

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 117 of 2020

STATE

vs.

- 1. INOKE QILAI DOKANAVOSA**
- 2. TIMOCI RASOVA MATAITINI**

Counsel: Mr. M. Vosawale & Ms. M. Naidu for the State
Ms. L. Ratidara for the 1st Accused
Ms. P. Mataika for the 2nd Accused

Date of Hearing : 20th to 28th September 2022

Date of written submissions: 29th September 2022

Date of Voir Dire Ruling : 31st October 2022

VOIR DIRE RULING

[On the admissibility of the interviews under caution, charge statements and of DNA evidence]

Introduction

1. The above named two Accused persons are jointly charged with 6 counts:
Manslaughter: contrary to Section 239 read with section 46 of the Crimes Act, Aggravated Robbery: contrary to Section 311 (1) (a) of the Crimes Act, 2009, Rape: contrary to Section 207 (1) & (2) (a) of the Crimes Act, 2009, Aggravated Robbery: contrary to Section 311 (1) (a) of the Crimes Act, 2009, Aggravated Burglary: contrary to Section 313 (1) (a) of the Crimes Act, 2009, and Theft: contrary to Section 291 of the Crimes Act, 2009.

2. During the pre-trial stages the prosecution informed that they will rely on the confessions made by both the Accused in their respective interviews under caution (caution interviews). Further, the prosecution also informed that a forensic report made upon the examination of DNA extracts of the first Accused will be lead in evidence. Both the Accused filed objections and filed their *voir dire* grounds in respect of their caution interviews.
3. The first Accused Inoke filed his grounds for *voir dire* on the 26th of February, 2021. Subsequently on the 14th September 2022 additional grounds for *voir dire* were filed on behalf of first Accused in which objections were raised in respect of the charge statement too. Thereafter, on the 19th of September 2022, the first Accused filed his grounds of *voir dire* in respect of DNA evidence.
4. The second Accused filed his grounds for *voir dire* on 6th August, 2020 for the caution interview as well as the charge statement.
5. Accordingly this *voir dire* was in respect of;
 - a. Caution interview of the 1st Accused recorded on 27th, 28th and 29th March 2022, [exhibit VDPE 2(a)-iTaukei and exhibit VDPE 2(b)-English],
 - b. Charge statement of the 1st Accused recorded on 29th March 2020, [exhibit VDPE 3(a)-iTaukei and exhibit VDPE 3(b)-English],
 - c. Taking of the buccal swab from the 1st Accused for DNA analysis on 28th March 2020 [exhibit VDPE (1)],
 - d. Caution interview of the 2nd Accused recorded on 3rd April 2022, [exhibit VDPE (5)-English], and
 - e. Charge statement of the 2nd Accused recorded on 3rd April 2022, [exhibit VDPE (6)-English].
6. Accordingly, the *voir dire* hearing in respect all matters commenced on the 20th September 2022. The prosecution led in evidence 23 witnesses and both the Accused gave evidence on their behalf. The Accused filed their objections to the admissibility of the record of caution interviews and the DNA test reports on the following grounds.

Grounds for Voir Dire – 1st Accused – Inoke Qilai Dokanavosa

7. The 1st Accused objects to the admissibility of his Record of Interview dated 27th March, 2020 and the Charge Statement dated 29th March 2020 on the following grounds:

1. Time of Arrest

- (i) Mr. Dokanavosa was arrested by two police officers in civilian clothing. In the process of arresting the Accused, the officer did not caution Mr. Dokanavosa nor did they inform Mr. Dokanavosa as to the reason for his arrest.
- (ii) During the arrest, the officers aggressively cuffed his hands, grabbed his phone and banged his head on the wall.
- (iii) The said arresting officers punched his ribs and threw him to the back seat of the police vehicle.
- (iv) When he was thrown to the back seat of the Police vehicle, there was Police officers at the back seat who began punching him on his thighs and stomach until they reached Namaka Police Station.
- (v) The same arresting officers threatened Mr. Dokanavosa not to complain to the medical officer that has examined him as he will be further assaulted if he did so.

(2) Namaka Police Station:

- (i) Mr. Dokanavosa was further assaulted by being punched on his head and kicked on his chest. The assaults were done by the CID and K9 team however he is not aware of their names nor badge identity.
- (ii) Mr. Dokanavosa was threatened and forced to admit to the allegations given by the Interviewing Officer. The same Interviewing officer also promised that Mr. Dokanavosa will be bailed if he admits to the allegations. This was a false promise.

Additional Grounds for Voir Dire on DNA Evidence – (1st Accused – Inoke Qilai Dokanavosa

8. The 1st Accused objects to the admissibility of the DNA evidence on the following grounds:

- (i) At the time the buccal sample was taken Inoke Dokanavosa's consent was not obtained.
- (ii) He was not explained as to the reasons why the sample was taken from him.

Grounds For Voir Dire – 2nd Accused – Timoci Mataitini Rasova

9. The 2nd Accused is challenging the admissibility of his Record of Interview dated 3/4/2020 and his Charge Statement taken at 19.00hrs to 19.27 hours on the following grounds:

Record of Interview

Voluntariness

1. Challenging the answers in his Caution Interview in relation to the issue of voluntariness and or its truth. The Accused was assaulted and slapped on the head and punched on his back at the point of arrest and on the way to the police station.
2. When he was arrested he was not given rights as per rights of an arrested and detained person. He was not given any reason as to why he was being arrested.
3. On the way from Savusavu, Natovi Jetty, to Sigatoka Police Station the police officers were threatening the Accused and intimidating him. They were swearing at the Accused and told him to confess about what had happened.
4. When the Accused was at the Sigatoka Police Station he was assaulted by an Indian police officer, his hands were hit with handcuffs by the officer and the officer had also threatened the Accused.
5. The Accused was forced to confess to the allegation of murder put against him.
6. When the interview was being done the Accused felt scared of being further assaulted and because he was threatened he confessed to the allegations.
7. When the Accused was being interviewed there were also 5 other people in the room who were also threatening the Accused.

General Unfairness

8. The record of interview was typed and after that the Accused was not given his record of interview to allow him read the contents.
9. The police officers said that they would assault the Accused if he didn't confess.
10. The Accused was refused medical attention.
11. Prior to being produced in the Sigatoka Magistrate Court the Accused was told by a police officer to confess to the Magistrate and agree to any allegations put by the court towards him.

The above was a breach of his constitutional rights that are protected under the 2013 Constitution section 13.

That there was breach of his rights under the Judges Rules and Articles 9(2) and Article 9(3) of the International Covenant on Civil and Political Rights prior to and during his

interview by the Police.

The legal regime and the applicable law

10. 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."*

11. The sections 13 and 14 of the Constitution has recognised and endorsed the above mentioned principles as well. However It is for the court to decide;
- a. Firstly, whether the caution interview and the charge statement of the Accused persons was conducted freely and fairly without any threats, assault, inducements or any improper practices by the persons in authority namely the police officers who were involved in the interrogation of the Accused persons and that the Accused persons have voluntarily given their answers on their freewill.
 - b. Secondly, if there has been oppression or unfairness then this court can in its discretion exclude the caution interview and the charge statement. Further if the Accused common law rights have been breached then that will lead to the exclusion of the confessions obtained, unless the prosecution can show that the Accused was not prejudiced as a result of that breach.
12. It is now settled law that, for a confession or the charge statement of an Accused person to be admissible as evidence such confession or the charge statement 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).

Burden of proof

13. The onus of proving voluntariness or 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.
14. Section 13 (1) (a) (b) and (d) of the Constitution provides that:
 - “(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)*
 - (d) Every person who is arrested or detained has the right not to be compelled to make any confession or admission that could be used in evidence against that person.”*
15. Section 13 (1) (d) of the Constitution states that, *“Every person who is arrested or detained has the right not to be compelled to make any confession or admission that could be used in evidence against that person.”*
16. In this case, the objections taken up by the defence are that at the time of the arrest the accused persons were not informed the reason, when recording of the statements under caution the Accused were not properly explained of their rights, they were subjected to physical harm (assault) as well as psychological trauma and threats as well as trickery was employed. The 1st Accused also alleges that his informed consent was not obtained prior to taking the buccal swab for DNA analysis.

Caution interview of 1st Accused Inoke

Prosecution case

17. According to the prosecution's evidence 1st Accused Inoke was arrested on the 26th of March 2020 by witness PC **Ulaiasi Radrovi** and another officer. He had been instructed by ASP Nagake to arrest the Accused. Accordingly he had been detected in Sabeto near a shop named HD Enterprise. PC Ulaiasi has identified the Accused, restrained him by holing his collar, and handcuffed him upon explaining the reason for his arrest and identified himself. The Accused had been brought to Namaka Police Station and taken to the Bure where he was handed over to ASP Nagake. The bure is within the Namaka Police and just a few feet away from the main building. A team of officers investigating this crime had been present at this Bure. The Accused had then been handed over to DC Talemaitoga who had been the escorting officer throughout the first Accused is stay in the police station.

18. According to **DC Taleimaitoga** he had taken charge of the Accused searched him and locked him in the cell block of the Namaka Police Station and the 1st Accused did not have injuries. This had been around 10 o'clock in the night shortly after he had been brought to the police station that day. On the 27th March, 2020 the first Accused had been released from the cell block and taken to the Namaka Police Office to record his caution interview. The recording of the caution interview has commenced at 1209 hours and according to the station diary he had been released from the cell and taken out at 1130 hours. The recording officer is DC Adriu and witnessing officer was Sergeant Yagavito.

19. According to **DC Adriu**, the recording of the caution interview which commenced at 1209 hours has proceeded until 1540 hours when it was suspended to take the suspect for the reconstruction. During that period there have been several occasions when the recording was suspended for short periods to enable the Accused to use the washroom, have water and lunch so on and so forth. For the reconstruction the Accused along with the interviewing officer and the escorting officer with some other officers have proceeded to Cuvu Top to the scene of crime. After the reconstruction they have returned to the Cuvu Community Centre Police Post where the rest of the caution interview was recorded. They have recommenced at 1840 hours and proceeded up to 2020 hours when they have stopped to obtain the buccal swab after which around 2030 hours the caution interview has resumed and proceeded up to 2108 hours at which time it was adjourned and suspended

for the day.

20. On the following morning the 29th of March recording of the caution interview has resumed at the Cuvu Police Post at 0915 hours. Recording of the caution interview was concluded at 1320 hours. Between these times there have been suspensions for the Accused to have water, food and use the washroom etc. Upon so recording the caution interview the Accused, witnessing officer and the recording officer have all signed at the bottom of each page and on every occasion where there was a suspension and the resumption. The caution interview had been conducted in the i-Taukei Language and then translated into English by the recording officer DC Adriu. As confirmed by exhibit VDPE 2(a) and VDPE 2(b) DC Adriu testified that all constitutional rights were afforded and explained.

Charge Statement of the 1st Accused

21. Then the Accused had been formally charged by **PC Misidomo Baseisei** on 29th March 2020 at 1607 hrs and the same had taken place at the Cuvu Police Post. This was witnessed by DC 4222 Uqeuqe and the Accused and the two police officers have signed at 6 places [vide VDPE 3(a) and (b)].
22. After concluding the formal charging the 1st Accused had been taken to the Sigatoka Hospital which was approximately a 15 minute drive from the Cuvu Police Post. Doctor Saverio has examined the first Accused and found no injuries except a cough upon the medical examination the first Accused had been taken to Sigatoka Police Station and locked up in the cell.
23. These are broadly the incidents and events that took place from the time of arrest up to the 29th night when he was brought back to the Sigatoka Police Station.

Medical Evidence

24. The prosecution led the evidence of **Doctor Saverio** who examined the 1st Accused. According to Doctor Saverio on the 29th March 2020, the 1st Accused has been brought to the Sigatoka Hospital by the police. She had examined him at 7.12pm and upon inquiry the Accused had told that he had no injuries and made no other complain. After recording the history, she had examined the Accused using her stethoscope and found the lungs and

chest clear. She had examined his hands or his extremities feeling his pulse. She had observed a tattoo on his right upper limb or the upper arm and also observed a tattoo on the medial aspect of the inner forearm which said 'Raiwaqa'. However, she had recorded that there were no other injuries except for a cough which the 1st Accused had been suffering for over 1½ weeks.

25. She has specifically noted at paragraph D11 of the medical report that, "*stable vitals; that meant his blood pressure, his pulse, his temperature, oxygen level and his breathing rate were all within the normal range*". The medical examination form was produced as exhibit **VDPE1**.
26. In cross-examination she was asked if the shirt was lifted when she examined the chest but she was able to clearly recall if the examination was done over the clothes or if the shirt was lifted up. The examination had been concluded within 8 minutes by 7.20pm.

The 1st Accused's position

27. Basically, the aforesaid sequence of events is not in dispute and is common ground. The 1st Accused in his evidence alleged that he was not informed of the reason for his arrest and the officers did not reveal their identity. He also alleged that he was handled in a *rough* manner and his head was banged against the wall at the time of his arrest. Then he was thrown into the rear seat of the twin cab was between two officers who punched him on the sides of his chest, stomach and the thighs. After being so brought to the Namaka Police Bure he claims to have been assaulted by several police officers who he was unable to identify or recognize. They have banged his head with their hands, kicked him on his chest and repeatedly stamped him when he was fallen on the ground.
28. The Accused also alleges that he was threatened shortly before the caution interview was recorded. He had been told that a mop stick would be inserted into his anus if he did not cooperate. He also says that they threatened him with assault if he did not tell what they wanted. The defence suggested that he was taken out of the cell at 1130 hours and the caution interview commenced at 1209 hours and it was during this period that he was so threatened. In his evidence the Accused also stated that during short suspensions of the caution interview he was humiliated and insulted.

29. Finally, the 1st Accused has taken up the position that he was threatened that nothing be told to the Doctor and the escorting officer was present when he was medically examined. It was suggested to the prosecution witnesses that the caution interview was in fact recorded and typed by the escorting officer Taleimaitoga and DC Adriu was there on and off.

Evaluation of the 1st Accused's evidence.

30. As suggested and testified, the 1st Accused, claims to have been physically assaulted from the point of arrest onwards. At the point of arrest his forehead had been banged against a wall and whilst being taken to the police station he had been assaulted on his thighs, chest and the head by two officers seated on either side. Immediately upon being brought to the Namaka Police Bure a large number of police officers have assaulted him on his head, kicked his chest and also stamped on him with their shoes. This physical assault had taken place towards late evening and the night of the 26th of March. He had been examined by a doctor around mid-day of the 29th of March however the doctor has not observed any injuries. The defence position is that the doctor did not physically examine the body but only inquired from the first Accused. Due to threats the first Accused had not disclosed anything to the doctor. If we assume that this was so, the doctor ought to have certainly seen his forehead. If his head was hit against a wall, one would certainly expect some kind of visible injury to be there.
31. According to the Accused at the point of arrest the officer had acted quite roughly and violently. If that be so it is more the reason that there should be a visible injury on his forehead. The doctor has not observed any such injury. Not only has the Doctor not observed any injuries but in the course of the first Accused's evidence he admitted that there were no injuries except his *body feeling sick*. Therefore, it is admitted that he had not sustained any external injury even in the form of a contusion. If one considers the violent and the concerted nature of the physical attack the first Accused claims to have been subjected to at the Bure, he should have sustained some form of injury. This was not friendly punching. If he was assaulted with hands, kicked with shoes, and stamped by several officers there should necessarily have been some form of injury. Accordingly, the description of the assault is certainly not consistent with there being no injuries, which makes the allegation and the description of assault extremely improbable and in all

probabilities, it appears to be false or untrue.

32. Further the Doctor Savero has observed that the 1st Accused's vitals were within the normal range. This means his blood pressure, pulse, temperature and heartbeat were all normal. It is in evidence that if a person was subjected to physical abuse or psychological trauma such as threats preceding a medical test, his vitals could not have been normal. According to the 1st Accused he had been subjected to physical abuse as well as extreme mental trauma and oppressive threats even just before he was taken for the medical examination. If that be so his vitals certainly could not have been normal. Therefore, not only is the allegation of physical abuse and threats but even the allegation of psychological trauma of threats and oppression becomes extremely improbable in view of the medical evidence.
33. The Accused does not deny and but in fact admits that he was provided with meals and a safe place to stay whilst held by the police. He had not been deprived of any sleep either. The affording a number of suspensions during the recording of the caution interview further confirms that the Accused had been afforded with sufficient facilities and opportunities to meet his personal requirements, rest, food and water. Accordingly, I am unable to accept the allegations made by the Accused of assault, oppression or ill-treatment to be realistic or true.

Voir Dire on DNA

34. The 1st Accused objects to the admissibility of the DNA evidence on the basis that when the buccal sample was taken his informed consent was not obtained. DC Adriu testified that in the course of recording the caution interview the first Accused has agreed to have his saliva tested for DNA (Questions 225 and 226). After so agreeing, Sergeant Naupoto from the Fiji Police SOCO Office was summoned to obtain a buccal swab.
35. **Sergeant Naupoto** in his evidence explained the procedure he follows in obtaining biological sample. He explains to the suspect the purpose and reason for collecting the sample and informs that such sample will be used for analysis and such evidence may be used against him in a Court of Law. If the Accused agrees then a written consent form is perfected by inserting the details to the standard form which is explained to the Accused

and if he still agrees he is required to sign it. After explaining and so obtaining the written consent then the sample collecting device (a cotton swab) is given to the Accused himself to obtain the sample. The witness says that he obtained the sample in this case and he followed the said procedure. He was cross-examined and it was suggested that the procedure was not followed but he just walked in, took the sample and just left.

36. The Accused stated that he was unaware that this would be used for analysis and as evidence against him. The said officer just walked in asked him to open the mouth took the sample and just left. The 1st Accused admits signing the consent form but claims to have been unaware what it was. He took up the position that if was made aware as to the purpose he would not have consented.

Challenging after 2 years

37. The 1st Accused filed his grounds of *voir dire* as far back as 26/02/2021. However, no challenge of the DNA evidence was raised. Almost 1½ years thereafter on 19/09/2022 the Accused for the first time raised the grounds of *voir dire* on DNA evidence. The prosecution did disclose that they were intending to rely on the DNA evidence as far back as 2020 with their disclosures. This clearly is belated and appears to be an afterthought.
38. I observed the evidence of Sergeant Naupoto's demeanor. He had been a SOCO officer for almost 12 years. He was extremely confident and certain that he follows the procedure when obtaining samples. He has documented the sample collection in the consent form. However, he admitted that he made no note or other entry elsewhere. When the prosecution asked him if Inoke is in court, the witness responded that due to the lapse of time he was unable to identify. This clearly shows that this witness is extremely truthful and he only states what he actually remembers. If not being a police officer and to support the prosecution case he could have very easily pointed out the Accused in court. He did not do so. Thus, his evidence to my mind is truthful and convincing.
39. The defence suggestion that the Accused was unaware of the reasons of taking the sample and it was not explained are highly improbable. This is more so because Accused admits signing the consent form and he does not say that he was forced to sign it. The consent form states that the collection of the sample is for DNA Forensic Biology Laboratory and is for this murder case. The Accused in signing has acknowledged that he has been briefed

on the objective and that he understands fully the purpose of this collection. In these circumstances I am more than satisfied that the prosecution has proved beyond reasonable doubt that the sample had been obtained after informing the Accused of its purpose and object and upon obtaining his informed consent.

Caution interview of 2nd Accused Timoci

Prosecution case

40. According to the prosecution evidence the second Accused was arrested in Vanua Levu on the 31st of March 2020 by a team of officers led by DC Timothy. Upon so arresting he was brought to the Tukavesi Police Station and PC Siuta has taken charge of the 2nd Accused at 0310 hours. Accused had been searched, checked and locked up in the cell. On the 2nd April 2020, PC Siuta had escorted the Accused to the Seaqaqa Junction at Savusavu and has handed him over to DC Petero between 7.00 and 7.30pm who then escorted the 2nd Accused to the Natovi Jetty and brought him by boat to the main Island (Viti Levu) and handed him over to ASP Esili Nadolo, who then escorted the 2nd Accused up to the Delainavesi Police Community Post. At the Community Post a team of officers from Sigatoka Police had arrived and the 2nd Accused was handed over to Corporal Setefano Samoca who accompanied him to the Sigatoka Police Station where he was handed over to PC Ashwin Kumar. According to PC Ashwin the second Accused was taken over by him at 4.00am of 3rd April 2020 and has locked him in the cell.

41. On the 4th of April 2020, the caution interview was conducted and recorded by **DC Timoci Tavurunaqiwa** witnessed by IP Meli. Then the 2nd Accused was taken to Cuvu Point for the reconstruction and then taken to the Cuvu Police Post where he was charged and the charge statement was recorded by PC Savenaca Mara. Upon recording the charge statement, the 2nd Accused had been taken to the Cuvu Health Centre at 1220 hours and was examined by Doctor Priyanka Shristy. The 2nd Accused was accompanied by PC Taleimaitoga.

Medical Evidence

42. The prosecution led the evidence of Doctor Shristy who medically examined the 2nd Accused. According to Doctor Shristy she examined the 2nd Accused on the 3rd April 2020 around 12.20pm at the Cuvu Health Centre. The patient had been brought by 2 policemen. Doctor Shristy explained the procedure she follows in examining a patient. According to

her after recording the history, the patient is examined from head to toe. She had not observed any injuries on the 2nd Accused except an old scar on the knuckle of the right hand.

43. She had observed the patient was not in any state of distress or pain and has appeared comfortable and stable. She had found all *vitals namely blood pressure, pulse, respiration rate and temperature had been within the normal range*. She states that if there was any abnormality such as hypertension or other issue, she would have necessarily made a note of it. However, the vitals have been within the normal range. Apart from the old injury to the knuckle she had not observed any other injury or issue on this patient. She had observed the 2nd Accused was fully oriented and fit for interview. She had concluded the examination at 12.50pm. The medical examination form was tendered as exhibit **VDPE4**.
44. Under cross-examination she said that the examination had taken place in a triage and in the presence of a staff nurse but she was unable to recall if the police officers were present and the examination had taken about 30 minutes. Upon being questioned by court the doctor explained that if a person had been subjected to any threat or assault on that day or shortly before that she would not expect the vitals to be normal. According to her if any such act has preceded, she would expect such person to be nervous, agitated and hypersensitive and the heart beat would be very high. Explaining the medical basis she said under stress, any extra force either physical or emotional will cause metabolic changes and would cause the blood pressure and pulse to change. This is due to the cortisol or stress hormones. She had not observed any such changes on the 2nd Accused.

2nd Accused's Position

45. The second Accused Timoci gave evidence and said that he was not informed of any reason for his arrest and was assaulted whilst being brought to Tukavesi Police Station. It is alleged that shortly before the recording of the caution interview, he was taken out of the cell up to a mango tree a short distance from the police station, at which place several police officers have threatened and intimidated and also slapped on the face and hit on the head.
46. It is also alleged that he was threatened and intimidated by PC Petero whilst he was brought from Savusavu to the main Island. He also states that when he was taken to the

doctor, he was threatened that nothing should be told to the doctor. It was suggested that his uncle and aunt made an attempt to see him but was prevented by the police. As for the recording of the caution interview the 2nd Accused says that the witnessing officer Meli was never there and that Inspector Meli did not accompany them to the reconstruction.

Threats and assault

47. According to his evidence and suggestions 2nd Accused claims to have been arrested without informing the reason. After the arrest he was taken directly to the Tukavesi Police Station and locked up in the cell. Within 5 minutes he had been taken out of the cell and escorted up to a mango tree about 5 minutes away from the police station at which place there was around 5 officers out of which the senior officer had wanted to know the story from the Accused. The second Accused has narrated what he knew but the said officers had then Accused him of lying and they have started slapping on his head and swearing at him that, '*you are a cursed generation*' (You have bad blood). After an hour or so, he had been brought back to the cell and then had been taken back once again to the same place where he was asked to narrate the story again. Then the senior officer has slapped him alleging that he was lying. Others around had once again have slapping from behind. When night fell, he had been taken back to the cell. This is the position taken by Timoci.
48. As to the assault near the mango tree was mentioned for the first time when the 2nd Accused gave evidence. It is not referred to or stated in the grounds of *voir dire*. This was not directly suggested to the prosecution witnesses either. According to the 2nd Accused this is the most serious act of intimidation and physical assault he had faced at the Tukavesi Police Station soon after his arrest. The failure to state this in his grounds of *voir dire* tendered to court on the 6th of August 2020 and the failure to suggest to the prosecution witnesses are serious omissions. In the normal course of events it is not possible for the Accused to have forgotten if he was assaulted, questioned and threatened in this manner for over an hour immediately upon his arrest. This lacks promptness and consistency thus appears to be an afterthought and to that extent a fabrication or an untruth.
49. The Accused alleges that after he was brought to the Sigatoka Police Station and locked up, several officers came to his cell throughout the night. They have come and humiliated him and also that an i-Taukei police officer has come by and hit him with a pair of handcuffs and threatened and said that he was the murderer. In his grounds of *voir dire* he

refers to this incident but states that it was an Indian police officer. To that extent the evidence of the 2nd Accused is contradictory.

50. The 2nd Accused has also stated that he was taken to the Cuvu Police Post and was questioned in a room and when he denied having anything to do with the murder the officer slapped him and threatened him to confess or if not things will be much worse. There is no mention in the grounds of *voir dire* of such an assault or threat at the Cuvu Police Post. Neither was this suggested to the prosecution witnesses.
51. He admits being taken to the Cuvu Health Centre but says that he was threatened just before he was taken in. According to the 2nd Accused he was terrified at this moment when he was taken into the Health Centre. However, according to Doctor Shristy there were no fresh injuries on the 2nd Accused and his vitals namely blood pressure, pulse, temperature and heartbeat have been normal. As stated above if a person had been subjected to intimidation, oppressive acts or being assaulted before being examined these vitals cannot be normal. The 2nd Accused claims that he was terrified. The medical evidence negates these assertions of the 2nd Accused, if he had been so subjected to prolonged physical as well as mental trauma and oppression his vitals certainly could not have been normal and the doctor ought to have observed some form of injury or tenderness. Nothing was so observed. Therefore, the 2nd Accused's evidence becomes highly improbable and in view of the medical evidence, it is in all probabilities false.
52. The Accused admits that whilst in the police station he was provided with meals and a comfortable environment. During the recording of the caution interview the 2nd Accused had been afforded several breaks for his personal needs. Therefore, the Accused had not been deprived of his basic necessities whilst in remand. He had been even taken home to collect his clothes. On the evaluation of the Accused's evidence I am satisfied that the allegation of assault and intimidation are improbable in these circumstances and false to that extent.

Discrepancy of the Station Diary entries

53. During the cross examination the defence did highlight several instances of the station diary not being in-line with the evidence of the police witnesses. Mainly they were where corresponding entries were not found in respect of certain things done by witnesses. One

such instance was that the witnessing officer IP Meli claimed to have come to the Cuvu Police Post to witness the caution interview of the 2nd Accused Timoci on 3rd April 2020. However, there is no entry on the station diary of IP Meli coming to the Cuvu Police Post that day. Based on this absence of the entry on the station diary it was suggested to the recording officer DC Timoci that IP Meli was not present at all during the recording of caution interview. This was so suggested to witness Meli but he pointed out to a station diary entry which stated that IP Meli was present when the caution interview was in progress. Upon this entry being shown the defence changed their stance and suggested that witness Meli was there on and off during caution interview but was not there continuously during the recording of the interview.

54. This establishes two things. Firstly, there had been an oversight to enter a note on the arrival of IP Meli. If I may emphasise, IP Meli cannot be present at a later stage unless he had arrived earlier at the Cuvu police post. Thus, the necessary inference is that the station orderly has due to an oversight failed to make the entry. The station diary is maintained by the station orderly who is a third party and not the witness. Thus, it is obvious that it is due to a human error that this lacuna has arisen. The other aspect is that the defence had been suggesting and formulating their defence taking advantage of inadvertent omissions in the station diary, but not on actual and truthful happenings or events.
55. An Accused is not entitled to advance a false or fictitious ground of challenge. If there be a lacunar or a discrepancy in the station diary or any other record an Accused certainly may take advantage and even have the benefit of such defect, lacuna or error in a criminal matter of this nature. This is quite different from taking advantage of an omission or defective entry and fictitiously assert basis of challenge. The 2nd Accused did attempt to falsely state that witness Meli was never present as the witnessing officer when the caution interview was recorded. This was based on the absence of an entry of witness IP Meli's arrival at the Cuvu Police Post. However, when witness IP Meli pointed out to an entry which confirmed his presence during the recording of the caution interview, the 2nd Accused changed his stance and took up the position that witness IP Meli was there but it was on and off.
56. The first position therefore was abandoned in the face of discovery of the said entry. The first position taken is thus clearly false and factually incorrect. This is a classic instance

of the Accused unsuccessfully attempting to create a false ground to challenge his caution interview. This confirms that the 2nd Accused is uttering falsehood or is untruthful.

Following the Procedure explaining the rights

57. Both the Accused did take up the position that at the point of arrest they were not informed of the reason. Thereafter, they also took up the position and suggested to the witnesses that their rights were not explained. On the perusal of the caution interview documents of both the Accused at the commencement as well as when there were suspensions and resumed the Accused have been informed of their rights. This including the right to remain silent, consequences of not exercising these rights and the fact that whatever that may be said may be used as evidence against them. These rights have been explained with reference to be constitutional provisions as well. The prosecution witnesses confirm that they explained these rights.
58. Both the Accused directly and by implication did suggest and took up the position that the officers who recorded the interviews merely got the Accused to admit to whatever the police wanted and recorded in the caution interview statements. In the course of the evidence of the recording officers it transpired that several breaks or suspensions were given to the Accused persons and the recording was suspended to carry out reconstruction. 1st Accused's caution interview statement had been recorded during three days and the 2nd Accused person's with in one day. Many suspensions were afforded and at all suspensions and resumptions the rights have been explained, the same recorded and all have signed at every such instance also on occasions an entry is also made in the station diary. When you consider the number of questions and answers in comparison with the duration of recording and the numerous breaks afforded to the suspect, it is more probable and is extremely consistent with a true record of the actual happenings and how these two interviews were conducted.
59. To come to this conclusion, I have considered the average number of questions and answers recorded between the periods of recording and suspensions. The number of questions and answers are proportionate to the durations of the recording times. Unless the recording had been actually so made as and when the interviews were conducted and progressing one cannot expect there to be such a uniformity and proportionate balance between the number of questions and the corresponding recoding time. This feature makes

it extremely probable that both the caution interviews reflect the actual happenings and they are contemporaneous and true recording of such interviews.

Findings

60. In the aforesaid circumstance that the evidence and the main positions taken up by both the Accused persons are improbable, untruthful and false. Accordingly I reject their evidence to that extent. The fact that the evidence of the two Accused persons are so disbelieved and rejected will in no way relive the burden of the prosecution to prove beyond reasonable doubt that the caution interviews and charge statements were obtained voluntarily and that the DNA sample was obtained with informed consent.

Caution interviews are voluntarily

61. According to records of both caution interviews as well as the charge statements the rights have been explained at the commencement and whenever there had been any suspension and resumption. At the commencement of the caution interviews both the Accused have been explained of their rights and their right to remain silent, consequences of not remaining silent, their right to counsel as well as the right to be visited by parent, family, next of kin, counselor or social worker. At the end of every page of the caution interviews of both the Accused persons the signatures of the respective Accused, witnessing officer and recording officer have been placed. At the end an opportunity to read the statement or make any corrections or alterations had been offered. Finally, the Accused persons have declared that the statements were read and an opportunity to add, alter or correct was offered and has also declared that the said statement to be true and as having given on their own freewill. Thereafter, the respective Accused, witnessing officer and the recording officer have all signed. The DNA sample consent form too perfected and signed by the 1st Accused. To that extend the legal requirements under the constitution as well as judges' rule have been complied with and documented.

62. All witnesses who attended, recorded, witnessed and escorting officers were led in evidence. There were no contradiction *inter se* or *per se*. Accordingly, I hold that both the caution interviews of both the Accused have been recorded according to the procedure established by law and judge's rule. In view of the medical evidence and the police evidence it is proved that there had been no physical harm or mental trauma which had affected the freewill and the voluntariness nor has there been anything that may have

sapped the freewill of each of the Accused persons. The evidence of the Accused nor their suggestion have been able to create any reasonable doubt on the voluntariness and thus I am satisfied that the prosecution has proved beyond reasonable doubt that both the caution interviews and the charge statements have been made voluntarily. Therefore, I hold that both the caution interviews and the charge statements have been made voluntarily.

Buccal swab obtained with informed consent

63. As for obtaining the buccal swab for the DNA analysis at question number 225 the first Accused had been informed that if he consents saliva sample may be taken for DNA analysis to be used for evidential purposes. At question 226 the Accused had agreed to sign the consent form on his own freewill when the recording of the caution interview has been suspended and his sample obtained. According to SOCO officer Sergeant Napuoto he had explained the purpose the nature and the effect of the DNA evidence and obtain the 1st Accused's written consent and then the Accused himself has been provided with a cotton swab to obtain the sample. I have analyzed the SOCO officer's above. Accordingly, the prosecution has proved beyond reasonable doubt that the buccal swab was obtained with informed consent of the 1st Accused and voluntarily.

Oppression or unfairness

64. As determined in Ganga Ram (supra). Apart from the voluntariness the court has also to consider if there be oppression or unfairness. I have considered the voluntariness in respect of both the accused so far. Now I would proceed to consider the second aspect.

65. A confession is admissible in evidence if this court is satisfied that it is voluntary. However, if it is shown such confession or DNA samples have been obtained by resorting to oppressive or unfair methods or if there be oppression or unfairness then this court in its discretion may exclude the caution interview of the charge statement. The unfairness may arise due to the breach of judges' rule or guidelines which may strictly not be law. Justice Prematilaka RJA., in **Julian Heinrich v State** (AAU 0029 of 2017) (07th March 2019). Considered several decisions and succinctly summarized the legal position in this regard and held thus,

*“[29] A confession may be excluded by a judge in the exercise of his discretion, even if he is satisfied that it was made voluntarily, if it was obtained in circumstances amounting to a breach of the Judges’ Rules which, of course, are not rules of law [see **R v Horsfall** (1981) 1 NZLR 116 and **R v Prager** (1972) 1 All ER 1114]. However, even where the statement was both voluntary and obtained in accordance with the Judges’ Rules, pursuant to the inherent or residual judicial discretion to exclude any evidence which might operate unfairly against the accused, such statement may still be excluded by the judge (See **Kuruma v R** [1955] A.C. 197, P.C. and **R v Middleton** [1974] 2 All E.R.1190, C.A). However, a decision whether a statement is voluntary and admissible in law is in no way dependent upon any discretionary power of the trial judge. If it is voluntary, it is admissible. It is only after it has been held voluntary and admissible that any discretionary power to exclude it from evidence can arise on the general ground of unfairness by falling short of overbearing the will, by trickery or unfair treatment. There is no discretion to admit into evidence a statement which is not voluntary.*

[30] There are two views as to whether breach of the Judges’ Rules can activate discretion to exclude for that breach simpliciter. One view is that although there was a caution, and no evidence of pressure, threats, or inducements, the court could proceed to consider the ‘reliability’ of the recorded confession and on this basis a confession may be excluded despite its voluntary nature in exercise of the overriding discretion. The other and stricter view is that if a voluntary statement is to be excluded in the exercise of the judge’s discretion, the basis for such exclusion must be, or at least include, something other than a failure to follow the advice given by the judges to the police. Failure to observe the Judges’ Rules was not ‘irrelevant’; such conduct may tend to show that the confession was not ‘voluntary’.

[31] However, the issue raised by the appellant in this appeal does not concern Judges’ Rules but a Constitutional provision regarding the rights of a person arrested and detained. Thus, Article 13(1)(f) of the Constitution is at a higher pedestal than mere guidelines to the law enforcement authorities. Therefore, any breach of rights guaranteed by the Constitution must be remedied by specific avenues for relief. Article 44 of the Constitution, accordingly, makes provision for enforcement of rights guaranteed under Chapter 2 – Bill of Rights which includes Article 13(1)(f). Article 44 states

‘44.—(1) If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress.

(2) The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.

(3) The High Court has original jurisdiction— (a) to hear and determine applications under subsection (1); and (b) to determine questions that are

referred to it under subsection (5), and may make such orders and give such directions as it considers appropriate

[32] Considering all the matters discussed above, I am of the view that though an accused in criminal proceedings against him is not prevented from making a collateral attack on his confessional statement on the bases of a breach of Article 13(1)(f) by the investigators, despite Article 44 making specific provision for enforcement of his rights under Bill of Rights, the breach of Article 13(1)(f) by itself would not be a bar for the admission of the caution interview in a court of law. However, the presiding Judge in any criminal proceedings is entitled to consider the fact of wrongful detention, length of time the accused was held under arrest, reasons for the delayed production of the accused before court, what impact the prolonged detention has had on the accused etc. in the broader context of oppression vis-à-vis the voluntariness of his confessional statement towards its admissibility. After the judge rules the caution interview voluntary and admissible, he may consider, whether it should be excluded on the general ground that it may operate unfairly against the accused, if required by the nature of the case or if the circumstances so warrant or demand.”

66. Accordingly, His Lordship has held that violation of judges’ rules or the non-compliance with the provisions of Section 13 of the Constitution will not *per se* and *ipso facto* result in the rejection of such a confession. The principle is that the trial judge should consider such grounds and then decide if it has affected the free will or if it had sapped his freewill and affected his mind to such an extent he would have crumbled and spoken the self-incriminating words. In short it is not the mere violation or non-compliance that is relevant but it is the real effect on the Accused so far as his caution interview is concerned.
67. However, there can be no doubt that in the current context of the civilised society there is certainly a requirement to ensure that persons who are charged with criminal offences and brought before these Courts are afforded the fullest protection of the law and that those entrusted with the responsibility to investigate such offences are held to the highest legal norms and ethical standards in the performance of their duties. Thus, were there be breaches of the Judges’ Rules and other constitutional norms and the cumulative effect of the totality of circumstances surrounding the recording of a caution interview and holding at the police station is such if it appears that it constitutes an oppressive and unfair state of affairs such caution statement, may not be voluntary.
68. The 1st Accused alleges that he was promised an early release on bail if he confessed. Further, it is alleged that the police said that there was other evidence connecting him,

which is a form of trickery. Thirdly the 1st Accused said that the reasons for taking the swab was not explained to him. The 1st Accused when asked said that now he knows why the swab was taken and at that time if he was informed of the purpose, he would not have consented.

69. Assume for a moment that the 1st Accused was assaulted, threatened and subjected to oppression as claimed by the 1st Accused and that he was under tremendous mental trauma and not in a position to exercise his freewill. If that was so and true, is it probable for him to be in a position to refuse and not consent to taking of the sample even if he was informed of and knew its purpose and consequences? It cannot be so. This answer clearly shows and proves that the accused was not subject to any form of threat, promise, and inducement as claimed and he was in a position to refuse or reject if need be. This contradicts his earlier position of being assaulted threatened and intimidated and his will been sapped. This further proves that the 1st Accused is uttering falsehood and is untruthful.
70. As for general unfairness the 2nd Accused alleges that he was not given his record of interview to allow him read the contents, that the police officers said that they would assault the Accused if he didn't confess and his rights were not explained. In view of the above analysis I find that these allegations are baseless and unsubstantiated.

Conclusion

71. Upon considering the totality of the evidence both Accused persons have failed to create any reasonable doubt on the prosecution evidence. The police officers who were involved in the arrest, detention and recording of both the caution interviews and the charge statements of both the Accused and the officer taking the buccal swab as well as the medical evidence were all led, which evidence this court has accepted as true and credible. Thus this court is satisfied beyond reasonable doubt that, the;
- a. caution interview of the 1st Accused recorded on 27th, 28th and 29th March 2022, [exhibit VDPE 2(a)-iTaukei and exhibit VDPE 2(b)-English],
 - b. charge statement of the 1st Accused recorded on 29th March 2020, [exhibit VDPE 3(a)-iTaukei and exhibit VDPE 3(b)-English],
 - c. taking of the buccal swab from the 1st Accused for DNA analysis on 28th March 2020 [exhibit VDPE (1)],

- d. caution interview of the 2nd Accused recorded on 3rd April 2022, [exhibit VDPE (5)-English] and
- e. charge statement of the 2nd Accused recorded on 3rd April 2022, [exhibit VDPE (6)-English]

were all obtained freely and voluntarily and with informed consent respectively. In the aforesaid circumstances I hold that the prosecution had proved beyond reasonable doubt that the said two caution interviews, both charge statements as well as the DNA buccal swab have been obtained voluntarily and with informed consent and accordingly the objections raised are rejected and the prosecution is permitted to lead in evidence the said items of evidence.



At Suva

31st October, 2022.

Solicitors

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for both the Accused.