IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No. HAC 52 of 2014

THE STATE

v

1. **MATAIASI ULUI**
2. **MAIKELI LOKO**
3. **RAKESH KUMAR**
4. **VINOD SEGRAN**

Dates of Hearing:	**15th -18th January 2018**
Date of Ruling::	**22nd January 2018**
Counsel:	**Ms. S. Kiran for the State** **Mr. I. Khan for 1st and 2nd Accused**

RULING
(VOIR DIRE)

1. The State seeks to adduce into evidence at trial the following documents pertaining to the first and second accused.

    (i) A record of interview conducted under caution with the first accused on the 16th and 17th April 2014.

(ii) An answer to charge given under caution by the first accused on the 17th April 2014.

(iii) A record of interview conducted under caution with the second accused on the 16th and 17th April 2014.

(iv) An answer to charge given under caution by the second accused on the 17th April 2014.

2. In challenging the admissibility of all documents, Counsel for both accused advances the following joint grounds:

   1. That the statements were obtained in circumstances that were unfair to the accused's (sic).

   2. The accused's (sic) were systematically softened to the interview in that they were kept in custody in circumstances which was (sic) degrading and inhumane.

   3. That the statements were obtained in circumstances that were oppressive.

   4. That the statements were obtained in breach of Rule 2, 4 and 7 of the Judges' Rules.

   5. That the statements were obtained in beach of the accused's right to Counsel before their arrest, before their caution interview and whilst in custody.

6. The accused were threatened and assaulted by the Police Officers who arrested them and were further threatened and assaulted during their caution interview by police officers.

7. The accused's (sic) were constantly threatened of further punishment if they didn't cooperate with them by admitting the offence.

8. The accused's (sic) were denied their rights under Section 13 of the Constitution of Fiji 2013.

The Law

3. The test in assessing whether an interview is admissible in evidence is whether it was made voluntarily or not, whether obtained without oppression or unfairness or not obtained in breach of the suspect's Constitutional rights. The burden of proving that the statement was obtained voluntarily, without oppression or unfairness and in accordance with his/her Constitutional rights is on the Prosecution and that burden remains on the State throughout. The standard is beyond reasonable doubt and I have kept these tests and the burden uppermost in my mind in deciding on these applications. These tests are entrenched in Fiji case law and no finding on admissibility can be made without recourse to these tests as propounded by the Fiji Court of Appeal in **Shiu Charan** (Crim Appeal 46/83) where the Court adopted for Fiji these tests, following the English Appellate Courts in **Pin Lin** (1976) ,

Ibrahim (1974) AC 574 and **Wong Kam-ming** [1982] AC 247

4. Evidence of assault, should I find it proved, amounts to an attack on the voluntariness of the statement in issue, in that assaults would sap the will of the accused and render his/her participation as unwilling.

5. The major thrust of Counsel's cross examination and in fact the bulk of his closing submissions centre on perceived breaches of the Judges Rules 1964.

6. It was decided by the English Court of Appeal in **Prager** (1972) 1 All ER 1114, that breaches of the Judges Rules do not necessarily lead to oppression and or unfairness. The headnote to that case reads:

> ***"The Judges Rules 1964 are not rules of law and their non-observance will not necessarily lead to a confession being excluded from evidence, unless it can be shown that the confession was not made voluntarily .***
>
> ***Accordingly, where it is alleged that a confession has been obtained in the course of questioning which was not introduced by a caution in terms of rule 2b of the 1964 Rules, it is open to the trial Judge to admit the confession on the basis that it was made voluntarily without ruling on the question whether it was obtained in breach of the Rules.***

The Prosecution Case

7. The prosecution called 10 witnesses in its quest to Prove beyond reasonable doubt that all 4 of these statements were generated voluntarily. Evidence was called revealing that these two accused (the first and second) were arrested on the 15th April 2014 at their workplace where they were both employed by a glass manufacturing company. Two officers in the arresting party gave evidence that these two were arrested there and taken in a group along with other arrestees to Nadi Police Station where they were handed over for detention and enquiries. The leading officer a Sergeant Yagavito, told the Court that the suspects were told why they were being taken in, that is for the allegation of a serious assault on a co-worker the day before. Having been given the reason for the arrest, the suspects were cautioned by not at that time were they given the right to Counsel.

8. At the station, each of these two accused was processed and detained until the next day when each was questioned under caution.

State's evidence with regard to First Accused.

9. Sergeant Sanaila Roqara interviewed the first accused (Ului). The interview was conducted in the iTaukei vernacular as chosen by the accused and there were breaks for meals and hygiene. The questions and answers were recorded on a computer in the presence of the first accused who is sitting alongside him watching the input on the screen.

10. The first accused was given his right to silence and a right to be advised by Counsel. In fact a lady Solicitor came to the station and sat with him for the first part of the interview until there was a power failure. Sgt. Roqara told the Court that at no time before or during the interview did he or any other officer assault, threaten or hold out inducements to the suspect.

11. The first accused agreed to take Police Officers to the scene of the alleged incident for a reconstruction, after which they returned to Nadi Police Station to complete the interview. The officer produced the notes of the interview along with a translation that another officer had prepared.

12. The interview was read back to the suspect page by page and the first accused chose not to make any alterations or additions before he signed it.

13. The suspect had refused to answer questions for two thirds of the interview but then had a change of heart and wanted to give an explanation of what had happened which he did in the last third of the interview as well as agreeing to take a police party to the scene of the incident.

14. In cross-examination Sgt. Roqara admitted that the right to silence has not been recorded in the notes to interview, nor was it recorded that the suspect could make additions or alterations; but the officer said that these rights were given to the suspect and he had overlooked recording them. He also admitted that he was unaware that the suspect could not read the iTaukei

vernacular, despite the fact that he spoke it well. He told the Court that the accused appeared to be reading what he was typing on to the computer.

15. It was put to him that when he was interviewing the first accused, another officer came into the room, slapped the suspect and then left. He denied that this occurred.

16. PC Douglas gave evidence as to the making of the record of the formal charge of the first accused. He was charged in the evening of the 17th June in the Nadi Police Station with the offence of murder. There was a witness present (Sgt. Yagavito) and he was cautioned at the beginning of the process. At no time were any improprieties extended to the accused, such as assaults, promises or inducements and the suspect made no complaint. Again the accused was reading the input on the computer while the record of charge was being generated.

17. The first accused had made a statement in answer to the charge and he asked that it be written for him. His inculpatory statement was recorded and read back to him. He chose not to add to it or alter it. This record was subsequently signed by the record maker, the first accused and the witness.

18. PC Akariva gave evidence as the witness to the caution interview of the first accused. His evidence was far from satisfactory in that he had no memory of what had happened at the time and I discard his evidence as it was no help to the prosecution, nor to the defence.

The State's evidence with regard to the second accused.

19. Witness Matarugu conducted the caution interview with the second accused at Nadi Police Station also on the 16th and 17th April 2014. The witness present was Corporal Jona. It was conducted in the iTaukei dialect and subsequently translated into English immediately thereafter by the interviewer himself. It was in question and answer form and typed on a computer with the accused sitting next to him reading the input at the time it was being generated.

20. The accused was advised of his rights and was cautioned. He was given appropriate breaks for hygiene and meals. After each break he would be reminded of the caution. He agreed to take a party of officers on reconstruction to the scene of the alleged assault. At the end of the interview he was given an opportunity to read it but he elected not to do so. Nor did he wish to make any additions or alterations to his answers. During the whole process there were no assaults, no threats nor any inducements held out.

21. The document was signed by all three participants.

22. In cross-examination he denied that he had threatened and assaulted the second accused. He explained that the accused was reading the answers at the time that they were being typed into the computer.

23. The witness Sgt. Jona gave evidence in accordance with that of the statement taker. He said that the accused was "supportive" and that there were no assaults or threats, and indeed being more senior to the statement taker, he would have stepped in if there were any improprieties.

24. WPC Merewai was the officer who formally charged the second accused. The witness to the charge was Sergeant Jona. She said that there were no threats, inducements or assaults, nor had he made any complaint of assault or injury. He understood the charge and made a statement in response which she recorded. The record was again typed into the computer, with the suspect sitting alongside reading as she typed. The document was signed by all three parties on completion. He was cautioned at the beginning of the charge and given his right to Counsel which he declined. He made an inculpatory statement which was transcribed into the record.

25. On completion the record was signed by all three parties.

The Evidence of the First Accused

26. The first accused (Ului) gave evidence under oath.

27. He was previously employed as a glass cutter with Modern Glass and Mirror in Nadi. On the 15th April 2014 he was at work with other co-workers when he was arrested. The officer arresting him said nothing and certainly did not

tell him he had a right to remain silent. When taken to Nadi Police Station, the officer interviewing him did not tell him he had a right to consult a legal practitioner. He then admitted that a lady lawyer came to the Station to see him. She talked to him and advised him not to answer any questions but just remain silent. He complied with her advice and refused to answer questions. The lady lawyer left the station when there was a power failure. When power was restored, the accused refused to answer the next 20 questions. At that stage the interviewing officer of the second accused (PC Matarugu) punched him on the head. Because of that punch, he said that he started to co-operate with the interview.

28. He was not told that he could refuse to take the police party on a reconstruction of the alleged assault.

29. Finally he said that he did not read the interview when it was completed because he could not read.

The Position of the Second Accused.

30. Before the hearing on this special issue commenced, counsel for the second accused had made an application to sever his client from the trial because he was suffering from mental impairment following a motor accident in September 2017. The application was made *in limine* after previous applications for vacation of trial and recusal had been refused.

31. The evidence of a surgeon was called in support of the application and this Court found that the surgeon was unqualified to assess the mental capacity of the second accused and the application for severance was therefore refused.

32. When called upon to make his election whether to give evidence or remain silent, his counsel advised the court that his client was unable to give instructions and he would therefore not be giving evidence.

33. Neither accused chose to call witnesses.

Discussion

34. In assessing whether these four documents were made voluntarily and without oppression, the Court turns to the submissions on the evidence made by the Counsel for both accused.

35. Mr. Khan argues that the right to silence and the consequences flowing from speaking prescribed by Section 13(1)(a) of the Constitution 2013 mean that the specific words in that section must be read to the suspect. That the usual Police pro forma is not enough. "You are not obliged to say anything unless you wish to do so but what you say maybe put into writing", he says is not sufficient to satisfy the right in the Bill of Rights, and that the suspect must be specifically told he has the right to remain silent and be told the consequences that flow from that.

36. This argument was made unsuccessfully before this Court in the case of **Ratu Inoke Tasere**

and others HAC 140 of 2015 (16 October 2015) where it was said:

> *"Judges' Rule No.2, a caution applied to accused persons and suspects detained, nicely encompasses the right to silence and the consequences of remaining silent. It is in simple and easily understood terms in compliance with Section 13(1)(a) (ii) & (iii) of the Bill of Rights."*

37. This view was followed by Aluthge J. in **Ratu Epeli Niudamu & ors** HAC 129 of 2015 (17 February 2017) when he said:

> *"In my opinion, the Constitutional provision only articulates or describes the right to be safeguarded and save as Section 13(2) of the Constitution, it does not specifically provide for the manner in which these rights are to be afforded to a particular person."*

38. This Court accepts the pro forma police caution to be in compliance with the constitution and Counsel Khan's argument fails.

39. In the caution interview of the second accused, this caution was given to the suspect and recorded therein before he was asked questions on the allegation of the lethal assault. He was reminded of this caution after every break taken in the course of the interview. He was given his rights to legal advice, and it is clear that he had already spoken to his Counsel (Ms. Patel), because this is recorded in the record.

40. There is no evidence before the Court of any improprieties or oppression that would justify a finding of involuntariness.

41. The Court would find that both the record of interview and the record of charge of the second accused were made voluntarily.

42. The records of the first accused present more arcane considerations. The interviewing officer gave evidence that he did caution the suspect, although it is not written in the record. However after each break, the suspect was **reminded** of that caution (my emphasis) which strongly suggests that he had been cautioned originally despite the fact that it has not been recorded. The fact that he was aware of his right to remain silent is borne out by the fact that he refused to answer at least 20 questions together with the fact that his Counsel was present with him for the first quarter of the interview.

43. The first accused told his interviewer that he cannot read the iTaukei vernacular; and as a consequence he was unable to read the contents of the record of interview. The interviewing officer told the Court that the suspect was in fact reading the record as it was being typed on the computer monitor. He was totally unaware that the suspect was not understanding what was being written. In addition, he said that he read each question and answer to the accused at the time asking him if he wanted to change or alter anything in the answer. The suspect elected not to make any alterations.

44. Interestingly when asked at the beginning of the record of charge whether he could "read and write in the Fijian language" he answered "yes".

45. I do not believe that he is illiterate, having been educated to Class 8.

46. The last issue relating to the first accused's interview is his allegation that he was assaulted. It was put to the interviewing officer that he was slapped, but the accused said in evidence that he was punched on the head. It was because of this punch that he was in fear and started co-operating with the officer and giving inculpatory answers. In turn the officer testified that there was no assault by him or anybody else, and the change of attitude came about because his conscience got the better of him and he wanted to tell his side of the incident. Before giving evidence in this Court, the first accused had never complained of this "slap" or "punch" and there were no visible injuries on him.

47. In conclusion, I find that the evidence of the Police Officers was consistent and truthful in contrast to the evidence of the accused which I did not accept on this special issue. He was hesitant and vague and I did not believe that he was assaulted or that he cannot read the iTaukei dialect.

48. There was no evidence before the Court of degrading and inhumane circumstances leading to a "softening" of the suspects as claimed in the grounds of objection; nor did I find any

credible evidence of threats, oppression or unfairness.

49. There is evidence that both accused were afforded their right to Counsel and any claimed breach of the Judges' Rules has not lead to unfairness which would render the answers involuntary.

50. I find that all four documents in question are voluntary and admissible in the trial on the general issues.

Paul K. Madigan
Judge