

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 343 of 2018

STATE

V

SAIMONI NABUKAVOU

Counsel : Ms. Bhavna Kantharia for the State
Ms. Namrata Mishra with Ms. Maria Cabona for the Accused

Dates of Hearing : 4-5 November 2020

Date of Ruling : 6 November 2020

VOIR DIRE RULING

- [1] This Ruling is further to the Ruling made by this Court on 26 March 2020.
- [2] As per the Information filed by the Director of Public Prosecutions (DPP) the Accused in this case is charged with the following offences:

[COUNT 1]

Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (a) of the Crimes Act 2009.

Particulars of Offence

SAIMONI NABUKAVOU, with others, on the 24th day of August 2018, at Nasinu, in the Central Division, in the company of each other, robbed **SUREN KUMAR** of 1 x Samsung J1 mini mobile phone and 1 x green army bag, the property of **SUREN KUMAR**.

[COUNT 2]

Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (a) of the Crimes Act 2009.

Particulars of Offence

SAIMONI NABUKAVOU, with others, on the 24th day of August 2018, at Nasinu, in the Central Division, in the company of each other, robbed **SATISH KUMAR** of 1 X Toshiba laptop, \$2, 760.00 – cash, 1 x silver chain, 1 x men's wrist watch, 1 x Samsung J3 mobile phone, 1 x J1 mini mobile phone, 1 x rip curl men's wallet and 4 x 1.25 litres whisky, the property of **SATISH KUMAR**.

[COUNT 3]

Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (a) of the Crimes Act 2009.

Particulars of Offence

SAIMONI NABUKAVOU, with others, on the 24th day of August 2018, at Nasinu, in the Central Division, in the company of each other, robbed **AMRITA DARSHANI** of \$2050.00 cash, Toyota Prado Black vehicle registration number 4U2NV, 1 x gold mangal sultra, 1 x bracelet, 2 x diamond ring, 1 x earring, 1 x ladies citizen wrist watch, 1 x Samsung S7 mobile phone, 2 x ladies handbag and 1 x rip curl ladies wallet, the property of **AMRITA DARSHANI**.

- [3] Following his arrest, the Accused was caution interviewed by Detective Constable 4647 Pita Gaunatalel, at the Valelevu Police Station, on 31 August 2018.
- [4] The State is relying on the caution interview statement made by the Accused. The Accused is challenging the admissibility of the said caution interview statement.

[5] In the Grounds for Voir Dire, which he filed in Court, on 12 August 2019, the Accused objects to the admissibility of his caution interview statement, on the following grounds:

- a. At the time of the Accused's Caution Interview, the right to remain silent as given at Question & Answer 8 was unfair insofar the Accused was informed that there were consequences to remaining silent.
- b. Moreover, at the time of such right being put, the Accused was not properly informed of what exactly the consequences of not remaining silent were.

[6] The Question and Answer No. 8 of the caution interview statement, which is the subject of contention, is reproduced below:

Q8: Before we proceed further with your interview, I wish to advise you of your constitutional rights stipulated under Section 13 of the Constitution which gives you the right to seek advice from a lawyer of your own choice and at your own cost or one from the Legal Aid Scheme if you can't afford one. You also have the right to communicate with your spouse, relative of your own choice, religious or social councillor to be present during the interview. **You also have the right to Remain Silent but I must also advise you that there are consequences of remaining silent or not to remain silent.**

Do you understand your Constitutional Rights put to you?

A: Yes

[Emphasis is mine].

The Law

[7] In *Ganga Ram and Shiu Charan v. Reginam*; Criminal Appeal No. 46 of 1983 (13 July 1984) (unreported) the Fiji Court of Appeal outlined the two grounds to be considered for admissibility of confessions;

"It will be remembered that there are two matters each of which requires consideration in this area. First it must be established affirmatively by the Crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force, threats or prejudice or inducement by offer of some advantage - what

has been picturesquely described as the flattery of hope or the tyranny of fear. Ibrahim v. R [1914] AC 599; DPP v. Ping Lin (1976) AC 574. Secondly even if such voluntariness is established there is also a need to consider whether the more general ground of unfairness exists in the way in which the police behaved, perhaps by breach of the Judges Rules falling short of overbearing will, by trickery or by unfair treatment. Regina v. Sang (1980) AC 402. This is a matter of overriding discretion and one cannot specifically categorize the matters which might be taken into account."

- [8] His Lordship, Justice Daniel Goundar in the case of the *State vs. Maikeli Rawaqa and Segran Murti* Criminal Case No. HAC 42 of 2004 (16 February 2008); held as follows:

"The principal governing the admissibility of confessions are well settled. Confessions could not properly be given in evidence unless it was shown that they were made voluntarily, that is, not obtained through violence, fear of prejudice, oppression, threats and promises or other improper inducements (Ibrahim v R [1914] AC 599). Even if such voluntariness is established, the trial Judge has the discretion to exclude the confessions on a general ground of unfairness (R v Sang [1980] AC 402). In addition, confessions could be excluded for breaches of Constitutional rights."

- [9] Accordingly, in order for a confession made by an Accused person to a police officer to be admissible as evidence against the maker of that confession, the confession should have been made by that Accused voluntarily, meaning it should have been made by the Accused on his own free will, with full appreciation of the legal consequences. If the said confession is made as a result of oppression, such confession would not be admissible and should be excluded. Oppression is anything that undermines or weakens the exercise of free will. However, even if such voluntariness is established, the trial Judge has the discretion of ruling such confession inadmissible, if it is obtained in an unfair manner (on general grounds of unfairness).
- [10] The onus of proving voluntariness/lack of oppression and fairness is on the prosecution and they must prove these matters beyond reasonable doubt. If there has been a breach of any of the Accused's Constitutional rights, the prosecution must prove that the Accused was not thereby prejudiced.
- [11] Section 13 of the 2013 Constitution (Constitution) sets out the rights of arrested and detained persons. Section 13 (1) (a) of the Constitution provides that:

"(1) Every person who is arrested or detained has the right—

(a) to be informed promptly, in a language that he or she understands, of—

(i) the reason for the arrest or detention and the nature of any charge that may be brought against that person;

(ii) the right to remain silent; and

(iii) the consequences of not remaining silent."

[Emphasis is mine].

- [12] In terms of Section 13 (2) of the Constitution it is stated *"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."*
- [13] Furthermore, Section 13 (1) (d) of the Constitution stipulates 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."*
- [14] In this case, the objection taken up by the defence is that at the time of the recording of the caution interview statement the Accused was not properly explained of his right to remain silent and had been informed that there were consequences to remaining silent. Moreover, that there was a failure on the part of the Interviewing Officer to properly highlight that there were consequences of not remaining silent and to explain the said consequences.
- [15] Pursuant to hearing of legal submissions from the prosecution and the defence, on 26 March 2020, this Court ruled that it does not deem it appropriate to exclude the caution interview statement made by the Accused as inadmissible prior to hearing the evidence in the matter.
- [16] Accordingly, an Inquiry was held to determine the admissibility of the said caution interview statement.
- [17] During the said voir dire hearing the prosecution led the evidence of Detective Constable 4647 Pita Gaunatalei (the Caution Interviewing Officer) and Inspector

Edward Ofati (the Witnessing Officer). The caution interview statement of the Accused was tendered to Court as Voir Dire Exhibit P1.

[18] The Accused exercised his right to remain silent.

The Prosecution Case

- [19] Detective Constable 4647 Pita Gaunatalei testified that he is currently serving with the Maritime Investigation Team at the Nabua Southern Division Headquarters. He has been with the Fiji Police Force since 6 February 1998 (a period of over 22 years). In the year 2018 he was based in the Crimes Branch of the Valelevu Police Station.
- [20] The witness said that on 31 August 2018 he had carried out the recording of the caution interview of Saimoni Nabukavou, the Accused in this case. The recording of the interview had commenced at 08:48 hours and concluded at 14:00 hours on the same day. The said interview had been conducted at the Valelevu Crime Operation Team Room. Detective Sergeant Edward Ofati functioned as the Witnessing Officer during the recording of the said interview.
- [21] The witness testified that the recording of the interview was conducted on a computer in the English language. The Accused had agreed to the conducting of the interview in the English language. When asked as to the format in which the said interview was conducted the witness said: "I asked the question, typed the question, read it to the suspect, he gave the answer and I typed it so that he can see it."
- [22] A total of 103 Questions had been asked from the Accused during the course of the interview. The officer testified that the Accused, the Witnessing Officer and himself signed the record of interview at the end of the recording. At the conclusion of the recording, the record of interview was printed out and signatures placed thereon. The witness said the first signature on the interview is of the Accused, the signature in the middle is of the Witnessing Officer and his signature is on the far right. He confirmed that throughout the caution interview the signatures were placed in the same order. The caution interview statement of the Accused was tendered to Court as Voir Dire Exhibit P1.

- [23] The witness testified that during the recording of the interview the allegations against him were put to him and that the Accused was cautioned in the following manner: *"You are not obliged to say anything unless you wish to do so, but what you say may be put into writing and given in evidence."* He said the Accused understood the allegations against him and the caution put to him (Question & Answer 6). The witness also confirmed that the Accused signed so as to certify that he understood the allegations and the caution put to him (Question & Answer 7).
- [24] DC Pita further testified that the Accused was given his constitutional rights under Section 13 of the Constitution (Question & Answer 8) and that he understood the said rights. The witness said that the Accused had not wanted to exercise any of the rights explained to him (Questions & Answers 10 & 11).
- [25] The witness was asked as to why the right to remain silent was explained to the Accused in the following manner at Question 8: *"You also have the right to Remain Silent but I must also advise you that there are consequences of remaining silent or not to remain silent."* The witness was then asked the following questions in this regard and he answered as follows:
- Q. Are those rights part of the Constitution?
- A. No.
- Q. Then why was it put to the suspect?
- A. It was a typing error.
- Q. What would have been the correct version of the right to have been put to the suspect?
- A. You also have the right to remain silent or not to remain silent.
- Q. What was the error?
- A. That you are also advised that there are consequences of remaining silent or not to remain silent.
- [26] DC Pita testified that the answers to all the questions were given voluntarily by the Accused. He confirmed that before, during or after the caution interview, he or the

Witnessing Officer did not in any manner threaten, intimidate or induce the suspect to give any answers to the questions that were put to him.

- [27] The witness further testified that the recording of the caution interview was suspended at 10.00 a.m. The purpose of the suspension was for reconstruction, search and recovery at the crime scene. Thereafter, the recording of the caution interview had recommenced at 12.29 hours. Although it is recorded that the recording of the caution interview recommenced at 14.29, the witness said that was a typing error.
- [28] At the recommencement of the caution interview the Accused had been again cautioned in the same manner as before: *"You are not obliged to say anything unless you wish to do so, but what you say may be put into writing and given in evidence."* [This portion is found after Question and Answer 68].
- [29] The witness further testified that the Accused's constitutional rights were again given to him at the recommencement of the caution interview. He said it is recorded in the following manner: *"..... I wish to inform you Saimoni Nabukavou that is still remains"* DC Pita said that the sentence is incomplete, and that it should read *"..... I wish to inform you Saimoni Nabukavou that your rights still remains"*.
- [30] DC Pita identified the Accused in the dock as Saimoni Nabukavou and the person whose caution interview he had recorded on 31 August 2018.
- [31] DC Pita confirmed that the answers recorded in the caution interview statement are a true reflection of the answers given by the suspect during the recording of the interview.
- [32] The witness was cross-examined at length by the Counsel for the Defence and several suggestions were put to the witness.
- [33] It was suggested to the witness that there were two other male iTaukei Police Officers present during the recording of the caution interview of the Accused, and that these two officers had assaulted and threatened the Accused with a pinch bar and an iron rod. The witness denied this suggestion.

[34] It was further suggested to the witness that it was Sergeant Ofati who as asking the questions from the Accused and that the witness was the Witnessing Officer during the recording of the caution interview. DC Pita denied the suggestion.

[35] With regard to the manner in which the right to remain silent was put to the Accused, the witness was asked the following questions and he answered as follows:

Q. Have a look at Question 8. Before you typed Question 8 you have verbally asked him the question?

A. Yes.

Q. And the way you have verbally asked him the question is how it is reflected in the caution interview?

A. Yes.

Q. So verbally you had put the right to remain silent incorrectly to my client?

A. Yes.

Q. And this is despite your 22 years of being in the Police Force?

A. Yes.

Q. And thereafter you typed this right to remain silent incorrectly?

A. Yes.

Q. And then you read it back to my client incorrectly?

A. Yes.

[36] The second witness for the Prosecution was Inspector Edward Ofati. He testified that he has been in the Fiji Police Force for the past 23 years. He had been promoted as an Inspector last Friday (30 October 2020).

[37] The witness is currently serving at the Valelevu Police Station. On 31 August 2018, he was also serving at the same Police Station and he acted as the Witnessing Officer during the recording of the caution interview statement of the Accused. The witness corroborated in material particulars the testimony given in Court by DC Pita, as to

the manner and form in which the Caution Interview Statement of the Accused was recorded.

Analysis

- [38] In this case the Prosecution has led the evidence of DC Pita and Inspector Ofati, the Caution Interviewing Officer and the Witnessing Officer respectively, to establish that the Accused gave his Caution Interview Statement voluntarily and fairly.
- [39] Having heard the testimony of the above two Police witnesses I am satisfied that the caution interview statement was given by the Accused voluntarily.
- [40] In the voir dire grounds filed by the Accused there is no mention that he is challenging the voluntariness of the caution interview statement. The objection taken up by the defence is that at the time of the caution interview the Accused was not properly explained of his right to remain silent and had been informed that there were consequences to remaining silent or not remaining silent.
- [41] In my opinion, what would be most objectionable is the fact during the recording of his caution interview statement the Accused being informed that there are consequences of remaining silent. In law there are no consequences of remaining silent. This is a constitutional right guaranteed under Section 13 (1) (a) (ii) of the Constitution. In addition, the Defence states that the consequences of not remaining silent has not been duly explained to the Accused at the time Question No. 8 was put to him.
- [42] During the recording of the caution interview, the cautionary words *"You are not obliged to say anything unless you wish to do so, but what you say may be put into writing and given in evidence"*, have been put to the Accused on two different occasions (After Question and Answer 5 and 68 respectively). This would have been adequate to explain to the Accused that he has the right to remain silent [You are not obliged to say anything unless you wish to do so], and that there are consequences of not remaining silent [But what you say may be put into writing and given in evidence].
- [43] However, in this case, in addition to the above cautionary words being put to the Accused, the Caution Interviewing Officer has gone on to further explain to the Accused

his right to remain silent while explaining certain other rights as found in Section 13 of the Constitution.

- [44] When asked as to the format in which the said interview was conducted the Caution Interviewing Officer, DC Pita had testified: "I asked the question, typed the question, read it to the suspect, he gave the answer and I typed it so that he can see it."
- [45] In cross-examination DC Pita admitted that he had verbally put the right to remain silent incorrectly to the Accused. He further admitted that thereafter, he typed this right to remain silent incorrectly and then read it back to the Accused incorrectly.
- [46] In spite of his long service with the Police Department, the Witnessing Officer Inspector Ofati, was unable to explain the right to remain silent as stipulated in the Constitution in a coherent manner when asked to do so in Court. I agree with the Learned Defence Counsel when she submitted to Court that the said witness *"struggled to inform what the right was in terms of the Constitution."*
- [47] Considering all the evidence led on behalf of the Prosecution in its totality I am of the opinion that at the time of the recording of the Accused's caution interview statement, the right to remain silent as given to the Accused at Question 8 has not been duly explained to him.
- [48] Furthermore, the Accused was informed that there were consequences of him remaining silent. As explained before, in terms of the law there are no consequences of remaining silent and that is an absolute right without any qualifications.
- [49] Furthermore, I am of the opinion that at the time such right was put to the Accused, the Accused was not properly informed and explained of what exactly the consequences of not remaining silent were.
- [50] For all the aforesaid reasons, I am of the opinion that the manner in which the right to remain silent has been put to the Accused in Question 8 would have caused much prejudice to the Accused and thereby led to the caution interview statement being recorded in an unfair manner.

[51] In the circumstances I hold that the caution interview statement of the Accused (Voir Dire Exhibit P1) is not admissible in evidence.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 6th Day of November 2020

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