

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 354 of 2019

STATE

vs.

JONI MALAULAU

Counsel: Mr. E. Samisoni for the State
Accused In Person

Date of Voire Dire Hearing: 30th March 2021

Date of Ruling: 31st March 2021

RULING

[Voire Dire]

1. The Prosecution proposed to adduce the caution interview of the accused in evidence. The accused had legal representation during the pre-trial stage. The learned Counsel for the accused informed the Court that the Defence does not wish to challenge the admissibility of the caution interview in evidence but would challenge the truthfulness of the confession. Hence, the matter was set for the hearing. However, the accused decided to represent himself. Consequently, the learned Counsel for the accused withdrew from her representation. Accordingly, the Court commenced this *voir dire* hearing since the accused

is now unrepresented. The Prosecution adduced the evidence of the Interviewing Officer and the Witnessing Officer while the accused decided to exercise his right to remain silent.

The Law

2. 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 their Lordships 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."

3. 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 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)."**

4. 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."

5. 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.
6. The Prosecution has the onus to prove beyond a reasonable doubt that the accused's caution interview was recorded voluntarily and fairly.

Evidence and Analysis

7. The Interviewing Officer, in his evidence, stated that he did not explain the accused his right to remain silent during the recording of the caution interview. The Interviewing Officer said that he did not intend to explain it to the accused but explained that he has a right to contact a private lawyer or a lawyer from the Legal Aid Commission.
8. However, the record of caution interview, which is tendered as Prosecution exhibit, states at Question 10 that the accused was explained the right to remain silent and the consequence of not remaining silent. The Interviewing Officer, during his evidence, did not explain the


reason for this contradiction, making a reasonable doubt whether the accused was explained correctly his right to remain silent before the recording of the Interview.

9. The Witnessing Officer in his evidence said that he witnessed the recording of the Interview. He had then signed the record of the Interview as it reflects the true events that he had witnessed. He further said that the accused was explained of his right to have legal assistance and the right to remain silent. The Witnessing Officer pointed out question 6 of the Interview to confirm that the accused was explained his right to Counsel. However, he said that he can't recall when the learned Counsel for the Prosecution asked him to show the Record of Interview to confirm that the accused was explained his right to remain silent.
10. Every person arrested or detained has the right to be informed promptly, the right to remain silent and the consequence of not remaining silent. (*vide; Section 13 (1) (a) (ii) and (iii) of the Constitution*). In addition to that, the arrested or detained person has a right to remain silent during his arrest or detained period. (*vide Section 13 (1) (b) of the Constitution*).
11. Section 13 (1) (d) of the Constitution has given the detained or arrested person a right not to be compelled to make any confession or admission that could be used in evidence against him. Therefore, it is imperative to explain to the accused his right to remain silent and the consequence of not remaining silent before the commencement of the caution interview as the confession made in the caution interview could be used in evidence against the accused. The Interviewing Officer has to ensure that the accused was explained correctly of his right to remain silent and the consequence of not remaining silent before the commencement of the recording of the Interview. In addition to that, the Interviewing Officer must make sure that the accused properly understood his right to remain silent and made an informed decision whether to exercise his right or not.
12. In view of the evidence given by the Interviewing Officer and the Witnessing Officer, there is a reasonable doubt whether the accused was explained correctly of his right to remain silent and the consequences of not remaining silent before the commencement of the recording of the Interview, thus creating a further reasonable doubt whether the accused gave

his answers voluntarily or not. 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.

13. Accordingly, I find that the Prosecution has failed to prove beyond reasonable doubt that the accused voluntarily gave his statement in the caution interview, and it was recorded under fair and just circumstances.
14. In conclusion, I hold that the caution interview of the accused is not admissible in evidence.




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

At Suva

31st March 2021

Solicitors

Office of the Director of Public Prosecutions for the State.

Accused In Person.