

STATE v ABHIKASH ANIL KUMAR

HIGH COURT — CRIMINAL JURISDICTION

5 SHAMEEM J

24 June, 10, 11 July 2002

[2002] FJHC 66

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Evidence — admissibility — confession — whether prosecution proved beyond reasonable doubt that the confession was voluntary — whether Accused suffered oppression during custody — whether the rights of the Accused were violated under the Constitution — Constitution s 27(1)I.

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The Accused objected to the admissibility of two statements he made while in police custody. They were his caution and charge statement. The grounds for objecting were it was obtained involuntarily and breached his constitutional rights. They were obtained as a result of unfairness, oppression and by assault. His evidence is that he never confessed despite brutal and sustained police assault and the police manufactured his confession, and

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Held — (1) The evidence is that no visible injuries were found on the Accused which might explain the bodily pains he said he was suffering from. There was no assault on the Accused and that the statement was signed by the Accused voluntarily.

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(2) The length of detention in the cell was less than 7 hours. He was provided with breakfast and his interview did not resume until the afternoon. In the break, he was able to move around the station and to speak to police officers with his brothers on one occasion and his uncle. It is beyond reasonable doubt that the circumstances of his questioning and detention were not oppressive and that the confessions were obtained voluntarily.

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(3) The rights to counsel were explained to the Accused and he understood it. The Accused waived that right on being charged. Both statements made by the Accused which the prosecution seeks to tender were made voluntarily, not by oppression or unfairness, nor by breaches of the Accused's constitutional rights. They may be led in evidence.

Evidence admitted.

Cases referred to

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Brydges v R [1990] 1 SCR 190; *Magee v United Kingdom* (2000) 8 BHRC 646; *R v Elliot* (1996–98) 4 HRNZ; *State v Mool Chand Lal Labasa* High Court Crim Case 3/99; *Sudesh Jeet v State* Crim App No AAU 36/96S, cited.

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Korponay v Attorney-General of Canada [1982] 1 SCR 41; *State v Raymond Sikeli Singh* Lautoka High Court 7/99, considered.

R v Black [1989] 2 SCR 138, distinguished.

V. Vosarogo for the State

A. Wolf for the Accused

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Ruling

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Shameem J. The Accused objects to the admissibility of two statements he made while in police custody, on the 3rd and 4th of September 2001. They are his caution statement (taken by Detective Constable Lingam and Detective Sergeant Balwant Singh) and his charge statement taken by Sergeant Shafique and Sergeant Diwan Chand. The grounds for objecting are that the statements

were not obtained voluntarily, that they were obtained as a result of unfairness and oppression and that there were breaches of his constitutional rights.

As a result a voir dire was held to determine the admissibility of these statements. As a general principle (set out at para (e) of the preamble to the
5 Judges Rules (Cap 13)) “it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in
10 authority or by oppression”. Oppression is anything that “tends to sap and has sapped that free will that must exist before a confession is voluntary” [*State v Mool Chand Lal* Labasa High Court, 22 November 1999].

The onus of proving that a statement made by the Accused person was
15 voluntary fairly obtained and not by oppression is on the prosecution. Further the prosecution must also prove beyond reasonable doubt that there were no breaches of the rights given to persons in custody under the Constitution, and if there are breaches that the Accused was not thereby prejudiced. In particular, the rights given to the suspect to remain silent and not to give incriminatory statements, and the right to counsel are relevant for the purposes of this voir dire. In *R v Elliot*
20 (1996–98) 4 HRNZ, the New Zealand Court of Appeal held that the right to counsel, and the right to be informed of that right, are not to be regarded as absolute and should be interpreted according to the individual circumstances of the case [see also *Magee v United Kingdom* (2000) 8 BHRC 646].

25 **The evidence**

The prosecution called a total of 14 witnesses in the voir dire. The defence called seven witnesses, including the Accused who gave sworn evidence. The evidence of the police witnesses was that the post-mortem of the deceased was
30 held on the 3rd of September 2001. The post-mortem disclosed some suspicious circumstances in relation to his death. Corporal Brahma Nand Chetty then called the Accused and his two brothers to the Nasinu police station. They arrived in private cars with their uncle Mr Hari Singh, at about midday on the 3rd of September. At the police station they were separated and kept in different places at the station. At 4.33pm the Accused gave a plain statement to Detective
35 Constable Anil Kumar. The statement was completed at 5pm. In that statement the Accused said that he slept at about 10.45pm on the 31st of August 2001 and woke up the next day when his brother Abhinesh told him there was something wrong with their father.

The Accused was then kept at the station until he was interviewed under
40 caution by Detective Constable Lingam. The interview was witnessed by Detective Sergeant Balwant Singh. It commenced at 10.30pm. According to the interview notes, and the evidence of both officers, the Accused was told of his right to counsel, his right to legal aid, his right to consult any person by telephone, and of his right to remain silent. The Accused asked to be interviewed
45 in English, and was questioned until 12.30am when the interview was suspended to reconstruct the scene, and for the Accused to rest. He was taken to the Raiwaqa police station where he was locked in the cell for the rest of the night. The next morning the Accused was brought back to the Nasinu police station via the Valelevu police station, by Sergeant Balwant and Constable Lingam. He was
50 given tea and bread. He was also taken to the scene again for reconstruction and the interview recommenced at 3pm. The Accused was cautioned again. He was

asked a further three questions. The Accused then said (having given, thus far, an exculpatory statement) “Okay Lingam, I want to tell you the truth now. I killed my father”. He then went on to make a full confession to the killing of his father. The interview continued until 5.30pm when it was suspended for another reconstruction of scene. It recommenced at 5.55pm after the Accused was again reminded of the caution. It concluded at 6.40pm on the 4th of September. The Accused was then formally arrested by Detective Constable Shiri Prasad, and charged with murder by Sergeant Shafique and Sergeant Dewan Chand. The Accused made a further statement after he was charged, which is inculpatory, and consistent with the contents of his statement under caution.

He was taken to court on the 5th of September 2001. According to the depositions, he appeared on the 5th of September before the Resident Magistrate who remanded him in custody until the next day. On the 6th of September the Accused appeared with counsel from the Legal Aid Commission and was further remanded in custody.

Prior to being taken to court, and after being charged the Accused saw a Justice of the Peace, Mr Chandar Yenkanna, and a doctor, Dr Yogendra Prasad at the Valelevu Health Centre. He was asked by Mr Yenkanna whether he had any complaints, and he said that he had not. Dr Yogendra Reddy examined him at the Valelevu Health Centre at 8.15am on the 5th of September 2001. He prepared a medical report of the examination. The doctor said that he examined the Accused, who had complained of body pains, and found no injuries on him which were consistent with such pains. He prescribed analgesics before the Accused was taken away by police officers. A police officer who was present during the examination said that the doctor’s examination had been thorough but that he could not recall that the Accused’s socks had been taken off.

All police officers involved in interviewing or escorting the Accused on the 3rd–5th of September 2001, who gave evidence, said that the Accused had not been assaulted or ill-treated in any way while he was at the police station. It is clear that from about midday on the 3rd of September, the Accused was a suspect, and was, in effect, in police custody.

The Accused gave evidence. His evidence was that he was beaten on several occasions at the Nasinu police station, by punches, slaps and kicks all over his body. His evidence was that these assaults were perpetrated on him by several police officers, and that he recognized Detective Constable Anil Kumar, and Detective Constable Lingam as two of those who assaulted him. He said that before the resumption of his interview on 4th September he was taken down to a room on the ground floor of the police station, where he and his brother Nilesh were beaten with sticks by Constable Lingam. He said that they were beaten until the sticks broke, and then beaten again with a sasa broom with a wooden handle by another police officer. He said that he was in pain and was afraid, but that he still did not confess to the killing of his father. He said that DETECTIVE CONSTABLE Lingam then manufactured the questions and answers in his interview except for a few questions and answers after Question 63, which were correctly recorded. In short, the Accused’s evidence is that he was assaulted severely, that all the inculpatory parts of his interview were fabricated by the police, and that he was then told to sign the record. He said that he was told of his right to counsel, and that he asked for a legal aid lawyer, which the police then declined to provide to him. He said that he told Mr Yenkanna, the Justice of the Peace, and Dr Prasad that he had been assaulted by the police. He said that the

doctor had not examined him at all, and did not see the injuries on his body. He said he had also told his lawyer in the Magistrates Court, of the assault.

Adriel Prasad, Suruj Datt, and Deepak Prasad all gave evidence that they are friends of the Accused who tried to visit him at the police station but were turned
5 away by police officers. Abinesh Kumar and Nilesh Kumar the Accused's brothers gave evidence that they too were subjected to beating at the police station and Nilesh Kumar said that he witnessed a beating of the Accused with sticks by Constable Lingam when he was himself being beaten with sticks. Both
10 brothers gave evidence that they were eventually permitted to leave the police station on the 4th of September with their uncle Ravindra Kumar. They said that they both gave statements to the police while they were in custody and that portions of it are incorrectly recorded by the police. The last defence witness was Ronald Prasad who said that Legal Aid lawyers could not be obtained at police station outside business hours because of resource constraints. He said that the
15 Legal Aid Commission was aware of the problem but that the commission, to his knowledge, had never brought it to the attention of the authorities so that steps could be taken to provide legal advice at police stations, at all hours.

Counsel then made both written and oral submissions which were thorough and well-researched.

20 I propose to deal with the issue of admissibility under three heads, voluntariness, oppression and breaches of s 27 of the Constitution.

Voluntariness

25 The Accused does not say that his confession was not voluntary and that it was obtained by assault. His evidence is that he never confessed, despite brutal and sustained police assault and the police manufactured his confession, and then told him to sign.

The question for me at this stage of the trial is not whether the confession is
30 true, but whether it was voluntarily made. The question of what weight can be put on the contents of the confession, if found admissible, is a question for the assessors. The question for the voir dire is whether the Accused signed the interview record and charge statement of his own free will, and not as a result of police brutality or oppression.

35 Has the prosecution proved beyond reasonable doubt that the interview record was obtained voluntarily? The interviewing officers themselves gave evidence that there was no assault. There can be no doubt that after the scene was reconstructed and the interview resumed, the Accused suddenly changed his story and confessed to killing his father. What was the reason for this sudden change
40 of mind? The Accused said that the police started to manufacture the answers at this stage, and he was told to sign the interview thereafter. However, Constable Lingam said that the Accused decided to confess, and he simply recorded the answers. Could it be that the Accused decided to unburden himself at this stage? Or was it because he succumbed to the assault and oppression? The
45 Accused himself said he did not so succumb.

His position is similar to that of the Accused in *State v Raymond Sikeli Singh Lautoka High Court 7/99* of whom Townsley said, in his ruling on the voir dire:

*In short the violence to the Accused did not produce one syllable of confessional material, such was their stoicism under torture, but when the time came to sign their
50 records of interview under caution, they say the violence and threat of violence caused them to sign.*

The evidence is that no visible injuries were found on the Accused by Dr Prasad. I accept his evidence that he examined the Accused at Valelevu police station and that he found no injuries on him which might explain the bodily pains the Accused said he was suffering from. Given the Accused's evidence of sustained
5 beating over 2 days, including the use of sticks and broom handle, some injuries might have been expected, particularly when the medical examination was conducted two days after the alleged initial assault.

Further, I accept the evidence of Mr Chandra Yenkananna's evidence that he asked the Accused at about 10.30pm on the 4th of September at the Nasinu police
10 station, after he had been charged, if he had given the statements. Mr Yenkananna said that the accused said "yes". The record then reads as follows:

*I asked him if he understood the statements. He said yes. Then I asked him if he agreed with the contents of the statements and he said yes. Then I told him not to be frightened and to tell the truth. I asked him if any force or pressure had been exerted on him to
15 obtain the statement and he said 'no'. Then I asked him if he needed help from me and he said 'no'. Then I asked him if he wanted to ask me any questions. Then he asked me how long he would go to jail for if he is convicted. I told him this question could not be answered by a policeman or a lawyer or me, only by the judge presiding over the case.*

20 Mr Yenkananna then told the Accused that he would record a statement of their conversation and might give evidence about it in court if necessary. The Accused in his evidence said that he did tell Mr Yenkananna about the assault, but I accept the evidence of Mr Yenkananna who appeared to me to be a transparently honest
25 witness with no particular interest in the outcome of this case. Similarly I accept Dr Prasad's evidence that no complaint of assault was made to him by the Accused, and that he found no evidence of assault.

Although the evidence is also that the Accused made no complaint to any police officers about ill-treatment, I place very little weight on such evidence. Any suspect subjected to sustained beating at the hands of police officers, is
30 hardly likely to bring himself to trust another member of the police force for the purpose of making a complaint while in custody. Indeed a better practice in future would be for suspects to see a justice of the peace, and/or a doctor in private rather than in the presence of a police officer, if this can be done without causing a security risk to the doctor or justice of the peace. In this case the Accused does
35 not say that he was intimidated by the presence of police officers at the health centre, or with the JP, he says that he complained to them but that they ignored him. As such, the presence of the police officers does not affect my finding that the Accused made no complaint to these men, and that there were no injuries found on him.

40 After the Accused was taken to court on the 5th of September, the court record shows that he appeared before the resident Magistrate. He said nothing of police ill-treatment. This may be explained by lack of legal representation. However on the 6th of September, when he appeared, he was represented by counsel. She said
45 nothing to the court of police assault, nor did she ask that the Accused be subjected to fresh medical examination. The evidence which I accept is therefore that despite the Accused's account of beating over two days at the Nasinu police station, there were no injuries and he made no complaints when he had at least three opportunities to make such complaint.

50 Further, some of the beating allegedly took place upstairs at the station in full view of the car park and playground outside, and in the presence of the Accused's uncle Hari Singh, and his brother. The Accused said he was not

allowed to see his relatives but in cross-examination said he had seen his uncle Hari Singh. Moreover, Ravin Kumar, the Accused's uncle (and the deceased's brother) said that on 4th September he met the Accused upstairs at the Nasinu police station, and said to him "how are you?" to which he replied "all right". He then asked him "did you have a feed?" and he said "yes". He said that the Accused made no complaint to him and that he showed no signs of assault. He said one of the other two brothers did complain of assault but that he had said that the police would do that if one was lying. I find also significant inconsistencies in the evidence of the Accused's brothers as to the alleged assault on them. Neither brother made any complaint about assault, or sought medical treatment for it. I do not accept their evidence that they were beaten by police officers at Nasinu police station, or that Nilesh Kumar saw the Accused being beaten.

Taking all this evidence into account, I am satisfied beyond reasonable doubt that there was no assault or threat administered to the Accused on the 3rd and 4th of September 2001, and that his statement was not given as a result of police brutality and ill-treatment. The fact that allegations have been made against Detective Constable Anil Kumar who did not give evidence does not affect my finding. I accept the evidence of the police officers who were present at the station, and who could not have avoided seeing such an assault, that no assault took place.

As to the charge statement, no allegations of assault were made against Detective Inspector Shafique or Detective Constable Dewan Chand in the Accused's evidence-in-chief. However, in cross-examination, the Accused said that Sergeant Shafique gave him two slaps in the course of the interview. He also said (in evidence-in-chief) that the charge statement was fabricated by the charging officers and that he was told to sign it.

I accept the evidence of Sergeant Shafique and Detective Dewan Chand that there was no assault on the Accused and that the statement was signed by the Accused voluntarily.

Oppression

There is really no dispute that the Accused was in custody during questioning, and that he was not free to go home (although he could move around the station) from about midday on the 3rd of September to the 4th of September at 8pm when he was formally charged. He was in custody therefore, for a total of 32 hours, during which time he was interviewed and charged. The hours of interview however were two hours on the 3rd of September, after which the Accused was locked in a cell at Raiwaqa police station, and 3 hours and 40 minutes on the 4th of September. The hours of interview were not unconscionably long, broken as they were with rest, reconstruction and meals.

Counsel submitted that there was no evidence that the Accused had been fed. However there was evidence, from the Accused that he was offered lunch on the 3rd and 4th of September that he ate breakfast (bread and tea) and a takeaway lunch on the 4th, and evidence from Ravindra Kumar that the Accused had told him on the 4th of September that he had eaten. The evidence of Private Constable Chetty was that food had been ordered for the brothers although he could not say if each brother had eaten. Finally when the Accused saw the doctor and the justice of the peace he made no complaint of being kept without any or adequate food for two days.

The locking of suspects in cells during questioning has been deprecated by the Court of Appeal (see *Sudesh Jeet v State* Crim App No AAU 36/96S). Despite the implied power to question those in custody in the Judges Rules (r (1)) there is no statutory authority given to the police to remand for questioning. Fiji provides
5 none of the protections given to suspects questioned in custody under the Police and Criminal Evidence Act (1984) (UK).

However, the real question in considering whether the Accused gave a statement as a result of oppressive conditions, is whether the detention (in respect of both length and circumstances) sapped at the free will of the Accused and
10 whether the statement was obtained thereby. I find that it did not. Although sleeping in a police cell cannot be a comfortable experience, especially for a person of the Accused's age and with his lack of experience of police stations, the length of detention in the cell was less than 7 hours. He was provided with breakfast and his interview did not resume until the afternoon of the 4th
15 of September. In the break he was able to move around the station, and to speak to police officers, with his brothers (on one occasion) and his uncle. I am satisfied beyond reasonable doubt that the circumstances of his questioning and detention were not oppressive and that the confessions were not obtained thereby.

20 **The Constitution**

Under s 27(1)(c) of the Constitution a person detained has the following rights:

To consult with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of the right promptly, and, if 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 require legal representation to be available, to be given the services of a legal practitioner under a scheme of legal aid.
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This section of the Constitution places a duty on the police to inform the suspect in a language he or she understands of the right to counsel, and this right includes a right to apply for legal aid. The purpose of this right is aimed at
30 "fostering the principles of adjudicative fairness one of which is concern for fair treatment of an Accused person" (*Brydges v R* [1990] 1 SCR 190, Canadian Supreme Court).

As to waiver of the right, the Supreme Court of Canada in *Korponay v Attorney-General of Canada* [1982] 1 SCR 41, said that waiver of the right to
35 counsel is "dependent upon it being clear and unequivocal that a person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights" (Per Lamer CJ, at 2020).

The effects of noncompliance with s 27(1)I of the Constitution, or of a finding
40 of an ill-informed waiver, may be the exclusion of any statements obtained thereby (*State v Mool Chand Lal* Labasa High Court, Crim Case 3/99). The discretion to exclude must be exercised after a balancing of the Accused's rights, and public interest rights to the efficient investigation of crime.

Counsel's submissions are that the police did not clearly explain these rights
45 to the Accused and that therefore there could not have been a competent waiver. The relevant part of the record of the caution interview reads as follows:

Q3 — Under the Constitution of Fiji you have a right to consult your lawyer. Do you wish to consult him or her?

Ans — No.

Q4 — Do you want to consult anyone from the Legal Aid Commission?

Ans — No.

Q5 — *Do you wish to consult anyone by phone?*

Ans — *No.*

His charge statement reads as follows:

5 *Before you make any statement, I wish to advise you that do you wish to consult your solicitor or want any Legal aid or want any of your family members, relatives or friends to be present during the formal charge.?*

A — *At present I do not need anyone but I will take advice from someone when I go to court.*

10 Counsel's complaint is that the s 27(1)I rights were not clearly explained to the Accused as "rights" and that therefore there could not have been a competent waiver. Even if we are to ignore Sergeant Shafique's evidence that he explained the right to counsel to the Accused, the evidence of Detective Constable Lingam was that he explained to the Accused what the Legal Aid Commission was. The record shows the following questions and answers under cross-examination of Detective Constable Lingam:

15 *Q — You said it was a Government lawyer?*

A — *No, I said that there was a Legal Aid Commission, and if you cannot afford a lawyer we would arrange for a lawyer from the Legal Aid Commission.*

Q — The accused says that he did hear that but also that no lawyer was available?

A — *No, I did not say that.*

20 Detective Constable Lingam's evidence was also that this was explained to the Accused as a right. The Accused in his evidence showed he understood this. His evidence was as follows:

25 *The right to a lawyer was not told to me. He asked me if I wanted a lawyer from the Legal Aid Commission. I asked him what Legal Aid meant. I did not know. He said Government provided lawyers and that I would not have to pay money. I said if I wanted one could I get one now? Then he said, you can apply when you go to court.*

Therefore although the Accused disputes waiving his right, he does not dispute being explained the right to legal aid counsel. I accept therefore that the rights to counsel were explained to him and that he understood. I accept the evidence of
30 Detective Constable Lingam and Sergeant Balwant that the Accused waived that right, and the evidence of Sergeant Shafique and Sergeant Diwan Chand, that the Accused waived that right on being charged. The evidence of Ronald Prasad was that legal aid is not available outside of business hours. His evidence was that the
35 Legal Aid Commission is aware that legal aid is not available at police stations after hours, but said that the commission had not brought this to the attention of the authorities. The evidence of the police witnesses was that legal aid, to their knowledge was available at all hours and that a notice to that effect is posted at all police stations. It is obviously a matter of concern that legal aid is not
40 available after hours, and although the question of availability is not strictly relevant in this case, because there was competent waiver by the Accused, I would urge law enforcement officials to look into this matter urgently to give proper effect to the constitutional right to counsel for persons in police custody and to ensure that police investigations are not held up because of the unavailability of lawyers.

45 The other complaint in relation to the Constitution is that the Accused was not told of the reasons for his detention. Although the Accused's evidence was that he was not told and he did not know why he was at the station, he said in evidence-in-chief that a woman police officer told him that there were suspicious
50 circumstances surrounding his father's death and that he knew he was there for questioning. Unlike the Accused in *R v Black* [1989] 2 SCR 138, referred to me by defence counsel, who was questioned initially for attempted murder but was

later questioned again for murder, I find that there was no doubt in the Accused's mind as to why he was at the station. He had been told by a woman police officer before any questioning commenced. And although he was not cautioned immediately, before he gave his plain statement, the prosecution is not seeking
5 the admission of that statement.

In all the circumstances I am satisfied beyond reasonable doubt that there was no breach of the Accused's constitutional rights, and that the statement should therefore not be excluded on that ground.

10 **Conclusion**

I am satisfied beyond reasonable doubt that both statements made by the Accused which the prosecution seeks to tender were made voluntarily, not by oppression or unfairness, nor by breaches of the Accused's constitutional rights. They may be led in evidence.

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Evidence admitted.

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