

IN THE COURT OF APPEAL
[On Appeal from the High Court]

CRIMINAL APPEALS NO. AAU0088.2011;
AAU 0096.2011 and AAU 0057. 2011
[High Court Case No. HAC 091.2010]

BETWEEN : 1. **ROPATE NAISUA**
2. **SEREVI VANANALAGI**
3. **SAMUELA ROKOPETA**
4. **IOWANE SALACAKAU**

Appellants

AND : **THE STATE**

Respondent

Coram : Calanchini, P
A.F.T Fernando, JA
Perera, JA

Counsel : 1st, 3rd and 4th Appellants in Person
Mr. J. Savou for the 2nd Appellant
Ms. S. Puamau for the Respondent

Date of Hearing : 5 and 10 February 2016

Date of Judgment : 26 February 2016

JUDGMENT

Calanchini P

1. I agree that the appeals should be dismissed.

Anthony F.T. Fernando J.A.

Nature of the Appeal:

2. The 1st Appellant has appealed against his conviction by the trial Judge on three counts of robbery with violence and one count of unlawful use of motor vehicle; the 2nd Appellant against his conviction on three counts of robbery with violence, one count of unlawful use of motor vehicle and one count of resisting arrest; the 3rd Appellant on two counts of robbery and the 4th Appellant against the sentence imposed on him on his conviction when he pleaded guilty to the three counts of robbery with violence and one count of unlawful use of motor vehicle with which he was charged.

CHARGES LEVELLED AGAINST THE APPELLANTS BEFORE THE HIGH COURT:

3. The Appellants were charged as follows before the High Court:

"First Count

Statement of Offence

Robbery with Violence: contrary to section 293(1) (b) of the Penal Code Act 17

Particulars of Offence

SEREVI VANANALAGI, ROPATE NAISUA and IOWANE SALACAKUA on the 6th day of January 2010 at Waimanu Road, Samabula in the Central Division robbed one STEPHEN JOHN PAUL of a Toshiba laptop valued at \$600.00, Seiko wrist watch valued at \$800.00, 2 x Men's watches valued at \$ 160.00, gold chain valued at \$ 1000.00, all to the total value of \$ 5960.00 and immediately before and after such robbery did use personal violence on the said STEPHEN JOHN PAUL.

SECOND COUNT

Statement of Offence

UNLAWFUL USE OF MOTOR VEHICLE: Contrary to section 292 of the Penal Code Act 17.

Particulars of Offence

SEREVI VANANALAGI, ROPATE NAISUA and IOWANE SALACAKUA on the 6th day of January 2010 at Waimanu Road, Samabula in the Central Division unlawfully and without colour of right but not so as to be guilty of stealing, took to their own use, motor vehicle registration number DP 748, the property of STEPHEN JOHN PAUL.

THIRD COUNT

Statement of Offence

Robbery with Violence: contrary to section 293(1) (b) of the Penal Code Act 17

Particulars of Offence

SEREVI VANANALAGI, ROPATE NAISUA, IOWANE SALACAKUA and SAMUELA RAKOPETA on the 7th day of January 2010 at Niranjans Service Station, Walu Bay in the Central Division, robbed one AMIT PRASAD of cash \$ 146.20, 7 x lighters valued at \$ 50.00, assorted recharge cards valued at \$ 160.00 and a cash till valued at \$ 65.00 all to the total value of \$ 634.40 and immediately before and after such robbery did use personal violence on the said AMIT PRASAD.

FOURTH COUNT

Statement of Offence

Robbery with Violence: contrary to section 293(1) (b) of the Penal Code Act 17.

Particulars of Offence

SEREVI VANANALAGI, ROPATE NAISUA, IOWANE SALACAKUA and SAMUELA RAKOPETA on the 7th day of January 2010 at the Total Service Station, Vivrass Plaza in the Central Division, robbed one SANJIWAN SAMI of cash \$ 399.00 and immediately before and after such robbery did use personal violence on the said AMIT PRASAD.

FIFTH COUNT

Statement of Offence

Resisting Arrest: contrary to section 247(b) of the Penal Code Act 17

Particulars of Offence

SEREVI VANANALAGI on the 7th day of January 2010 at Korovou in the Central Division, being lawfully arrested by S/CPL 2243 SAMISONI MADIGI and JOELI ROKORASEI in due execution of their duty, resisted the said arrest."

OUTCOME OF THE TRIAL BEFORE THE HIGH COURT:

4. In this case the Assessors had returned not guilty verdicts against the 1st, 2nd and 3rd Appellants at the end of the summing up by the learned Trial Judge on the 17th of August 2011. The learned Trial Judge however had delivered his judgment two days later convicting all three Appellants in accordance with section 237 of the Criminal Procedure Decree.

Section 237 of the Criminal Procedure Decree states:

"237(1) When the case for the prosecution and defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.

(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinion of the assessors.

(3).....

(4) When the judge does not agree with majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be-

a) Written down, and

b) Pronounced in open court.

(5).....
(6).....
(7).....”

5. There is no doubt as stated in the case of **Sakiusa Rokonabete v The State; Criminal Appeal No AAU 0048 of 2005** that “In Fiji, the assessors are not the sole judges of fact. The judge is the sole judge of fact in respect of guilt and the assessors are there only to offer their opinions based on their views of the facts...”

6. What is required of a Judge when he decides to act under the provisions of section 237(4) was stated in **Ram Bali v Reginam** (1960-61) & FLR 80 at p 83 as follows:

“In general, it is enough if, as in the present case, the Judge proceeds on cogent and carefully reasoned grounds based on the evidence before him and his views as to the credibility of witnesses and other considerations.”

7. In the case of **Ram Dulare, Chandare, Chandar Bhan and Permal Naidu v Regina** [1956-57] FLR, Vol 5 page 1 the Court of Appeal stated: “....It is clear that the legislature has given a trial Judge the widest powers to accept or reject the opinions of assessors sitting with him. These powers are discretionary. From the terms of the judgment, the learned trial Judge made it quite clear why he came to his decision in this case and why it was that he was unable to accept the opinion of the assessors.” I would venture to go further to state so long as the record of the proceedings bear out a strong case against the accused, which makes it clear to this Court as to why the learned Trial Judge had decided to reject the opinion of the assessors it would not matter if all the reasons have not been itemized in the judgment. To hold otherwise would mean that what is on appeal is not the correctness of the conviction of the accused but the correctness of the judgment of the Trial Judge.

LEAVE TO APPEAL:

8. Of the two grounds raised, leave had been granted by a single Judge of this Court, to the 1st 2nd and 3rd Appellants only on the second ground of appeal, which in the learned Judge's opinion was in relation to the truth of the confessions made by the three Appellants. The first ground was in relation to the admissibility of the confessions by the Trial Judge despite evidence of police brutality. The Trial Judge had in his Ruling on the Voir Dire found that the injuries contained in the medical reports were insignificant, inconsistent with the evidence of the Appellants of brutal assaults and consistent with the police evidence of having received the injuries whilst resisting arrest. The single Judge of this Court had found that finding of the Trial Judge "was available on the evidence led by the prosecution" and had not disturbed that finding of fact and ruled that that the first ground was not arguable.

9. The second ground for which leave had been sought was to the effect:

The learned Trial Judge erred in law and in fact when he overturned the verdict of the assessors without giving cogent reasons for the decision to do so in the following manner:

- a) Speculating upon the minds of the appellants in that the alleged offending were still fresh in their minds and they had no time to rethink their defences when there were no evidence to support this contention;*
- b) Relying upon the opinion and findings of Doctor Danford which was inconclusive and thereby concluding that the Appellants were not credible; and*
- c) Incorrectly stating that there was a burden on all the Appellants to make a complaint about police brutality.*

10. The single Judge of this Court in granting leave on the second ground had said "It is clear from the learned Trial Judge's summing-up and his judgment that he did not consider the truth of the confessions before acting on them to convict the applicants" and had said that the second ground was therefore arguable.

GROUNDS OF APPEAL BEFORE THE COURT OF APPEAL:

11. Counsel Mr. J. Savou in his Written Submissions filed on behalf of the 2nd and 3rd Appellants before this Court had made the following submissions:

- The issue of there being no direction as to the truth of the confessions is the primary issue which we submit has resulted in not only an unbalanced and unfair summing up but more succinctly it allowed for the judgment to lack the essential qualities of objectivity, even-handedness and balance required to ensure a fair trial.
- The learned trial Judge we submit by failing to direct the assessors on the truth of the confessions in his summing up fell into error when he directed himself on his own summing up when overturning the decisions of the assessors.
- Therefore the determination of the truth of the confessional statements remains unanswered and in such light any decision reached as a result we submit is in error and should be quashed forthwith.

12. At the hearing before us the 3rd Appellant, as set out earlier, appeared in person, and put forward additional grounds to the effect:

[1] The learned Trial Judge erred in Ruling the Confession Statement as admissible evidence in the Voir Dire Ruling when:

- (i) He failed to apply the burden and standard of proof when he ruled that the answers given in the caution interview were given voluntarily.*
- (ii) There was a wrong assessment of weight and analysis given to the medical report in regards to the injuries sustained whilst in police custody.*
- (iii) He failed to satisfy that there were no any general grounds of unfairness existed before and during the recording of the caution interview.*

In bringing forward this ground the 3rd Appellant is re-agitating the first ground on which leave had been sought and a single Judge had refused to grant leave.

[2] The learned Trial Judge erred when he failed to caution and direct the assessors in the inconsistencies in the evidence of the prosecution witnesses.

[3] The learned Trial Judge erred in law and in fact when he overturned the verdict of the assessors without giving cogent reasons on the burden of proof.

13. The 1st Respondent in his submission had relied on the ground on which leave to appeal had been granted as referred to at paragraph 8 above and stated that it is the “only issue where this appeal is brought before this honourable Court”.

BASIS FOR THE CONVICTION BY THE LEARNED HIGH COURT JUDGE:

14. As regards the 1st Appellant the learned Trial Judge had said: “As for Ropate,..I find him not to be a credible witness and I reject his evidence. I find as a matter of fact that Ropate voluntarily ‘confessed’ to counts No. 1 to 4, when he was caution interviewed by police. I therefore find him guilty as charged...” . As regards the prosecution witnesses the learned Trial Judge had said: “I hold the police witnesses as credible witnesses, because they were forthright and not evasive.

As regards the 2nd Appellant the learned Trial Judge had said: “I find Serevi’s evidence not credible, and I therefore reject the same. I therefore find as a matter of fact that Serevi Vananalagi ‘confessed’ voluntarily to the crimes.....and I find him guilty as charged”. As regards the police officers the learned Trial Judge accepts their evidence as credible.

As regards the 3rd Appellant the learned Trial Judge had said: “He was not forthright and evasive most of the time. I reject his evidence. I find as a matter of fact that Samuela voluntarily ‘confessed’ when he was caution interviewed and formally charged by police.....and I find him guilty as charged”. As regards the prosecution witnesses the learned Trial Judge had said: “I found the prosecution witnesses were credible because they were not evasive and were forthright. I accept the evidence of the prosecution witness as credible.”

15. I find that the learned Trial Judge had in convicting the 1st, 2nd and 3rd Appellants consistently made reference to their confessions, which he believed to be truthful. This he was entitled to do in view of his rejection of the evidence of the three Appellants pertaining to their assault by the police which was not supported by the medical evidence. A confession is an acknowledgement admitting that one is guilty of a crime. Once the voluntariness of a confession is established it can be relied upon to convict the maker, unless it has been shown that the maker was mistaken in making the confession or had made false statements in making the confession or merely placed a signature on a document without been conscious of its contents. None of the Appellants have taken up this position. The learned Trial Judge had in his summing up to the assessors stated: "During their closing submissions, State Counsel and the three accuseds seemed to agree that, if accepted, the only compelling evidence against all the accused were their alleged confessions in their police interview or charge statements". He had gone on to state: ".....during cross-examination of State witnesses, and after closing submissions, the accuseds did not question the statements themselves, but questioned the methods used in getting those statements" (verbatim). This is true because the emphasis had always been that the confessions had been extracted after assaulting them.
16. In view of the assessors returning a not guilty verdict against the three Appellants the issue of a misdirection or non-direction does not really arise in this case. What has to be looked into by this Court is whether there was sufficient evidence against the 1st, 2nd and 3rd Appellants and whether the learned Trial Judge was correct in his finding of guilt against the 1st, 2nd and 3rd Appellants. This Court would set aside a conviction only if it is unreasonable or cannot be supported having regard to the evidence or where there has been a wrong decision on a question of law or where there has been a miscarriage of justice.

FACTS OF THE CASE:

17. The facts of the case based on the confessions of the 1st, 2nd and 3rd Appellants, which are somewhat similar, have been summarised by the learned High Court Judge to the assessors at paragraphs 15 – 19 is as follows. On the 6th of January 2010, Stephen John Paul was at his home, at 437, Waimanu Road. At about 9 pm, he was busy with his

laptop computer in his sitting room. Suddenly the 1st, 2nd and 4th Appellants had broken into his house. They had threatened Stephen with a pinch bar, and warned him not to resist. They had tied Stephen up with electrical cords and ransacked the house. They had stolen Stephen's properties that have been itemized in count No.1. Before leaving his house, they had taken Stephen's car keys.

18. They had started Stephen's blue Subaru vehicle, registration No. DP 748, which was parked inside and driven away, without his permission. They had shared the properties stolen from Stephen. On the 7th of January 2010, the 1st, 2nd and 4th Appellants were driving around Lami in Stephen's car when the 3rd Appellant joined them. The 2nd Appellant had been driving while the 1st Appellant had sat in the front passenger seat. The 3rd and 4th Appellants were seated at the back. The Appellants had driven through Walu Bay towards Suva.
19. They had decided to rob Niranjan's Service Station. Mr. Amit Prasad, a bowser attendant, was manning the counter when the 2nd Appellant driven to the front door of the Service Station. The 1st, 3rd and 4th Appellants had jumped out of the car while the 1st and the 4th Appellants had gone into the Service Station and threatened Mr. Prasad with a pinch bar and stolen the properties itemized in count No.3. They had then left the station in the Subaru vehicle.
20. The Appellants had then decided to rob the Vivrass Total Service Station. At that time Sanjiwan Sami was working as a cashier at the Service Station. The 2nd Appellant had driven the blue Subaru to the Service Station. The 1st, 3rd and 4th Appellants had jumped out of the car and the 1st and the 4th Appellants had gone into the shop, threatened Sanjiwan Sami with a pinch bar, and stolen cash amounting to \$ 399. They had then fled in the blue Subaru and gone to Sawani to share the loot. Thereafter they had gone through Nausori towards Korovou, Tailevu. At Korovou town, the appellants had failed to stop when requested by traffic police officers.

21. The Appellants were pursued by the police to Waitoa Settlement. At Waitoa, the Appellants blue Subaru had run off the road. The 1st 3rd and the 4th Appellants had fled into the bush, while the 2nd Appellant had run along the road and boarded a bus towards Korovou. The police had boarded the bus and arrested him. The 2nd Appellant had resisted being arrested. The 1st and 3rd Appellants were later captured by the police. All the Appellants had been placed in the cell at the Korovou police station and later taken to Samabula police station where they had confessed to their crimes.

CONFESSIONS OF THE APPELLANTS:

1st Appellant

22. The 1st Appellant in his confessional statement had prior to giving details of the offences committed by him had given information about his residence, the date from which he had been staying there and with whom he is residing. He had said how he planned on the 6th of January around 7pm to burgle and commit theft in a house at Samabula with some others. He had been carrying a pinch bar with him. He had identified the pinch bar that had been shown to him by the police during the recording of his cautioned statement. He had given a detailed description of how they came to the house, how they entered it, the lay out of the house, how they robbed an old European man sitting at a table and working with a laptop and what they robbed from his house. He had identified the laptop and scanner, digital camera, the wallet, and a suit case which was used to pack the red label bottles that was stolen from the house and the electrical cord used to tie up the old man at the time of his caution interview. When shown a Motorola mobile he had said that it had been removed from him in the bushes at Korovou, Talevu. He had then gone on to describe how they took the keys from the European and drove away in it. Thereafter he had gone on to describe how the loot was shared between them and spent the night. On the 7th of January 2010 they had been moving around in the blue Subaru taken from the European when they stopped near a bowser passing the Beer factory and decided to rob two Indian boys who were inside a service station. He and another had gone inside while the third waited outside. He had said that "he ran towards the Indian boy at the counter and lifting the pinch bar at him I told him to give the money and don't shout". The other who was with him had gone behind the cashier and stolen the cigarettes from the shelves. He had grabbed the cash

box given to him by the cashier and got into the car. Having committed that robbery while travelling in the car they had decided to rob the Service Station at Vivrass plaza. He had gone inside the service station and “used a pinch bar to threaten the Indian guy who was at the counter inside” and had asked him to give all the packets of cigarettes and run outside. Thereafter they had driven away and gone to Sawani and shared the cash amongst them.

2nd Appellant:

23. The 2nd Appellant in his confessional statement had prior to giving details of the offences committed by him had given information about where he schooled and his level of education. He had said how he along with others had, on the 6th of January around 7pm burgled a house at Samabula. He had a pinch bar with him when he met the others. He had identified the pinch bar that had been shown to him by the police during the recording of his cautioned statement. He had given a detailed description of how they came to the house, how they entered it, the lay out of the house, how they robbed an old European man sitting at a table and working with a laptop and what they robbed from his house. He had given the laptop stolen from the house to one Maika. He had identified the laptop and a bag stolen from the house at the time of his caution interview. He had then gone on to describe how they took the keys from the European and drove away in it. He had driven the car. Thereafter he had gone on to describe how the loot was shared between them and spent the night. On the 7th of January 2010 they had been moving around in the blue Subaru taken from the European when they stopped at a budget station opposite Cartons Brewery Fiji and decided to commit robbery. The other three who were with him had got out of the car and two of them had gone inside the Service Station. They had come back running and he had driven away in the car. Thereafter they had gone to the Total Service Station at near the Ratu Dovi roundabout. Two of the persons in the car had entered the Service Station while the other stood beside the car. A few minutes later they had come back running with cash. Thereafter he had driven away with the rest and stopped at Sawani road to share the money. Thereafter while driving to rob some more shops they had been stopped by the police. There had been a change of drivers when the police started to chase the vehicle. At a certain stage they had got out of the vehicle and run away. The 2nd appellant says

that he had boarded a bus coming to Suva. The police had then stopped the bus, boarded it and arrested him inside the bus and taken him to Korovou police station.

3rd Appellant:

24. The 3rd Appellant in his confessional statement had prior to giving details of the offences committed by him had given information about where he schooled, his level of education and his current residence. He had said that on the 7th of January 2010 having woken up around 8.45 in the morning and having had his breakfast he had come on to the road to wait for his transport to go for work. By the time he came, the pickup transport had gone. While waiting on the road a blue car had come along and there were three persons in it. He had got into the car. The car had driven up to the Service Station at Walu Bay. Two of the persons in the vehicle had gone up to the station and come back with money and given it to him. Then they had driven off and come to the Service Station at Vivrass. Two of the persons in the vehicle had gone into the Service Station and come back with money and given it to him. He had during his cautioned statements pointed out to the Service Stations at Walu Bay and Vivrass that they robbed. At a certain point they had broken open the money tills and shared the money. While driving along at Korovou they had been signalled by the police to stop but they had continued driving. They were then given chase by the police. In view of the speed the car was been driven the car had gone off the road just past Korovou and all of them had got off the car and taken to their heels. They had all run into the bush in various directions and the 3rd Appellant had later been apprehended by the police with the help of the villagers. He had hereafter been taken to the Korovou police station.

EVIDENCE OF CORROBORATION OF THE CONFESSIONS:

25. It is to be noted that certain parts of the confessional statements of each of the three Appellants have been corroborated by the evidence of PW Amit Prasad; PW Atish Kumar; PW S. Sami; PW SC 906, J. Rokorasei; PW Senior Corporal 2243, S. Madigi;; PW, PC 2749, Taniela Yabakidrau and PW Corporal 2254 Alipate Rayasi.

26. PW Amit Prasad, a bowser attendant at the Walu bay Total service Station testifying before the Court had stated in his evidence before the Court that on the 07th of January 2010 while he was at the Service Station counter, counting the cash, a “guy came in suddenly”. Thereafter “A second guy came in with a pinch bar and asked me to surrender”. There had also been third guy. The two persons who came in had run away carrying their money and cigarettes and other items. “They fled in a car. It was a blue car. I did not see the registration number.”
27. PW Atish Kumar, a Sales Assistant at the Total Service Station had also stated that at around 10 am on the 7th of January 2010 while he was working at the Service Station with a colleague a blue vehicle bearing registration number DP 748 had come and 3 guys from the car had gone into the shop while he was busy speaking to the driver. He says he had not noticed what was happening inside. In two minutes the “3 guys came back to the car and the last person was carrying a pinch bar. I couldn’t see what the other two were carrying”.
28. PW S. Sami, a cashier, at the Total Service Station at Laucala Beach Estate in his testimony before the High Court had stated that on the 7th of January 2010 while he was working “one boy came inside with a pinch bar, he closed the door and jumped to me and took the money till and went to a blue coloured car parked outside”.
29. PW SC 906 J. Rokorasei, of the Korovou Police Station in his testimony before the High Court had stated that on the 7th of January 2010 at 11 am he was on traffic duty along with others when he saw car registration DP 748 travelling at a high speed. The driver had not stopped although he had been signalled to stop. They had then sought the assistance of one Vinod Patel who was driving along the road and given chase to car registration DP 748. He had recognised the 1st and 2nd Appellants inside the car. Rokorasei had said: “At the time Ropate was driving and Serevi in the front passenger seat. I have known them for the past 7 years. When we reached Korovou Town, we saw DP 748, parked at a Total service Station. There was a change of driver. Serevi moved to the driver’s seat, while Ropate moved to the front passenger seat. We went and

parked beside DP 748. I got off and approached the driver of DP 748. I told him not to move the vehicle. I spoke to Serevi. Serevi moved the vehicle and headed towards Rakiraki. At Waito car registration DP 748 had gone off the road and its occupants had jumped out of the car and fled. Rokorasei had said: "We followed the one walking along the main road. He got on a Sunbeam bus... We stopped the bus... I recognised the 2nd Respondent. According to Rokorasei "We tried to get him from the bus, but he refused. Corporal Samisoni was with me. He resisted being arrested by holding the seat and trying to prevent us taking him out of the bus.... He was trying to escape from us". He had been pulled out of the bus by Rokorasei with the assistance of PW Samisoni Madigi. He had thereafter been taken to the Korovou police station. They had then returned to the place where car registration DP 748 had gone off the road and was searching in the area for the other suspects with the assistance of other police officers when they apprehended two of the suspects along with the assistance of the villagers. PW J. Rokorasei had recognised one of them as the 3rd Respondent. He had last seen him when he abandoned car DP 748 and ran into the bush. Evidence of PW J. Rokorasei had been corroborated by PW Senior Corporal 224, S. Madigi, of the Korovou Police Station. The 1st, 2nd and 3rd Appellants had not challenged the evidence of Rokorasei or Madigi about the place and manner of their respective arrests in cross-examination.

30. PWPC 2749, Taniela Yabakidrau, of the Korovou Police Station in his testimony before the High Court had stated that on the 7th of January 2010 he arrested the 3rd Appellant along with another (*4th Appellant who had pleaded guilty by the time Yabakidrau testified*) after a search of the area in which car registration DP 748 was abandoned with the help of civilians. Yabakidrau's evidence has been corroborated by PW Corporal 2254, Alipate Rayasi. The 3rd Appellant had not challenged the evidence of Yabakidrau or Rayasi about the place and manner of his arrest.
31. In **Wood Green Crown Court, ex parte Taylor [1995] Crim LR 879**, the Divisional Court approved the principle that a party who fails to cross-examine a witness upon a particular matter in respect of which it is proposed to contradict him or impeach his credit by calling other witnesses, tacitly accepts the truth of the witness's evidence in

chief on that matter, and will not thereafter be entitled to invite the jury to disbelieve him in that regard.

SWORN EVIDENCE OF THE APPELLANTS AND THEIR WITNESSES:

1st Appellant

32. The 1st Appellant's evidence when called for his defence had been one of denial and an alibi. He had challenged his confession on the basis that "I didn't give that statement to the police voluntarily. I was punched in the mouth and beaten on both soles of my feet and sprayed on the eyes at Samabula Police Station. His alibi is to the effect "At the time the offence was committed on 6.1.10, I was at home all night, until the 7.1.10. At 2.30 pm on 7.1.10. I then left home." Even in his sworn evidence before the Court the 1st Appellant had not challenged the evidence of PW J. Rokorasei who had testified before the Court to having recognised him driving car registration DP 748 and having known him for 7 years. His submission that the dock identification was not proper is of no significance as this was a case of recognition by a person who had known him for 7 years.

Under cross-examination he had said: "I was punched on the mouth one time. I was sprayed on the eyes. I was hit in the soles 4 times and then it was numb. I complained to the doctor about the above. I didn't tell the doctor I was sprayed".

On the issue of alibi he had said: "On 6.1.10 I was at home. I did not go to Korovou Town. I didn't go to Waito Settlement. I admit I was arrested at Waito Settlement on the 8.1.10".

Speaking about his confession, he had said "I was sprayed in the eyes, anus and scrotum. I also told the court I was punched in the chest, ribs and head. I also told court that I fell down and the police jumped on me....I never complained to the Magistrate on 1st call in the Magistrate's Court of any police assault. On the 1st call in the High Court, I never complained of any police assault. I was visited by my mother at Samabula Police Station and I didn't complain to her about any police assault,

because the police were present". In re-examination he had said: "I confirm what the doctor said in my medical report", thus not challenging the evidence of the doctor.

33. DW Siteri Bula, testifying in support of the alibi of the 1st Respondent and who had a defacto relationship with him had said that the 1st Respondent had been with her the whole of the 6th of January 2010 and until 2pm on the 7th of January 2010. She had said that "He was at home, when I left the house for hospital. When I returned from hospital, he was still there", without any indication of when she left for hospital and when she returned. She had admitted under cross-examination that she had told the police of having being with the police only in the afternoon of the 6th of January 2010. This in my view being a material omission, her evidence in support of the alibi of the 1st Respondent loses its significance.

The learned Trial Judge had in his judgment stated in respect of DW Siteri Bula "I found his wife not to be a convincing witness. When cross-examined by the prosecution, she often paused, and then had difficulty in giving her answers. In my view, she was not a credible witness". This is a finding of fact by the Trial Judge who had the opportunity to see her demeanour which this Court was not privy to.

34. The false alibi by the 1st Appellant in my view is indicative of consciousness of guilt and therefore amount to circumstantial evidence of guilt. On a consideration of the entirety of the evidence in this case and the learned trial judge's comments on Siteri Bula's evidence, I am satisfied that the evidence pertaining into the false alibi was deliberate, related to a material issue and there was no innocent explanation for it. In the case of R v Landon [1995] Crim. L. R. 338 and R v Tucker [1994] Crim. L.R. 683, it was held that a lie told by an accused may reflect on his credibility as a witness. In R. v Goodway [1994] 98 Cr. App. R. 11, it was held the accused's lies to the police as to his whereabouts at the time of the crime were used to bolster identification evidence.

2nd Appellant

35. 2nd Appellant's evidence when called for his defence had been one of denial. He had said that: "I don't know anything about the allegations against me". Even in his sworn evidence before the Court the 2nd Appellant had not challenged the evidence of PW J. Rokorasei who had testified before the Court to having recognised him driving car registration DP 748, of having known him for 7 years, of having spoken to him at the Total service station at Korovou town and asked him not to move the car, and of arresting him from a Sunbeam bus after he ran away from car registration DP 748 and boarded the bus.

Speaking about his confession, he had said: "The police assaulted me to admit the offence.... They punched me more than 5 times on each side of my ribs, punched me on the head, in the stomach. They were hard punches with closed fists. They poked the baton on my ribs. They sprayed my anus and scrotum with capsicum spray. They held me on the table and hit the sole of my feet with a police baton and timber. He had said that he had been assaulted by 6 police officers.

3rd Appellant

36. 3rd Appellant's evidence when called for his defence had been one of denial. He had said that: "I don't know anything about the allegations". His position had been: "On 7.1.10 I was in Nausori. I was talking to Tai. He told me one Chinese company was in Waito village and it was hiring workers. I met one gay person. I was arrested at Korovou....". Even in his sworn evidence before the Court the 3rd Appellant had not challenged the evidence of PW J. Rokorasei who had testified before the Court to having recognised him when he abandoned car DP 748 and ran into the bush. He had also not challenged PW Taniela Yabakidrau's and PW Alipate Rayasi's evidence about his arrest on the 7th of January 2010 along with another after a search of the area in which car registration DP 748 was abandoned with the help of civilians.

Speaking about his confession, he had said: "He sprayed my eyes several times. He then punched me on my head and ear. He beat the soles of my feet, until it bled. He

then kicked my chest". Under cross-examination he had said that he had not complained to the doctor about the assaults because the police were there, nor had he complained to the Magistrate's Court or the High Court about the police assault.

37. DW Elia Boleitamana testifying on behalf of the 3rd Respondent in his defence had stated that he had seen the 3rd Respondent with another guy of the 3rd Respondent's age in the morning of the 7th of January 2010. He had not specified where he saw him or the time he saw him.

MEDICAL EVIDENCE:

38. The medical evidence led before the Court contradicts the evidence of each of the Appellants of having been brutally beaten before their confessions were made. Thus the allegation of each of the Appellants that their confessions were not made voluntarily stands on its own. Dr. James Danford who examined the 1st, 2nd and 3rd Appellants on the 11th of January 2010 and had issued Medical Reports in respect of them testifying before the Court had said that the 1st Appellant "looked and sounded calm. All three Appellants had walked normally and were not in apparent pain. The 1st Appellant had an infected laceration with bruise (1cm long) on the right inner lower lip, which would not be visible if patient doesn't open his mouth. This could have been caused possibly by accident or fall on a hard object. As regards the 2nd Appellant the doctor had said there were no injuries or visible marks seen on him. The 3rd Appellant has had a 1cm skin deep cut on his left sole and a bruise over his sternum. Both injuries according to the doctor could have been caused when someone had been running in the bush. Explaining his remarks on all three Reports about tenderness, the doctor had said: "tenderness is not an injury.....It is what the patient feels and given by the patient as opposed to what we see". He had gone on to say: "If a patient is beaten on the head with a lot of force, there would be swelling, breaking of skin, bleeding in the soft tissue..... If he was hit on the sole, you are likely to see injuries and patient would find difficulty in walking. If the patient was hit on the ribs with batons, or punched several times with a lot of force there would be bleeding in the soft tissue and fractures to the ribs.

APPELLANTS' LIES ABOUT BEING BRUTALLY ASSAULTED BY THE POLICE:

39. The medical evidence in this case referred to at paragraph 37 above, proves beyond reasonable doubt that the 1st, 2nd and 3rd Appellants had lied before the High Court as to the manner they had been assaulted. The 1st Appellant had said that he never complained to the Magistrate's Court or to the High Court, or to his mother when she visited him at Samabula Police Station of any police assault. As regards the 2nd Appellant the learned High Court Judge in his judgment had said: "Serevi would have been dead if his version of events of police assaults were accepted". The 3rd Appellant had said that he had not complained to the doctor about the assaults, nor had he complained to the Magistrate's Court or the High Court about the police assault. I wish to emphasise, that there certainly is no burden on an accused to show that complaints were made to the police and the courts; in order to show that the confessions were not made voluntarily. The burden to prove that the confessions were made voluntarily always rest on the prosecution and never shift to the defence. But when it becomes obvious through established evidence that an accused person had deliberately lied in order to escape liability on the basis of his own confession, and that there was no innocent motive for the lie, then it may indicate a consciousness of guilt and may be relied upon by the prosecution as evidence supportive of guilt. Lies about being brutally assaulted prior to recording of the confessions in my view falls within the four situations specified in Burge [1996] 1 Cr. App R 163; where a 'Lucas Direction' may be required, namely where the prosecution seek to show that something said, either in or out of court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved.

RESPONSE TO THE GROUNDS OF APPEAL:

40. The main issue that needs the determination of this Court in this appeal in view of the grounds of appeal raised is whether there is a sufficient basis to consider the truth of the confessions that have been made by the 1st, 2nd and 3rd Appellants. In my view the corroboration of the confessions of each of the Appellants by the unchallenged evidence of PW Amit Prasad; PW Atish Kumar; PW S. Sami; PW SC 906, J.

Rokorasei; PW Senior Corporal 2243, S. Madigi; PW, PC 2749, Taniela Yabakidrau and PW Corporal 2254 Alipate Rayasi as referred to at paragraphs 25 to 29 above and contradiction by the evidence of Dr. James Danford of the evidence of the 1st, 2nd and 3rd Appellants pertaining to their brutal assaults, is more than sufficient for any Court to come to a determination as to the truth of the confessions that have been made by the 1st, 2nd and 3rd Appellants. I would therefore dismiss this ground of appeal.

41. The other ground raised, namely the admissibility of the confessions which is a re-agitation of the ground for which leave to appeal has been refused in my view has no merit. The challenge was that the learned Trial Judge had failed to apply the burden and standard of proof when he ruled that the answers given in the caution interview were given voluntarily. The learned Trial Judge had in his Summing Up, to the Assessors had stated: "However, before you can accept a confession, you must be satisfied beyond reasonable doubt that it was given voluntarily by the maker. The prosecution must satisfy you beyond reasonable doubt that the accused gave his statements voluntarily, that is gave his statements out of his own free will. Evidence that the accused had been assaulted, threatened or unfairly induced into giving those statements, will negate free will, and as judges of fact, you are entitled to disregard them." I would therefore dismiss this ground of appeal.
42. Although the 3rd Respondent had complained about the failure to direct the assessors in the inconsistencies in the evidence of the prosecution evidence none were drawn to our attention at the hearing save the fact that some of the police officers who interviewed the Appellants and recorded their cautioned statements had stated that there were no visible injuries on them. It was the submission of the Appellants that this evidence was inconsistent with the medical evidence. I do not see any merit in the ground that there were inconsistencies in the evidence of the police officers and that of the medical evidence in view of what I have stated at paragraph 35 above. In fact the police evidence that the 1st, 2nd, and 3rd Respondents were not subject to any assault stands corroborated by the medical evidence, thus confirming that the confessions had been made voluntarily. I find from the record that the opinion and findings of Doctor Danford was conclusive and any reasonable Court would have placed reliance on his

testimony despite the challenge to his evidence that his opinion and findings were not conclusive and a wrong assessment of weight and analysis had been given to his medical report in regards to the injuries sustained by the Appellants while in police custody. I would therefore dismiss this ground of appeal.

43. For the reasons enumerated above I would have no hesitation in dismissing the appeals of the 1st, 2nd and 3rd Appellants against their convictions.

APPEAL BY THE 4TH APPELLANT AGAINST HIS SENTENCE:

44. The 4th Appellant has come before this Court for a determination of his application for leave to extend time within which to appeal pursuant to section 35(3) of the Court of Appeal Act, Cap 12, after having had his application refused by a single Judge of this Court. Section 35(3) of the Court of Appeal act states:

“If a judge refuses an application on the part of the appellant to exercise a power under subsection (1) in the appellant’s favour, the appellant may have the application determined by the Court as duly constituted for the hearing and determining of appeals under this Act.”

45. In Nioni Tagici v The State [2014] FJSC 8, CAV004.2011 (15 April 2014) the Supreme Court following K Kumar v The State ; Criminal Appeal No. CAV0001/2009 FJSC set down the following principles in respect of an application for extension of time within which to appeal:

- i. *The reason for the failure to file within time.*
- ii. *The length of the delay.*
- iii. *Whether there is a ground of merit justifying the appellate courts consideration.*
- iv. *Where there has been a substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
- v. *If time is enlarged, will the respondent be unfairly prejudiced?*

46. In **Julian Miller v State**; Criminal Appeal No. AAU0076 of 2007 it was said:

"The courts have said time and again that the rules and time limits must be obeyed, otherwise the lists of the courts would be in a state of chaos. The law expects litigants and would be petitioners to exercise their rights promptly and certainly, as far as notices of appeal are concerned, within the time prescribed by the relevant legislation."

47. On the 10th of September 2010 the 4th Appellant having waived his right to Counsel had pleaded guilty to counts 1 to 4, as referred to at paragraph 2 above, that was levelled against him. On the 21st of October 2010 Appellant was represented by Counsel and the prosecutor had presented the summary of facts to Court. As stated in the Ruling of the learned Trial Judge they are as follows:

"Briefly, she said, you and two others, on 6th January, 2010, at about 8.45 pm, forcefully entered Stephen John Paul's house at Waimanu Road, Samabula, and violently robbed him of \$ 5,960 worth of properties. In fact, you and your friends, forcefully tied Stephen John Paul to a chair, threatened him with a pinch bar, ransacked his house, and stole his properties as itemized in count No.1. Then you and your friends unlawfully used his vehicle, registration number DP 748, as your getaway vehicle (count No. 2). On the next day, 7th January, 2010, you and three others, violently robbed Amit Prasad at the Niranjans Service Station, Walu Bay and stole \$ 634.40 worth of properties. Mr. Prasad was working at the Service Station, at the time. You and the others came in Stephen John Paul's stolen car, rushed into the shop, threatened Mr. Prasad, and stole the items mentioned in count 3. Then you and the others drove to Total Service Station, Vivrass Plaza, and violently robbed Sanjiwan Sami of \$ 399 cash (count 4)". The Appellant had through his Counsel agreed to the said facts as narrated by the prosecutor.

48. On the 11th of November 2010 the 4th Appellant had been sentenced to 7 years imprisonment on count 1; 3 months' imprisonment on count 2; 7 years imprisonment on count 3; and 7 years imprisonment on count 4. The learned Sentencing Judge had ordered that the sentences be made concurrent to each other. He had also ordered that the Appellant serve a non-parole period of 6 years. The Appellant had been represented at the time of sentencing by Counsel.

49. The Appellant's notice for leave to appeal against sentence was received by the Court of Appeal Registry on the 31st of May 2011. Section 26(1) of the Court of Appeal Act, Cap 12, required him to file his notice for leave within 30 days from 11 November 2010. Thus the notice for leave to appeal is out of time by 6 ½ months. The reason adduced by him before the single Judge of this Court who determined the matter was to the effect that he was unaware of the appeal period because he was a first time and juvenile offender and had filed his notice without legal assistance.
50. In my view it is difficult to accept that the 4th Appellant who had played a lead role in three violent robberies and having decided to plead to the offences having waived his right to legal representation can now claim to be a Juvenile and that he was unaware of the appeal period. In fact he had been represented at the time the prosecutor presented the summary of facts to the court and at the time of sentencing.
51. A single Judge of this Court in refusing his application to grant an extension of time had said:
- "...For the purpose of an extension of time, it is not sufficient that the grounds of appeal are arguable. The grounds must be as such as to give rise to grave injustice if the appeal is not heard. Even if the grounds of appeal are upheld, it is not necessary the sentence will be reduced... ..A total sentence of 7 years imprisonment for three separate incidents of robbery with violence fairly reflects the criminality involved. Since these were violent offences, the need to protect the community clearly outweighed the personal need for rehabilitation for the applicant who is a young and a first time offender."*
52. In my view the sentence of 7 years imposed on the 4th Appellant was in fact lenient. In **Livai Nawalu v The State** CAV0012/2012 the Supreme Court had laid down the tariff for robbery with violence at 10-16 years. Most of the reasoning in that case for approving of the sentence of 13 years is apposite to this case also, namely the spate of offending, the gravity of the anti-social behaviour with its menace to persons and property, the invasion of home and privacy and the need for very strong disapproval of such behaviour.

53. These approaches to tariff have been established in several cases. The State v Rokonabete HAC118/07; The State v Rasoqio[2010] FJHC, HAC155,2007; Basa v The State [2006] FJCA 23, AAU0024/05 and Samuel Donald Singh v State Crim AAU15 and 16 of 2011.
54. The Appellant seeks to appeal on the grounds that his sentence was harsh and excessive in that it failed to reflect the following factors:
- i. He entered an early guilty plea.*
 - ii. He was a juvenile at the time he committed the offence.*
 - iii. He was a first offender.*
 - iv. He had been in custody on remand for 10 months.*
55. The learned Sentencing Judge in setting out the mitigating factors in relation to the case against the 4th Appellant, in his Ruling on Sentence had certainly made reference to the factors referred to at (i), (iii), and (iv), amongst others. Although the learned Sentencing Judge had made reference to the period the Appellant had been on remand as a mitigating factor there is no deduction specifically made for it when he made a calculation of the sentence to be meted out to the Appellant by taking the mitigating and aggravating factors into consideration. In my view when considering the very lenient sentence given to the 4th Appellant as set out at paragraph 47 above; and also the sentences of 13 years imprisonment imposed on the 1st and 2nd Appellants with a non parole period of 11 years and a sentence of 10 years imprisonment on the 3rd Appellant with a non parole period of 8 years, the co- accused of the 4th Appellant, no substantial miscarriage of justice had occurred in sentencing the 4th Appellant..
56. If an extension of time is to be granted by this Court on the basis that grounds urged by the Appellant give rise to grave injustice if the appeal is not heard, the only ground that needs consideration by this Court is the 4th Appellant's present complaint to this Court that he was a juvenile at the time he committed the offences.

57. The 4th Appellant was 17 years and 6 months old at the time of offending, his date of birth being 13th July 1992. As earlier stated he had on the 10th of September 2010, having waived his right to Counsel, pleaded guilty to counts 1 to 4, as referred to at paragraph 2 above, that was levelled against him. On the 21st of October 2010 Appellant was represented by Counsel and the prosecutor had presented the summary of facts to Court which was admitted by the 4th Appellant. On the 11th of November 2010 the 4th Appellant had been sentenced to a total period of 7 years imprisonment with a non-parole period of 6 years in respect of the four counts. He had been represented by Counsel even at the time of sentencing.
58. It is now the submission of the 4th Appellant before us that he should have been sentenced as a juvenile in view of the provisions of section 57 of the **Corrections Service Act 2006**, which amended section 2 of the **Juveniles Act Cap 56**, by deleting the definition of 'juvenile' and replacing it with the following definition:

“‘Juvenile’ means a person who has not attained the age of 18 years, and includes a child and a young person”

Prior to this amendment a “juvenile” according to the **Juveniles Act Cap 56**, meant a person who had not attained the age of 17 years, and included a child and a young person.

59. The Corrections Service Act 2006 had been passed by the House of Representatives on the 23rd of February 2006 and passed by Senate on the 17th of March 2006. The Corrections Service Act 2006 pursuant to section 1(2) of the said Act was to come into force on a date appointed by the Minister, by notice in the Gazette. The Minister acting in accordance with section 1(2) of the Corrections Service Act 2006 had on the 18th of March 2011 back dated the commencement of the Act to 27th June 2008.
60. **Section 1(2) of the Corrections Service Act 2006** provided: “This Act comes into force on a date appointed by the Minister, by notice in the Gazette.”

D. C. Pearce and R.S. Geddes in *Statutory Interpretation in Australia*, 6th Edition, citing Maxwell v Murphy [1957] 96 CLR 261; Fisher v Hebburn Ltd [1960] 105 CLR 188; Geraldton Building Co Pty Ltd v May [1977] 136 CLR; Mathieson v Burton [1971] 124 CLR; and Perpetual Trustees (Australia) Ltd v Valuer General [1999] 102 LGERA states at [10.1]: “The courts have frequently declared that, in the absence of some clear statement to the contrary, an Act will be assumed not to have retrospective operation”. At [10.11] it is said: “In the absence of power in the enabling Act, even regulations favourable to the interests of the members of the public cannot be made with retrospective effect.” There was nothing in the Act which gave the Minister the power to bring it into retrospective operation. It is not the function of this Court in these proceedings to question the decision of the Minister in regard to the order made under Section 1 (2) of the Corrections Service Act 2006.

61. The **Interpretation Act, Cap 7 (Ed 1978)** provides that: “an Act assented to by the Governor-General shall come into operation on the day on which it is published in the Gazette.” However “if it is enacted in the Act that the Act or any provision shall come or be deemed to have come into operation on some other day, the Act or as the case may be, such provision shall come or be deemed to have come into operation accordingly.”

62. The **Interpretation Act, Cap 7 at section 18(3)** also provides:

“Where a written law repeals.....in part any other written law, then, unless a contrary intention appears, the repeal shall not: (a) revive anything not in force or existing at the time at which the repeal takes effect; or (b) affect the previous operation of any written law so repealed or anything duly done....under any written law so repealed; or (c) affect any right, privilege,...accrued...under any written law so repealed; or (e) affect any.....legal proceeding....in respect of any such....punishment...and any such legal proceeding.....maybe.....enforced.....,as if the repealing written law had not been made.”

63. I am of the view that the new definition of ‘juvenile’ as one who has not attained the age of 18 years will apply in respect of cases which were pending before the courts of

Fiji at the time the notice for the commencement of the Corrections Service Act 2006 was issued, namely on the 18th of March 2011, in view of the provisions of section 18(3)(a),(b), (c) and (d) of the Interpretation Act, Cap 7. There was no contrary intention expressed in the Corrections Services Act that punishments or sentences already imposed, will also be affected. The learned High Court Judge treated the 4th Appellant as per the provisions of section 2 of the **Juveniles Act Cap 56** that was in force and existing at the time of sentencing. The amendment brought about by the **Corrections Service Act 2006** cannot in my view affect the determinations already made by Courts in sentencing juvenile offenders prior to 18th of March 2011.

64. I am of the view that for this Court to hold that the amendment to the Juveniles Act by the Corrections Service Act 2006, applies to the 4th Appellant whose case had been finally determined by the Courts of Fiji, without any provision in the enabling act that it also applies to even cases finally determined, would disturb another fundamental principle of Justice, namely finality of judicial decisions.
65. I am of the view that it would not have been the intention of the Legislature to treat all offenders who were not treated as juveniles for purposes of sentencing prior to the date of the notification for the commencement of the Corrections Service Act 2006, as juveniles. The head note for the Corrections Services Act states that this was an act to repeal the Prisons Act and to make comprehensive provision for the administration of prisons with appropriate emphasis on providing corrective services and applying all human rights obligations and standards, and for related matters. In determining the issue of retrospectivity according to D. C. Pearce and R.S. Geddes in *Statutory Interpretation in Australia*, 6th Edition “regard needs to be paid to the problem with which the legislation was intended to deal. The presumption is a rule of construction and the context in which the relevant provision appears will ultimately determine its effect.”
66. The 4th Appellant cannot even place reliance on article 14(2)(n) of the Constitution which states:

“Every person charged with an offence has the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing...”

(emphasis added by me)

Article 14(2)(n) makes reference to the word ‘changed’. In my view the law undoubtedly was changed on the date of the notification for the commencement of the Corrections Service Act 2006, although it was to come into operation retrospectively. The offence in this case was committed between the 6th and 7th of January 2010, the sentencing was done on the 11th of November 2010 but the law was changed on the 18th of March 2011 and that was after the time of sentencing.

67. In **Lauri v Renad** [1892] 3 Ch.421 and **Re Nautilus Steam Shipping Co., Ex. P. Gibbs & Co** [1936] 1 Ch 17, 26 it had been held that a statute is not to be construed to have a greater retrospective operation than its language renders necessary. **Maxwell on Interpretation of Statutes, 11th Edition** citing decided cases states: “In general, when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights.....Even in construing a section which is to a certain extent retrospective, the maxim ought to be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain. For it is to be observed that the retrospective effect of a statute may be partial in its operation.”

68. In the case of **Barber v Pigden** [1937] 1 K. B. 664, 673 the Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30) was held to be retrospective and was construed as putting an end to the liability of a husband for his wife’s torts when ever committed unless legal proceedings had been started before the passing of the Act. In **Bath v Berwick** [1892] 1 Q.B. 731 it had been said that section 35 of the Divided Parishes and Poor Law Amendment Act, 1876 (c.61), which contained a code of transmitted status in relation to poor law settlement, must be considered as retrospective for all purposes, except only as regards adjudications made before the commencement of the Act, so that, to determine the settlement of children born after 1876, it may be

that their father's settlement is governed by the section, even though his settlement, for the purposes of his own removal, is not affected by it. In **Moon v Durden** [1848] 2 Ex 22 it was held that the Gaming Act, 1845 (c 109), which made all wagers void and enacted that no action should be brought or maintained for a wager, applied only to wagers made after the Act was passed. In **Knight v Lee** [1893] 1 Q.B. 41, it was held, The Gaming Act, 1892 (c.9), which prevented a betting agent from recovering from his employer sums paid for debts, was held not to prevent such recovery where the sums had been paid before the passing of the Act. In **Beadling v Goll** [1922] 39 T.L.R.128, The Gaming Act, 1922 (c.19), which repealed section 2 of the Gaming Act, 1835 (c.41), did not render incompetent an action under the Act of 1835 begun before the Act of 1922 was passed, nor even an action begun after the Act of 1922 was passed but in respect of causes arisen before that date as per the decision in **Henshall v Porter** [1932] 2 K. B. 193. In **Burns v Nowell** [1880] 5 Q.B.D. 444 it was held that The Pacific Islanders Protection Act, 1872 9c.19), which made it unlawful for a vessel to carry native labourers of the Pacific Islands without a licence, did not apply to a voyage begun before the Act was passed.

69. A case somewhat similar to the one before us is the case of **Darryl Wayne Smith And The State**, Case No 321/1986; decided by the Appellate Division of the Supreme Court of South Africa. In that case the Appellant had been convicted by the Johannesburg Magistrate's Court for dealing in 30 ½ Obex tablets in contravention of section 2(c) of Act 41 of 1971 and sentenced to the then minimum sentence of 5 years imprisonment, on the 6th of September 1985. He had appealed against his conviction and sentence to the Witwatersrand Local Division. The appeal was heard and dismissed on the 26th of May 1986. He had been granted leave to appeal to the Appellate Division of the Supreme Court of South Africa against the dismissal of the appeal. It had been the argument of the Appellant before the Supreme Court that by virtue of the amendment of section 2 of Act 41 of 1971 effected by section 1 of Act 101 of 1986, which did away the minimum sentence of 5 years 'imprisonment for that offence, a discretion was conferred upon the Supreme Court to impose a lesser sentence and that the circumstances of the case justified that being done. The amendment came into force on the 24th of September 1986, more than a year after the Appellant's conviction and sentence. It had been the Appellant's argument that the amendment had retrospective

effect and consequently applied to his case. The Supreme Court held that it cannot on appeal impose a sentence which would at the time of the Appellant's conviction not have been a competent sentence for the magistrate to impose and dismissed the appeal.

70. The single Judge of this Court who heard the 4th Appellant's application for an extension of time had said: "At the time the applicant committed the offences, he was not a juvenile under the law. When the applicant was sentenced on 11 November 2010, he could not have been considered a juvenile because the new definition had not come into effect. However, if the applicant had been sentenced after 11 March 2011, the new definition would have applied to him." I would go along with the view expressed by the learned single Judge of this Court.
71. For the reasons set out above I would refuse the application of the 4th Appellant for an extension of time to appeal.

V. Perera JA

72. I have read the judgment of A. Fernando JA in draft and I concur with it and the proposed orders.


The Orders of the Court are:

1. 1st, 2nd and 3rd Appellant's appeal against conviction dismissed.
2. 4th Appellant's application for an extension of time to appeal dismissed.




.....
Hon. Mr. Justice W. Calanchini
PRESIDENT, FIJI COURT OF APPEAL


.....
Hon. Mr. Justice A.F. T. Fernando
JUSTICE OF APPEAL


.....
Hon. Mr. Justice V. Perera
JUSTICE OF APPEAL