

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO.AAU 0090 of 2013
[High Court Criminal Case No. HAC 0069 of 2008]

BETWEEN : ADRIU TUILAGI

Appellant

AND : THE STATE

Respondent

Coram : Calanchini, P
Prematilaka, JA
Rajasinghe, JA

Counsel : Appellant in person
Mr. S. Vodokisolomone for the Respondent

Date of Hearing : 23 August 2017

Date of Judgment : 14th September 2017

JUDGMENT

Calanchini, P

[1] I agree with the judgment of Prematilaka JA.

Prematilaka, JA

[2] This appeal arises from the convictions of the Appellant on four counts under the Penal Code. The first count is under section 293(1) (b) of the Penal Code and alleged to have been committed on 03 March 2008 at Navua. The Amended Information dated 30 November 2010 describes the particulars of the first count as the Appellant having robbed Jo Boddam Whettam Llew of assorted jewellery valued at \$5000.00,

two ladies wristwatches valued at \$500.00, one Oroton leather handbag valued at \$300.00, one Angle grinder valued at \$50.00 and a Eveready torch valued at \$30.00, all to the total value of \$5880.00 and immediately before such robbery used personal violence to the said Jo Boddam Whettam Llew.

- [3] The second count is under section 292 of the Penal Code and alleged to have been committed on 03 March 2008 at Navua. The Amended Information describes the particulars of the second count as the Appellant having unlawfully and without color of right but not so as to be guilty of stealing taken to his own use motor vehicle registration number D1 789, the property of Jo Boddam Whettam Llew.
- [4] The third count is under section 293(1) (a) of the Penal Code and alleged to have been committed on 05 March 2008 at Nasinu. The Amended Information describes the particulars of the third count as the Appellant having robbed Prem Adip Singh s/o Singh of FJD \$1,200.00 cash, one Philips radio and one Philips DVD Player valued at \$350.00, two Nokia mobile phones valued at \$200.00, one Sagem mobile phone valued at \$100.00 and 14 bottles of assorted duty free alcohol valued at \$1260.00, all to the total value of FD\$3,110.00, the property of the said Prem Adip Singh.
- [5] The fourth count is under section 293(1) (a) of the Penal Code and alleged to have been committed on 05 March 2008 at Nasinu. The Amended Information describes the particulars of the fourth count as the Appellant having robbed Sitla Wati d/o Lauton of one pair of gold bangles valued at \$400.00, one pair of thin gold bangles valued at \$1000.00, one Seiko wrist watch valued at \$250.00, one Mangal Sutra valued at \$1500.00, one gold chain valued at \$300.00, one diamond engagement ring valued at \$1500.00 and one pair of gold earrings valued at \$200.00, all to the value of FD\$5150.00, the property of the said Sitla Wati.
- [6] After trial, on 04 April 2014 two assessors expressed their opinion that the Appellant was not guilty of all counts while the third assessor's opinion was that the Appellant was not guilty of the first and fourth counts but guilty of the second and the third. The Learned High Court Judge in his judgment dated 04 April 2014 disagreed with the opinions of 'not guilty' and found the Appellant guilty and convicted him of all

counts. The trial Judge had given reasons for the convictions entered against the Appellant on 24 April 2014 and sentenced him on the same day to terms of 14 years imprisonment on the 1st, 3rd and 4th counts and 3 months imprisonment on the 2nd count to run concurrently with a non-parole period of 13 years.

Preliminary observations

- [7] The Appellant in person had tendered a timely application for leave to appeal dated 28 April 2014 where he had sought leave to appeal against the convictions and sentences. He had followed it up with written submissions which had reached the Court of Appeal registry on 02 June 2014. The Appellant had thereafter filed a Notice containing several additional grounds of appeal seeking leave to appeal which had been received by the Court of Appeal registry on 16 June 2014. The Respondent had altogether filed three sets of written submissions. The first of them had only dealt with the question whether there could be an appeal against the ruling of the *voir dire* inquiry while the second written submission had dealt with only the additional grounds of appeal. The third had focused on a purported allegation of bias on the part of the trial Judge arising from a letter that the Appellant had written to the Court of Appeal with a newspaper 'cutting'.
- [8] The single Judge of the Court of Appeal in his ruling dated 13 March 2015 had narrowed down the grounds of appeal and stated that the main complaint of the Appellant related to the admissibility of his confessional statement at the trial based on the evidence of the Appellant's bodily injuries alleged to have been the result of an assault by the police, and determined that it was an arguable issue. Secondly the single Judge had ruled that the trial Judge in the summing up had directed the assessors only on voluntariness of the confession but not on the truth or weight of it and decided that it was a misdirection. Accordingly, leave to appeal had been granted against the conviction but refused against the sentence.
- [9] The Appellant in person had filed a notice of additional grounds of appeal on 27.04.2016 containing 12 grounds and submitted his written submission on 27.05.2016 on 09 of them withdrawing the rest. There was no renewed application for

leave to appeal against the sentence. Neither did he canvass the sentences at the hearing of the appeal.

- [10] In the meantime, on 17 June 2016 the Appellant in person had tendered to the Court of Appeal registry what could be considered as an application to admit fresh evidence on appeal supported by his own affidavit of 27 April 2016.
- [11] The Appellant when inquired by this Court declined legal representation and opted to prosecute the appeal in person. He had been represented by counsel only during the *voir dire* inquiry at the High Court and had appeared in person throughout the rest of the proceedings in the High Court too. The Full Court decided to consider the application for fresh evidence along with the merits of the appeal against the convictions.

Summary of evidence

- [12] The factual background to the grounds of appeal and the application for fresh evidence on appeal could be summarised as follows.
- (i) The Appellant had been arrested around 11.00 a.m. on 05.03.2008 by the officers of Nabua Police Station in connection with the offences committed around 1.00 a.m. on 05.03.2008 at Nasinu (03rd and 04th counts) and taken him to Nabua Police Station. He had been handed over to Valelevu Police Station later on the same day. The arresting officers had denied having assaulted the Appellant and stated that he was cooperating with them all the time.
 - (ii) Valelevu police station had been informed on 06.03.2008 by Nabua police station of the arrest of two suspects and a team of police officers from Valelevu police station had visited Nabua police station where they had interviewed the Appellant and recorded the caution interview concerning the crimes committed on 05 March 2008. All of them had seen a black eye on the Appellant but it had been thought to be an old one. He had walked normally. The police officer who led the team had said that he first saw the Appellant

before lunch on 05.03.2008 at Nabua police station and even at that time he had seen the black eye on the Appellant. The caution interview had commenced at 2.45 p.m. on 06 March 2008. The officers Valelevu police station had denied having assaulted the Appellant.

- (iii) The Appellant had been formally charged at Valelevu police station at 9.50 p.m. on 06 March 2010. He had been produced before Nasinu Magistrate Court along with two other suspects on 07 March 2008 in connection with the robberies with violence committed on 05 March 2008 and on their request the Magistrate had ordered that they be medically examined for any injuries sustained upon arrest. Accordingly, the charging officer from Valelevu police station had escorted the Appellant to Valelevu Health Centre at 3.17 p.m. on the same day and brought him back to the police station. The charging officer also had denied any assault on the Appellant.
- (iv) The Appellant's Medical Report had been marked as MFI No.1 at the *voir dire* examination and shown at the trial to several police witnesses from Valelevu police station. However, the contents of the Report had not been elicited from them. The Appellant's Medical Report is not available in the Record of the High Court provided to this Court.
- (v) Dr. Ravi Narayan Naidu had claimed to have examined the Appellant on 07 March 2008 and the Appellant had told him that the police had assaulted him 02 days ago which had continued for the next 02 days. He had seen a bruise below the left eye and swelling on the left cheek. The Appellant had complained of tenderness on the chest as well. According to the doctor had the Appellant been assaulted for two days, there would have been clinical signs such as redness, warmth, swelling and obvious deformities like a broken finger resulting in discoloration, blue patches and bruises. The doctor had found none of them on the Appellant. He had further said that though he thought that the bruise and the swelling under the left eye was a fresh injury at that time, having seen him in court on 25 November 2010 after more than two years he could see the same injury on the Appellant suggesting that it was a permanent deformity possibly occurring prior to his examination.

- (vi) I examined the original High Court Record and found the Medical Examination Form of the Appellant marked at the *voir dire* inquiry on 17 November 2010 as MF1- (TWI) (P12) and at the trial on 03 April 2014 as DE1. It appears that the doctor had given evidence consistent with the medical report. No other marks had been seen on the body of the Appellant except what had been explained in oral evidence. According to the medical report the only significant injury was on the face and it did not correlate with the history of repeated abuse as alleged by the Appellant.
- (vii) The Appellant's caution interview on the crimes committed on 03 March 2008 at Navua had been conducted at 8.50 a.m. on 10 March 2008 at Navua police station. He had been charged at the same police station at 3.50 p.m. on the same day. Both officers who recorded those statements had denied having assaulted or seen any injuries on the Appellant.
- (viii) According to the Record of the Navua Magistrate Court, on 11 March 2008 the Appellant alone had been produced before the Magistrate in connection with the robbery with violence and unlawful use of motor vehicle on 03 March 2008 at Navua (01st and 02nd counts). However, the prosecuting officer appears to have erroneously referred to this date as 09 March 2008. The Appellant had complained to the Magistrate that he had been assaulted by the police and wanted to be examined by a doctor. The Magistrate had directed that he be examined immediately and the prosecuting officer had escorted him to Navua police station to be taken for a medical examination. According to the prosecuting officer the Appellant could not sit properly and was not walking properly but the witness had not seen an actual injury. However, it is an officer from Valelevu police station who had taken the Appellant to Valelevu Health Centre. According to him the Appellant was walking normally.
- (ix) The Medical Examination Form relating to the examination of the Appellant on 11 March 2008 is not to be found in the High Court Record provided to us and not even in the original High Court Record I examined. But it is beyond

doubt that he had in fact been examined at Valelevu Health Centre on 11 March 2008. The prosecution had not produced it at the *voir dire* inquiry. The Appellant too had not demanded that it be produced at the *voir dire* inquiry.

- (x) The Appellant had alleged that he was punched hard on his stomach, chest, eye and head at the point of arrest and the police officers had even sprayed chillies on his eyes. Then, at Nabua police station also hard punches had been allegedly delivered by the police officers on his stomach, chest, cheek and head. According to the Appellant, they had threatened to take his other eye out and even killed him. Yet, he had admitted at the *voir dire* inquiry and at the trial that the injury to eye had been there from the time he was in the secondary school. He had claimed that he made the first confessional statement on 06 March 2008 due to these actions of the police officers. He had complained of the assault to Valelevu Magistrate who had order a medical examination.
- (xi) According to the Appellant he had been assaulted at Navua police station as well. The police had burnt his body with a cigarette butt. He had been forced to sign the confessional statement made on 10 March 2008. He had complained to Navua Magistrate of the police assault and on its orders he had been examined by the doctor on 11 March 2008 and the police had taken the medical report. According to him the police had used a special technique in beating him in that it did not leave marks of the injuries on the body.
- (xii) Several witnesses had spoken at the *voir dire* inquiry to the assault on the Appellant at the time of arrest and later at Nabua police station on 06 March 2008. The Appellant had given evidence more or less on the same lines at the trial but had not called any witnesses.

[13] Therefore, it is clear that the Appellant had challenged the admissibility of both his confessions at the *voir dire* inquiry and at the trial on the basis that it had been given under oppression and he had been forced to sign them by the police under threat and duress due to actual and threatened physical assaults.

- [14] It is also clear that the Appellant's confession on 06 March 2008 relate only to counts 4 and 5 in the Amended Information while his confession on 10 March 2008 relate only to counts 1 and 2 of the Amended Information. Therefore, the medical report marked and the medical evidence placed before courts are only relevant to the admissibility, truthfulness and weight of the confessional statement obtained on 06 March 2009. Such medical evidence cannot be taken to test the admissibility, truthfulness and weight of the confession made on 10 March 2008.
- [15] The High Court Judge had delivered the *voir dire* ruling on 29 November 2010 where he had ruled both of the Appellant's confessions made on 06 and 11 March 2008 as being voluntary and admitted the same. According to the ruling the decisive factor had been the doctor's conclusion that the history of two days physical assault does not correlate with examination result. Unfortunately, the medical evidence led at the *voir dire* inquiry and the medical report produced therein did not at all relate to the Appellant's allegations of assault from the first confession on 06th March to his second confession on 10 March *vis-à-vis* his physical condition arising from his allegation that he had been assaulted during that period as well.
- [16] On the other hand the Learned High Court Judge had ruled out the confession of the co-accused who had allegedly been assaulted along with the Appellant due to the medical evidence and his medical report where the examining doctor had concluded that the injuries found on the co-accused were consistent with his history of assault. Thus, the trial Judge had placed immense faith on the medical evidence in admitting the Appellant's confessions and rejecting the co-accused's confessions.
- [17] In the circumstances, had the trial Judge (and the assessors) had the benefit of the medical report relating to the Appellant's examination on 11 March 2008 and if it had corroborated his allegation of police assault from 06 to 10 March it may have had a crucial impact on the admissibility as well as the truthfulness and weight of his second confessional statement obtained on 10 March 2008. Second medical report would have revealed fresh injuries provided the Appellant had been assaulted during the interim period. If not, such evidence may have been helpful in demonstrating the lack of credibility of the Appellant's allegations of police assault during that time.

Consequently, in either way, it may have had a decisive impact on the culpability of the Appellant on count 1 and 2 of the Amended Information.

- [18] The Respondent could not explain at the hearing of the appeal as to why at the proceedings in the High Court, the prosecution had not produced the Appellant's second medical report. No explanation had been given by the prosecution either. After the initial request the Appellant also had not demanded during the trial that it be produced.
- [19] After the delivery of the ruling into the admissibility of the Appellant's confession he had avoided court from 30 November 2010 to 06 September 2013. As a result the trial had got delayed by nearly 03 years. However, at the trial it had been recorded on 13 November 2013 that medical reports be given to the Appellant. On 11 March 2013 the Appellant had asked for 02 medical reports stating that he had been examined at Valelevu Health Centre on the 'Navua case' which relate to the alleged crimes set out in count 01 and 02. He had demanded 'Navua case medical report'.
- [20] It is clear that what the Appellant had meant by 'Navua case medical report' was the medical report relating to his second examination on 11 March 2008 at Valelevu Health Centre. The prosecution also had understood what was meant by 'Navua case medical report' because it had informed court on 14 March 2014 that 'Navua medical report is around'. That medical examination on the Appellant would have a significant bearing on the confession recorded on 10 March 2008 which implicated the Appellant with the two crimes committed at Navua set out in count 01 and 02 of the Amended Information.
- [21] Unfortunately for some inexplicable reason the medical report relating to the examination of the Appellant on 11 March 2008 at Valelevu Health Centre had never surfaced. The prosecution had not given any reason as to why it was unable to produce that to court and provide a copy to the Appellant. The medical report already marked at the *vior dire* inquiry along with the other exhibits appears to have been given to the Appellant before the trial commenced. At the trial the prosecution had not produced the Appellant's medical report on his first examination dated 07 March

2008. Neither had the prosecution called the doctor. However, the Appellant in his evidence had produced it as DE1 and admitted under cross-examination that apart from his face there had not been any injury marks on his body. Moreover, he had admitted that his right eye had been like that since secondary school in Form 4. He had not said anything about the second medical examination on 11 March 2008 in his evidence at the trial.

Admissibility of the confessions

- [22] I have examined the evidence led at the *voir dire* inquiry and am not inclined to hold that the trial Judge had wrongly admitted the Appellant's confessional statement made on 06 March 2008 which connects him with count No.03 and 04 of the indictment. The medical evidence of the doctor and his medical report do not support his allegation of the police assault. The only significant injury namely a slight bruise and swelling below the left eye seen on the Appellant on 07 March 2008 had been admittedly with him since his school days.
- [23] However, I cannot say the same with regard to the second confessional statement of the Appellant. I think the trial Judge was wrong to have admitted the second one made on 10 March 2008 connecting the Appellant with count 01 and 02 of the Amended Information: Because, he did not have the most relevant evidence in evaluating the voluntariness of the second confession *vis-à-vis* the Appellant's position that he was forced to make it due to the severe police assault, in the absence of the medical report issued on 11 March 2008 and medical evidence subsequent to the medical examination. The prosecution should not have withheld it from court at the *voir dire* inquiry and at the trial. The trial Judge should have insisted on its production in the interest of justice.

Misdirection in the summing up

- [24] Similarly, I have examined the evidence *in toto* led at the trial on behalf of the prosecution and the Appellant and the summing up. I find that the trial Judge had explained to the assessors the burden of proof clearly in paragraphs 4 - 6 of the

summing up. He had in detail placed before them the cases for the prosecution and the Appellant. He had addressed them on the confessional statements of the Appellant and said that that is the only evidence that could connect the appellant to the crimes charged.

- [25] Having directed the assessors as to how they should evaluate the confessional statements in the following words, the trial Judge had placed the respective positions of both sides on that aspect also before the assessors drawing their attention to the evidence of the police officers, the doctor and the Appellant.

'However, before you consider the accused's above alleged confessions, I must direct you as follows. A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact – is strong evidence against its maker. However, before you can accept a confession, you must be satisfied beyond reasonable doubt that it was given voluntarily by its maker. The prosecution must satisfy you beyond reasonable doubt that the accused gave his statement voluntarily, that is, he 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. However, if you are satisfied beyond reasonable doubt, so that you are sure that the accused gave those statements voluntarily, as judges of facts, you are entitled to rely on them for or against the accused.'

- [26] Unfortunately, it is clear that the trial Judge had directly placed the issue of voluntariness of the confessions before the assessors when they had already been ruled voluntary and admitted in evidence as part of the judge's function. It is only the making of it, truthfulness/weight and probative value/sufficiency for the conviction that should have gone before the assessors. The correct law and appropriate direction on how the assessors should evaluate a confession could be summarised as follows.

- (i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a *voir dire* inquiry upon being satisfied beyond reasonable doubt of its voluntariness (*vide* Volau v State Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51).
- (ii) Failing in the matter of the *voir dire*, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial but such evidence goes to the weight and value that the jury would attach to the confession (*vide* Volau).

- (iii) Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them. (emphasis added) (*vide Volau*).
- (iv) Even if the assessors are sure that the defendant said what the police attributed to him, they should nevertheless disregard the confession if they think that it may have been made involuntarily (*vide Noa Maya v. State* Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30])
- (v) However, Noa Maya direction is required only in a situation where the trial Judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the confession is voluntary, Noa Maya direction is irrelevant and not required (*vide Volau* and Lulu v. State Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19).

[27] This error in the summing up perhaps could explain the assessors' opinion in favour of the Appellant. In my view, it may have unwittingly favoured the Appellant. Since the Appellant had appeared in person he may not have understood this error in the direction to ask for a redirection. Yet, I am surprised that the Prosecutor too had been silent despite the trial judge having asked for redirections, despite the appellate courts of the country highlighting the importance of this function in many a case. In Abdul Khair Mohammad Islam [1997] 1 Cr. App. R. 22 Buxton LJ said '*At the end of the summing-up neither counsel reminded the judge of that omission.*' His Lordship the Chief Justice in Raj v The State CAV 0003 of 2014: 20 August 2014 [2014 FJSC 12] said '*The raising of direction matters in this way is a useful function and in following it, counsel assist in achieving a fair trial.*'

[28] I am not surprised that the trial Judge had disagreed with the assessors' opinion of '*not guilty*' and delivered a dissenting judgment and convicted him. The trial Judge had every right to do so.

- [29] In Fiji the ultimate decider of fact, law or the verdict is the presiding judge and the decision on guilt or innocence of an accused is a matter for him who need not conform to even an unanimous opinion of the assessors, if he thinks such opinion is wrong, in which event he is free to differ and pronounce his own verdict. The role of the assessors is to render opinions to assist the judge (*vide* Walili v State Criminal Appeal No.AAU0055 of 2013: 26 May 2017 [2017] FJCA 55; Prasad v The Queen [1981] 1 A. E. R 319; Ram v. State Criminal Appeal No. CAV0001 of 2011: 09 May 2012 [2012 FJSC 12] and Noa Maya v. State Criminal Petition No. CAV 009 of 2015: 23 October 2015 [2015 FJSC 30]).
- [30] I have carefully examined the judgment and the reasons given by the trial Judge and agree with his decision to convict the Appellant on count 03 and 04 on the totality of evidence but not on his argument that the medical evidence relating to the Appellant should be rejected because the doctor had not been summoned and therefore the medical report was hearsay. The same medical report was produced at the *voir dire* by the prosecution and the doctor who made it was called to give evidence. The Appellant was allowed to produce it at the trial by the Judge 'in the interest of a fair trial' and given to the assessors as well. In my view, the medical evidence taken at its best does not support the allegation of police assault. Thus, the decision to rely on the first confession and to convict the Appellant on count 03 and 04 could be justified.
- [31] I would follow Ram v. State Criminal Appeal No. CAV0001 of 2011: 09 May 2012 [2012 FJSC 12] where the Supreme Court held *inter alia*
- 'an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case'.*
- [32] To my mind the verdicts of guilt against the Appellant on count 03 and 04 are neither unsafe nor dangerous. I have no doubt that on the available evidence the case against the Appellant had been proved beyond reasonable doubt and despite the misdirection in the summing up, on the whole of the facts the only reasonable and proper verdict would be one of guilt on count 03 and 04. No substantial miscarriage of justice has

occurred due to the aforesaid misdirection on the confessional statements and I would apply the proviso to section 23 (1) of the Court of Appeal Act.

- [33] However, I am not in agreement with the trial Judge's decision to convict him on count 01 and 02 as the evidence regarding the second medical examination of the Appellant on 11 March 2008 which could have had a crucial bearing on the voluntariness of his second confession relating to count 01 and 02 was not made available to court and to the Appellant. If the second confession were to be ruled out on the basis of involuntariness there would not have been any other evidence to connect the Appellant with the crimes committed on 03 March 2008 at Navua. One cannot rule out the possibility of the trial Judge having done so as in the case of the co-accused, had he had the benefit of the medical evidence. Therefore, in my view the conviction on count 01 and 02 cannot stand and should be set aside.

Application for fresh evidence on appeal.

- [34] The Appellant's affidavit states that he was making the application to lead fresh evidence on appeal in terms of section 28 (a) of the Court of Appeal Act under the supplementary powers of the Court of Appeal. The fresh evidence sought to be led is his medical report on the examination done on 11 March 2008. He also avers in the affidavit that he was seriously prejudiced in not having a fair trial due to the admission of the second confession as having been made voluntarily in the absence of the said medical certificate.

- [35] In Mudaliar v State Criminal Appeal No. CAV 0001 of 2007: 17 October 2008 [2008] FJSC 25 the Supreme Court remarked

'The application to adduce further evidence before the Court of Appeal was based upon s 28 of the Court of Appeal Act. That section relevantly provides that the Court of Appeal may, if it thinks it "necessary or expedient in the interest of justice" receive such evidence'.

- [36] The Supreme Court in Mudaliar quoted with approval Ladd v Marshall [1954] 3 All ER 745 and stated there were three following preconditions to the reception of such evidence on appeal. The Supreme Court had referred to other decisions quoted in the following paragraphs as well.
- (i) the evidence could not have been obtained prior to the trial by reasonable diligence;
 - (ii) it must be such as could have had a substantial influence on the result and
 - (iii) it must be apparently credible.
- [37] Tuimereke v State Criminal Appeal No. AAU 11 of 1998: 14 August 1998 [1998] FJCA 30 the Court of Appeal considered the principles governing the reception of fresh evidence in criminal matters. They referred to Ratten v R [1974] HCA 35; (1974) 131 CLR 510 and Lawless v R [1979] HCA 49; (1979) 142 CLR 659. In both Ratten and Lawless the High Court focussed upon the expression "miscarriage of justice" in the context of intermediate appellate courts dealing with criminal matters.
- [38] In Ratten, Barwick CJ observed that there would be a miscarriage of justice if the jury did not have before it evidence not available to the appellant at the time of his trial which, if believed by the jury, was likely to lead to an acquittal. It was added, however, that there would be no miscarriage of justice simply because evidence which was available to the appellant, actually or constructively, was not called, even though it might appear that if that evidence had been called, and believed, a different verdict would most likely have resulted.
- [39] Gallagher v The Queen [1986] HCA 26; [1986] 160 CLR 392, the High Court of Australia confirmed the approach in Ratten and held that unavailability of fresh evidence at the time of the trial will constitute a miscarriage of justice only if it considers that there is a significant possibility that the jury, acting reasonably, would have acquitted the accused of the charge if that evidence had been before it.

[40] **R v Bain** [2004] 1 NZLR 638, however, Tipping J added a caution:

"Ordinarily if the evidence could, with reasonable diligence, have been called at the trial, it will not qualify as sufficiently fresh. This is not an immutable rule because the overriding criterion is always what course will best serve the interests of justice. The public interest in preserving the finality of jury verdicts means that those accused of crimes must put up their best case at trial and must do so after diligent preparation."

[41] In **Singh v The State** Criminal Appeal No.CAV0007U of 2005S: 19 October 2006 [2006] FJSC 15 the Supreme Court stated:

"The well-established general rule is that fresh evidence will be admitted on appeal if that evidence is properly capable of acceptance, likely to be accepted by the trial court and is so cogent that, in a new trial, it is likely to produce a different verdict ..."

[42] In the present appeal the Appellant had not been able to disclose in his affidavit what fresh medical evidence he wanted to lead on appeal except to say that it is the medical evidence relating to his second examination on 11 March 2008. This Court does not know the identity of the doctor who examined the Appellant on 11 March 2008, whether he or she had prepared a medical certificate and if so, what it reveals etc. I am, therefore, not in a position to evaluate such medical evidence independently and objectively to determine if such evidence is likely to produce a different result or whether there is a significant possibility that the trial Judge would have acquitted the Appellant of the 01st and 02nd counts, if that evidence had been before him. Neither could I say that such medical evidence could have had a substantial influence on the result of the case in so far as the 01st and 02nd counts were concerned.

[43] Whether it is necessary and expedient in the interest of justice to allow fresh evidence on appeal on the above judicial guidelines could be determined only where the Court of Appeal is made aware of the fresh evidence sought to be led. The Court cannot allow an application to lead fresh evidence on appeal on surmise and conjecture. It cannot go on a voyage of discovery. Therefore, I disallow the Appellant's application to lead fresh evidence on appeal.

Additional grounds of appeal

- [44] However, the prosecution by not providing the Appellant with the medical certificate assumed to have been made following his examination on 11 March 2008 at Valelevu Health Centre and more importantly not proving an explanation why it failed to do is in my view, has infringed on his right to have a fair trial. Section 14(2)(1) of the Constitution of the Republic of Fiji states '*Every person charged with an offence has the right to call witnesses and challenge the evidence presented against him or her*' while section 15(1) states that '*Every person charged with an offence has the right to a fair trial before a Court of Law*'. **Dromudole v State** Criminal Appeal No.CAV0013 of 2013: 20 April 2017 [2017] FJSC 7 the Supreme Court said

'The right to a fair trial is vital to any accused charged with a criminal offence, and though initially recognized by the common law, it has acquired the status of a constitutional right in Fiji.'

- [45] After the initial discussion prior to the commencement of the trial, the prosecution and the trial Judge have forgotten it completely. The Appellant had also contributed to this lapse by not pursuing the matter thereafter. In his cross-examination of prosecution witnesses he had not challenged them to produce his second medical certificate. Yet, there is merit in his complaint because of the pre-trial orders the court could have made on his initial application.

- [46] Section 290.— (1) of the Criminal Procedure Decree, 2009 (now Criminal Procedure Act, 2009) states *inter alia*

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

(b) compelling the attendance of any witness or the production of any evidence at the trial;

(c) compelling the provision by the prosecution to the defence of any briefs of evidence, copies of documents or any other matter which should fairly be provided to enable a proper preparation of the defence case;

- [47] Thus, the High Court could and should have made an appropriate order in terms of section 290 (b) and/or (c) of the Criminal Procedure Act, 2009 to make sure that the medical report or the medical evidence relating to the Appellant's second medical examination on 11 March 2008 would be available at the trial. Therefore, in my view the Appellant's complaint set out in additional appeal ground 01 is serious enough to conclude that the convictions on counts 01 and 02 should not be allowed to stand and be set aside on the ground of denial of a fair trial. I allow this ground of appeal in so far as the convictions on counts 01 and 02 are concerned.
- [48] In his additional appeal ground 06 the Appellant complains of alleged inconsistencies and contradictions among police officers. I do not think there are such material inconsistencies and contradictions in their evidence. The discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance [see Bharwada Bhoginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280; Nadim v State Criminal Appeal No.AAU0080 of 2011: 02 October 2015 [2015] FJCA 130; Lulu v State Criminal Appeal No.AAU0043 of 2011:29 November 2016 [2016] FJCA 154 and Lulu v. State Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19]. I reject this additional ground of appeal.
- [49] Additional appeal ground 02 is on the issue whether the prosecution had explained the injuries on the Appellant whilst in police custody. The only significant injury on the appellant was the alleged black eye on the Appellant. The Appellant himself had explained it on the basis that he had had it from his school days. Therefore this ground of appeal is rejected. Whether he had sustained fresh injuries after the first medical examination, whilst in police custody, is not yet known due to non-availability of medical evidence and a medical report on his second examination. I have already dealt with that aspect and ruled in the Appellant's favour in setting aside the convictions on count 01 and 02. The ground of appeal succeeds but only on convictions on count 01 and 02.

[50] The Appellant in additional appeal ground 05 seeks to question the competence and experience of the doctor who examined him and gave evidence at the *voir dire* inquiry. These aspects were never challenged by the Appellant's counsel at the *voir dire* inquiry. In any event, the same medical certificate was produced by the Appellant as part of his defence at the trial. I do not see any merits in this complaint.

[51] The Appellant in his additional ground of appeal No.7 had queried whether the trial Judge had applied the correct legal tests in admitting his confessions. In **Varani v State** Criminal Appeal No.AAU064 of 2011: 02 October 2015 [2015] FJCA 145: the Court of Appeal held

*'The law in Fiji in this area is well settled. In **Ganga Ram and Shiu Charan v Reginam** (Criminal Appeal No. 46 of 1983), the Fiji Court of Appeal said the following. "...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** (1941) AC 599. **DPP v Ping Lin** (1976) AC 574. **Secondly** even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which the police behaved, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or by unfair treatment. **Regina v Sang** (1980) AC 402, 436 @ C – E. This is a matter of overriding discretion and one cannot specifically categorize the matters which might be taken into account..."*

[52] The Trial Judge had given his mind to this aspect in paragraph 4 of the *voir dire* ruling but I find that the second aspect of the admissibility namely the general unfairness appears to have escaped his attention. Therefore, I have examined carefully whether applying the aforesaid two tier test of admissibility the first and/or the second confession of the Appellant should have been rejected. I am convinced that considering the totality of evidence including the first caution interview itself that the Appellant's first confession had been voluntary and there had not been any general unfairness either and therefore, the trial Judge was right in admitting it in evidence. However, I find that the results of the second medical examination would have been

very important to determine the voluntariness of the second caution interview though I do not find any credible material pointing towards any general unfairness on that occasion. In the absence of that medical evidence which was admittedly available but not produced, I am reluctant to hold that the Appellant's second confession had passed the test of voluntariness. Thus, I hold against the admissibility of the second caution interview on this ground of appeal as well. Logically, therefore, the convictions on counts 01 and 02 cannot stand. The Appellant's 07th additional ground of appeal is allowed only with regard to convictions on counts 01 and 02.

[53] The gist of the Appellant's 08th additional ground of appeal is the denial of due process of law arising from the interviewing officer of the second caution interview having not allowed him to obtain legal advice. He has no complaint with regard to the first confession made on 06 March 2008 connecting him with counts 03 and 04 on this ground as the Appellant had specifically waived his right to have a lawyer, legal advice from Legal Aid or a family member at the caution interview. However, at the second caution interview conducted on 10 March 2008 at Navua police station he had opted to consult the Legal Aid Commission. The interviewing officer had attempted to contact the Commission but had nevertheless proceeded to conduct the interview when there had not been any response from the Commission. The Appellant had also informed the interviewing officer that he had got no relative or friend at Nabua town to be present at the interview. I think there is merit in the Appellant's complaint which becomes graver and more substantial considering his complaint of police assault leading to the second caution interview.

[54] The Constitution of the Republic of Fiji under the Chapter on '*Rights of arrested and detained persons*' *inter alia* proclaims

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

(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;

(k) to communicate with, and be visited by,— (i) his or her spouse, partner or next-of-kin; and (ii) a religious counsellor or a social worker.

- [55] It is clear that the rights of a person under detention or arrest to remain silent, to communicate and seek legal advice and to communicate with, and be visited by the family or even a religious counsellor or social worker are guaranteed by the Constitution and should be respected and upheld at all times by the law enforcement agencies. It is only then that the Constitution becomes a living document and a beacon light. I think the Appellant had been denied of one or more of them with regard to the second caution interview. Therefore I hold with the Appellant on additional ground 8 and allow his appeal on convictions on counts 01 and 02.
- [56] The Appellant under additional appeal ground 09 complains that the trial Judge had not given cogent reasons to differ from the opinion of the assessors. I have examined the entirety of evidence, the dissenting judgment and reasons for dissention of the trial Judge. As already stated, I do not agree with the trial Judge's reasons to reject the medical report namely that it was hearsay as the doctor was not summoned but I have no difficulty in upholding on the totality of the material available the decision of the trial Judge to admit the Appellant's first caution interview connecting him with count and 04. However, there are no cogent reasons given by the trial Judge to admit the second caution interview and the issue of non-availability of the second medical report had not entered the mind of the Judge at all. Therefore, as I have already indicated I would not approve the admissibility of the second caution interview where the Appellant did not have the benefit of his second medical report and set aside the convictions on counts 01 and 02. But, this ground of appeal concerning counts 03 and 04 is, therefore, rejected. Subject to the above, I am inclined to agree with the judgment and trial Judge's reasons for dissention with assessors.
- [57] The Appellant's 11th additional ground of appeal seems to be on lack of legal representation and lack of guidance from the trial Judge throughout the trial. The Appellant was represented by counsel at the *voir dire* inquiry. After almost 03 years of the *voir dire* ruling when the Appellant appeared for the trial he had not requested to have legal representation. The trial Judge had recorded on 31 March 2014 that the

Appellant had chosen not to have a counsel and should be deemed to have waived his right to legal representation. In any event the complainants had not identified the Appellant in respect of the two incidents on 03 and 05 March 2008. When it came to the evidence of the police officers the trial Judge had advised the Appellant of his right to challenge their evidence on the voluntariness of his caution interviews. This advice had been given in respect all police witnesses and the Appellant had cross-examined all of them and suggested that he had made those confessions under duress and oppression due to assault. I see no merit on this ground and reject it.

- [58] In **Tabaloo v State** Criminal Appeal No.AAU0058 of 2008: 15 July 2010 [2010] FJCA 34 the Court of Appeal said

*'It is well established that the right to counsel is not an absolute right (**Eliki Mototabua v. The State** CAV 004 of 2005S) and the absence of counsel is not necessarily fatal to a conviction which is obtained after a trial which is fairly conducted (**Seremaia Balelala v. The State** Criminal Appeal No. AAU0003 of 2004). The question is whether the trial miscarried as a result of the appellant being unrepresented (**Samuela Ledua v The State** Criminal Appeal CAV004 of 2007).'*

- [59] The last of the additional grounds of appeal (No.13) is that the Learned Trial Judge had erred in directing the assessors on the Appellant's confessional statements. His complaint is that the trial Judge had directed the assessors on the voluntariness but not on the truth and weight of the confessions. I have already dealt with this ground of appeal. In any event the majority of assessors had expressed an opinion of 'not guilty' and the Appellant had not been prejudiced by the misdirection complained of. No miscarriage of justice had resulted.

Conclusions

- [60] It becomes increasingly clear from the reading of the proceedings that this is a case where the prosecution should have had two separate trials in respect of the two incidents of robbery with violence. Since I have already decided that I do not intend to interfere with the convictions on counts 03 and 04, what is left for me to decide is

after setting aside the convictions on counts 01 and 02 whether I should order a retrial or acquit the Appellant altogether on those counts.

[61] Since the Appellant has clearly confessed to his involvement in the offences set out in counts 01 and 02 in his second confession made on 10 March 2008 the only question is its voluntariness. If the second confession is duly admitted, that alone is sufficient to establish the charges in counts 01 and 02 beyond reasonable doubt. The purported medical evidence of the second examination on 11 March 2008 relates to the issue of voluntariness of the second confession.

[62] However, such medical evidence even if available has to be tested at the trial. A mere perusal of the medical certificate would not produce the desired results in either way. Therefore, in any event this Court is not the best forum to do that. In **Kumar v State** Criminal Appeal No.AAU0005 of 1992: 05 May 1993 [1993] FJCA 9 the Court of Appeal said

'There is power for this Court to take evidence itself in such circumstances (s.28 (b) of the Court of Appeal Act), but this Court is not well equipped for the taking of evidence and in any event the trial Judge is the more appropriate person to do it.'

[63] I am conscious that the offences had been committed as far back as in 2008. The trial had been concluded in 2014. However, the trial could not proceed for almost 03 years because the Appellant was not present in court. Nevertheless, I am not inclined to acquit the Appellant of counts 01 and 02. I am also aware that given the decision reached with regard to counts 03 and 04, the outcome of a new trial would not have a significant bearing on the liberty of the Appellant. Nevertheless, I believe that the best decision I could reach in the interest of justice is the option of ordering a new trial.


Rajasinghe. JA

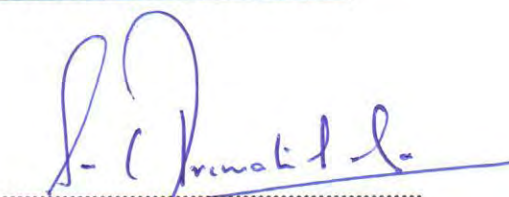
[64] I have read the draft judgment and agree with the conclusions therein.


The Orders of the Court are:

1. *Appeal on counts 03 and 04, is dismissed.*
2. *Convictions on counts 03 and 04 are affirmed.*
3. *Appeal on counts 01 and 02, is allowed.*
4. *Convictions on counts 01 and 02 are set aside.*
5. *New trial is ordered on counts 01 and 02.*




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Hon. Mr. Justice W. Calanchini
PRESIDENT OF APPEAL


.....
Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL


.....
Hon. Mr. Justice T. Rajasinghe
JUSTICE OF APPEAL