

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**

**Crim. Case No: HAC 349 of 2016**

**STATE**

**v.**

- 1. EREMASI RINASAU**
- 2. RATU SIMIONE VAKACOKASAI**
- 3. JEKOPE PANAPASA RAIBEVU**
- 4. LUKE TAGINAQALI**
- 5. JOLAME LAGAITUKANA**

**Counsel:** Ms. S. Tivao, Ms. L. Bogitini for State  
In Person - Accused 1  
Ms. E. Leweni for Accused 2  
Ms. V. Filipe, Ms. E. Radroke for Accused 3  
Mr N. Sharma for Accused 4  
Mr N. Sharma for Accused 5

**Hearing:** 22<sup>nd</sup>, 23<sup>rd</sup>, 24<sup>th</sup>, 25<sup>th</sup>, 26<sup>th</sup>, 29<sup>th</sup>, 31<sup>st</sup> January 2018

**Ruling:** 09<sup>th</sup> February 2018

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**RULING**  
**[Voir Dire]**

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**Introduction and Background**

1. The second, third and the fourth accused persons challenge the admissibility of their respective caution interviews made to the Police in evidence on the following grounds, *inter alia*;

2<sup>nd</sup> Accused:

1. ***THAT*** the accused's confessions were involuntarily obtained through pressure, duress and force by the police officers at Valelevu Police Station specifically by one police officer known to the accused as Ratu Jo.
2. ***THAT*** the accused was questioned in the i-taukei language however, his interview was recorded in the English language, a language he barely understands.

3<sup>rd</sup> Accused:

1. Jekope was threatened by the interviewing officer, DC 4663 Taitusi Lualala to cooperate and admit to the allegation throughout the interview or else he would be repeatedly assaulted with a stick.
2. Jekope was not given proper caution during the interview, Jekope was not informed and explained of his right to remain silent nor was he informed and explained that whatever he stated would be used in a court of law, he was forcefully told to sign at various places of the interview.
3. Jekope's confession was further induced by an untrue representation made by the interviewing officer DC 4663 Taitusi Lualala. The untrue representation was that after the interview he would go home and that would be the end of the matter.
4. The Police officer had acted unfairly when he did not ask Jekope whether he needed to talk to a lawyer from the Legal Aid Commission. The interviewing officer only asked him if he wanted to engage a private lawyer knowing that this was a paid service and that Jekope would not be in a position to pay. That because of this unfair act, the interview was conducted without Jekope being fully informed and explained of his rights during an interview and rights whilst in the custody of the police.

5. *The interviewing officer had acted unfairly when he told Jekope to sign the caution interview first then read his answers.*
6. *There was a breach of his rights under sections 13 and 14 of the Constitution of Fiji, the Judges Rules and Articles 9 (2), 10 (1), and 14 (3) (a) of the international Covenant on Civil and Political Rights during his interview.*

4<sup>th</sup> Accused:

1. ***THAT*** *his confession in the caution interview conducted on the 17<sup>th</sup> September 2016 was obtained by threats of physical violence by the officer conducting his caution interview namely DC 5090 Inoke Tuiloaloa.*
2. ***THAT*** *his confession in the caution interview conducted on the 17<sup>th</sup> September was obtained by verbal abuse by the officer conducting his caution interview namely DC 5090 Inoke Tuiloaloa.*
3. ***THAT*** *his confession in the caution interview conducted on the 17<sup>th</sup> September 2016 was obtained through intimidation and false promises of being released upon admission by the officer conducting his caution interview namely DC 5090 Inoke Tuiloaloa.*
4. ***THAT*** *the accused was not given proper breaks during the lengthy caution interview.*
5. ***THAT*** *the interviewing officers did not allow the Accused to be interviewed in the language of his choice being the i-taukei language which would have made it easier for the Accused to understand the caution interview process.*

6. ***THAT*** the accused was not properly explained his legal rights by the interviewing officer namely DC 5090 Inoke Tuiloaloa during the caution interview in a manner which he understood considering that the interview was conducted in English including his right to the following:
- (i) *Right to seek breaks to rest, visit the washroom, drink water etc.*
  - (ii) *Right against self-incrimination*
  - (iii) *Right to remain silent.*
  - (iv) *Right to legal Representation including free legal assistance from the Legal Aid Commission.*
  - (v) *Right to have the interview read to him.*
  - (vi) *Right to be interviewed in the language of his choice namely the i-taukei language.*
7. ***THAT*** the Accused was not read back nor did he know the contents of the interview written in English and was only asked to sign on the papers by the interviewing officer namely DC 5090 Inoke Tuiloaloa.
8. ***THAT*** there was breach of his rights under the Judges Rules and Article 13 and 14 of the 2013 Constitution of Fiji prior to and during his interview by the Police.
2. Accordingly, the hearing of the trial within the trial (*voir dire*) commenced on the 22<sup>nd</sup> January 2018 and concluded on the 31<sup>st</sup> January 2018. The Prosecution adduced the evidence of seven witnesses including the interviewing officers and witnessing officers of the respective caution interviews. The second, third and the fourth accused persons gave evidence for the defence, but did not adduce the evidence of any other witnesses on behalf of the defence. Subsequently, the learned counsel for the prosecution and the three accused persons, filed their respective written submissions. On the 01<sup>st</sup> of February 2018, the learned counsels for the parties made their oral submissions. Having carefully

considered the grounds of voir dire, the evidence adduced by the parties and their respective written and oral submissions, I now proceed to pronounce my ruling as follows.

3. According to the evidence adduced by the parties during the course of the hearing, I find that the objections of the three accused persons are mainly founded on the ground of unfairness. All of them mainly contend that their respective caution interviews were conducted in a language that they could not properly understand. Hence, they failed to properly understand the questions posed to them during the record of the caution interviews. Accordingly, they were not in a position to properly answer to those questions. Moreover, the three accused persons urged that they were forced, threatened and induced by the Police Officers, making false promise that if they say "yes" to the questions and sign the record of the caution interviews, they could go home.
4. The prosecution in their evidence denies the allegation made by the defence, stating that all three caution interviews were conducted fairly, with the voluntary and willing participation of the accused persons. The witnesses of the prosecution said that these three accused persons were fairly and professionally treated during the recording of their respective caution interviews.

#### The Law

5. Having briefly discussed the procedural and factual background of this matter, I now draw my attention to discuss the laws pertaining to the admissibility of the confession made by the accused in his caution interview.
6. Lord Carswell in R v Mushtaq (2005) 3 All ER 885, at 908 has discussed the importance of careful evaluation of the confession before it is accepted in evidence, where his Lordship held that:

*"It has long been recognised that the content of a confession made by an accused person has to be evaluated with great care in order to determine whether it can safely be accepted as an admission against his interest. The*

*approach of the law to that evaluation has varied over the years and the rules applied by the courts have to be kept under review to ensure that they reflect the standards accepted by each generation”.*

7. Accordingly, it appears that the court is required to adopt a cautionary approach in order to admit the confession of an accused in evidence. Justice Goundar in State v Akanisi Panapasa (Criminal Case No 34 of 2009) has outlined the general rule on admissibility of confession, where his Lordship found that:

*“As a matter of general rule, a confession made by an accused person to a person in authority out of court is admissible only if the confession was made voluntarily. The rule which was developed by the English common law is the state of law in Fiji”.*

8. The rights against self-incrimination has been embodied in Article 13 (1) (d) of the Constitution, where it states that:

*“not to be compelled to make any confession or admission that could be used in evidence against that person;”*

9. Moreover, Article 14 (2) (k) of the Constitution has stipulated that unlawfully obtained evidence should not be adduced against a person who is charged with an offence. Article 14 (2) (k) of the Constitution states that:

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

10. The Privy Council in Wong Kam – Ming v The Queen (1982) A.C. 247 at 261 has discussed the basic control over admissibility of statement, where it was held that:

*"The basic control over admissibility of statement are found in the evidential rule that an admission must be voluntary i.e. not obtained through violence, fear or prejudice, oppression, threats and promises or other improper inducements. See decision of LORD SUMNER in IBRAHIM v. R (1914-15) AER 874 at 877. It is to the evidence that the court must turn for an answer to the voluntariness of the confessions."*

11. The Fiji Court of Appeal in **Shiu Charan v R (F.C.A. Crim. App. 46/83)** has discussed the applicable test of admissibility of caution interview of the accused person in evidence at the trial. The Fiji Court of Appeal in **Shiu Charan (supra)** held that:

*"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 Pin 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 (1980) AC 402, 436 @ c - E." (State v Rokotuiwai - [1996] FJHC 159; HAC0009r.95s (21 November 1996)."*

12. The Fiji Court of Appeal in **Fraser v State ([2012] FJCA 91; AAU24.2010 (30 November 2012))** held that:

*"The court shall not allow a confession to be given in evidence against him unless the prosecution proves beyond reasonable doubt that the confession was not obtained (a) by oppression of the person who made it (b) in consequence of anything said or done which was likely, in the*

*circumstances existing at the time to render unreliable any confession which might be made by him in consequence thereof."*

13. The test enunciated in Shiu Charan (supra) and Fraser (supra) constitutes two components. The first is the test of oppression. The court is required to satisfy that the statement in the caution interview had been taken without any form of force, threats, intimidation, or inducement by offer of any advantage. The second component is that, even though the court is satisfied that the statement was given voluntarily without any form of threat, force, intimidation or inducement, it is still required to satisfy that no any general grounds of unfairness existed before or during the recording of the caution interview.
14. It is the onus of the prosecution to prove beyond reasonable doubt that the caution interview of the accused was recorded voluntarily and under fair and just circumstance.

#### Analysis

15. Having considered the laws pertaining to the admissibility of the confessions made in the caution interview, I now turn on to analyze the evidence adduced by the witnesses during the course of the hearing with the legal principles.

#### Second Accused,

16. The main contentions of the second accused is that the caution interview was conducted in a language that he could not properly understand, making it difficult for him to properly answers to the questions that were put to him. According to the evidence given by the accused, the caution interview had been conducted in English language, which he could not understand properly.
17. The Interviewing Officer, in his evidence, stated that he had translated all of the questions into i-taukei language after recording them in English language. The accused then answered in i-taukei language which were then translated and recorded in English language. In view of the question three of the caution interview, it is clear that the accused



had agreed to record the caution interview in English language and translated it into i-taukei language.

18. It is my opinion that the record of the caution interview must reflect the actual conversations and exchange of questions and answers in its authentic version. Indeed, it is allowed that the Police Officers could translate the original version of the caution interview into a language which they preferred for the purpose of court proceedings. If the court accept the evidence given by the Interviewing Officer, the record of the caution interview, that is tendered as prosecution's exhibit one, is not the record of the original conversation or the exchange of questions and answers that have taken place during the recording of the caution interview.
19. The Interviewing Officer is not consistent in explaining the reasons for recording the caution interview in English, instead of recording it in i-taukei language. The Interviewing Officer explained that he thought that the Prosecuting Officers at the Valelevu prosecution office would request him to translate it into i-taukei language if he records the caution interview in i-taukei language. The interviewing officer then stated during the cross examination, that he made a record of the caution interview in i-taukei language, which he had handed over to the prosecution office at Valelevu.
20. The Witnessing Officer of the caution interview, in his evidence, stated that the most of the questions were asked in English language and the accused also answered to them in English language. Only few questions were translated into i-taukei language. However, the Witnessing Officer in his evidence admitted that he heard the accused was asking the Interviewing Officer to translate the caution interview into i-taukei language. He further admitted in his evidence that the accused had difficulties in understanding English language.
21. Accordingly, the evidence given by the Witnessing Officer contradicts the evidence given by the Interviewing Officer. The Interviewing Officer said that he translated all the questions into i-taukei language once he recorded them in English. The accused then

answered in i-taukei language, which were later translated and recorded in English language. In contrast, the Witnessing Officer in his evidence said that only few questions were translated into i-taukei language. However, the witnessing officer admitted that the accused had difficulties in understanding English language.

22. In view of the reasons discussed above, there are reasonable doubts whether the recording of the caution interview of the second accused was conducted in a language he could understand, whether the second accused properly understood the questions put to him before he made his answers. Accordingly, there is a reasonable doubt whether the record of the caution interview was conducted in fair and just manner. Therefore, it is my opinion that the admissibility of the confession made by the second accused in his caution interview in evidence is not safe.

#### Third Accused.

23. The main contention in challenging the admissibility of the caution interview in evidence by the third accused is also founded on the ground that his interview was conducted in a language that he could not properly understand.
24. The Interviewing Officer of the third accused in his evidence specifically stated that he chose not to have a Witnessing Officer as he found it unnecessary. He further said that there is no such a legal requirement or law, requesting the Interviewing Officer to have a Witnessing Officer during the recording of the caution interview. However, the Interviewing Officer admitted that it has been a practice adopted by the police to have a Witnessing Officer during the recording of caution interviews of accused persons.
25. I am mindful of the fact, that there is no mandatory legal requirement to have a Witnessing Officer during the recording of the caution interview. However, the court is required to take into consideration whole circumstance that was prevailed during the recording of the caution interview, in order to determine whether it was recorded in fair and just manner. The presence of a Witnessing Officer, who later can give evidence in court in a hearing of a matter of this nature would undoubtedly assist the court. Mere absence of a Witnessing

Officer may not render the confession made by the accused in his caution interview inadmissible in evidence. (State v Orisi Roko & others ( 2001) HAC 13/00S Ruling 27 November 2001. However, the court could evaluate the effect of such an absence of the Witnessing Officer with all other circumstances that were prevailed during the recording of the caution interview.

26. In this case, the third accused alleged that he was forced to sign the caution interview that was conducted in a language that he could not properly understand. According to the evidence given by the Interviewing Officer, the accused was given an opportunity to read the record of the caution interview at the conclusion of it. The accused had then read the 93 questions and answers in the caution interview within two minutes. The accused in his evidence denied that he was given an opportunity to read it. Instead he was threatened to sign it. According to the evidence given by the accused, the Interviewing Officer has made a false promise to him, saying that if he signs the documents, he could go home.
27. The record of the caution interview consists eleven pages with 93 questions and answers. According to the Interviewing Officer, the accused had only taken two minutes to read over these eleven pages before he sign on it. Other hand, the accused denies that he was given an opportunity to read it before he signed on it. In view these reasons, there are reasonable doubts whether the accused was actually given an opportunity to read it, whether the accused could read over the eleven pages that contain 93 hand written questions and answers in English within two minutes. Accordingly, there is a reasonable doubt whether the accused had signed his caution interview, having properly comprehended the contents in it. Therefore, it creates a reasonable doubt whether the confession of the third accused was made under a fair and just circumstances.

#### Fourth Accused.

28. The main contention of the fourth accused, challenging the admissibility of the caution interview in evidence, is that his interview was conducted in a language that he could not properly understand.

29. According to the question number three and its answer, the fourth accused had agreed in his caution interview that he can be interviewed in English language, but it has to be translated to him in i-taukei language. However, the Interviewing Officer in his evidence said that all of the questions were asked in English language and the accused provided answers in English language as well. He had only translated the cautionary paragraph into i-taukei language as he found the accused was finding difficulties in understanding it. The Interviewing Officer said that the accused actually did not ask for the translation, but in his own initiative, he translated the cautionary paragraph of the caution interview into i-taukei language.
30. The Witnessing Officer of the caution interview, in his evidence, said that the accused understood all the questions that were put to him during the caution interview apart from the allegation. Therefore, the Interviewing Officer had to translate certain terms in the allegation into i-taukei language, such as the time, date, place. Accordingly, it appears that the evidence given by the Witnessing Officer contradicts the evidence given by the Interviewing Officer in respect of the translated part of the caution interview. There is no record of the translation in the caution interview. Moreover, the Witnessing Officer during the cross examination, admitted that he heard the accused was asking the Interviewing Officer to translate them into i-taukei language.
31. The fourth accused in his evidence denies that he could understand English language. He further said that the police officer continued with the recording of caution interview in English language though he wanted to be interviewed in i-taukei language.
32. If the accused was capable of understanding English language as claimed by the prosecution, then what was the reason for telling the accused that the caution interview will be translated into i-taukei language as per the question number three. If the accused agreed to be interviewed in English language, there was no need to translate it into i-taukei language as stated in the question three.

33. In view of these reasons, I find that there is a reasonable doubt whether the fourth accused could actually understand English language or not. Accordingly, there is a reasonable doubt whether the caution interview was conducted in a language that the fourth accused could not properly understand. Therefore, it is my option that the admission of the caution interview of the fourth accused in evidence is not safe.
34. In conclusion, I hold that the caution interviews of the second, third and fourth accused persons are not admissible in evidence on the ground that there are reasonable doubts whether these three caution interviews were made under a fair and just circumstances.



  
R.D.R.T. Rajasinghe  
Judge

At Suva  
09<sup>th</sup> February 2018

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