

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 11 of 2019

[CRIMINAL JURISDICTION]

STATE

V

1. SETAREKI RAVIA

2. WAISKAE ROKOBATI

Counsel : Mr. E. Samisoni for State
Ms. A. Singh for Accused

Hearing on : 27 May, 2020

Ruling on : 29 May, 2020

VOIR DIRE RULING

[On the admissibility of the cautioned interview and the charge statement]

1. The above named accused are charged with one count of aggravated burglary and one count of theft.
2. The prosecution intends to rely on the admissions recorded in the cautioned interview statement of the second accused above named ("the accused") and they also wish to rely on the charge statement. The accused assails the admissibility of the said documents.
3. The *voir dire* grounds filed on behalf of the accused challenging the admissibility of the said documents are as follows;

1. *At the time of the Accused's Caution Interview, the right to remain silent as given at Question and Answer 9 was unfair insofar that it did not specially specify the reasons for remaining silent or not and that if anything was said it would be used against him.*
 2. *That on the date of arrest the accused person was not given his rights of arrest.*
 3. *That on the date of arrest 9 police officers, two of whom were of Indian descent and 7 Itaukei came to the accused house and upon arresting him used physical violence on him. He is unaware of the names of the police officers.*
 4. *They assaulted him with a torch. He was hit on the ribs and leg and punched on the head.*
 5. *That before his record of interview on 4th January, 2019 he was assaulted by the interviewing officer (DC 5165 Kosham Shanil Dutt) and the witnessing officer namely PC 5420 Apenisa. These two Police officers were also part of the arresting team. Apart from the interviewing officer and the witnessing officer some other police officers also swore and assaulted him prior to the interview.*
 6. *They swore at him and told him to confess after he repeatedly told them that he didn't steal the items.*
 7. *They would hit his legs, ribs and head with a torch.*
 8. *That during the interview he was spoken to harshly, sworn at and threatened of further assault if he didn't confess to the allegations.*
 9. *When all these things happened to the accused he was scared and admitted everything.*
 10. *That the signing of his caution interview i.e. (placement of signatures) was not contemporaneous (occur at the same time) with or when the questions were being asked.*
 11. *That the accused was forced to sign the record of interview on the condition that he would be released to go home if he signed.*
 12. *That he was threatened verbally of further assaults during reconstruction.*
 13. *That the answers in the charge sheet were not given voluntarily and he was told to sign his statement on the condition that he would be released to go home after he signed.*
4. A confession could be excluded or ruled inadmissible on two grounds; voluntariness and unfairness.
5. In *Ganga Ram and Shiu Charan v. R* (Criminal appeal 46 of 1983 delivered on 13th July 1984), the Fiji Court of Appeal said thus;
- "It will be remembered that there are two matters each of which requires consideration in this area. **First** it must be established affirmatively by the Crown (sic) 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. 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 Judges' rules falling short of overbearing 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".
[Emphasis added]

6. It should be noted that if the accused's position is that there was oppressive circumstances before and during the recording of the relevant cautioned interview statement or the charge statement, but he did not make the relevant statement (confession) and the said statement was one fabricated by the police, there is no issue to be determined by way of a *voir dire* in such a case. The issue whether the accused made the relevant confession or not, is a matter (followed by the issue whether the relevant confession is true) to be decided during the trial. In the case of *Kean v State* [2013] FJCA 117; AAU 95.2008 (13 November 2013) Calanchini P said thus;

[26] *It is apparent that the issue raised by this paragraph is not so much whether the caution statement was made voluntarily but rather the Appellant is claiming that he never made the caution interview admissions and that his signature had been forged. The Appellant cannot rely on both grounds. He cannot claim that the caution interview was obtained by oppression force and unfairness on the one hand and on the other hand claim that he never made the caution interview and that his signature was forged. When this was raised with the Appellant during the course of the hearing before this Court, the Appellant indicated that he was pursuing the claim that he did not make the caution interview in the photocopy and that his signature had been forged.*

[27] *Although on the one hand the issue whether the caution interview admissions were made voluntarily was a question of law for the judge at the voir dire stage whilst the authenticity of the interview was a question of fact for the assessors to be decided after all the evidence has been heard, the Appellant cannot nevertheless maintain both positions in this appeal.*

[Emphasis added]

7. In determining the admissibility of a confession based on voluntariness, the question to be resolved is whether the accused had confessed in the exercise of his/ her free choice. *“The word "voluntary" in the relevant connection does not mean "volunteered". It means "made in the exercise of a free choice to speak or be silent". [R. v. Lee [1950] HCA 25]*

8. I find the following dictum of Brennan J in the case of *Collins v R* (1980) 31 ALR 257 to be useful in this connection;

“The ultimate question is whether the will of the person making the confession has been overborne, or whether he has confessed in the exercise of his free choice. If the will has been overborne by pressure or by inducement of the relevant kind, it does not matter that the police have not consciously sought to overbear the will. A finding that there has been an attempt to overbear by persons in authority is neither determinative of, nor an essential prerequisite to, a finding that the will of the person making the confession was overborne. . . .

A confession is not held to be involuntary merely because the confessionalist is by nature or temperament predisposed to confess and is furnished with an opportunity to do so; it is the effect of an external factor, of the kind referred to by Dixon J. in McDermott's case, upon the will which determines admissibility.”

9. When an accused challenges his/ her confession made to police on the basis that the said confession was made involuntarily, the prosecution should prove beyond reasonable doubt that the relevant confession was not made as a result of oppression meted out by the police or due to a promise or other form of inducement (*‘tyranny of fear or flattery of hope’*). If the prosecution fails in this task, the court has no option but to rule the relevant confession inadmissible in evidence.

10. How can the prosecution prove that a particular confession was made voluntarily? Would it be sufficient to simply call the police officers who are named in the *voir*

dire grounds to the stand and have them deny the allegations leveled against them?

11. The answer is 'no'. The prosecution should demonstrate to the court the manner the relevant accused was handled and the steps taken in relation to the accused from the time of arrest to the time the accused was produced in court, or at least until the recording of the cautioned interview or the charge statement (as the case may be) was completed. This should be done with the objective of establishing beyond reasonable doubt that proper procedure was followed and there was no possibility for any oppression or inducement including whatever is alleged in the grounds of *voir dire* to have taken place. [See *State v Lenikali* [2019] FJHC 338; HAC44.2018 (25 February 2019)] Having the police officers against whom allegations are made in the *voir dire* grounds to give evidence who will invariably deny those allegations should be secondary.
12. It would assist the prosecutor if he/ she constructs a timeline of events from the time of arrest of the relevant accused to the time the accused was produced in court, using the statements made by the police officers who were involved in the investigation, the Cell Book entries, Meal Book entries and the Station Diary Entries at the preparation stage. The decision on which witness to call and which document to produce can be made by the prosecutor based on the issues raised in the *voir dire* grounds and the facts agreed if any, but having in mind the importance of providing a clear picture to the court of how the accused was handled by the police before and during the time the relevant confession was made.
13. Needless to say, the police has a vital role to play in this regard. It is noted in almost every case where the admissibility of the cautioned interview is challenged that the statements of the police officers who were involved in the relevant investigation are recorded and compiled after the *voir dire* grounds are received by the prosecution. This should not be the case. It is important that every police

officer who was involved in a particular investigation to prepare a statement as early as possible indicating the tasks that were carried out and any relevant observations made (may be of the accused, of a witness or of the crime scene). These statements taken together, should ideally reflect the steps taken by the police from the time the first information about the relevant offence was received, until the relevant suspect was produced in court including the considerations that led to the decision to arrest that suspect. For the reason that this is not the preferred practice at the moment, it is not only the prosecutors who are affected, but the justice system as a whole.

14. There is no gainsaying that justice is not delivered merely by producing a suspect in court in relation to a crime that is committed. The investigators (police officers) and the prosecutors should carry out their work (individually and collectively) to achieve the ultimate twofold objective; '*guilt shall not escape or innocence suffer*'. [*Berger v. United States* 295 U.S. 78, 88 (1935)]
15. Moving on to the second ground based on which a confession could be excluded which is unfairness, at the outset, it should be noted that the court has a discretion whether or not to exclude a confession on this ground. The question is whether given the circumstances under which the relevant confession was made, is it unfair for that confession to be used as evidence against the accused.
16. Non-compliance of a constitutional provision during the recording of a cautioned interview inter alia would come within the purview of this ground. In the case of *State v Kumar* [2002] FJHC 194; HAC0003D.2002S (11 July 2002) Shameem J held thus;

The effects of non-compliance with section 27(1)(c) of the Constitution, or of a finding of an ill-informed waiver, may be the exclusion of any statements obtained thereby (State-v-Mool Chand Lal Crim. Case 3/99 Labasa High Court). The discretion to exclude must be exercised after a balancing of the accused's rights,

and public interest rights to the efficient investigation of crime. [Emphasis added]

17. In this case, the prosecution called four witnesses. The accused gave evidence.
18. When the first witness called by the prosecution ("PW1") was asked by the prosecutor whether he received any instructions in relation to this case on 04/01/19, he said 'no'. According to his evidence he had no involvement in this case. But his name appears in an entry in the relevant Cell Book [VDPE1] as the officer who apprehended the accused. He clearly said that he did not arrest the accused and that he did not make the relevant entry. He further said that he should have been the person making that entry if he was the officer who brought the accused to the station under arrest. The date of this entry in question was 04/01/19 and the time was 1245 hours (though PW1 read it as 1215 hours). He said that this entry should also reconcile with a corresponding entry made by the Station Orderly in the relevant Station Diary where it should be recorded that he brought the accused to the station under arrest. That was his evidence in chief.
19. Where PW1 had clearly said in his evidence in chief that he had nothing to do with the case at hand, the defence counsel decided to cross-examine the witness and went a step further by tendering the relevant pages of the Station Diary through the witness. The defence counsel wanted the witness to confirm that there is no corresponding entry in the station diary that reconciles with the entry in the Cell Book he was questioned during the examination in chief. This was in fact the position taken by the witness during the examination in chief. However, after PW1 was given the relevant pages of the Station Diary by the defence counsel, he found one entry that according to him could be reconciled with the entry in question in the Cell Book. This entry was not for 04/01/19, but for 05/01/19. According to this entry in the Station Diary, one DC Dutt had brought the accused to the station from 'the bure' on 05/01/19. Again, this particular entry in the Station Diary does

not reflect that the accused was arrested by the said DC Dutt or the officer who had effected the arrest.

20. Therefore, according to the evidence unfolded in court, there is an entry in the Valelevu Police Station Cell Book that the accused was locked in the cell on 04/01/19 at 1245 hours by PW1 which is disputed by PW1. There is another entry in the Station Diary that the accused was brought to the Valelevu Police Station on 05/01/19 at 1245 hours from 'a bure' by one DC Dutt (presumably PW2). There was no explanation offered as to who in fact arrested the accused; whether the accused was in fact taken to the cell on 04/01/19 at 1215 hours and by whom; who took him to the cell; or, how and why did the accused end up in a bure on 05/01/19 before 1245 hours.
21. The second witness for the prosecution ("PW2") was the interviewing officer. He said that he interviewed the accused under caution on 04/01/19 from 0906 hours to 1210 hours. The interview was recorded using a laptop. That was the only task he carried out in relation to this case. He clearly said that he was not part of the arresting team that arrested the accused. He said that the accused did not make any complaint before the interview and he did not see any injuries on the accused. He said that no one including him physically or verbally assaulted or threatened the accused, before, during or after the interview. He said that he gave the accused his rights and that he gave the accused an opportunity to read the interview. The relevant cautioned interview was tendered as VDPE2.
22. During cross examination he denied the suggestions that he assaulted the accused. He agreed with the suggestion that he had failed to inform the accused the consequences of not remaining silent. He agreed that the accused was further questioned during the scene reconstruction. He said that he took the laptop to the crime scene. According to him, he handed over the accused to the charging officer upon the conclusion of the cautioned interview.

23. The third witness for the prosecution ("PW3") was the witnessing officer for the cautioned interview. He said that he was present during the entire interview. He also said that no one including him physically or verbally assaulted or threatened the accused, before, during or after the interview. He was not part of the arresting team as well. He did not notice any signs of assault on the accused before the interview and the accused did not make any complaint.
24. During cross examination he denied assaulting the accused. He said that the questions and the answers during the scene reconstruction were recorded by the interviewing officer in his note book and they were typed in the computer after they returned to the station after the scene visit.
25. The fourth and the final witness for the prosecution ("PW4") was the police officer who recorded the charge statement of the accused. He said that it was recorded on 05/01/19. According to him the accused did not make any complaint to him, before during or after the recording of the charge statement. The accused was given his rights. He said that he did not make any promise to the accused to get him to sign the statement. He said that the accused made a statement saying that ". . . *I'm sorry of what I have done and I won't do this again*". The relevant charge statement was tendered as VDPE3.
26. The prosecution case was riddled with inconsistencies. The interviewing officer (PW2) said that he handed over the accused to the charging officer after the cautioned interview was concluded. But the cautioned interview was concluded on 04/01/19 and the accused was charged on 05/01/19. According to the Cell Book pages tendered as VDPE1, the accused was locked in the cell at 1245 hours on 04/01/19. The interviewing officer (PE2) said that he took the laptop to the crime scene indicating that the recording of the questions and answers continued to be done using the laptop during the scene reconstruction. But the witnessing officer (PW3) said that the interviewing officer recorded the questions and answers in his note book at the crime scene.

27. According to the evidence led, no proper record of the movement of the accused after his arrest had been maintained in the Station Diary at the Valelevu Police Station. When PW2 was questioned about the movement of the accused at the police station, he kept on saying that the Station Orderly was informed. Especially given the discrepancy that transpired in this case in relation to the entries maintained at the police station with regard to the accused, the prosecution not making an attempt to either establish that proper records were maintained at the Valelevu Police Station regarding the accused or to call the Station Orderly or any other witness to offer an explanation for the non-availability of the records, was detrimental to the prosecution case.
28. More importantly, the prosecution did not call any witness to testify on how and when the arrest of the accused took place especially where the accused had alleged that physical violence was used on him during the arrest. In fairness to the prosecutor, I consider it appropriate to mention that the prosecutor had informed the court that he could not ascertain as to who had arrested the accused, based on the material and the information made available to him. In other words, what the prosecutor had informed this court was that, according to the material available to him, there is no record of the accused's arrest. This, to say the least, is unfortunate.
29. The accused gave evidence and he said that he was arrested on 05/01/19 by PW1 and a team of 08 officers came to arrest him. He said that PW2 was also part of this team. He cannot recall the others. He said that he was threatened and assaulted. He was taken to a bure after his arrest which was situated 'a little bit far' from the Valelevu Police Station. He said that he told PW2 that he does not know anything about the case. But he was assaulted with a torch, threatened and slapped. He was told that if he won't say 'yes to this case' they will kill him. He said that he signed the interview because he was told that he would be allowed to go home if he signs same. He said that he was not asked to go through the record of the interview. He said that he did not make the statement that is found in his charge statement saying that he is sorry and that he won't do it again. He said that he signed the

charge statement because he was told that he will be released on that same afternoon.

30. I did not find the entire version of the accused as narrated in his evidence to be true. For example, according to him the reason for him to sign the cautioned interview was the promise that he will be released. But he was not released after signing it. He was kept at the police station and was charged on the following day. He said that he signed the charge statement again because he was promised that he will be released that day. He did not explain what made him believe that he will be released after he signed the charge statement after having experienced that he was not released after signing the cautioned interview with the same promise (according to him). He did not seem very confident when he said that PW1 arrested him and that PW2 was part of the arresting team.
31. However, the pertinent question is, whether the prosecution has proved beyond reasonable doubt that the statements that are recorded in the cautioned interview tendered as VDPE2 and the charge statement tendered as VDPE3 are statements made by the accused voluntarily, in the exercise of his free choice to speak and not to remain silent.
32. Having that question in mind, I would now examine the grounds raised by the accused.
33. The crux of the first allegation is that the right to remain silent was not properly explained to the accused. The defence says that the right to remain silent as given at 'question and answer 9' was unfair. At the outset, it should be noted that this ground is not premised on voluntariness, but on unfairness. Therefore, there is a discretion for the court on whether or not to exclude the cautioned interview based on this ground.

34. The accused had been explained about the allegation in question 6. Immediately after the allegation, the following sentence is noted;

“You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence”

35. Question 9 to which the accused had answered in the affirmative, reads thus;

“Can you sign this copy of interview to acknowledge that you have understood the allegation and the nature of caution put to you?”

36. Below the answer to question 9, the accused and the two police officers have signed. Thereafter, the following paragraph is printed;

“Now I would like to advice you about your rights in giving your statement that you have the right to remain silent and the sequences (sic) of remaining silent and not remaining silent. You can consult with any lawyer . . . ”

37. The allegation that the interviewing officer failed to explain the consequences of not remaining silent is based on the above paragraph which is printed below the answer to question 9. Indeed it appears that the interviewing officer had been careless with regard to the drafting of the aforementioned paragraph found under question 9. Nevertheless, the consequences of not remaining silent has been clearly stated under question 6, in the sentence alluded to above. Therefore, there is no merit in the first ground.

38. Grounds 2 through 9, 12 and 13 are about the oppressive circumstances the accused says he was subjected to, from the time of arrest up to the recording of the cautioned interview and the charge statement. Given the failure of the prosecution to adduce evidence regarding how and when the accused was arrested and by whom, the inconsistencies in the evidence given by the prosecution witnesses, and

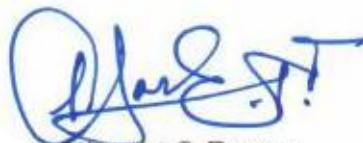
the failure to establish that proper procedures were followed in handling the accused from the time of his arrest especially in light of the discrepancies noted in the records maintained at the Valelevu Police Station, I am not satisfied beyond reasonable doubt that the oppressive circumstances alleged by the accused had not prevailed.

39. The complaint in ground 10 is that the signatures that appear in the cautioned interview have not been placed contemporaneously. This is clearly not relevant to the question of voluntariness. According to what transpired in evidence, because the cautioned interview was recorded with the aid of a laptop, the signatures (of the accused, the interviewing officer and the witnessing officer) that were supposed to be placed at various stages of the interview were placed on the document only after the conclusion of the interview. This was because the entire document was printed only after the conclusion of the interview.
40. The placement of signatures after different questions and answers at different stages of the interview was possible and it made sense during the early days when the interview notes were only handwritten and also when they were typed using mechanical typewriters. During that time a hardcopy of the relevant interview (or part of it) existed from the inception. But with the use of laptops or computers to record interviews, the record of the interview appear to remain only as a softcopy until the interview is concluded and printed on paper.
41. With the use of computers to record the interviews, the use of the said previous format of the interview where signatures are supposed to be placed at various stages of the interview to reflect that the suspect's confirmation of certain facts was obtained before proceeding further with the interview, had become incongruous. In fact, given the manner certain questions/ statements which requires the signatures to be placed are drafted, they suggest that the signatures were placed contemporaneously, the same time the relevant question was asked and the answer was given. Therefore, technically, the final document produced with the

use of computers, but based on this previous format in fact provides misleading information as far as the placing of the signatures are concerned. Though it may be argued as inconsequential, this undermines the authenticity of the document to some extent.

42. I do not find this a reason to rule such record of interview inadmissible in evidence. However, I find this to be an appropriate matter the police and the Office of the Director of Public Prosecutions should look into. Steps may be taken either to change the format or the template of the cautioned interview and the charge statement appropriately, or the relevant document (either the cautioned interview or the charge statement) should be printed in part so that the signatures could be placed contemporaneously. That is, whenever the signatures are required to be placed after a particular question and/or answer, the document that is typed up to that point (whether or not the bottom of the page is reached) should be printed and then have the signatures placed. The next page of the (soft) document in the laptop or the computer should be used to continue with the recording of the interview. That is, the next question should be typed in the next (fresh) page. The same procedure should be followed whenever there is a need to obtain the signature of the accused other than upon the conclusion of the statement.
43. All in all, for the reasons discussed above, I am not satisfied that the prosecution has established beyond reasonable doubt that the accused had made the statements recorded in VDPE2 and VDPE3 voluntarily. I would therefore rule the two documents inadmissible in evidence.




Vinsent S. Perera
JUDGE

Solicitors;

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