

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 276 of 2016

STATE

vs.

KITIONE VAKADRANU

Counsel: Ms. U. Tamanikaiyaroi for the State
Ms. L. David for Accused

Date of Hearing: 18th, 19th, 20th, 21st, 22nd, 28th February 2019 and 1st March 2019

Date of Ruling: 05th March 2019

RULING

[On Admissibility of DNA Evidence]

1. The accused is being charged with one count of rape contrary to Section 207 (1) and (2) (a) of the Crimes Act and one count of Criminal Trespass, contrary to Section 387 (1) (a) of the Crimes Act. The particulars of the offences are that:

COUNT ONE

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (a) of the Crimes Decree 2009.*

Particulars of Offence

KITIONE VAKADRANU on the 19th day of July, 2016 at Cunningham, Suva in the Central Division penetrated the vagina of **INDRA MANI** with his penis, without her consent.

COUNT TWO

Statement of Offence

CRIMINAL TRESPASS: Contrary to Section 387 (1) (a) of the Crimes Decree 2009.

Particulars of Offence

KITIONE VAKADRANU on the 19th day of July, 2016 at Cunningham, Suva in the Central Division, entered into the property in the possession of **INDRA MANI** with intent to commit an offence.

2. During the pre-trial stages of this matter, the prosecution informed the court that the prosecution will rely on the confession made by the accused in his caution interview and also the Forensic Report made on the examination of DNA testing in evidence. The accused then filed his objection to the admissibility of the record of caution interview and the DNA test report in evidence on the following grounds, *inter alia*;

AMENDED GROUNDS FOR VOIR DIRE

DNA Evidence

- i. *That at the time his clothing was taken by the Police at Nasinu Police Station his consent was not obtained nor was he explained the reasons as to why his clothing was being taken.*
- ii. *That at the time the buccal sample was taken by the Police at Nasinu*

Police Station his consent was no obtained nor as he explained the reasons as to why the sample was being taken.

iii. The accused, Mr. Vakadranu objects to the admissibility of his Caution Interview and Charge Statement both dated 19th of July 2016 on the following grounds:

Caution Interview and Charge Statement

- i. That at the time of his arrest from his home he was not informed of the reason of his arrest, the right to remain silent and the consequences of not remaining silent;*
- ii. That while in transit to the Nasinu Police Station he was punched on his chest by one of the arresting officers unknown to him. He was also threatened by both the arresting officers that he must admit to the allegations put to him if not he would be further assaulted;*
- iii. That when he arrived at the Nasinu Police Station he was taken to a room where he was threatened again to admit to the questions asked and thereafter hit on his chest with a plastic pipe by one of the arresting officers unknown to him;*
- iv. Prior to him being interviewed he was threatened by the arresting officers to admit to the allegations if not he would be assaulted further;*
- v. That he was not given sufficient rest prior to his interview being conducted.*
- vi. The interview was conducted in an unfair manner as he wanted to be questioned in the i-Taukei language however, the record of interview was done in the English Language as such he was denied the opportunity of reading and understanding the Record of Interview; nor was it read over to him in a language he understands;*
- vii. Along with the above, the interview was unfairly conducted as he was told and made to sign all the pages at the end of the Caution*

Interview;

- viii. That he was not given the right to communicate with a legal practitioner;*
- ix. That he was not given the right to communicate with next-of-kin during his interview;*
- x. The witnessing officer for the Caution Interview was not present throughout the whole interview to witness the interview being conducted in a fair manner.*

There was a breach of his rights under the 2013 Constitution and the Judges Rules whilst he was in Police Custody.

3. Accordingly, the voir dire hearing was commenced on the 18th of February 2019 and concluded on the 1st of March 2019. During the course of the hearing, the learned counsel for the prosecution informed the court that the prosecution no longer wishes to rely on the record of the caution interview of the accused. Hence, the hearing continued focusing only on the admissibility of the DNA test report in evidence. The prosecution adduced the evidence of five witnesses. The accused gave evidence and also called one witness for his defence. The learned counsel for the prosecution and the defence then made their respective closing submissions. Having carefully taken into consideration the grounds of the voir dire, the evidence presented by the parties and the respective written and oral submissions of the parties, I now proceed to pronounce my ruling as follows.
4. The Deoxyribonucleic Acid or commonly known as DNA is a genetic blueprint of the human body. When a criminal leaves a stain of blood or semen at the scene of the crime, it may be possible to extract from the stain sufficient DNA of the criminal, which later can be compared with the DNA samples obtained from the suspect. It is a scientific process of comparison of DNA obtained from the crime scene with the DNA of the suspect. DNA evidence emerged as a reliable scientific evidence in the mid-1980s and gained its popularity and the confidence of its accuracy in the 1990s. Fiji is now slowly embracing the DNA testing and evidence in criminal trials.

5. The defence is mainly relied on three main sections of the Constitution, inter alia Section 11 (3), 12 and 14 (2) (k) of the Constitution:

(i) Section 11 (3) of the Constitution, states that:

“Every person has the right to freedom from scientific or medical treatment or procedures without an order of the court or without his or her informed consent, or if he or she is incapable of giving informed consent, without the informed consent of a lawful guardian.”

(ii) Section 12 of the Constitution, stipulates that:

i. Every person has the right to be secure against unreasonable search of his or her person or property and against unreasonable seizure of his or her property.

ii. Search or seizure is not permissible otherwise than under the authority of the law

(iii) Section 14 (2) (k) of the Constitution:

“not to have unlawfully obtained evidence adduced against him or her unless the interests of justice require it to be admitted”;

6. The learned counsel for the prosecution and the defence relied much on the **State v Singh [2008] FJHC 202; HAM060.2008 (5 September 2008)**, where the High Court of Fiji has found that the DNA testing is a scientific procedure and a person cannot be compelled to DNA testing in the absence of his or her consent.

7. The decision of **Singh (supra)** is based upon Section 25 (2) of the Constitution of 1997, where it states that:

“Every person has the right of freedom from scientific or medical treatment or procedure without his or her informed consent or, if he or she is incapable of giving informed consent, without the informed consent of a lawful guardian”.

8. According to Section 25 (2) of the Constitution of 1997, a person cannot be taken for scientific or medical treatment or procedure without his or her informed consent. In **Singh (supra)** Justice Goundar has taken into consideration the said section and found that the DNA evidence is a scientific procedure, therefore, a person cannot be compelled to DNA testing in the absence of his or her consent.

9. However, the authors of the present Constitution of 2013, has not brought forward Section 25 (2) of the previous Constitution in its entirety. Instead, Section 11 (3) of the 2013 Constitution has stipulated that the court could restrict the freedom from scientific and medical treatment and procedure, by making an order, requesting a person to undergo a scientific and medical treatment or procedure. Section 11 (3) of the Constitution states that:

“Every person has the right to freedom from scientific or medical treatment or procedures without an order of the court or without his or her informed consent, or if he or she is incapable of giving informed consent, without the informed consent of a lawful guardian.” (underlines is mine)

10. Accordingly, the conclusion of **Singh (supra)** is based upon Section 25 (2) of the previous Constitution. Therefore, the said conclusion in **Singh (supra)** has no direct application to Section 11 (3) of the Constitution of 2013.

11. The prosecution and the defence are further relied on Section 12 of the Constitution, which deals with freedom from unreasonable search and seizure. Section 12 of the Constitution stipulates that:

- i) *Every person has the right to be secure against unreasonable search of his or her person or property and against unreasonable seizure of his or her property.*
- ii) *Search or seizure is not permissible otherwise than under the authority of the law*

12. In order to support her position in respect of Section 12 of the Constitution, the learned counsel for the defence in her submissions, relies on **R v J.R.B (1993) CanLII 5658 (NS CA)**, a decision of the Court of Appeal of Canada. In **R v J.R.B (supra)**, the Court of Appeal of Canada found that obtaining of hair from the head and pubic area of the Appellant and also the blood sample for DNA profiling without informing the Appellant the reason for the DNA testing, has breached his rights from unreasonable search and seizure. In that case, the Appellant was arrested and investigated in relation to an incident that took place in a motel. During the course of the said investigation, the police had obtained those DNA samples in order to compare the DNA sample found in another crime scene, without informing the Appellant of the purpose of obtaining those DNA samples.

13. Section 8 of the Canadian Charter of Rights and Freedoms, states that:

"Everyone has the right to be secure against unreasonable search or seizure."

14. Unlike Section 8 of the Canadian Charter of Rights and Freedoms, Section 12 of the Constitution of Fiji has specified the scope of the search and seizure. The freedom from unreasonable search extends to the person and to the property. However, the unreasonable seizure extends only to the property and not to the person as of search. The seizure of clothes of the accused obviously falls within the meaning of property, but I am not in a

position to hold that the buccal swab sample obtained from the accused comes within the meaning of ‘property’ as stipulated under Section 12 (1) of the Constitution. I leave that issue to be properly determined in a future application to this court.

15. I now draw my attention to determine whether, obtaining of buccal sample and the clothes of the accused amount to a breach of his constitutional rights guaranteed under the Bill of Rights in the Constitution. In order to do that, I first take my attention to discuss the nature and purpose of DNA evidence in the criminal trials.
16. The DNA sample obtained from the accused is being used to compare with the DNA sample found in the crime scene. If the samples matches, it could be used in evidence in order to incriminate the accused to the alleged crime. Hence, the accused is taking part in providing his DNA samples in order to create the DNA evidence, which could be used as an incriminatory evidence against him. Unless the accused contributes in providing his bodily sample to compare his DNA with the DNA samples found in the crime scene, the State or the Investigators are not in a position to construct the DNA evidence. Hence, the accused is actively taking part in constructing the evidence of DNA which could be used in evidence to incriminate the accused to the crime.
17. The Canadian Supreme Court in **R v Collins (1987) 1 S.C.R. 265** found that the use of the evidence emanating from the accused either in the form of confession or other evidence, in violation of any of the rights as stipulated under the Canadian Charter of Rights and Freedom, would render the trial unfair. Lamer J in **Collins (supra)** held that:

“The situation is very different with respect of cases where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination (284)”

18. In **R v Stillman (1997) 1 S.C.R.607** the Canadian Supreme Court has discussed the principle of constrictive evidence, where it was held that:

“Evidence will be constrictive when an accused, in violation of his Charter rights, is compelled to incriminate himself as the behest of the state by means of a statement, the use of the body or the production of bodily samples. The traditional and most frequently encountered example of this type of evidence is a self-incriminating statement made by the accused following a violation of his right to counsel as guaranteed by S 10 (b) of the Charter. The other example is the compelled taking and use of the body or of bodily substances of the accused, such as blood, which lead to self-incrimination. It is the compelled substance or the constricted use of bodily substances obtained in violation of charter rights which may render a trial unfair.”

19. **Stillman (supra)** has further discussed whether giving of bodily substances is same as making a statement or a confession and, therefore it could come under the right against self-incrimination. It has taken into consideration that the statement is a product of the mind, which would not exist unless it is made. However, the bodily substance already exist in the body. The shape of body or any marks on it, are usually used for evidence of identification. Therefore, would it be possible to give the same protection of right against self-incrimination to the giving of bodily substance by the accused in order to construct DNA evidence.
20. The Canadian Supreme Court in **Stillman (supra)** has taken into consideration that the human body is the outward manifestation of the man. A man considers his body as his own self and it is uniquely important for him. Therefore, any invasion of the body is an invasion of that particular person. It was found that such invasion, indeed, an ultimate invasion of personal dignity and privacy. Therefore, the concept of fairness requires that searches carried out in the course of police investigation recognize the importance of body. Having found that the Supreme Court of Canada in **Stillman (supra)** held that:

“It is repugnant to fair-minded men and women to think that police can without consent or statutory authority take or require an accused to provide parts of their body or bodily substances in order to incriminate themselves. The recognition of the right to bodily integrity and sanctity is embodied in s 7 of the Charter which confirms the right to life, liberty and the security of the person and guarantees the equally important reciprocal right not to be deprived of security of the person except in accordance with the principles of fundamental justice. This right requires that any interference with or intrusion upon the human body can only be undertaken in accordance with principles of fundamental justice. Generally that will require valid statutory authority or the consent of the individual to the particular bodily intrusion or interference required for the purpose of the particular procedure the police wish to undertake. It follows that the compelled use of the body or the compelled provision of bodily substances in breach of a charter right for purposes of self-incrimination will generally result in an unfair trial just as surely as the compelled or conscripted self- incriminating statement.”

21. According to the above dictum expounded in **Stillman (supra)** the right against self-incrimination has not been limited to making an oral confession and/ or a statement but has been extended to giving of bodily substances for DNA testing.
22. There is neither any law enacted in this jurisdiction empowering the police to obtain the DNA sample of the suspect without considering his consent nor allowing the court to make an order, requesting the suspect to give such bodily samples for DNA testing.
23. Section 62 of the Police and Criminal Evidence Act of United Kingdom 1984 has given the authority to the police to collect such bodily sample from the suspect, if such an act is authorized by a police officer holding a rank of Inspector or above, and the purpose of the collecting of such substance is in respect of a recordable offence. Otherwise, the Police is not allowed to obtain such bodily samples without the consent of the suspect.

24. Section 18 of the Criminal Procedure (Scotland) Act enables the police to obtain mouth swab and some other less contentious hair and nail samples from the suspect if it is authorized by a police officer holding a rank of Inspector or above.
25. Section 5 of the Criminal Investigations (Bodily Samples) Act of New Zealand has specifically enunciated that the suspect has to give his consent to provide any bodily sample for the investigation. Section 13 of the Criminal Investigations (Bodily Samples) Act has provided a procedure to make an application to the District Court or to the High Court, for an order requiring the suspect to provide bodily samples for the investigation.
26. In the absence of such a law in Fiji, as of England, Scotland and New Zealand as discussed above, I have to examine the relevant provisions in the bill of rights of the Constitution in order to understand the applicable procedure of obtaining of bodily sample of the suspect for DNA testing.
27. Section 8 of the Constitution of Fiji has stipulated that every person has a right to life. Section 9 has been recognized that every person has a right to personal liberty. Section 11 (2) of the Constitution deals with the rights to security of the person. Accordingly, the Constitution of Fiji has been recognized the right to life, personal liberty and the security of the person, emphasizing the importance of personal dignity and individual privacy of the person. Therefore, any invasion into the personal liberty would undoubtedly amount to a breach of the fundamental rights guaranteed under Sections 8, 9 and 13 (2) of the Constitution. Hence, the police or any investigation authority cannot compel the suspect to provide his DNA sample, unless he does it with an informed consent.
28. 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;”

29. Section 13 (1) (d) has not limited the confession or admission into oral form of confession or an admission. Hence, compelling of the suspect to provide his bodily sample in order to construct the evidence of DNA which could be used to incriminate the suspect to the crime, can be considered as a compelled admission as stipulated under Section 13 (1) (d) of the Constitution. Use of such admission in evidence would definitely breach the rights against self-incrimination and also the right to remain silent as stated under Section 13 (1) (b) and 14 (2) (j) of the Constitution.

30. Section 14 (2) (j) of the Constitution states that every accused person has a right to remain silent and not to be compelled to give self-incriminating evidence, where it states that:

“Every person charged with an offence has the right to remain silent, not to testify during the proceedings, and not to be compelled to give self-incriminating evidence, and not to have adverse inference drawn from the exercise of any of these rights”.

31. Accordingly, any DNA evidence that is constructed using the DNA sample obtained from the accused without his or her informed consent, would amount to self-incriminating evidence against the accused. Hence, such evidence would become unlawfully obtained evidence in breach of the constitutional rights of the accused. Such evidence is not allowed to be adduced against the accused pursuant to Section 14 (2) (k) of the Constitution. Section 14 (2) (k) of the Constitution states that:

“Every person charged with an offence has the right not to have unlawfully obtained evidence adduced against him or her unless the interests of justice require it to be admitted;”

32. At this point, I do not wish to discuss whether the court has jurisdiction to grant an order requiring the suspect to provide bodily samples for DNA testing pursuant to Section 11 (3) of the Constitution and leave that issue to be determined at the appropriate occasion when the jurisdiction of the court is properly invoked for that purpose.

33. I now take my attention to discuss the scope of the consent that is required from the suspect in order to obtain his bodily sample for DNA testing. It has to be an informed consent. It means that the suspect must have the knowledge and the capacity to make that choice freely and without any form of force. The suspect must be informed the nature, the purpose and the consequences of the DNA testing, more importantly that the result of the DNA testing could be used in evidence against him in the trial. Such knowledge would enable the suspect to properly and clearly understand the nature, purpose and the consequences of giving his bodily sample for the DNA testing. He should not be pressured, forced or threatened and made any form of promises for, in obtaining his bodily samples.
34. Having discussed the constitutional provisions in relation to the obtaining of DNA sample from the suspect, I now draw my attention to the facts of this matter.
35. The main contention of the defence is that the police has not obtained the consent of the accused and he was not properly explained about the purpose and the consequences of taking of his clothes and buccal swab.
36. Detective Sergeant Vinod Chand, in his evidence said that he was briefed by his superior officer to get the consent of the accused to obtain his clothes and buccal sample for the DNA testing. He has then approached the accused around midday of the 19th of July 2016. Having told the accused that the police needs his cloths and buccal sample for the testing at the Fiji Police Forensic Laboratory, he has called Sgt. Naupoto from the Crime Scene Unit to come and collect the buccal swab. Stg. Naupoto has arrived to the police station and then taken the buccal sample by putting the cotton tip swab into the mouth of the accused. Sgt. Vinod had then gone to the house of the accused in order to get his change cloths and had returned to the police station. Afterwards, he had obtained the cloths of the accused.
37. Sgt. Vinod did not specifically stated the time that he collected the cloths of the accused, but said that it was during the midday. According to the station diary of the police station pertaining to the 19th of July 2016, Sgt. Vinod had left the police station with another team of police officers at 11.20 a.m. He and his team had returned to the police station at 13.45

hours. Again at 13.50 hours Sgt. Vinod had left the police station with the accused for reconstruction. They have returned to the police station at 14.25 hours. There is no entry in the station diary, confirming that Sgt. Vinod had collected the cloths of the accused for the DNA testing. Moreover, there is no entry in the station diary, stating that Sgt. Vinod had left the police station to go to the house of the accused to pick his change clothes.

38. According to Sgt. Naupoto, he had reached the police station around 11.20 a.m. on the 19th of July 2016. If Sgt. Naupoto was received and accompanied by Sgt. Vinod during the time where Sgt. Naupoto collected the buccal swab from the accused as claimed by Sgt. Vinod, he could not have left the police station at 11.20 a.m as stated under serial number 77 of the Station Diary.
39. According to the evidence given by DC Taitusi Lualala, who is the interviewing officer of the accused, the recording of the caution interview had commenced at 9.59 hours on the 19th of July 2016. It was concluded at 1622 hours. DC Lualala explained in his evidence about the breaks given to the accused during the course of the recording of the caution interview. According to his evidence, there was no record in the caution interview regarding any break or suspension of the interview, allowing Sgt. Naupoto and Sgt. Vinod to collect the buccal swab and clothes of the accused during the time between 0959 hours to 1622 hours of 19th of July 2016.
40. Sgt. Naupoto said that upon his arrival to the police station at 11.20 a.m. he had demonstrated the accused about collecting buccal swab using the cotton tip swab. He had then given the accused the cotton tip swab for him to put it into his mouth and collect the buccal swab. It is obvious that this process might have taken at least ten to fifteen minutes. It is obvious that during that time the recording of the caution interview has to suspend. However, neither DC Lualala in his evidence explained about such a suspension of the recording of the interview nor the record of the caution interview states such a suspension. Moreover, there is no record of the arrival of Sgt. Naupoto or collecting of buccal swab by him from the accused in the station diary pertaining to 19th of July 2016.

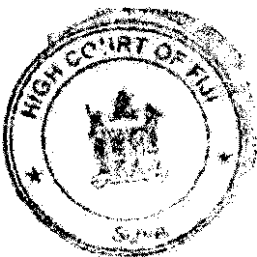
41. In view of these contradictions and inconsistencies in the evidence of Sgt. Vinod, Sgt. Naupoto and DC Lualala, I find reasonable doubt about the credibility and reliability of the evidence given by Sgt. Vinod and Sgt. Naupoto regarding the collection of buccal swab and clothes of the accused for the DNA testing. Therefore, I am inclined to refuse the evidence given by Sgt. Vinod and Sgt. Naupoto regarding the collection of clothes and buccal swab of the accused on the 19th of July 2016.
42. Both Sgt. Vinod and Sgt. Naupoto in their respective evidence, admitted that they have not explained the accused that the result of the testing would be used in evidence against him.
43. Section 6 (2) of the Criminal Investigation (Bodily Samples) Act of New Zealand provides the procedure of requesting the suspect to provide bodily samples, where it states that:

Subject to section 8, on making a request under subsection (1) of this section, the constable shall—

- (i) hand to the suspect to whom the request is made a written notice containing the particulars specified in section 7(b); and*
- (ii) inform the suspect, in a manner and in language that the suspect is likely to understand,—*
- (iii) of the offence in respect of which the request is made; and*
- (iv) that the constable has reasonable grounds to believe that analysis of a bodily sample taken from the suspect would tend to confirm or disprove the suspect's involvement in the commission of that offence; and*
- (v) that the suspect is under no obligation to give the sample; and*
- (vi) that if the suspect consents to the taking of the sample, the suspect may, at any time before the sample is taken, withdraw that consent; and*
- (vii) that the suspect may wish to consult a lawyer before deciding*

- whether or not to consent to the taking of the sample; and*
- (viii) *that the sample will be analysed and may provide evidence that may be used in criminal proceedings; and*
- (ix) *that if the suspect refuses to consent to the taking of the sample, and there is good cause to suspect that the suspect committed the offence in respect of which the request is made, or a related offence, and that offence is an imprisonable offence or offence against any of the provisions listed in Part 3 of the Schedule, an application may be made to a District Court Judge for an order requiring the suspect to give a bodily sample.*

44. I am mindful of the fact that Criminal Investigation (Bodily Samples) Act of New Zealand has no application in this jurisdiction, but it could be used as a guideline or a tool to understand the appropriate approach of requesting the suspect to provide his bodily sample.
45. In view of these reasons discussed above, I find that the prosecution has failed to prove beyond reasonable doubt that the accused has given his informed consent to obtain his clothes and buccal swab for DNA testing. Hence, I find the collection of the clothes and the buccal swab of the accused in order to construct the DNA test result is in breach of his rights under Section 8, 9, 12, 13 (1) (d), 14 (2) (j) and (k) of the Constitution. I accordingly rule that the DNA test report is not admissible in evidence.



A handwritten signature in black ink, appearing to be "R.D.R.T. Rajasinghe".

R.D.R.T. Rajasinghe
Judge

At Suva
05th March 2019

Solicitors
Office of the Director of Public Prosecutions for the State.
Office of the Legal Aid Commission for the Accused.