

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO. HAC 362 OF 2017S**

**STATE**

**VS**

- 1. ARVIND CHAND**
- 2. JONETANI ROKOTUINASAU**
- 3. LIVAI DRIGITA**

**Counsels : Ms. S. Serukai for State**  
**Mr. A.K. Singh for Accused No. 1.**  
**Accused No. 2 in Person, but tried in absentia.**  
**Ms. N. Mishra for Accused No. 3**

**Hearings : 17 and 18 June, 2019.**

**Ruling : 18 June, 2019.**

**Written Reasons: 12 July 2019.**

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**WRITTEN REASONS FOR VOIR DIRE RULING**

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1. All the three accuseds were charged with the following information:

*"First Count*

*Statement of Offence*

**AGGRAVATED ROBBERY: Contrary to section 311 (1) (b) of the Crimes Act of 2009**

*Particulars of Offence*

***ARVIND CHAND, JONETANI ROKOTUINASAU AND LIVAI DRIGITA on the 15<sup>th</sup> day of November, 2017, at Bau Road, Nausori in the Central Division, robbed SURUJ PRASAD of 1 x Nokia mobile phone valued at \$60.00 and cash of \$110.00 all to the total value of \$170.00 the properties of SURUJ PRASAD, and at the same time of such robbery had a pinch bar with them.***

*Second Count*

*Statement of Offence*

**AGGRAVATED ROBBERY: Contrary to section 311 (1) (a) of the Crimes Act of 2009**

*Particulars of Offence*

*ARVIND CHAND, JONETANI ROKOTUINASAU AND LIVAI DRIGITA on the 15<sup>th</sup> day of November, 2017, at Bau Road, Nausori in the Central Division, robbed UMA KUMARI MISHRA of 1 x silver and gold ring valued at \$1,600.00, 1 x 22 carat gold chain valued at \$2,000.00, 2 x gold wrist watch valued at \$1,000.00, 2 x Alcatel mobile phone valued at \$210.00, 2 x Dell tablet valued at \$1,000.00, 2 x wrist watches valued at \$1,600.00 and assorted imitation jewelries valued at \$50.00, all to the total value of \$7,460.00 the properties of UMA KUMARI MISHRA, and at the time of such a robbery, did use personal violence on the said UMA KUMARI MISHRA.*

*Third Count*

*Statement of Offence*

**AGGRAVATED BURGLARY: Contrary to section 313 (1) (a) of the Crimes Act of 2009**

*Particulars of Offence*

*ARVIND CHAND, JONETANI ROKOTUINASAU AND LIVAI DRIGITA on the 15<sup>th</sup> day of November, 2017, at Bau Road, Nausori in the Central Division, entered into the house of ROHINI NANDAN as a trespasser with intent to steal.*

*Fourth Count*

*Statement of Offence*

**THEFT: Contrary to section 291 (1) of the Crimes Act of 2009**

*Particulars of Offence*

*ARVIND CHAND, JONETANI ROKOTUINASAU AND LIVAI DRIGITA on the 15<sup>th</sup> day of November, 2017, at Bau Road, Nausori in the Central Division, stole 5 x pairs of canvas valued at \$700.00, the property of ROHINI NANDAN”.*

2. During the police investigations, all three accuseds were caution interviewed by police. Prior to trial, Accused No. 1 submitted an “Agreed Facts” with the Prosecution, dated 7 June 2019. As a result of the same, the prosecution waived their right to use his caution interview statements as evidence against him, in the trial proper. As for Accused No. 2 and 3, the prosecution indicated it was going to use their police caution interview statements, in the trial proper. Thus, the question of their admissibility in the trial proper became an issue.
  
3. Accused No. 2 and 3 were thereafter given permission to challenge the admissibility of their police caution interview statements in a voir dire. The voir dire was conducted on 17 and 18 June 2019. However, the voir dire was conducted in their absence. On 6 March 2019, the prosecution applied for Accused No. 2 and 3

to be tried in absentia, as they had chosen by conduct, not to attend their trial. The two had not attended court on 25 February and 6 March 2019. Since 22 August 2018, they were aware of the trial dates from 17 to 28 June 2019. The prosecution, in their application, relied on the authority of section 14 (2)(h)(i) of the 2013 Fiji Constitution. The court granted the prosecution's application. Despite Accused No. 3's non-attendance, his counsel, Ms. N. Mishra of Legal Aid Commission was present.

4. In the voir dire, the prosecution called 6 police officers as witnesses. They were DC 3730 Ropate Raburau (PW1); DC 4344 Amani Bosenawai (PW2); DC 4510 Esava Kobiti (PW3); PC 5057 Apisai Voravora (PW4); DC 4509 Mesulame Narawa (PW5) and WDC 4495 Senimili Vuibeqa (PW6). The evidence of the prosecution, in its totality, appear to say that Accused No. 2 and 3 gave their caution interview statements to the police voluntarily and out of their own free will. The police officers said they did not assault, threaten or made false promises to the two accuseds, while they were caution interviewed and while they were in their custody. Accused No. 2 and 3 did not call any witness. By not attending the voir dire, they were taken to have chosen, by conduct, to remain silent.
5. At the close of the parties' cases, they were invited to make submissions. The prosecution made an oral submission that both accuseds made their caution interview statements voluntarily and out of their own free will, and because of the same, their caution interview statements ought to be ruled as admissible evidence.
6. Accused No. 2 was deemed to have chosen to remain silent. Ms. N. Mishra, on behalf of Accused No. 3, made a written submission. I reproduced her submissions for the purpose of this ruling:

**“3.1           The Defence relies on the evidence adduced under oath during the course of the Voir Dire hearing being, 17-18 June, 2019.**

**3.2           The State led the evidence of six (6) police officers who were the Interviewing Officers of both Accused in the course of the Caution Interviews.**

**3.3           When considering the test for determining the admissibility of a Caution Interview, it is evident that it is a twofold test wherein,**

“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.”

Secondly, even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which the police behaved, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or by unfair treatment.”

3.4 Given the above, it is the duty of the State to establish beyond a reasonable doubt that the admissions within the Third Accused’s Record of Interview was gathered in a manner that was not by way of an improper practice i.e. no use of force, threats or false promises were made or even any assaults were perpetrated against the Third Accused.

3.5 An allegation has been made that the admissions were obtained in a manner that was generally unfair and thus induced/threatened the Third Accused to make such admissions.

3.6 It is thus, the duty of the State to establish that this was not the case. This goes towards if the Accused Person had made the admissions voluntarily.

3.7 Further the tests also dictates that the ground of unfairness exists in the way in which the Police behaved. It is respectfully submitted that at the time of the Caution Interview, the Third Accused was not properly explained his right to remain silent.

3.8 Rather this right was given to the Third Accused but attached with the inducement to tell his side of the story to avoid being charged.

a. Caution Interview dated 15 November 2017 commencing 1530 hours and concluding at 1815 hours. Conducted by DC 5057 Apisai Voravora. [Tendered as Prosecution Exhibit 4, Voir Dire].

Q11. Mr. Livai Drigita under the provisions of the Constitution, you have a right to remain silent but in that case we would not be able to get your side of the story and as such we may have to proceed further and prosecute you for the allegation with the evidence currently on hand. You shall feel free to make your choice now, are you willing to remain silent or will you make a statement”?

Ans. I will answer your questions.

b. Caution Interview dated 16 November 2017 commencing 1845 hours and concluding at 2120 hours. Conducted by DC Mesulame Narawa. [Tendered as Prosecution Exhibit 5, Voir Dire].

Q8. Mr. Livai Drigita under the provisions of the Constitution, you have a right to remain silent but in that case we would not be able to get your side of the story and as such we may have to proceed further and prosecute you for the allegation with the evidence currently on hand. You shall feel free to make your choice now, are you willing to remain silent or will you make a statement?

Ans. Both in some questions I will remain silent and some I will answer your questions.

- c. Caution Interview dated 15 November 2017 commencing 1540 hours and concluding at 1345 hours on 16 November 2017. Conducted by WDC 4495 Senimili. [Tendered as Prosecution Exhibit 6, Voir Dire].

Q8. Mr. Livai Drigita under the provisions of the Constitution, you have a right to remain silent but in that case we would not be able to get your side of the story and as such we may have to proceed further and prosecute you for the allegation with the evidence currently on hand. You shall feel free to make your choice now, are you willing to remain silent or will you make a statement?

Ans. Both in some questions I will remain silent and some I will answer your questions.

3.9 In the case of State v Fusi; Criminal Case No: HAC 223 of 2017 (15 November 2018) [TAB A] His Lordship Justice Rajasinghe dealt with the issue of an Accused's person not being properly explained his right to remain silent and its consequences which then breached the rights given to an Accused under Section 13(1) (a) (ii), (b) and (d) of the Constitution. His Lordship stated:

"9. DC Isoa in his evidence admitted that he put the question number nine to the accused as in the same form as it has been recorded in the caution interview. He then explained the reason for putting that question. I will now reproduce the said question nine and the answer in verbatim as it was recorded in the caution interview, that:

*Q; Under the provisions of the constitution you have a right to remain silent but in that case we would not be able to get your side of the story and as such we may have to proceed further and prosecute you for the allegation with the evidence currently on hand. You shall feel free to make your choice now, are you willing to remain silent or will you make a statement now?*

*A: I will make a statement.*

10. Having carefully considered the above questions, it is clear that the interviewing officer has not explained the accused the consequent of not remaining silent. Instead, he has told the accused that if he exercises his right to remain silent, he won't be able to tell his side of the story, and that would allow the Police to continue to prosecute him with the available evidence. This has created a condition that unless the accused made a statement, the police would prosecute him. [my emphasis]

11. Accordingly, I am of the view that this question has compelled or rather forced the accused to make a statement. The accused was not properly explained of his right to remain silent. Hence, he was not in a position to make an informed decision about his right to remain silent. Therefore, it has created a reasonable doubt whether the accused made his statement in the caution interview voluntarily. Moreover, the failure of the interviewing officer to properly explain the accused his right to remain silent and the consequences of remain silent as required under Section 13 (1) (a) (ii) and (b) of the Constitution has created a reasonable doubt whether the caution interview was conducted under a fair and just circumstances.

12. Accordingly, I find that the prosecution has failed to prove beyond reasonable doubt that the accused voluntarily gave his statement in the caution interview and it was recorded under fair and just circumstances.”

(our emphasis)

3.10 Further , in the case of State v Matia; Criminal Case No: HAC 260 of 2018 (13 March 2019) [TAB B] His Lordship Justice Goundar also disregarded the admission in the Accused’s Caution Interview due to incentive being place in the Accused to tell his side of the story when the right to remain silent was administered. His Lordship state:

“[6] Section 13 (1) of the Constitution states that every person who is arrested or detained has the right to remain silent and that the right must be administered promptly, in a language that the accused understands. In Fiji the constitutional right to remain silent must be administered in unqualified terms. Otherwise, the right will become a dead letter. In the present case, the right to remain silent was qualified by an incentive to tell his side of the story to avoid being charged based on the allegation. The qualifications placed on the right to remain silent are inappropriate and objectionable. The qualifications were placed by an experienced police officer without any justification. The qualifications breached the Accused’s constitutional right against self-incrimination. For these reasons, the admissions are disregarded and given no weight.”

[our emphasis] [my emphasis]

3.11 As such it is the position of the Defence that given the above discussed issues, the State has been unable to establish that the admissions obtained by the Interviewing Officers were made voluntarily and on the freewill of the Third Accused.

3.12 It is, thus, respectfully submitted that the above highlighted factors, when considered in its entirety, renders the record of interview for the Third Accused, Livai Drigita inadmissible.”

7. On 18 June 2019, at the end of the parties’ closing submissions, I rejected Ms. N. Mishra’s above submission and ruled Accused No. 3’s caution interview statements, that is, Prosecution Exhibits No. 4, 5 and 6 as admissible evidence in the trial proper, but its acceptance or otherwise, will be a matter for the assessors.

Accused No. 2's caution interview statements, which were tendered as Prosecution Exhibits No. 1, 2 and 3, were also ruled as admissible evidence in the trial proper. I said I will give my written reasons later. Below are my reasons.

8. Their Lordships Mr Justice Goundar and Mr Justice Rajasinghe in paragraph 3.9 and 3.10 of Ms Mishra's submission referred to section 13 of Fiji's 2013 Constitution, which reads as follows:

*"(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) to communicate with a legal practitioner of his or her choice in private in the place where 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 so require, to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission;*
  - (d) not to be compelled to make any confession or admission that could be used in evidence against that person;...*
  - (f) to be brought before a court as soon as reasonably possible, but in any case not later than 48 hours after the time of arrest, or if that is not reasonably possible, as soon as possible thereafter;*
  - (g) at the first court appearance, to be charged or informed of the reasons for the detention to continue, or to be released;...*
  - (i) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;...*
  - (k) to communicate with, and be visited by,—
    - (i) his or her spouse, partner or next-of-kin; and*
    - (ii) a religious counsellor or a social worker.**
- (2) Whenever this section requires information to be given to a person, that information must be given simply and clearly in a language that the person understands.*
- (3) A person who is deprived of liberty by being detained, held in custody or imprisoned under any law retains all the rights and freedoms set out in this Chapter, except to the extent that any particular right or freedom is incompatible with the fact of being so deprived of liberty..."*

9. Since this ruling concerns what constitute "a right to remain silent", it is arguable that it would be prudent to quote section 14 (2) of the 2013 Fiji Constitution also, which reads as follows:

*"(2) Every person charged with an offence has the right—*

- (a) to be presumed innocent until proven guilty according to law;*
- (b) to be informed in legible writing, in a language that he or she understands, of the nature of and reasons for the charge;*
- (c) to be given adequate time and facilities to prepare a defence, including if he or she so requests, a right of access to witness statements;*
- (d) to defend himself or herself in person or to be represented at his or her own expense by a legal practitioner of his or her own choice, and to be informed promptly of this right or, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission, and to be informed promptly of this right;*
- (e) to be informed in advance of the evidence on which the prosecution intends to rely, and to have reasonable access to that evidence;*
- (f) to a public trial before a court of law, unless the interests of justice otherwise require;...*
- (j) 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;*

- (k) not to have unlawfully obtained evidence adduced against him or her unless the interests of justice require it to be admitted;*
- (l) to call witnesses and present evidence, and to challenge evidence presented against him or her;...*

*(3) Whenever this section requires information to be given to a person, that information must be given as simply and clearly as practicable, in a language that the person understands.”*

10. In order to find out what constitute “a right to remain silent” in section 13 and 14 of the 2013 Fiji Constitution, section 3 of the Constitution reads as follows:

*“3.—(1) Any person interpreting or applying this Constitution must promote the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom.*

*(2) If a law appears to be inconsistent with a provision of this Constitution, the court must adopt a reasonable interpretation of that law that is consistent with the provisions of this Constitution over an interpretation that is inconsistent with this Constitution.”*

11. Furthermore, since section 13 and 14 of the 2013 Fiji Constitution are part of the Bill of Rights in Chapter 2, Section 7 of the 2013 Fiji Constitution reads as follows:

*“7.—(1) In addition to complying with section 3, when interpreting and applying this Chapter, a court, tribunal or other authority—*

*(a) must promote the values that underlie a democratic society based on human dignity, equality and freedom; and*

*(b) may, if relevant, consider international law, applicable to the protection of the rights and freedoms in this Chapter.*

*(2) This Chapter does not deny, or prevent the recognition of, any other right or freedom recognised or conferred by common law or written law, except to the extent that it is inconsistent with this Chapter...*

*(5) In considering the application of this Chapter to any particular law, a court must interpret this Chapter contextually, having regard to the content and consequences of the law, including its impact upon individuals or groups of individuals.” [my emphasis]*

12. The concept of what constitute “a right to remain silent” is not defined in the Constitution. Its meaning must therefore be obtained from how it is used contextually in section 13 and 14 of the Constitution. Section 13 talks about the rights of arrested and detained persons. Section 14 talks about the rights of Accused persons. In a democratic society such as the Republic of Fiji, the task of protecting the public and policing the criminal laws of this country falls on the State via the police. Society had delegated the task of protecting itself and enforcing its criminal laws on the police; and if there is a national emergency, the police can call on the military; otherwise there would be anarchy and chaos in society. Fiji had experienced political and legal chaos in 1987, 2000, 2006 and 2009. Even now, crimes are committed daily against members of our society that created the



appearance of anarchy and chaos. Anarchy and chaos are not values that underlie a democratic society based on human dignity, equality and freedom. It is in the above light that the wordings in section 13 and 14 of the 2013 Constitution must be considered when defining what constitute “a right to remain silent.”

13. Section 13 and 14 of the 2013 Constitution is basically a constitutional contract between the State and its citizens, who are “arrested, detained or charged with an offence.” It is a constitutional contract between those who are governing and those who are governed. It is a constitutional contract between the State and its citizen. Once a person is arrested or detained, the rights in section 13 automatically attaches to that person. To arrest or detain a person, the police must have some evidence to support the arrest or detention. This is even before the person is called for a caution interview. Then the rights from section 13 (1)(a) to (k) attaches to the person arrested or detained. The person's right “to remain silent” is enshrined in section 13 (1)(a)(ii) and (b) of the 2013 Constitution. A right to remain silent often connotes “a right not to be compelled to give self-incriminating evidence”. In other words, a person arrested or detained has a right not to be forced or pressured into admitting to a crime. If that happened, the trial judge is entitled to strike out the alleged confessions forced or pressured out of the person arrested or detained. The rights enshrined in section 13 (1)(a) to (k) to a person arrested or detained is the minimum standard expected from state officers when dealing with arrested or detained persons. Section 14 (2)(a) to (o) are the rights of a person charged with an offence, and state officials are bound to comply with the same also.

14. The question now becomes: Was Mr Livai Drigita's (Accused No. 3) right to remain silent, as enshrined in section 13 (1)(a)(ii) and (b) of the 2013 Constitution, violated when he was asked and answered Question 11 in Prosecution Exhibit No. 4; and Question 8 in Prosecution Exhibit No. 5; and Question 8 in Prosecution Exhibit No. 6?

15. Before answering the above questions, I wish to acknowledge the binding nature of the Court of Appeal authority of **Ganga Ram & Shiu Charan v Reginam**, Criminal Appeal No. 46 of 1983, which Ms N. Mishra used as her authority on the rules

concerning the admissibility of an accused's police caution interview statements. The Court of Appeal, said the following on 13 July 1984:

*"...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 of 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 (1941) AC 599, DPP V Ping Lin (1976) AC 574. Secondly even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which the police behaved, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or by unfair treatment. Regina v Sang 91980) AC 402, 436 @ C-E. This is a matter of overriding discretion and one cannot specifically categorize the matters which might be taken into account...."*

16. In my view, "a right to remain silent" means "a right not to be compelled to make any confession or admission to a crime." It means "a right not to be forced or pressured into admitting a crime." It means that if a police caution interview officer asks you a question that may lead you to provide direct or circumstantial evidence implicating you in a crime, you are entitled not to answer the same and insist on your right to remain silent. This right is well established in common law and now entrenched in the 2013 Fiji Constitution. Whether or not "a person's right to remain silent" had been violated by police is a question of fact to be decided at the conclusion of a voir dire or alternatively, at the end of a trial proper.
17. I agree with Ms Mishra's submission in paragraph 6 sub-paragraph 3.1 to 3.6 hereof. As mentioned in paragraph 4 hereof, Accused No. 3 was tried in absentia in the voir dire and was deemed to have chosen to exercise his right to remain silent and call no witness. The only evidence available were the police officers' sworn evidence and Prosecution Exhibits No. 4, 5 and 6. I had carefully read and considered Prosecution Exhibits No. 4, 5 and 6 – all Accused No. 3's caution interview statements. All the police officers who gave evidence in the voir dire said, accused no. 3 was given all his legal rights when cautioned interviewed, and they said, they did not assault, threaten or made false promises to Accused No.3 when he was caution interviewed, and while in their custody. They said, accused no. 3 gave his statements voluntarily and out of his own free will. In Prosecution Exhibit No. 4, Accused No. 3 was asked a total of 73 questions and he gave 73 answers.

In question 1, he was asked his preferred language. The answer was English. In question 2, his level of education. In question 3 and 4, his understanding of English and the interview will be in English. In question 5, the interview will be recorded via a computer. After question 5, the allegation was put to the accused, followed by the standard caution. Question 6, 7 and 8, concerned his understanding of the allegation, the caution and his signatures to the interview notes. Question 9 concerned his signatures and he will not be threatened or induced to sign the interview notes. Question 10, his right to counsel was put to him. Ms Mishra did not object to the above questions and answers.

18. It was question 11 in Prosecution Exhibit No. 4 that she objected to. It reads as follows:

*“Q.11 Mr Livai Drigita under the provisions of the Constitution, you have a right to remain silent but in that case we would not be able to get your side of the story and as such we may have to proceed further and prosecute you for the allegation with the evidence currently on hand. You shall feel free to make your choice now, are you willing to remain silent or will you make a statement?”*

*Ans. I will answer your questions.”*

19. The question becomes: Were the above question unfair on Accused No. 3? To answer the question properly, we will need to look at the question in the context of the whole interview, and individually, on its own. Ten questions and answers preceded question and answer 11. Question 1 covered the language to be used. Question 2 involved the Accused's education. Question 3, 4 and 5 involved the language to be used and the mode of recording the interview. After question 5, the allegation was put to the accused in a language he understands. He was given the standard caution. Question 6 and 7 covered the accused's understanding of the charge and caution. Question 8 and 9 concerned his signing the interview notes and that he will not be threatened or pressured with the same. In question 10, he was given his right to counsel. Ms Mishra did not challenge the above questions and answers. In my view, questions 1 to 10 were proper and fair. The police were complying with the requirements of section 13 (1)(a)(i) and (c) of the 2013 Fiji Constitution.

20. Now we look at Question 11 itself. The first sentence in Question 11 is a combination of three sentences. We will identify them individually, and decide whether or not they are proper, or alternatively, whether or not they are fair? The first sentence said, “Mr Livai Drigita under the provisions of the Constitution, you have a right to remain silent.” Is this proper and whether or not it was fair? In my view, the police officer was informing Accused No. 3 of his right pursuant to section 13 (1)(a)(ii) and (b) of the 2013 Fiji Constitution. This was proper and fair, in my view. The second sentence said, “but in that case we would not be able to get your side of the story.” Was this proper and whether or not it was fair? In my view, this question, at first raises suspicion, but on a closer look at section 13 (1)(a)(ii) and (iii) of the 2013 Fiji Constitution, this question is given constitutional validity by virtue of section 13 (1)(a)(iii) of the Constitution. In fact, “the right to remain silent”, as enshrined in section 13 (1)(a)(ii) is “joined” to “the consequences of not remaining silent”, as enshrined in section 13 (1)(a)(iii), by the use of the word “and”. So, it is arguable, that when you give a suspect “his right to remain silent”, you must also explain to him “the consequences of not remaining silent”, that is, the police won’t be able to get his side of the story. This is where the tricky part begins.

21. In this particular case, the suspect’s right to counsel was put to him in question 10, before question 11 was asked. Accused No. 3 chose to represent himself. He waived his right to counsel. In my view, when putting question 10 to the suspect, the police was complying with section 13 (1)(c) of the 2013 Constitution, and this was proper and fair. As mentioned before, the suspect waived his right to counsel. Under the law, every person is presumed to be of sound mind or not mentally impaired, until the contrary is proved on the balance of probabilities (section 11 of the repealed Penal Code, or section 28 (3) of the Crimes Act 2009). Thus, if the suspect made any admissions thereafter, the admissions are admissible evidence, subject to a voir dire ruling or a judgment after a trial proper. If the suspect elected to be legally represented, then the accused’s lawyer can advise him accordingly on how to tackle the police questions.

22. In this case, after question 11, the suspect’s right to a break during the caution’s interview, his right to rest and refreshment was put to him. The above was covered

in questions 12 and 13. In question 14, the suspect's right for his spouse, next of kin, family members or friend to be present at the interview was put to him. In question 15, the suspect's right to a social worker or religious counsellor was put to him. In question 16, the suspect's right to make a telephone call was put to him. In question 17, the suspect's right to a medical examination if he was not well was put to him. In question 18, the suspect's right not to be threatened, assaulted or made false promises and his right to remain silent was put to him. In question 19, the suspect's right to read the record of the interview at the end of the same and make addition, correction or alteration was put to him. In question 20, the suspect was asked to acknowledge that his rights under the Bill of Rights in the 2013 Constitution had been put to him. In my view, question 11 as mentioned in paragraph 18 hereof, cannot be considered in isolation, without taking into account the surrounding context in which it was made, that is, it must be read and considered within its context by considering also questions and answers 1 to 10 and 12 to 20 of the caution interview statements (Prosecution Exhibit No. 4).

23. Still on Question 11, the third sentence said, "and as such we may have to proceed further and prosecute you for the allegation with the evidence currently on hand." Was this question proper and/or fair? As previously mentioned, before a suspect is caution interviewed, the police must have some evidence to provide the grounds for his arrest or detention. The above statement must be taken in the above light. If the police arrest or detain suspects without an iota of evidence, then they are opening themselves to a civil claim of false imprisonment, or a cost and compensation order under section 150 of the Criminal Procedure Act 2009. It must be noted that under section 150, the office of any prosecuting authority and/or the prosecutor personally, can be ordered to pay cost for bringing cases to court without an iota of evidence to support the charge. Furthermore, it is the ethical duty of every prosecutor not to waste the court's time, by bringing cases to court without an iota of evidence to support it. Thus the third sentence in Question 11 above cannot be regarded as a threat by the police because, it is simply a statement of fact. The last sentence in Question 11 reads, "You shall feel free to make your choice now, are you willing to remain silent or will you make a statement?" This question, in my view, is not improper. It is a fair question.

24. I had also examined Prosecution Exhibit No. 5 and 6 mentioned in paragraph 6 sub-paragraph 3.8 b and c hereof, that is, Ms Mishra's written closing submission. The discussions and arguments mentioned above can also be extended to Accused No. 3's caution interview statements in Prosecution Exhibit No. 5 and 6. Looking at the challenged questions in the above exhibits within the context of the whole interview notes, and individually, in my view, the challenged questions does not violate section 13 of the 2013 Fiji Constitution. In my view, the challenged questions were proper and fair. Since the only evidence offered in the voir dire were the six police officers' sworn evidence, and the above prosecution exhibits, I had found no credible evidence to rule that the test expounded in **Ganga Ram & Shiu Charan v Reginam** (supra) had been violated, nor the requirements of section 13 (1)(a)(ii), (b) and (d) of the 2013 Fiji Constitution not followed.

25. As a result of the above, I had found that Accused No. 3's caution interview statements, that is, Prosecution Exhibit No. 4, 5 and 6 were admissible evidence, and they may be used in the trial proper, as evidence. As for Accused no. 2, since he chose by conduct, not to attend the voir dire and thus deemed to have chosen to remain silent, his police caution interview statements were also ruled to be admissible evidence, and may be used in the trial proper, as evidence. The above are my reasons for declaring Accused No. 2 and 3's caution interview statements as admissible evidence, on 18 June 2019.



  
**Salesi Temo**  
**JUDGE**

**Solicitor for the State** : **Office of the Director of Public Prosecution, Nausori.**  
**Solicitor for the Accused No. 1:** **A.K. Singh, Lawyers & Notary Public, Nausori.**  
**Solicitor for the Accused No. 2:** **In Person, but tried in absentia.**  
**Solicitor for the Accused No. 3:** **Legal Aid Commission, Nausori.**