

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 255 of 2019

STATE

vs.

MICHAEL HAZELMAN

Counsel: Ms. D. Rao for the State
Ms. L. Ratidara with Ms. N. Ali for the Accused

Date of Voire Dire Hearing: 3rd, 4th and 5th February 2021

Date of Ruling: 19th February 2021

RULING

[Voire Dire]

1. The Prosecution proposed to adduce the caution interview of the accused in evidence, for which the accused objected on the following grounds *inter alia*;
 - i) *That Michael Hazelman's caution interview was not conducted fairly because of the following reasons:*

- (a) *That Michael Hazelman was threatened by the short i-taukei officer that had arrested him by threatening to assault him if he does not agree to the allegations.*
- (b) *That Michael Hazelman was intimidated by the arresting officer's tone and manner when they told him that the place they are taking him people should always tell the truth.*
- (c) *That Michael Hazelman was induced by the arresting officer's offering him cigarettes prior to and during the interviews.*
- (d) *That Michael Hazelman was not allowed to have his wife or an independent person present at the interview to assist him as he does not know how to read.*
- (e) *The Caution Interview of Michael Hazelman was conducted unfairly because there was no evidence of Rape or Sexual Assault gathered during the course of their investigation, yet he was caution interviewed on the allegations above.*

2. The trial within a trial (*voir dire*) commenced on the 3rd of February 2021 and concluded on the 5th of February 2021. The Prosecution presented the evidence of two witnesses, and the accused gave evidence for the Defence. The parties were then directed to file their respective written submissions. However, only the accused filed his written submission as per the direction. Having carefully considered the evidence presented during the hearing and the accused's written submissions, I now proceed to pronounce the ruling as follows.
3. The accused alleged that he was threatened and intimidated by the police during his arrest and recording of the caution interview. He further claimed that he was not allowed to have his wife or an independent person at the interview to assist him as he does not know

how to read. Moreover, he claimed that the police induced him during the recording of his caution interview by offering him cigarettes. In addition to that, the accused alleged that his caution interview was conducted unfairly as there was no evidence of Rape or Sexual Assault gathered by the police during the investigation.

4. The two witnesses of the Prosecution, in their evidence, stated that they have properly arrested the accused at his home. Cpl. Seremaia said that he did not explain the accused his right to remain silent when he was arrested. Nevertheless, the accused was treated fairly and given his rights at the beginning and during the caution interview recording.

The Law

5. House of Lords in **R v Mushtaq** (2005) 3 All ER 885, at 908 has discussed the importance of careful evaluation of the confession before it is accepted in evidence, where his Lordship held that:

"It has long been recognised that the content of a confession made by an accused person has to be evaluated with great care in order to determine whether it can safely be accepted as an admission against his interest. The approach of the law to that evaluation has varied over the years and the rules applied by the courts have to be kept under review to ensure that they reflect the standards accepted by each generation."

6. The Fiji Court of Appeal in **Shiu Charan v R** (F.C.A. Crim. App. 46/83) has discussed the applicable test of admissibility of caution interview of the accused person in evidence at the trial. The Fiji Court of Appeal in **Shiu Charan** (*supra*) held that:

"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. "Á Ibrahim v R (1914) AC 599. DPP v Pin 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." (State v Rokotuiwai - [1996] FJHC 159; HAC0009r.95s (21 November 1996)."

7. The Fiji Court of Appeal in **Fraser v State** ([2012] FJCA 91; AAU24.2010 (the 30th of November 2012) held that:

"The court shall not allow a confession to be given in evidence against him unless the prosecution proves beyond reasonable doubt that the confession was not obtained (a) by oppression of the person who made it (b) in consequence of anything said or done which was likely, in the circumstances existing at the time to render unreliable any confession which might be made by him in consequence thereof."

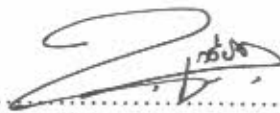
8. The test enunciated in **Shiu Charan (supra)** and **Fraser (supra)** constitutes two components. The first component is the test of oppression. The Court is required to satisfy the caution interview was recorded without any form of force, threats, intimidation, or inducement by an offer of any advantage. The second component is that, even though the Court is satisfied that the statement was given voluntarily without any form of threat, force, intimidation, or inducement, it is still required to satisfy that no general grounds of unfairness existed before or during the recording of the caution interview.
9. The Prosecution has the onus to prove beyond a reasonable doubt that the accused's caution interview was recorded voluntarily and fairly.

10. According to the evidence presented by the Prosecution, the accused had emotionally broken down during the recording of the caution interview. The Witnessing officer said that the accused was given breaks whenever he broke down emotionally. The accused was in tears, claiming that he is the sole breadwinner of the family, and this case would affect his family. According to the Witnessing officer, the behaviour of the accused was unusual. However, there is no record in the caution interview regarding such emotional breakdowns of the accused and the breaks given to him as claimed by the Witnessing officer. The accused was not presented to the senior-most officer at the Police Station after making his confession as required under the Force Standing Orders, thus denying the accused to raise any complaint about any improper conduct of the Interviewing officer and Witnessing officer. The Force Standing Orders are not rules of laws. But they are guides to ensure the fairness and breaches of them should not be accepted lightly.
11. The accused claimed, in his evidence that he does not know how to read. He had only studied up to class two in the school. The Interviewing Officer said that he did not ask the accused about his level of education and whether the accused could read. The Interviewing officer needs to make sure that the accused is competent enough to understand all the steps pertaining to the caution interview recording, including whether the accused could read or not. If the accused could not read, the Interviewing officer must ensure that he read the record of the interview to the accused at the end of the recording. It is not the responsibility of the accused to inform the Interviewing officer that he could not read, but the Interviewing officer.
12. Both the witnesses of the Prosecution stated, in their evidence, that the wife of the accused made a brief visit during the recording of the interview. Still, the record of the caution interview has no record of such a visit.
13. In view of the reasons, discussed above, there is a reasonable doubt whether the accused broke down emotionally due to the threat and intimidation made by the Interviewing officer and the Witnessing officer. Moreover, there is a reasonable doubt whether the accused was in a proper state of mind to answer the allegation as he was emotionally

broke down. On account of these doubts, it creates a further doubt whether there was some general unfairness that existed during the recording of the caution interview, thus making the admissibility of it in evidence unsafe.

14. In conclusion, I hold that the caution interview of the accused is not admissible in evidence on the ground that there is reasonable doubt whether the caution interview was made under a fair and just circumstances.




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Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

19th February 2021

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.