 3 days on the 6th.

53. In cross examination by the state counsel the accused stated that he was brought from the Nabua Police Station by the police recap team. In respect of the number of punches he had received the accused could not recall this, but said the assault to his head, chest and body was not continuous. He was assaulted when he denied what was alleged.
54. When the accused was taken to the hospital he only had pain in his anus there was no other pain so that was the reason why he told the doctor about the pain in his anus only. The accused maintained police officers Opeti, Qasi and others had assaulted him at the crime office of Namaka Police Station.
55. This was the defence case.

DETERMINATION

56. The prosecution wishes to rely on the confession obtained by the police during the caution interview of the accused. On the other hand, the accused is objecting to the confession from being adduced as evidence on the grounds that the confession was obtained by the police as a result of assault on him.
57. There is no dispute that the accused had escaped from the Nadi Police Station and after about 10 months being at large the accused was arrested in Suva. The accused was brought to Namaka Police Station, early morning on 1st August by the police recap team.

58. The accused was interviewed on 2nd August at the crime office of the Namaka Police Station from 2pm till 4.35 pm in the English language. The accused says that before the interview he was taken to the crime office which was full of police officers from the Nadi Police Station and the recap team.
59. The officers were questioning the accused about four offences that were committed in the Nadi/Namaka areas, when the accused denied committing these offences the police officers assaulted him. The accused was handcuffed to his back. Opeti and Qasi were the officers at the forefront in assaulting the accused with other officers joining in. The assault was not continuous.
60. The prosecution witnesses have denied any wrong doing, since nobody assaulted the accused in fact how could they, the crime office was a hive of activities with suspects and other police officers doing their work. The prosecution witnesses also said that the accused was well, he did not make any complaints about any assault to the interviewing officer although the accused wanted medical attention it was for his toothache after he had lunch that day.
61. Police officers Opeti and Qasi could not recall whether they had been to the crime office on the 2nd. They did not go into the crime office where the accused was interrogated because they were not part of the investigations and the instructions were that none of the recap team officers were to be in the crime office.
62. The accused produced his medical report and summoned the doctor who had examined him on the 6th of August after he had obtained a court order on the 3rd to be medically examined at a hospital.

63. It is to be noted that the police officers knew the accused wanted to visit the hospital but no action was taken to do so. It was on 3rd August that the Magistrate's Court made an order for the accused to go to the hospital, however, he wasn't taken to the hospital until the 6th.

CONCLUSION

64. Upon considering the evidence adduced by the prosecution and the defence it is quite obvious to me that the accused had been assaulted by police officers when he was in their custody during interrogation at the Namaka Police Station.

65. I am unable to accept that the officers of the recap team were not allowed into the crime office whilst the accused was being interrogated. My observations of the prosecution witnesses have been that the prosecution witnesses were not forthright. I do not accept that police officers Opeti and Qasi did not interrogate the accused or were not present when the accused was in the crime office.

66. It is also difficult to understand why Sergeant Anil Kumar would have issued instructions to the CID police officers not to allow the officers of the recap team into the crime office when the accused was being interrogated. I accept that it was the recap team that had brought the accused from Suva and that the accused did not raise any complaints about his trip from Suva to Namaka. The interviewing officer did not say the accused had complained about anything, yet Sergeant Anil Kumar said the accused had complained of toothache.

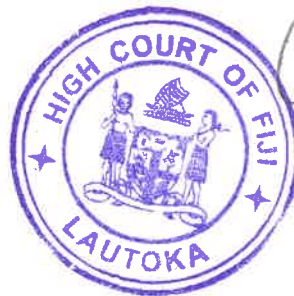
67. Furthermore, I do not accept that the accused was in a jovial mood, joking and making fun of the victim during his caution interview. The doctor who had examined the accused on the 6th had told the court that

the accused was complaining about what the police officers had done to him and was unhappy gives credence to what the accused had told the court. The medical report tendered by the doctor also supports the defence version.

68. I accept the explanation given by the accused that he had only told the doctor about the pain in his anus because when he was taken to the doctor he did not feel pain anywhere else in his body except his anus due to lapse of time.
69. The evidence of the prosecution witnesses is not plausible on the totality of the evidence it is obvious to me that the prosecution witnesses were covering for each other, they gave a narration which is not credible.
70. Based on the above, this court is not satisfied beyond reasonable doubt that the accused had given his caution interview voluntarily. In my view the assaults on the accused by the police officers had sapped the freewill of the accused. This court prefers the evidence of the defence over that of the prosecution.
71. In view of the above, I rule that the caution interview of the accused dated 6th August, 2018 is not admissible in evidence.

At Lautoka
20th February, 2020

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




Sunil Sharma
Judge