IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 116 OF 2019S

STATE

Vs

1. **WAISALE VATANIRUA**
2. **SEVULONI MOCENACAGI**

Counsels	**:**	**Mr. Z. Zunaid for State** **Ms. L. Vateitei for Accused no. 1** **Ms. L. Vateitei for Accused no. 2**
Hearing	**:**	**5, 6 and 9 November, 2020**
Ruling	**:**	**10 November, 2020.**
Written Reasons	**:**	**13 November, 2020.**

WRITTEN REASONS FOR VOIR DIRE RULING

1. In this case, both accuseds were charged with the following information:

"Statement of Offence

UNLAWFUL CULTIVATION OF AN ILLICIT DRUG: Contrary to Section 5 (a) of the Illicit Drugs Control Act 2004.

Particulars of Offence

WAISALE VATANIRUA & SEVULONI MOCENACAGI between the 1st day of September 2015 and the 23rd day of June 2016, at Navosa in the Western

Division, without lawful authority, cultivated 643 plants of Indian Hemp botanically known as Cannabis Sativa, an illicit drug weighing 17.5 kilograms."

2. At the time of the alleged offence, Accused No.1 was 30 years old, while Accused No. 2 was 17 ½ years old. Accused No. 2 was therefore a juvenile at the time of the alleged offence. Both the accuseds are brothers. On 23 October 2020, in the presence of their counsel, the information was put to the two accuseds. Both pleaded not guilty to the offence. In other words, they denied the allegation against them.

3. In the course of the police investigation, both accuseds were caution interviewed by police at Navosa Police Station on 23 and 24 June 2016. In the interview, both accuseds allegedly admitted the offence by confessing to the same. When formally charged by police on 24 June 2016, both accuseds also allegedly admitted the offence in their charge statements.

4. On 5, 6 and 9 November 2020, both accuseds challenged the admissibility of their caution interview and charge statements in a voir dire hearing. Both accused alleged that the police allegedly assaulted and threatened them to admit the offence in their interview and charge statement. They also alleged that the police unfairly induced and oppressed them to admit the offence. As a result, they were asking the court to declare their caution interview and charge statements as inadmissible evidence in the trial proper.

5. Seven witnesses were called by the prosecution. Six of them were police officers and one civilian, that is, the doctor. Both accuseds chose to remain silent and called no witness. Altogether, there were seven witnesses, on whose evidence, the court will have to make a decision. I heard the witnesses on 5, 6 and 9 November 2020. After listening to the evidence, and after carefully considering

their closing verbal submissions, I ruled firstly that, Accused No.1's caution interview and charge statements were admissible evidence, and it may be used in the trial proper. Secondly, I ruled that Accused No. 2's caution interview and charge statements were inadmissible evidence, and it may not be used in the trial proper. The above ruling was given on 10 November 2020. I said I would give my written reasons later. Below are my reasons.

6. The law in this area is well settled. On 13th July 1984, the Fiji Court of Appeal in **Ganga Ram & Shiu Charan v Reginam, Criminal Appeal No. 46 of 1983, said the following. "….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 of 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 (1941) AC 599, DPP V Ping Lin (1976) AC 574. Secondly, even if such voluntariness is established, there is also 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 the will, by trickery or by unfair treatment. Regina v Sang (1980) AC 402, 436 @ C-E. This is a matter of overriding discretion and one cannot specifically categorize the matters which might be taken into account…."**

7. In addition to the above, section 13 (1), (a), (b), (c), (d), (f), (g), (i) and (k) of the 2013 Fiji Constitution, reads as follows:

> **" 13 (1) Every person who is arrested or detained has the right—**

(a) to be informed promptly, in a language that he or she understands, of –

(i) the reason for the arrest or detention and the nature of any charge that may be brought against that person;

(ii) the right to remain silent; and

(iii) the consequences of not remaining silent;

(b) to remain silent;

(c) to communicate with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly and, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the services of a legal practitioner under a scheme for ;legal aid by the Legal Aid Commission;

(d) not to be compelled to make any confession or admission that could be used in evidence against that person;…

(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;

(g) at the first court appearance, to be charged or informed of the reasons for the detention to continue, or to be released;…

(i) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;…

(k) to communicate with, and be visited by,-

(i) his or her spouse, partner or next-of-kin; and

(ii) religious counsellor or a social worker…"

8. I have carefully listened to and considered the evidence of all the prosecution's witnesses. I have carefully examined their demeanors when they were giving evidence in court. I have carefully considered the parties' closing submissions.
9. The voluntariness of both accuseds' caution interview statements were disputed by the parties. The accuseds said, the police assaulted and threatened them while they were in their custody. They appear to say that their caution interview and charge statements were not given voluntarily and were not given out of their own free will. The police witnesses said otherwise. They said, both accuseds were not assaulted nor threatened, while they were in their custody. The police said, both accuseds gave their caution interview and charge statements voluntarily, and both accuseds voluntarily signed their interview and charge notes to acknowledge they were giving the same voluntarily.

10. After carefully considering the evidence and the parties' closing submissions, I had come to the conclusion that both accuseds gave their caution interview and charge statements voluntarily and out of their own free will. On the evidence, I find the police did not assault or threaten the two accuseds to admit the offence, while they were in their custody. In my view both accuseds gave their caution interview and charge statements voluntarily and out of their own free will. On the first limb of the test laid out by **Ganga Ram & Shiu Charan v Reginam** (supra), the prosecution had passed the same. I find, on the totality of the evidence that, both accuseds gave their police caution interview and charge statements voluntarily and out of their own free will to police. They both voluntarily signed the interview and charge statements. They were given their rights to counsel,

their other rights, were given the standard caution, rest and meal breaks. I find no evidence that they were physically abused by police.

11. On the second limb of the test in **Ganga Ram & Shiu Charan v Reginam** (supra), I find the police were not unfair in their treatment of Accused No. 1, while he was in their custody. However, for Accused No. 2, a juvenile at the time, it was a different matter. Section 19 of the Juvenile Act 1973 states as follows:

> **" Every court in dealing with a juvenile, who is brought before it, shall have regard to his or her welfare…"**

The word "welfare" is undefined in the Juvenile Act 1973. In the "**Oxford Advanced Learners Dictionary**," Oxford University Press, 6th edition, 2002, the word "welfare" means "the general health, happiness and safety of a person". The obligation imposed by section 19 of the Juvenile Act 1973 on the courts was mandatory. In my view, the word "court" covered every court in the country. When the duties imposed by section 19 of the Juveniles Act 1973 is read together with the duties arising out of section 13 abovementioned of the 2013 Constitution of Fiji, the courts are expected to carefully scrutinize the fairness of the police in how they obtain caution interview and charge statements from juveniles with a view to upholding their welfare.

12. In this particular case, the police must be commended for getting the juvenile's father before the caution interview started on 23 June 2016. This complied with the juvenile's constitutional right to have his next of kin at the interview. However, before the important questions were asked that led to the alleged confession, the juvenile's father was financially forced to go home to Vatubalavu Village from Navosa Police Station because of transport problem. It was late afternoon, that is, 5.45 pm on 23 June 2016. The police did not call an alternative next of kin to be present, or alternatively, offer the juvenile's father a return trip to the village in

a police vehicle, to enable the interview to continue fairly, bearing in mind the fairness obligations resting on the police. When the juvenile's father left, the police continued with the interview. They obtained alleged confessions thereafter. In my view, they should have stopped the interview and continued in the morning, when the juvenile's father or mother were present. Looking at the surrounding circumstances as a whole, in my view, continuing the interview without the juvenile's father, or mother, or other next of kin present, was unfair to the juvenile. Consequently, on the second limb laid out in **Ganga Ram & Shiu Charan v Reginam** (supra), I find that the police acted unfairly in continuing the caution interview and formal charging of Accused No. 2, without his father, or mother or next of kin present.

13. Because of the above, I ruled Accused No. 2's police caution interview and charge statements, as inadmissible evidence. As far as Accused No. 1 was concerned, he gave his caution interview and charge statements voluntarily and out of his own free will. The police also acted fairly towards him. The above were the reasons for my declaring Accused No. 1's police caution interview and charge statements as admissible evidence, while declaring Accused No.2's police caution interview and charge statements, as inadmissible evidence. I rule so accordingly.

HIGH COURT OF FIJI

Salesi Temo
JUDGE

Solicitor for Applicant : Legal Aid Commission, Suva
Solicitor for Accused No. 1 : Ms. L. Vateitei, Barristers & Solicitor, Suva.
Solicitor for Accused No. 2 : Ms. L. Vateitei, Barristers & Solicitor, Suva