

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 283 of 2019

STATE

v

SEVANAIA NAKAUYACA

Counsel : Ms. Shirley Tivao for the State
Ms. Litiana Ratidara for the Accused

Dates of Hearing : 6-8 October 2020

Date of Ruling : 9 October 2020

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "IW".

VOIR DIRE RULING

[1] The Accused in this case is charged with the following offences:

COUNT ONE

Representative Count

Statement of Offence

RAPE: Contrary to Section 207 (1) and 2 (b) and (3) of the Crimes Act
2009

Particulars of Offence

SEVANAIA NAKAUYACA, between the 1st of May 2018 to the 31st of December 2018, at Waibasaga Settlement, in the Eastern Division, penetrated the vulva of IW, a child under the age of 13 years, with his finger.

COUNT TWO

Statement of Offence

RAPE: Contrary to Section 207 (1) and 2 (b) and (3) of the Crimes Act 2009.

Particulars of Offence

SEVANAIA NAKAUYACA, between the 1st of May 2018 to the 31st of December 2018, at Waibasaga Settlement, in the Eastern Division, on an occasion other than Count 1, penetrated the vulva of IW, a child under the age of 13 years, with his finger.

COUNT THREE

Statement of Offence

RAPE: Contrary to Section 207 (1) and 2 (b) and (3) of the Crimes Act 2009.

Particulars of Offence

SEVANAIA NAKAUYACA, on the 22nd of July 2019, at Waibasaga Settlement, in the Eastern Division, penetrated the vulva of IW, a child under the age of 13 years, with his finger.

COUNT FOUR

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 of the Crimes Act 2009.

Particulars of Offence

SEVANAIA NAKAUYACA, on the 22nd of July 2019, at Waibasaga Settlement, in the Eastern Division, unlawfully and indecently assaulted

IW, by kissing the lips of IW.

- [2] Investigations into this case had been conducted by officers of the Vunidawa Police Station. Pursuant to his arrest at his home in Waibasaga, on 2 August 2019, the Accused was brought to the Vunidawa Police Station.
- [3] At the Vunidawa Police Station, the Accused was caution interviewed by Detective Corporal (D/Cpl) 3908 Emosi Nokonokovou, from 2 to 4 August 2019. Detective Constable (DC) 4589 Kaminieli Basalusalu, was the Witnessing Officer during the recording of the caution interview statement.
- [4] The Accused is challenging the admissibility of the said caution interview statement.
- [5] In the Grounds of Voir Dire, which he filed in Court on 27 November 2019, the Accused objects to the admissibility of his caution interview, on the following grounds:
 1. That Sevanaia Nakauyaca's caution interview was not conducted fairly because of the following reasons:
 - (a) That the right to remain silent was not properly explained to Sevanaia Nakauyaca.
 - (b) Before being caution interviewed, Sevanaia Nakauyaca had informed D/Cpl Emosi Nokonokovou that he was having high blood pressure and memory loss. Sevanaia Nakauyaca had asked the interviewing officer if he could be taken to the hospital but D/Cpl Emosi Nokonokovou refused to do so.
 - (c) During the caution interview, Sevanaia Nakauyaca was never informed of his right to seek medical assistance or medical attention.
 - (d) During the caution interview, Sevanaia Nakauyaca was never asked if he was physically fit to proceed with the interview.
 2. For the trial within a trial, Sevanaia Nakauyaca requires the Vunidawa Police Station Diary for the period he was held in custody.

The Law

- [6] In *Ganga Ram and Shiu Charan v. Reginam*; Criminal Appeal No. 46 of 1983 (13 July 1984) (unreported) the Fiji Court of Appeal outlined the two grounds to be considered for admissibility of confessions;

*"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 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 the police behaved, perhaps by breach of the Judges Rules falling short of overbearing will, by trickery or by unfair treatment. *Regina v. Sang* (1980) AC 402. This is a matter of overriding discretion and one cannot specifically categorize the matters which might be taken into account."*

- [7] His Lordship, Justice Daniel Goundar in the case of the *State vs. Maikeli Rawaqa and Segran Murti* Criminal Case No. HAC 42 of 2004 (16 February 2008); held as follows:

*"The principal governing the admissibility of confessions are well settled. Confessions could not properly be given in evidence unless it was shown that they were made voluntarily, that is, not obtained through violence, fear of prejudice, oppression, threats and promises or other improper inducements (*Ibrahim v R* [1914] AC 599). Even if such voluntariness is established, the trial Judge has the discretion to exclude the confessions on a general ground of unfairness (*R v Sang* [1980] AC 402). In addition, confessions could be excluded for breaches of Constitutional rights."*

- [8] Accordingly, in order for a confession made by an Accused person to a police officer to be admissible as evidence against the maker of that confession, the confession should have been made by that Accused voluntarily, meaning it should have been made by the Accused on his own free will, with full appreciation of the legal consequences. If the said confession is made as a result of oppression, such confession would not be admissible and should be excluded. Oppression is anything that undermines or weakens the exercise of free will. However, even if such voluntariness is established, the trial Judge

has the discretion of ruling such confession inadmissible, if it is obtained in an unfair manner (on general grounds of unfairness).

[9] The onus of proving voluntariness/lack of oppression and fairness is on the prosecution and they must prove these matters beyond reasonable doubt. If there has been a breach of any of the Accused's Constitutional rights, the prosecution must prove that the Accused was not thereby prejudiced.

[10] In this case, the Accused is not challenging the voluntariness of the caution interview statement. The objection taken up by the defence is that the said caution interview of the Accused was not conducted fairly.

[11] During the voir dire hearing the prosecution led the evidence of the following 2 witnesses in order to prove beyond a reasonable doubt that the caution interview statement was made voluntarily by the Accused and that it was not obtained in an unfair manner:

1. Detective Corporal (D/Cpl) 3908 Emosi Nokonokovou.
2. Dr. Rajiv Lal.

[12] The following exhibits were tendered by the prosecution during the hearing:

- Voir Dire Exhibit P1 - The caution interview statement of the Accused, recorded from 2 to 4 August 2019.
- Voir Dire Exhibit P2 - The English translation of the said caution interview statement.
- Voir Dire Exhibit P3 - The Station Diary of the Vunidawa Police Station from 4 July 2019-15 October 2019.
- Voir Dire Exhibit P4 - The Medical Examination Report of the Accused.

[13] The defence called one witness, the Accused himself.

The Prosecution Case

- [14] D/Cpl 3908 Emosi Nokonokovou testified that he has served in the Fiji Police Force for 14 years. He is currently serving at the Vunidawa Police Station, where he has been serving since 2019.
- [15] The witness said that on 2 August 2019 he had been tasked to record the caution interview statement of the Accused. The said statement was recorded in the Station Officer's room and was recorded on a computer, in the Fijian language. DC 4589 Kaminieli Basalusalu, functioned as the Witnessing Officer during the recording of the said caution interview statement. The recording of the interview had commenced at 17.44 hours on 2 August 2019 and concluded at 11.30 hours on 4 August 2019.
- [16] After recording of the interview, copies were printed out and was signed by the Accused, himself and the Witnessing Officer. The caution interview statement of the Accused was tendered to Court as Voir Dire Exhibit P1.
- [17] The witness said that the iTaukei version was translated into English by himself. The English translation of the said caution interview statement was tendered to Court as Voir Dire Exhibit P2.
- [18] The witness testified that the Accused's constitutional rights were given to him. After having explained the allegations to the Accused, the following cautionary words were put to him: *"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."*
- [19] The above cautionary words are first reflected after question and answer 6. The witness said that the Accused understood the said caution and signed voluntarily to acknowledge that he had understood the same.
- [20] On each occasion the recording of the caution interview was suspended and then resumed, the same cautionary words had been put to the Accused. The Prosecution highlighted four such occasions during the course of the caution interview, when the recording of the interview was suspended and then resumed:

1. After question and answer 26 (recording of interview suspended at 18.40 hours on 2 August 2019 and resumed at 10.00 hours on 3 August 2019);
2. After question and answer 55 (recording of interview suspended at 12.00 hours on 3 August 2019 and resumed at 13.00 hours on 3 August 2019);
3. After question and answer 58 (recording of interview suspended at 15.00 hours on 3 August 2019 and resumed at 15.40 hours on 3 August 2019);
4. After question and answer 68 (recording of interview suspended at 16.30 hours on 3 August 2019 and resumed at 10.00 hours on 4 August 2019).

The witness said that on each of the above occasions the Accused understood the said caution and signed voluntarily to acknowledge that he had understood the same.

- [21] D/Cpl Emosi testified that prior to the commencement of the recording of the caution interview statement, the Accused had been taken to the Vunidawa Hospital for examination. He said the Vunidawa Hospital is just a few meters away from the Police Station. The reason for taking the Accused for medical examination was due to the Accused's advanced age. The witness said that the said medical examination had been conducted at 17.30 hours on 2 August 2019.
- [22] The witness further testified that as per the Accused's request, he was again taken to the Vunidawa Hospital for examination, at the time the recording of the interview was suspended at 15.00 hours on 3 August 2019. The recording of the interview had recommenced at 15.40 hours after his visit to the hospital. Later in his evidence the witness said this was a typing error and that the recording of the interview had actually recommenced after 16.24 hours.
- [23] At the conclusion of the caution interview the Accused had been given the right to read his statement. Consequent to reading his statement, the witness said that the Accused had signed the statement voluntarily.
- [24] During the course of D/Cpl Emosi's testimony, the Station Diary of the Vunidawa Police Station from 4 July 2019-15 October 2019 was produced in Court by the Prosecution as

Voir Dire Exhibit P3. The witness said that the Station Diary records the movement of what is happening in the Police Station.

- [25] The witness referred to the following entries made in the Station Diary on Friday 2 August 2019, to confirm that the Accused was taken to the Vunidawa Hospital for medical examination, prior to the commencement of his caution interview.

On 2 August 2019, at 17.17 hours (serial number 44), it is recorded thus: "Escorted the Rape Accused to Vunidawa Hospital by PC"

On 2 August 2019, at 17.40 hours (serial number 45), it is recorded thus: "Ref. to above entry. The (Accused) called back to the Station and is fit to be interviewed."

On 2 August 2019, at 18.00 hours (serial number 46), it is recorded thus: "D/Cpl Emosi commenced with the interview of Sevanaia."

- [26] Similarly the witness referred to the following entries made in the Station Diary on Saturday 3 August 2019, to establish that the Accused was taken again to the Vunidawa Hospital for medical examination.

On 3 August 2019, at 15.40 hours (serial number 34), it is recorded thus: "Ref. to the above entry DC Kami drove F/444 back to the yard and took the prisoner Sevanaia Nakauyaca to the Vunidawa Hospital for his check due to his complain of cold in his body conveying Cpl. Emosi."

On 3 August 2019, at 16.24 hours (serial number 35), it is recorded thus: "Further ref. to the above entry DC Kami drove F/444 to the yard from the Vunidawa Hospital conveying the prisoner one Sevanaia Nakauyaca and C/O EV Cpl. Emosi."

- [27] The witness was cross examining at length by the Defence. It was suggested to the witness that he did not properly explained to the accused his right to remain silent at the time his caution interview statement was recorded. The witness denied this suggestion.

- [28] It was suggested to D/Cpl Emosi that the accused had only been taken for medical examination to the Vunidawa Hospital on Sunday 4 August 2019, after the conclusion

of his caution interview statement, and not on 2 August 2019 and 3 August 2019 as the witness had testified. The witness denied this suggestion.

- [29] It was further suggested to the witness that when the Accused was taken to the Vunidawa Hospital on 4 August 2019, the Accused was only given a pink slip with the next appointment date written on it and that he was not medically examined by a doctor at the time. The witness denied this suggestion and insisted that the Accused was not taken to the Vunidawa Hospital on 4 August 2019.
- [30] It was further suggested to D/Cpl Emosi that at the time the Accused was brought to the Police Station after his arrest, he had been very sick. It was also suggested to the witness that the Accused had complained to police officers, including him that he was suffering from high blood pressure and as a result was feeling unwell, and as such was not in a physically fit state to proceed with the interview. The witness denied all the above suggestions.
- [31] D/Cpl Emosi had to be recalled to clarify a typing error that had occurred in the original iTaukei version of the Caution Interview Statement (Question 9).
- [32] The next witness for the Prosecution was Doctor Rajiv Lal. Currently he is serving as a Medical Officer at the CWM Hospital. In August 2019, he had been serving at the Vunidawa Hospital.
- [33] The doctor confirmed that the Accused was produced by the police at the Vunidawa Hospital on 2 August 2019 for medical examination. He had conducted the said examination commencing at 17.30 hours and concluding at 17.40 hours. The Medical Examination Report was tendered to Court as Voir Dire Exhibit P4.
- [34] The doctor testified that the reason the Accused was brought to the hospital for examination was to assess and determine if he was fit to be interviewed and to be detained in custody.
- [35] In column D (15) of the Medical Examination Report (Clinical Management) it is recorded thus: "Patient is a known case of hypertension and arthritis. Defaulted his clinics."

[36] The doctor testified that consequent to his examination of the Accused he concluded that the Accused was fit for his interview and to be detained in custody.

The Defence Case

- [37] The Accused testified that he had been arrested from his home on 2 August 2019. At the time of his arrest he said he was very sick. He said: "I know I was sick because I could feel that my body was weak and I was feeling cold and my blood pressure was high."
- [38] The Accused said that at the time his caution interview was recorded he was not in a fit state as he was having high blood pressure and memory loss. He said he had been sick since 17 July 2019, since the weather was not good and it was raining.
- [39] When asked as to how he knew his blood pressure was high the Accused answered thus: "Because whenever I have blood pressure, I wouldn't have an appetite for food cooked in oil and coconut milk and fatty foods."
- [40] He testified that he had been taken to the Vunidawa Hospital for examination only on Sunday 4 August 2019, after his caution interview statement had been recorded. He denied that he had been taken to the hospital for examination on 2 August 2019 and 3 August 2019 as stated by the prosecution.
- [41] The Accused further testified that his right to silence had not been properly explained to him.
- [42] The Accused was cross-examined at length by the State. It was suggested to him that his evidence about not understanding the right to silence, and that he was suffering from high blood pressure and memory loss, was made up by him so that he could make sure that his caution interview statement is not accepted as evidence. The Accused answered as follows: "I made it up so that I can escape the allegations and I do not agree to these allegations."

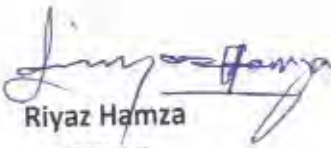
Analysis

- [43] I have considered all the evidence led during the course of the Inquiry. I am satisfied that the right to remain silent was properly explained to the Accused. As depicted above the cautionary words: *"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"* was put to the Accused and explained to him on no less than 5 occasions at the commencement and during the course of the recording of his caution interview statement.
- [44] D/Cpl Emosi testified that the Accused was taken for medical examination to the Vunidawa Hospital on 2 August 2019, prior to the recording of his caution interview statement. This evidence is corroborated by the evidence of Dr. Rajiv Lal. This is further corroborated by the contemporaneous entries found in the Station Diary and also the medical examination report of the Accused.
- [45] Furthermore, during the recording of his caution interview statement, on 3 August 2019, at the Accused's request, he was again taken to the Vunidawa Hospital for examination. This is corroborated by the contemporaneous entries found in the Station Diary.
- [46] Taking all factors into consideration, I am satisfied that during the time his caution interview was recorded the Accused was not suffering from high blood pressure or memory loss and was medically fit to proceed with his interview.
- [47] The onus of proving the voluntariness and fairness of a caution interview statement is on the prosecution and they must prove these matters beyond reasonable doubt. As stated before, in this case, the Accused is not challenging the voluntariness of the caution interview statement. The objection taken up by the defence is that the said caution interview of the Accused was not conducted fairly.
- [48] Taking into consideration the totality of the evidence led at the hearing, I am of the opinion that the prosecution has established beyond reasonable doubt that the recording of the Accused's caution interview statement was conducted fairly and also voluntarily.

Conclusion

[49] In the circumstances, I hold that the caution interview statement of the Accused (Prosecution Voir Dire Exhibit P1) is admissible in evidence.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 9th Day of October 2020

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