

**IN THE MAGISTRATES' COURT OF FIJI
AT TAVUA
EXTENDED - CRIMINAL JURISDICTION**

Lautoka High Court HAC 155 of 2019
Tavua Juvenile CF 07 of 2019

STATE

-v-

RATU SULIASI NASARA

For Prosecution : Ms. Latu L. [ODPP]
For Defendant : Ms. Henao G. and Mr. Samy A. [LAC]
Voir Dire Hearing : 30th June 2020
Voir Dire Ruling : 7th July 2020

VOIR DIRE RULING

BACKGROUND

1. The juvenile defendant was 15 years old when he first appeared before me on the 29th of August 2019.
2. He was around 15 years old when the alleged offence happened.
3. The juvenile defendant is now 16 years old.
4. I had to transfer the case to the High Court as the juvenile defendant was charged with the indictable offence of rape which is contrary to section 207 (1) and (2) (a) and (3) of the **Crimes Act 2009**.
5. The juvenile was remanded to appear before the High Court.
6. A name suppression order was made for the alleged victim.
7. When the case was before the High Court, the prosecution filed the Information and disclosures.

juvenile not to eat and to put the food away. As a result the juvenile did not complete his dinner that night.

18. In the morning, another Itaukei police officer came to the juvenile in the cell yelling angrily at the juvenile telling the juvenile to wake up. The officer also said 'So this is what you young people are doing!'.
19. As a result of these, the juvenile was afraid and confessed in his interview and when his charge statement was taken.
20. Before the *voir dire* enquiry began, the prosecution indicated that the cell book entries related to the time the juvenile defendant was in police custody could not be located.
21. The admissibility of the alleged admission by the defendant in his police caution interview and charge statement made to police while in their custody is the subject of this *voir dire* ruling.
22. I received the evidence in relation to impugned documents on the 30th of June 2020.
23. During the *voir dire* enquiry, the prosecution called 5 witnesses who gave oral evidence.
24. In addition, the prosecution tendered the following exhibits:

EXHIBIT NUMBER	DESCRIPTION	TENDERED BY
1	Medical Report of Suliasi Nasara – date of examination 29 th of August 2019.	PW1 – Ms. Swastika Devi/medical officer
2 (a)	Itaukei Police Caution Interview of Suliasi Nasara.	PW4 – Corporal 3905 Alanieta Marama
2 (b)	Typed Translated English Caution Interview of Suliasi Nasara.	PW4 – Corporal 3905 Alanieta Marama

3 (a)	Itaukei Police Formal Charge Statement of Suliasi Nasara.	PW5 – Constable 5568 Joeli Ratu
3 (b)	Typed English translation of the Police Formal Charge Statement of Suliasi Nasara	PW5 – Constable 5568 Joeli Ratu

25. I have read these exhibits in the course of preparing this ruling or decision.
26. After the prosecution closed their case for the *voir dire* enquiry and after providing and explaining the options available to the juvenile, the defence opted to call the juvenile defendant as a witness. There was no other witness for the defence.
27. I summarise the oral evidence of the *voir dire* witnesses below:

PW1

28. Prosecution witness 1 [PW1] is Ms. Swastika Devi.
29. She is a medical officer or doctor.
30. She graduated with an MBBS from the University of Fiji in 2016.
31. She was an intern in 2017.
32. In 2018 she started practicing.
33. This is her fourth year practicing.
34. She has dealt with general cases and those include criminal cases, alleged assault, alleged rape cases even anal and vaginal penetration.
35. She medically examined the juvenile defendant and rendered a report regarding that.
36. She tendered the medical report as an exhibit.

Prosecution Exhibit 1 – Medical Report of Suliasi Nasara – date of examination 29th of August 2019.

37. A social welfare officer Mr. Prem Kumar was present as the patient or defendant was a juvenile.
38. A staff nurse was also present.
39. The social welfare officer Mr. Prem Kumar signed at B (5) of the report to indicate consent to the medical examination.
40. The examination of the patient or defendant took about 25 minutes.
41. There were no bruises and no sign of any injury to the patient or defendant.
42. When the 'history' was elicited from the patient or defendant translated by the staff nurse, reference was made to the cell where the patient or defendant was kept at the police station where the defendant denied being abused by anyone.
43. When cross examined, PW1 described that the examination took place in a private room.
44. The patient or defendant was accompanied by police officers but the police were not in the room where the examination took place.
45. The patient or defendant was calm or normal.

PW2

46. PW2 is Mr. Shyam Reddy.
47. He is 59 years old.
48. He is a pastor at a Church.
49. On the 29th of August 2019 at 8 am he was at the Tavua Police Station.
50. He was there to pray for prisoners.
51. He spoke to the juvenile defendant who was in the police station cell block.

52. He shared a 'message' with the defendant about Jesus.
53. PW2 asked the defendant whether he had any complaint and the juvenile replied 'No'.
54. When cross examined, PW2 said that he ministered to the juvenile defendant for about 5 minutes.
55. The defendant did not complain and PW2 accepted that there were police officers around.

PW3

56. PW3 is Mr. Prem Kumar.
57. He is with the social welfare department and is a social welfare officer.
58. He joined the department in 2013.
59. He deals with juveniles in his line of work.
60. In August 2019, this case was referred to the department by police namely by Alanieta.
61. Police wanted someone from the department to be present as the juvenile suspect had no immediate family member.
62. PW3 was present during the juvenile defendant's interview.
63. Alanieta recorded the interview or was writing it down.
64. The interview was in Itaukei.
65. Before the interview, PW3 met the juvenile.
66. The juvenile did not complain before the interview.
67. PW3 did not witness any police officer threaten the juvenile.
68. The police officer Alanieta was cooperative and so was the juvenile.
69. After the interview, PW3 asked the juvenile whether he had any complaints with police and the juvenile replied 'No'.

70. PW3 asked the juvenile whether the juvenile wanted to say something before the interview was about to end and the juvenile said 'No'.
71. PW3 signed on the interview and identified his signature on the Itaukei record of interview.
72. PW3 also sat in when the juvenile was formally charged by police.
73. The formal charge was also done in Itaukei.
74. PW3 identified his signature too on the Itaukei charge statement.
75. There was no threat made to the juvenile during the charging process.
76. The charge took place on the same day of the interview.
77. No complaint was made by the juvenile.
78. The juvenile was then taken for a medical examination to the hospital before he was produced in court.
79. PW3 identified his signature on paragraph B (5) [consent portion] of the medical report tendered as **Prosecution Exhibit 1**.
80. PW3 was at the hospital when the juvenile was medically examined.
81. When cross examined, PW3 stated that he has sat in in more than 10 cases where a juvenile was interviewed.
82. PW3 first met the juvenile in the morning on the 28th of August 2019 on the day of the interview.
83. PW3 spoke with the juvenile in the police Crime Office.
84. There was no assault or threat when PW3 was present.
85. Alanieta was present in the Crime Office.
86. PW3 asked the juvenile how he was or how he felt?
87. 2 police officers accompanied them to the hospital. 1 of the 2 police officer's drove the vehicle.

88. The police officers were standing with PW3 about 2 meters away from where the juvenile was with the doctor.
89. PW3 said that if there was 'something' the juvenile could have told him.

PW4

90. PW4 is Corporal 3905 Alanieta Marama.
91. She is based at the Tavua Police Station.
92. The interview of the juvenile was done on the 28th of August 2019 at the Tavua Police Station Crime Office.
93. Mr. Prem Kumar the social welfare officer was present as the juvenile had no immediate family and the juvenile was not staying with his parents.
94. PW4 had called Mr. Prem Kumar.
95. PW4 identified the Itaukei caution interview which she prepared.
96. Mr. Prem Kumar and the juvenile both signed on the interview.
97. The juvenile was not forced to sign.
98. PW4 tendered the Itaukei and English translated caution interview as exhibits.

PROSECUTION EXHIBIT 2 (a) - Itaukei Police Caution Interview of Suliasi Nasara.

PROSECUTION EXHIBIT 2 (b) - Typed Translated English Caution Interview of Suliasi Nasara.

99. Before the interview, the juvenile made no complaint.
100. The juvenile was cooperative.
101. At the end of the interview, the juvenile made no complaint.
102. No threat was made to the juvenile.
103. The juvenile gave his answers voluntarily.

104. When cross examined, PW4 said that she is aware that the juvenile was brought in in the evening of the previous day by the juvenile's grandfather.
105. PW4 was not present in the cell when the juvenile was brought in.
106. PW4 accepts that there was no time when the social welfare officer and the juvenile were alone.
107. In re-examination, PW4 explained that the grandfather who brought the juvenile in to the police station is related to the alleged victim.

PW5

108. PW5 is Constable 5568 Joeli Ratu.
109. He is based at the Tavua Police Station.
110. On the 28th of August 2019 he formally charged the juvenile at the Tavua Police Station in the conference room.
111. It was done in Itaukei.
112. PW5 recorded or wrote it down.
113. PW5 translated it into English.
114. PW5 did not sign on the charge statement although he understood that he was supposed to.
115. However, the juvenile and the social welfare officer Mr. Prem Kumar signed on the charge statement.
116. PW5 tendered the Itaukei and translated formal charge statements as prosecution exhibits.

PROSECUTION EXHIBIT 3 (a) – Itaukei Police Formal Charge Statement of Suliasi Nasara.

PROSECUTION EXHIBIT 3 (b) – Typed English translation of the Police Formal Charge Statement of Suliasi Nasara.

117. Before the charge statement was taken, the juvenile did not complain.
118. The juvenile gave his charge statement voluntarily.
119. What the juvenile said is recorded in the charge statement.
120. When cross examined, PW5 said that he first came into contact with the juvenile when they visited the 'scene'.
121. PW5 denied that he was on duty when the juvenile was brought into the police station.
122. PW5 accepts that if the juvenile was assaulted, he would not have known.
123. PW5 accepts that he was with the juvenile and the social welfare officer the 'whole time'.
124. PW5 denied that the juvenile did not complain because of PW5's presence.

DW1

125. Defence witness 1 [DW1] is the defendant Mr. Ratu Suliasi Nasara.
126. He is 16 years old and his date of birth is 25th March 2004.
127. In 2019 he was residing at the village.
128. He was brought to the village to help in planting sugar cane.
129. He stayed at the village with the family that had brought him.
130. He was brought to the police station on the 27th of August 2019 at around 6pm by one of the family members who were looking after him at the village.
131. Police searched the defendant and then locked him in the cell.
132. The search took about 15 seconds.
133. He said that police were 'rough' with him.
134. They forced him to turn while they were searching him.

- 135.** Around midnight when he was sleeping in the police cell, a police officer came and was threatening him by banging the grills of the cell block.
- 136.** The officer also shouted at him saying 'Oiko saraga qo o cakava tiko na ka qo vei ira na gone lailai' meaning you are the one doing this to the little children.
- 137.** The officer said that he will get the key and will enter the cell block.
- 138.** The officer told him to sleep and not to eat his food.
- 139.** He saw that there was another police officer present.
- 140.** The defendant said that he was scared and frightened.
- 141.** That was his first time at the police station.
- 142.** He does not know what are the laws inside the police station.
- 143.** He was young.
- 144.** He had heard about police beating people up.
- 145.** The Pastor came and was speaking to a drunk person inside the cell block and then the Pastor came to see the defendant.
- 146.** The Pastor sang a song, prayed and then left.
- 147.** The Pastor did not spend a long time.
- 148.** The defendant did not complain to the social welfare officer as police were present.
- 149.** The officer who interviewed him was not present when he was threatened inside the cell.
- 150.** Mr. Prem Kumar and 2 police officers accompanied the defendant to the hospital.
- 151.** The defendant explained that he did not complain to the doctor as the police officers were present in the room and only a curtain separated them.
- 152.** The defendant explained that he did not want to show police that he was afraid and so he acted normal.

153. The defendant admitted in his interview and also his charge statement because of the threat.
154. The defendant said that he told the interviewing officer Alanieta that he was 'set' as he did not know the officer who had threatened him the night before.
155. When cross examined, the juvenile defendant accepted that he was interviewed by police with the social welfare officer present.
156. He accepts signing on the interview.
157. The juvenile defendant said that the same officers who took him to hospital also escorted him to court.
158. The defendant did not make any complaint to the Magistrate.
159. He accepts that he could have.
160. When he was taken into detention, he lodged complain there.
161. When his case was in the High Court, the defendant complained to his counsel.

ANALYSIS

162. Generally, every person has the right to be at liberty. A person can be deprived of his or her liberty if for example they are reasonably suspected of committing an offence [section 9 (1) (e) of the **2013 Constitution**].
163. There is a balance that needs to be made when enforcing these rights.
164. Section 10 (1) and (3) and section 13 of the **Criminal Procedure Act 2009** authorises the touching or confinement of the person to be arrested unless the person submits to custody either by word or action. Reasonable force is justified and is the standard to be applied if for instance there is forcible resistance or an attempt to evade arrest. A person arrested need not be subjected to more restraint than what is necessary to prevent escape.
165. There are certain situations in which a police officer may arrest a person without a warrant or an order from a Magistrate. The situation listed below is selected intentionally from the list prescribed in section 18 of the **Criminal Procedure Act 2009** as it may be applicable in this case against the juvenile defendant:

- a. whom the officer suspects on reasonable grounds of having committed an indictable offence (whether or not the offence is triable summarily);
166. Section 17 of the **Criminal Procedure Act 2009** prescribes that a police officer or other person making an arrest may take from the person arrested any instruments of violence.
167. Section 13 (1) (a) (i) (ii) and (iii) of the **2013 Constitution** stipulates that an arrested or detained person has the right to be informed promptly in a language which he or she understands of the reason for the arrest or detention and the nature of the charge that maybe brought, the right to remain silent and the consequence of not remaining silent.
168. Further on, section 13 (1) (d) prescribes that an arrested or detained person has the right not to be compelled to make any confession or admission that could be used in evidence against that person.
169. Moreover, section 14 (2) (k) stipulates that a person charged with an offence has the right not to have unlawfully obtained evidence adduced against him or her unless the interest of justice require the evidence to be admitted.
170. The **Judges Rules of 9th January 1967 Cap 13** in its preamble at part (e) promotes:
- That is it is fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense, that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.*
171. At paragraph II, the Rules prescribe that if there are reasonable grounds to suspect that a person has committed an offence, the officer shall 'caution' the suspect before putting questions or further questions to the suspect relating to that offence.
172. Rule III (b) stipulates that any questions put or answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refuses by the interrogating officer.
173. The Fiji Police Force continues its existence under the **2013 Constitution** [see section 129].
174. The primary legislation is the **Police Act 1965**.
175. Section 5 of the Act stipulates that 'The Force shall be employed in and throughout Fiji for the maintenance of law and order, the preservation of the peace, the

protection of life and property, the prevention and detection of crime and the enforcement of all laws and regulations with which it is directly charged; and shall be entitled for the performance of any such duties to carry arms.'

176. An officer can be appointed or enlisted pursuant to Part 3 of the Act.
177. Further on, section 17 (1) (2) and (3) of the Act prescribes the general powers and duties of police officers.
178. For instance, every police officer is deemed to be on duty at all times, to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances, to detect and bring offenders to justice, and to apprehend all persons whom he or she is legally authorised to apprehend and for whose apprehension sufficient ground exists.
179. There are certain pre-trial orders that can be made by the Court and this has been codified in the **Criminal Procedure Act 2009**. It reads:

290. — (1) Prior to the trial of any criminal proceeding either party may make application to the court having control of the proceeding for any order necessary to protect the interests of either party or to ensure that a fair trial of all the issues is facilitated, and such applications may relate to —

... (d) a challenge to the use of any report or other evidence that may unfairly prejudice the defence case;

... (3) Upon hearing any application under this section the court may make any necessary order to protect the rights of any party to the proceedings, or to facilitate a fair and timely hearing of the proceedings to which the application relates.

180. The Fiji Court of Appeal Case of **Ganga Ram and Shiu Charan v Reginam** Criminal Appeal No. 46 of 1983 (13th July 1984) is the precedent authority in Fiji in relation to the admissibility of 'alleged confessional statements'.
181. The Court of Appeal at page 7 and 8 laid down the criteria for admissibility as follows:

*...**First**, it must be established affirmatively by the Crown beyond a 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 “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 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. Sana (1980) 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.

- 182.** In addition to the 2 grounds above, an alleged confessional statement can still be ruled inadmissible if there is a breach of a constitutional right.
- 183.** The prosecution carries the burden and they must satisfy the court beyond a reasonable doubt that the impugned statement or in this case the police caution interview of the juvenile should be admitted and used as evidence during his trial.
- 184.** I adopt the above principles when deciding the admissibility of the impugned caution interview and charge statement of the juvenile while in police custody.
- 185.** Even if I do not accept the version of the juvenile defendant, that does not automatically mean that the prosecution has discharged their burden.

FINDINGS

- 186.** There are facts in this case which I accept to be proven beyond a reasonable doubt and which are not disputed.
- 187.** The juvenile defendant who was 15 years old was brought to the police station by his de-facto guardian in the evening on the 27th of August 2019.
- 188.** Although not expressed in the evidence, there is overwhelming direct and circumstantial evidence that the juvenile defendant in effect was re-arrested by police at the police station, searched and placed in police custody or in the police cell. This stems from the juvenile's own evidence which I accept and the evidence of the prosecution witnesses which makes it apparent that the defendant was not free to leave. He was also kept in the police cell and escorted for example by police to the hospital before being produced in court under police custody.
- 189.** It is also undisputed and established beyond a reasonable doubt that the juvenile defendant was interviewed under caution the following day on the 28th of August 2019 and his charge statement was recorded the same day.
- 190.** He was medically examined the following day on the 29th of August 2019 at the Tavua hospital and produced in court later that same day.

191. The social welfare officer Mr. Kumar was present during the juvenile defendant's caution interview, the time the juvenile was charged and when the juvenile was medically examined. Mr. Kumar was in attendance as there was no next of kin or close family member available.
192. That the Pastor spoke to the juvenile while the juvenile was in the police cell prior to the interview.
193. That no complaint was made by the juvenile to the interviewing police officer Corporal Alanieta, to the social welfare officer Mr. Prem Kumar, to the Pastor Mr. Shyam Reddy, to the medical doctor and none was made to the Court.
194. Also proven beyond a reasonable doubt, it is established that the interviewing officer, the social welfare officer and the juvenile defendant signed on the caution interview and only the social welfare officer and the juvenile signed on the charge statement.
195. I also find proven beyond a reasonable doubt that no force or threat was made or done to the juvenile defendant during his police caution interview and during the recording of his charge statement.
196. The defendant when he gave evidence suggested that police were aggressive and forced him to turn around during the time he was searched at the police station before being locked in the cell.
197. I am satisfied that police were empowered to search the suspect or juvenile defendant for any dangerous material that might be on him before locking him in the cell and this is for instance is allowable under section 17 of the **Criminal Procedure Act 2009**.
198. Even if there is no express legal provision, I would think that standard police operating procedure which appears to be the case, would support the action of searching a suspect before locking the suspect in the cell.
199. This course of action I find is reasonable and is primarily for the safety and protection of the suspect, others detained in the cell and the safety and protection of the police. The risk of escape too is lessened.
200. I did not find the defendant believable when raising his complaint about police treatment when he was searched. The defendant too was vague in his evidence. He said that police were aggressive but did not describe how?. He said that police forced him to turn around but he did not express how? and what was the force.

201. This assertion about police mistreatment during his search is also not reflected in the juvenile defendant's *voir dire* grounds.
202. I find this complaint by the defendant belated, unsupported, unreliable and cannot be believed.
203. To the more pressing issue, in my opinion, the main period in question is prior to the interview. More specifically in the night when the defendant juvenile was kept in the police cell at the police station.
204. The only direct evidence about this comes from the juvenile defendant.
205. The prosecution did not call anyone to account for this time for example, no police officer on duty at the police station at the time gave evidence.
206. One would think that if I accept the juvenile defendant's evidence and assertion that he was threatened by a police officer while he was in police custody, then that should be enough to disallow the prosecution from relying on the defendant's police caution interview or charge statement or both the caution interview and charge statement.
207. The caution interview and charge statement were recorded on the same day. From a reading of the timeline in the documents, the charge statement was recorded 10 minutes after the caution interview of the juvenile defendant ended.
208. It would be dangerous to rely upon on the charge statement too, if the caution interview were to be ruled inadmissible due to the alleged threat made by a police officer as the nexus in time between the caution interview and charge statement is close.
209. Having listened and observed the defendant give evidence, I am convinced that he is telling the truth that someone banged on the grills of the cell during the night he was kept in the police cell. He was told not to eat. He was told the cell would be open. The man alleged that this is what the juvenile was doing to the small children.
210. The defendant did not give evidence that the police officer said that he was going to be beaten. It is in his *voir dire* grounds though.
211. What is raised in the *voir dire* grounds filed is not evidence, evidence is what the defendant relates in the witness box.
212. It could be inferred that the juvenile defendant thought he was going to be beaten as the person supposedly told the defendant that the cell was going to be open.

213. I accept that the defendant took that to be the meaning when the person said that the cell was going to be opened.
214. However, the juvenile defendant does not describe or justify how he reached the conclusion that this was a police officer who did and said this to him.
215. As the evidence reveals, other persons have access to the cell block and the presence of the Pastor praying for those in the cell block is an example of this.
216. There was also another drunk person which the defendant accepts was also present in the cell.
217. It is an easy inference to make especially at that time of the night, that it was a police officer but I am not convinced on the balance of probabilities that it was.
218. Even if it was not a police officer, I accept that the defendant certainly thought that it was a police officer.
219. The juvenile defendant's police caution interview commenced at around 10.30am which is about 10 hours 30 minutes later.
220. I accept the evidence of the social welfare officer, the Pastor, the doctor, the interviewing officer, the charging officer that nothing out of the ordinary was observed with the juvenile. That the juvenile made no complaint. No injury was observed on him.
221. The juvenile also appeared before me on the 29th of August 2019 at around mid-day which is about 2 days after the incident at the police cell block. That was the first time he was produced in court in for the allegation.
222. I spent more than the usual amount of time dealing with the juvenile's case on that first day in contrast to what I would on a fresh case especially in light of the juvenile's age, the seriousness of the charge and that I contemplated whether bail should be granted.
223. In my exchange with the juvenile defendant in court, I found nothing abnormal with him.
224. I found him relaxed and open.
225. I questioned him directly whether he had complaints against police to which he denied.

226. He is young and I am sure the experience in police custody was new for him and subsequently and similarly the experience in court.
227. I accept the defendant's evidence that while in police custody he pretended that he was not scared.
228. I have borne these in mind when deliberating this decision.
229. I have accepted that the defendant was under the impression that it was the police who said and did those things to him when he was in the police cell block.
230. I am satisfied that he was shaken about what was said and done but I am not convinced that he held the same emotions or feelings or reservations by the time he was interviewed and when his charge statement was taken which is more than 10 hours later.
231. I do not accept that he was fearful or intimidated at the time his interview and charge statement were recorded.
232. The evidence of the social welfare officer, the Pastor, the interviewing and charging officer all convince me of the juvenile defendant's unreserved cooperation and comfort level.
233. I accept that police were present but there were frequent opportunities for the juvenile defendant to complain.
234. The lack of any complaint around that time is consistent with the juvenile defendant having given his answers during his interrogation voluntarily.
235. I do not find that police breached any of his constitutional right.

SUMMARY

236. For the reasons explained above, I am satisfied that the prosecution has discharged their burden and I am satisfied beyond a reasonable doubt.
237. I admit or allow the police caution interview and the charge statement of the juvenile defendant to be admitted into evidence or used during his trial.




LISIATE T.V FOTOFILI
Resident Magistrate

At TAVUA this 7th day of July, 2020.