

IN THE HIGH COURT OF FIJI AT SUVA

CRIMINAL JURISDICTION

Criminal Case No. HAC 258 of 2022

BETWEEN: THE STATE

AND: 1. TUPENI NASAU
2. WAISEA SASALU

For the State: Mr. Naimila

For the 1st Accused: No appearance.

For the 2nd Accused: Mr. Navuni and Ms. Chand

Date of Voir Dire: 12th March 2024

Date of Ruling: 22nd March 2024

Voir Dire Ruling

1. The two Accused persons are charged with the following offences under the Information filed on the 1st day of September 2022: -

**INFORMATION BY THE
DIRECTOR OF PUBLIC PROSECUTION**

TUPENI NASAU AND WAISEA SASALU are charged with the following offence:

Statement of Offence

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

Particulars of Offence

TUPENI NASAU and WAISEA SASALU on the 28th of July 2022 at Suva in the Central Division, in the company of each other, stole 1 x Navy dark blue Infinix mobile phone, and assorted cards from **RAVISHEK CHANDAR** and immediately before stealing from **RAVISHEK CHANDAR** used force on him.

2. The two Accused persons were first produced in the Suva Magistrate's Court on the 1st of August 2022 and the matter was sent up to the High Court in Suva.
3. They were arraigned in the High Court on the 15th of August 2022 and although the record does not record the date when the plea was taken, it is safe to say that the Accused have both pleaded not guilty, with the first Accused representing himself and the second Accused being represented by the Legal Aid Commission.
4. The first Accused indicated on the 20th of September 2022 that he wished to challenge the record of interview and he was given time to file the voir dire grounds.

The voir Dire Grounds.

5. The 1st Accused submitted his voir dire grounds on the 20th of September 2022. He challenges his record of interview on the following grounds: -
 - (i) Question and answers 84 to 90 were fabricated by the interviewing officer and it was not his answer. This is not a voir dire issue as it is evidential in nature and will be dealt with at the substantive trial.
 - (ii) He was given false promises by the interviewing officer that if he cooperated with the investigation, they would decrease the charge to Theft. Even though he had no knowledge of the case, he just said yes to the allegations and then later he knew that they were lying.
 - (iii) There was no witnessing officer at the interview and there was no signature of the witnessing officer to prove that he was present.
6. The matter was fixed for trial from the 11th to the 15th of March 2024 in the presence of both Accused, and the matter was fixed for PTC on the 31st of January 2021.
7. When the matter was called again on the 31st of January 2024, the 1st Accused was not present therefore a bench warrant was issued for his arrest. The warrant was made returnable for the 29th of February 2024 and on that date the Court was advised that the 1st Accused had apparently left the country and the Police were directed to confirm the same with an updated bench warrant report.

8. On the next mention date, 6th March 2024, State counsel advised the Court that they were unable to obtain the 1st Accused's travel history and advised that they would try and get confirmation of his whereabouts through other means, either through an affidavit or by leading evidence from witnesses. The matter was then adjourned to the Trial date – 11th March.
9. On the first day of Trial, the State made an oral application for Trial in Absentia with respect to Accused 1 Tupeni Nasau and this application was supported by the affidavit of the investigating officer Sgt. 2391 Ulaiasi Robanakadavu.
10. After hearing from both parties and considering the affidavit in support, the Court granted the application for Trial in absentia against Tupeni Nasau, commencing with a voir dire hearing as he had challenged the record of interview and filed voir dire grounds.
11. The voir dire hearing commenced on the 12th of March 2024.

The voir Dire Hearing.

12. The State called the following witnesses: -

- (i) PW1- PC 7527 Emosi
- (ii) PW2 – DC 7541 Bruno
- (iii) PW3 – DC 4321 Aasaeli Tuivuaka
- (iv) PW4 – DC 3536 Josaia
- (v) PW5 – Sergeant Mataiasi

13. The following documents were tendered into evidence: -

- (i) Exhibit P1 – Record of Interview for Tupeni Nasau
- (ii) Exhibit P2 – Tupeni Nasau's identification details (MC Form 1A)
- (iii) Exhibit P3 – Coloured photograph of Tupeni Nasau
- (iv) Exhibit P4 – Charge Statement of Tupeni Nasau

14. The first two witnesses are the arresting officers. On the night of the 28th of July 2022, the two officers received information relating to two robberies – one at the

Terry Walk and the other later that night at Carnarvon Street. The description of the two suspects in both incidents were provided and the two officers proceeded on mobile patrol throughout Suva.

15. They saw the two suspects when they were driving along Victoria Parade and they saw them in front of Temptation 2 Nightclub. They called out to them however the two suspects ignored them and entered the nightclub.
16. The two officers then got off and followed the two suspects into the nightclub and they saw them standing at the Bar. They brought them outside the club and into the Police vehicle.
17. PW1 then formally arrested them – he formally introduced himself, informed them of the allegations raised against them and informed them of their constitutional rights. PW1 identified the 1st Accused from his photograph.
18. This testimony was corroborated by PC Bruno (PW2) and he confirmed that he did not assault, threaten or make any false promises to the two suspects while they were in his custody nor did he see PW1 doing that to the two suspects.
19. The next witness was DC Asaeli based at the Crime Branch at Totogo Police Station. On the 28th of July 2022 he was on day shift, and he was instructed by the investigating officer to interview the suspect Tupeni Nasau.
20. He confirmed that he interviewed Tupeni Nasau in the Crimes general office, and the interview was witnessed by DC Josaia. The Accused elected to be interviewed in the English language. The three of them signed on every page except at page 2 and the last page the witness forgot to put his signature, but the Accused and the witnessing officer signed on every page.
21. The interview commenced at 10:55 am on the 29th of July 2022 and the interview was concluded in one day.
22. He put the allegations to the Accused Tupeni Nasau, and he advised that he understood the allegations, but he refused to sign to acknowledge the allegations.

23. He then gave Tupeni Nasau the right to counsel, the right to remain silent and the consequences of not remaining silent. He also informed him of his right to bathroom and meal breaks or to rest.
24. There were three breaks in the interview – the first break was at 12:30 pm to have his lunch and rest for 20 minutes. The second break was for Tupeni Nasau to rest as he was complaining of a toothache and this break was for 2 hours. The third break was to attend scene reconstruction.
25. He confirmed that Tupeni Nasau answered all the questions put to him and he did not threaten, intimidate, or make any promises to him in order to elicit his answers.
26. After the interview he filled in the Accused identification detail form. He identified Tupeni Nasau from his photograph.
27. The fourth witness PW4 was DC Josaia Bukaniraraki, of the Crime Branch, Totogo Police Station. He confirmed that he witnessed the interview, and he did not threaten, intimidate or promise anything to Tupeni Nasau in exchange for his statement nor did he see the interviewing officer do any of these things to Tupeni Nasau.
28. He also did not see the witness threaten, intimidate, or make any promises to Tupeni Nasau in exchange for his statement.
29. The last witness was Sergeant Mataiasi, the charging officer. He confirmed that he recorded the charge, and the charge statement was recorded in English. He cautioned the Accused and accorded him his rights.
30. That was the evidence for the State.

Analysis

31. The Constitution guarantees the following rights to an arrested or detained person at section 13 and for the purposes of this voir dire challenge, the relevant sections are section 13 (1) (a) to (d), which provides as follows: -

“Rights of arrested and detained persons

13.—(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;” (Emphasis added)

32. Section 288 of the Criminal Procedure Act provides for voir dire hearings to be conducted at any stage of the proceedings after the plea has been taken.

33. The principles relating to voir dire hearings are well settled and were discussed in the case of State –v- Nakauyaca – Voir Dire Ruling [2020] FJHC 825; HAC 283 of 2019 (9 October 2020).

34. The law was discussed from paragraphs 6 to 9 of the judgment as follows: -

“The Law

[6] 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 [1979] UKHL 3; (1980) AC 402. This is a matter of over overriding discretion and one cannot specifically categorize the matters which might be taken into account."

[7] His Lordship, Justice Daniel Goundar in the case of the *State vs. Maikeli Rawaga 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* [1979] UKHL 3; [1980] AC 402). In addition, confessions could be excluded for breaches of Constitutional rights."

[8] 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).

[9] 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."


35. The Court of Appeal also discussed this in the case of Josateki Lulu v State [2016] AAU 43/11 (HAC 62/10S) 29 November 2016 where the Court stated as follows:-

"In assessing weight and value of a confession, assessors should take into consideration all circumstances in which it was made, including allegations of force, if true. Trial judge is bound to place a defence challenging the caution interview on the basis that D simply agreed to what the police wanted him to admit due to persistent physical assault already inflicted upon him and a fear of similar assault in the future by police, to evaluate probative value and weight to be attached to the caution interview. Detached direction is adequate

36. The Accused Tupeni Nasau answered a total of 92 questions, and he was given breaks at his request. He was advised of all his rights, and he chose not to exercise his right to counsel.

37. After considering the evidence led, I am satisfied beyond a reasonable doubt that the 1st Accused Tupeni Nasau, answered the questions that have been taken down by DC Aasaeli in the record of interview that has been tendered as Exhibit P1.
38. The Court is further satisfied beyond a reasonable doubt that the Tupeni Nasau gave the statement of his own free will without any coercion, physical assault or any false promises or inducements on him.
39. I have also examined the conduct of the Police officers at the arrest, during the interview and during the conduct of the charge and I am satisfied that they acted fairly and accorded to him all of his rights and protections under the Constitution and the law.
40. I therefore find that the State has discharged its burden and the statement of Tupeni Nasau shall be admissible in evidence against him at the Trial of this matter.
41. So ordered.





Mr. Justice U. Ratuveli
Acting Puisne Judge

cc: - *Office of the Director of Public Prosecutions*
- *Office of the Legal Aid Commission*
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