

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

CRIMINAL APPEAL NO.AAU 0053 of 2015
[High Court Criminal Case No. HAC 076 of 2008]

BETWEEN : **JOJI KACIVAKAWALU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Bandara, JA

Counsel : **Appellant in person**
: **Mr. Burney, L.J. with Mr. Kumar, R.R for the Respondent**

Date of Hearing : **15 November 2018**

Date of Judgment : **29 November 2018**

JUDGMENT

Gamalath, JA

[1] I agree with the reasons and decisions given by Prematilaka, JA .

Prematilaka, JA

- [2] This appeal arises from the conviction of the Appellant on the following counts alleged to have been committed along with others on 01 August 2018 at Nailaga, Ba in the Western Division.
- i. Robbery with violence contrary to section 293(1)(b) of the Penal Code, Cap 17, having robbed Hassan Ali of cash \$20,202, two Alcatel mobile phones valued at \$258, two 22ct gold chain valued at \$1100, 3 piece diamond earrings valued at \$300, one gents gold ring valued at \$150, two gold car rings valued at \$550, two gold bangles valued at \$1500 all to a total value of \$24,060, the property of Hassan Ali, having used personal violence to the said Hassan Ali immediately before the time of such robbery.
 - ii. Robbery with violence contrary to section 293(1)(b) of the Penal Code, Cap 17, having robbed Khatoon of a gold chain valued at \$400, gold bangles valued at \$400 all to a total value of \$800, the property of the Khatoon, having used personal violence to the said Khatoon immediately before the time of such robbery.
 - iii. Unlawful use of Motor Vehicle contrary to section 292 of the Penal Code, Cap 17, by unlawfully and without color of right but not to be guilty of stealing for their own use motor vehicle registration number EX 213 the property of Hassan Ali.
- [3] There had been another accused called Jose Petro when the trial commenced at the High Court but after the *voir dire* inquiry his caution interview had been ruled inadmissible on 18 December 2014, a *nolle prosequi* had been entered and he had been discharged by the High Court before the trial proper commenced. Amended Information had been filed on 28 January 2015.
- [4] After trial the assessors had returned unanimous opinions of guilty on all three counts and the Learned Trial Judge had convicted the Appellant accordingly and on 17 April 2015 sentenced him to 11 years of imprisonment each on first and second counts of

robbery with a minimum serving period of 09 years and 06 months imprisonment on the third count.

- [5] The Appellant had applied for leave to appeal by way of a notice dated 04 May 2015 against the conviction and sentence and amended the grounds of appeal by way of another notice dated 04 October 2015 which contained 06 grounds of appeal only against conviction. Even in his first notice, the Appellant had not set out any grounds of appeal against sentence. The Appellant who appeared in person before the single Judge had not urged leave to appeal against sentence.
- [6] The single Judge of the Court of Appeal who considered the Appellants' Leave to Appeal Application granted leave to appeal on conviction based on three grounds of appeal set out under paragraphs 2.2, 2.3 and 2.4 of his amended grounds of appeal dated 04 October 2015.
- [7] Both the Appellant and the Respondent had filed written submissions on the three grounds of appeal in respect of which leave was granted by the single Judge. At the hearing before the Full Court the Appellant once again confirmed that he was not canvassing the sentence.
- [8] Thus, the grounds of appeal that would be considered in this Judgment are as follows.

(i) 'That the record for caution interview was wrongly admitted by failing to appropriately consider the impact of the contusion to the voluntariness of the caution interview.'

(ii) 'That the learned trial Judge had totally failed to direct the assessors on the missing first part of the medical report.'

(iii) 'That the learned trial Judge erred in law and in fact in failing to direct himself and/or the assessors on the fact that the prosecution had totally failed to establish as to how the Appellant came by the injury namely the contusion.'

- [9] These grounds can be identified as relating to the *voir dire* Ruling admitting the caution interview (ground 1) and the directions of the Trial Judge given to the assessors and to himself on medical evidence (grounds 2 and 3). Medical evidence in the form of the Appellant's medical report figures in all three grounds.
- [10] The single Judge while granting leave to appeal had attempted to capture the essence of the Appellant's complaint as follows. It has to be kept in mind that the single Judge most probably did not have the benefit of the full case record at the leave stage.

'[8] The learned Judge in his Ruling stated that he preferred the evidence of the prosecution and that he did not believe the evidence of the Appellant. The learned Judge did not specifically state why he disregarded the evidence adduced in the form of the medical report. It is, in my opinion, arguable that the learned Judge has not sufficiently considered the medical report. In other words, it is arguable that the learned Judge has not sufficiently explained why he remained satisfied beyond reasonable doubt that the admissions in the caution statement were made voluntarily in the light of the supporting independent medical evidence. This Court in Nacagi and Others v The State ([2015 FJCA 156] AAU 49 of 2010; 3 December 2015) has considered the approach that should be adopted by the trial judge in a voir dire when there is independent medical evidence that supports the complaint made by an accused.(emphasis added)

- [11] The Respondent in its written submissions filed before the single Judge had stated that it is perhaps arguable on the approach adopted in Nacagi that the Trial Judge had not sufficiently assessed what weight, if any, to attach to the medical evidence that, upon examination, the appellant was found to have contusion to his lower back and noted that the Learned Judge had ruled the other accused's caution interview inadmissible on the basis that he had been assaulted by the police. At the same time the Respondent had submitted before the single Judge that the decision in Nacagi had imposed too stringent a requirement on the trial judge and the single Judge had left it to the Full Court to consider.
- [12] The crucial evidence against the Appellant and the other accused was their respective caution interviews. This explains why the other accused was discharged after his caution interview was ruled out by the Trial Judge.

[13] I shall now consider the first ground of appeal

'That the record for caution interview was wrongly admitted by failing to appropriately consider the impact of the contusion to the voluntariness of the caution interview.'

[14] The Appellant's challenge to the admission of the caution interview therefore is based on his evidence that he was assaulted by the police before the caution interview resulting in *inter alia* a contusion on the lower back as shown in his medical report.

[15] The Magistrate's Court of Lautoka case record shows that the Appellant had been produced before court on 06 August 2008 and he had complained to the Magistrate in the following words.

'I am suffering from several injuries. I have been medically examined at Ba Mission Hospital yesterday. I was arrested by the police on Monday 4th August CID Officers in Ba tortured me. They hit my back with baton and also my nose, 6 officers were involved. They were all Fijian Officers. I was examined again at Lautoka Hospital this morning. They will send X-ray results.'

[16] The Learned Magistrate had recorded what the Appellant had stated but not called for the medical report/X-ray report from Lautoka Hospital. However, the Judge had said in his Bail Order delivered soon after that '*... he has an obvious limp. I note that he has been medically examined twice. Once in Ba and this morning at Ba. Lautoka Hospital still needs to confirm his rays results.*' Yet, it should be mentioned that the doctor who had examined the Appellant at 9.45 a.m. on the same day *i.e.* 06 August 2018 had not observed any such limp and according to him except the contusion on the low back the Appellant was good. Even the Appellant had not referred to a limp in his evidence at the *voir dire* inquiry.

[17] It appears that the Magistrate may have meant Lautoka instead of the inadvertent reference to Ba on the second examination. It also looks as if only an X-ray of the Appellant had been done at Lautoka hospital as ordered at Ba Mission Hospital and that X-ray report had not reached court. There was probably no other second examination.

- [18] There is only one medical report available in the case record where Part A had been filled up by DC 1715 Esira Bari of Ba Police Station on 05 August 2008 and Part B by the examining doctor on 06 August 2008 who had ordered an X-ray on the Appellant. The police officer had recorded under Part A that the Appellant had complained of pain on his back. The doctor had written in illegible handwriting under Part B a short history related by the Appellant. Upon examination, the Appellant had been found to have been carrying a contusion on the low back area though he had described a more severe beating on several other parts of his body not corroborated by the medical report. The Appellant had not made any complaint of police assault when produced in the High Court though his co-accused had done so.
- [19] At the *voir dire* inquiry four police officers had given evidence including the arresting/charging officer (Tomasi Nakeke) and interviewing officer (Illario Belo). The other two had been part of the team that went to arrest the Appellant. All of them said that there were no improprieties, ill-treatments, assaults and verbal or physical abuses. The Appellant had given evidence and produced his medical report.
- [20] The *voir dire* ruling of the High Court Judge has dealt with the evidence of the police officers and the Appellant in detail. The Judge said of the Appellant's evidence as follows.

'The first accused (Joji) swore an oath on Holy Bible and said that he is 32 years old and a farmer. When the Police came for him on the 04th August 2008 he was in a carrier and he had been asked to step out. They took him in a Police vehicle to a Feeder Road and assaulted his face and ribs with fists and batons.'

'When they go to the Police Station, they took him to the Crime office where he says that they started 'torturing' him and telling him to admit. He was made to lie on the floor. One officer was sitting on his knees and another was pulling his arms. They started to beat the soles of his feet with batons and this lasted he said for about 30 to 40 minutes. They were banging his head and then started with caution interview. He asked to go to the hospital but they told him that they would take him to the hospital after the interview. And because of all that pressure, he admitted the crime that they were putting to him. Some of the answers given were his but some were not his and they were only given because of the pain. He was taken to the hospital the next day. He was never given a chance to rest during the interview

and on the second day he was given no food nor any drinks. There were only torture-punches on the ribs and head, his nose bleeding and again he was lying on the floor while the soles of his feet were being beaten.'

'The first accused produced his medical report in evidence, and he said that he told the Doctor he had been assaulted. The medical report, he says, is not the full medical report.'

- [21] The Trial Judge's observations on the medical report go as follows.

'The medical report after examination of the first accused and dated 05th August reveals that the first accused had complained to the Doctor about a pain on his back. The doctor opined that his general health condition was good but that he had "contusion in the lower back area." He was prescribed pain killers.'

- [22] The Learned Trial Judge had considered, believed and also found the prosecution witnesses namely the four police officers to be reliable and consistent even in the face of the Appellant's evidence and the medical report. The Judge had made the following observations.

'The first accused gave evidence which seemed to be embellishing the situation as he found it. If he had been "tortured" as he said he was, by having his feet beaten and punched and sat upon, he would have had injuries visible to the medical practitioner, yet there were none. The only injury found on examination was contusion to his lower back and in his evidence he had not mentioned anything about his back until an entirely improper leading question from his counsel alerted him to the lacuna. I did not believe the evidence of the first accused and I am left then with consistent and reliable evidence of the first four Police Witnesses and I find that I can rely on that evidence as proof of the voluntariness of the first accused's caution interview. The record of that interview and the answer to charge may both be led in evidence in the trial on the general issue.'

- [23] Having perused the evidence of the four police officers, I do not find any material contradictions or inconsistencies among them. I think that it is fair to say that if the medical report lends some support to the Appellant's allegations it is only in respect of the police officers having allegedly hit him on the back with a baton. However, even though he had made that allegation in the Magistrate's Court, he had not spoken to such an attack in his evidence at the *voir dire* inquiry. The rest of the alleged brutal

attack comprising of an assault lasting for more than one hour at Feeder Road on the way to the Police station and another beating for 30-40 minutes prior to the caution interview and more torture on the second day is not borne out by the medical report at all. There is not a semblance of any such brutality revealed by the examining doctor.

[24] The Appellant had not called any medical evidence except the medical report to show that the contusion on his low back is the result of any recent attack. No nexus could be established between the contusion on his low back and the alleged police assault in the preceding two days. In the absence of such a cause and effect scenario it would be naive to assume that it is the alleged police assault that had resulted in the contusion on the Appellant's low back. It is quite possible that the Appellant had suffered that injury prior to his arrest, for if it is the result of the police brutality of such a magnitude as described by the Appellant it would have left him with a host of other injuries on many parts of the body that would have been easily visible to the examining doctor. The absence of a single such other injury suggests that the contusion on his low back was not the result of a police assault upon his arrest. It is impossible that all such other injuries would have disappeared within less than two days leaving only the contusion on the back. The logical conclusion that could be drawn is that the contusion was not associated with the alleged police assault.

[25] Police Officer Esira Bari who had filled up Part A of the medical report had stated that the Appellant had complained of pain on his back. At the *voir dire* inquiry this witness had not been cross-examined as to whether he saw any injuries on the Appellant. The same witness who had interviewed the co-accused had come out with the injuries seen on him and therefore, there is no reason for him to suppress such injuries on the Appellant if there were any. In any event the Appellant had not complained of any other discomforts to Esira Bari which cannot be explained given his allegation of a ferocious attack by the police. In fact the Appellant had not said in his evidence at the inquiry that he had told Esira Bari of any other pains or discomforts.

[26] The Appellant had stated in his evidence at the *voir dire* inquiry that the medical report he produced was incomplete. I cannot find any missing part in the report as all

the relevant parts had been filled and signed by the examining doctor at the end. It appears that it had been filed by the police officer on 05 August 2008 and the Appellant had been examined on the following day and the rest had been completed by the doctor who had also ordered an X-ray. The Appellant had not taken steps to call a witness from Ba Hospital to produce the X-ray at the *voir dire* inquiry.

- [27] Another issue that the Appellant had taken up to buttress his allegation of assault by the police is to show that it had taken an unusually long time for the arresting party to reach the Police Station from Nailaga where he was arrested. He had maintained that during this time he was assaulted at Feeder road. His counsel suggested to the arresting police officers that they had gone to the village at 2.30 p.m. but come back at 3.20 p.m. with the appellant when normally it takes 5-7 minutes for one way journey. The arresting officer Tomasi admitted that they reached there at 2.30 p.m. but could not recollect the time of return. Despite Ba Police Station Diary and Cell Book having been available, the Appellant's counsel had not produced the relevant entries to substantiate the time of return. Thus, his proposition on the belated return attributed to the assault on the way remains a mere suggestion.
- [28] The Appellant's argument that he was not given the Constitutional Rights when recording the caution interview and the charge statement carries little credibility as both statements refer to rights under Section 27 of the Constitution being given to the Appellant but not availed of by him. Further DC 2860 Ilario and DC 2982 Tomasi N had stated that they afforded those rights to the Appellant. I have no reason to discredit the evidence of the police officers on that score.
- [29] It had been elicited by the counsel for the Appellant under cross-examination of the police officer Illario Belo that after the appellant was told of the arrests of the others he had admitted verbally that he was involved in the robbery while he was still in the vehicle that brought him to the Police Station. That being the case, there would have been no necessity for the police to use any force, threat or violence to get the Appellant to admit his involvement in the robbery as alleged by the Appellant.

- [30] On the other hand the Appellant himself had said under oath at the *voir dire* inquiry referring to his caution interview that ‘*Some answers not mine some were mine.*’ However, he had not clarified what parts of the caution statement or answers therein were those of his and what were not. Therefore, on his own account the police had not fabricated the whole of the caution interview. In fact when one reads the caution interview objectively he or she would get the inescapable impression that it is a complete and a step by step description of how the robbery had been carried out and those minute details therein could not have been given in such a chronological order by anyone other than somebody who had been present and participated in the robbery.
- [31] The Appellant is entitled to challenge the *voir dire* Ruling admitting his caution interview at this hearing, for it is well established that where an earlier interlocutory judgment has influenced the outcome of a later final judgment, an appeal against that final judgment may be based on an error in the earlier interlocutory judgment (see **Mudaliar v State** CAV0001 of 2007:17 October 2008[2008] FJSC 25).
- [32] The single Judge had granted leave mainly on the basis of **Nacagi v State** AAU49 of 2010:3 December 2015[2015] FJCA 156 which has *inter alia* considered the approach that should be taken by the trial judge in a *voir dire* inquiry when there is independent medical evidence that supports the complaint made by an accused. The Appellant has relied on **Nacagi** and **Sugu v State** AAU44 of 2012: 27 May 2016 [2016] FJCA 69 which had followed **Nacagi**. Both involved a similar complaint on the admission of confessional statements based on the evaluation of medical evidence.
- [33] In my view both **Nacagi** and **Sugu** embody the judicial approach to be taken when confessions are challenged *inter alia* on the basis of medical evidence. However, both decisions are distinguishable from the present case on the facts and the trial judge’s approach. In **Nacagi** the Appellant had produced a medical report and called a doctor who had produced an X-ray on the healed bone injury on his leg which could be 01 month to 01 year old. Calanchini P found that the trial judge had not summarised but made only a passing reference to the medical evidence and had offered no assessment as to weight if any to be attached to that evidence when he concluded that the caution

statements had been made voluntarily and also that the trial judge had admitted the confessional statements without any indication that he had considered, analysed and accepted or rejected the medical evidence. Thus, there had been a total failure on the part of the trial judge to take the medical evidence into account in Nacagi. In Sugu there had been evidence of an injury in the eye area of the appellant causing “hematoma” and the medical officer had testified that “hematoma” can be caused within 24 to 72 hours prior to the medical examination and it could be a result of an assault on the face with a blunt object, such as a punch dealt on the face. Yet, the Court of Appeal found that there had been nothing in the *voir dire* ruling to demonstrate that the High Court Judge had made an accurate evaluation of the medical evidence and its impact on the voluntariness of the caution statement. Thus, in both cases despite strong medical evidence in support of an assault the trial judge had failed to refer or analyse them *vis-à-vis* the voluntariness of the caution statements.

- [34] In my view, the Learned Trial Judge, as quoted above, in the impugned *voir dire* Ruling had not only referred to the medical report, being the only medical evidence available, but had analysed the contusion on the low back of the Appellant revealed in the medical report in conjunction with the Appellant’s own evidence and found that the Appellant had not even spoken to an assault on that part of the body at the *voir dire* inquiry, implying that the injury described on the face of the medical report is not referable to the alleged police assault following his arrest coupled with the fact that the medical report does not reveal any other injury allegedly caused to the Appellant by an alleged overwhelming brutal police attack. Obviously medical evidence cannot be considered in a watertight compartment or in isolation. The mere presence of an injury on an accused cannot shut out a confessional statement unless it could be related to or the result of an alleged assault by the police. In the light of the totality of evidence including the medical report led at the *voir dire* inquiry, I cannot make the same criticism that was made in Nacagi and Sugu in respect of the Learned High Court Judge’s impugned Ruling in so far as his consideration of the medical report on the aspect of voluntariness of the Appellant’s caution statement is concerned and his subsequent decision to admit it in evidence. The depth of such an analysis of medical

evidence in combination with other evidence by a trial judge at a *voir dire* ruling has been subjected to judicial scrutiny and is discussed later.

- [35] Before that, it is pertinent to quote from **Rahiman v State** CAV0002 of 2011: 24 October 2012 [2012] FJSC 24 which had been cited in **Nacagi** by Chalanchini P in the overall context of this case.

'(21) In Director of Public Prosecutions v Ping Lin 1976 AC575 Lord Salmon made the following observations regarding the Judge's task when considering the evidence before him, to assess its implications as follows:

"The Court of Appeal should not disturb the judge's findings merely because difficulties in reconciling them with different findings of fact, on apparently similar evidence, in other reported cases but only if it is completely satisfied that the judge made a wrong assessment of the evidence before him or failed to apply the correct principle—always remembering that usually the trial judge has better opportunities of assessing the evidence than those enjoyed by an appellate tribunal."

- [36] To what extent a trial judge should give reasons for any procedural ruling has been dealt with by the Supreme Court in **Lesi v State** CAV0016 of 2018: 01 November 2018[2018] FJSC 23 where it was held following **Wallace v. R** [1997] Cr App R 396 that there was no obligation on the judge to give reasons for his ruling and disagreed with the complaint that the judge should have given reasons. The Supreme Court said

'[59] In Fiji, it has been the practice in trials before the High Court where there have been voir dire inquiries, for the trial judge to give a ruling with an economy of words. This is mainly to avoid situations at the trial which follows any bias on the part of the trial Judge.'

'[60] The Privy Council in Wallace v. R [1997] 1 Cr App R 396 stated that there is no rule of general application that a judge should give reasons for any procedural ruling made in the course of a trial within a trial. There may be circumstances where it would be unwise to give reasons which the accused would conclude that he would not be believed on the general issue if he chose to give evidence.'

'[62] The ruling on the voir dire inquiry of the learned trial though economically worded was sufficiently reasoned out. His directions to the Assessors in his summing up regarding the confessions has been adequate and therefore the contention of the 2nd Petitioner as well as

the 1st Petitioner based on their confessions being inadmissible is without merit....'

'[85] But the complaint proceeds on the assumption that the judge should have given reasons for his ruling. The judge himself cited what O'Regan JA had said in Kalisogo v Reginam (Criminal Appeal No 52 of 1984) at p 9, namely that "in giving a decision after a trial within a trial there are good reasons for the Judge to express himself with an economy of words". But giving one's reasons economically is different from not giving any reasons at all, and so one needs to look elsewhere for the answer. It is not hard to find. The issue was addressed head on by the Privy Council in Wallace and Fuller v Reginam [1997] 1 Cr App R 396, to which Chandra J has referred. In that case the judge gave no reasons for finding that the statements under caution were admissible, beyond stating that he found them to be voluntary, and it was contended in the Privy Council that a judge should always express his reasons for any procedural ruling given during a trial. The Privy Council rejected that contention, saying that it all depended on the particular circumstances of the case. Good practice may require a reasoned ruling, for example, where the judge was deciding a question of law so that his reasoning could be reviewed on appeal, or where the judge was deciding a mixed question of law and fact so that the law could be put in context, or where the judge was exercising a discretion in circumstances in which the existence of the discretion was in issue.' (emphasis added)

[37] However, it appears that Nacagi and Sugu had not been cited before the Supreme Court in Lasi. I cannot fathom any reason for this failure. Similarly Wallace and Kalisogo had not been considered by the Court of Appeal in Nacagi and Sugu. Be that as it may, in Lasi the Accused had not placed any medical evidence at the *voir dire* inquiry to substantiate the claim of police assault except his evidence. However, in Nacagi and Sugu there had been medical evidence led at the *voir dire* inquiry.

[38] Thus, the pronouncements in Lasi have been made without specifically referring to a situation where medical evidence is placed before the trial judge who conducts the *voir dire* inquiry and Lasi states that there is no rule of general application that a trial judge should give reasons for any procedural ruling made in the course of a *voir dire* inquiry but in Fiji, as a good practice the trial judge may give a ruling with an economy of words where there has been a trial within a trial.

- [39] On the other hand Nacagi and Sugu are cases where there have been medical evidence but the trial judge had not considered or properly analysed such evidence in the light of allegations of oppression, in deciding to admit the confessional statements. It is this failure by the trial judge that paved the way for the approach adopted by the Court of Appeal. The pronouncements in Nacagi and Sugu should be viewed in that light. Obviously the Court of Appeal in Nacagi and Sugu had envisaged something more than ‘a ruling with an economy of words’ when medical evidence that supports the complaint made by an accused is placed before court at the *voir dire* inquiry.
- [40] The Respondent had argued that the judicial approach suggested in Nacagi is too stringent and as result a rule of best practice (the giving of adequate reasons for admitting contested statements of interest) had been elevated to the level of a general rule of law (that a judge should always express in a written ruling his assessment of medical evidence) the breach of which may found a successful appeal against conviction and said that to that extent Nacagi had been wrongly decided. Whether Nacagi had set the bar too high or introduced a too stringent approach and also whether the general guidelines articulated in Lasi are applicable equally to instances dealt with in Nacagi and Sugu are matters that should be dealt with by the Supreme Court in order to reach a finality on the issue binding on all lower courts. Although the Respondent had urged this Court to clarify this matter in this case I think that this issue should be best left to the Supreme Court to pronounce upon, particularly because the correctness of at least part of the decisions in Nacagi and Sugu are being challenged by the State.
- [41] In my view there cannot be a set formula for setting out reasons in a *voir dire* ruling. It varies from case to case depending on the facts and circumstances of each case. Too much analysis in the ruling at the *voir dire* stage would leave the prosecution or the defence, as the case may be, with the impression that they would not be believed on the general issue at the trial proper. On the other hand if the ruling is devoid of a discussion on the crucial issues placed before court at the *voir dire* inquiry it may leave the parties with doubts of the rationality and transparency of the judicial process and expectations of a fair hearing. The trial judge has to strike a healthy balance between these two ends.

[42] However, as far as this appeal is concerned, it is my view that there is sufficient analysis of medical evidence by the Trial Judge. Neither is there any wrong assessment of medical evidence in the *voir dire* Ruling. The Judge had given reasons why he had accepted the account of the police officers and rejected the Appellant's version of events despite the medical report. Thus, the Trial Judge's *voir dire* Ruling is in sufficient compliance with the approach suggested in Nacagi and Sugu and more than what Lesi had prescribed and I can safely say that the *voir dire* Ruling of the Learned Trial Judge is sufficiently reasoned out.

[43] In addition, I have independently analysed this aspect of the matter and given anxious consideration to the Appellant's complaint in detail. I am satisfied that the Trial Judge was correct in his decision to admit the Appellant's caution interview as the prosecution had proved beyond reasonable doubt of its voluntariness. Therefore, I reject the first ground of appeal.

[44] I shall now deal with the second and third grounds of appeal. They are as follows.

'(ii) 'That the learned trial Judge had totally failed to direct the assessors on the missing first part of the medical report.'

[45] The Appellant had spoken to a missing part of the medical report in his evidence under cross-examination at the *voir dire* inquiry. However, he had not elaborated as to what part was missing. As mentioned before, I do not find any such missing part from his medical report. In any event, the Appellant had been silent with regard to this complaint in his evidence at the trial. Nor had his counsel questioned Dr. Joeli Marakou or Inspector Esira Bari who had completed Part A of the medical report and called on behalf of the Appellant to ascertain whether the medical report was incomplete. The doctor had not said that any part was missing from the medical report. The Appellant's written submission tendered to the CA Registry on 17 October 2018 does not take up this as a ground of appeal at all. In the circumstances, there was no basis or reason for the Learned Judge to have addressed the assessors on the so called missing part of the medical report.

[46] There is no merit in ground 2 and I reject it.

‘(iii) That the learned trial Judge erred in law and in fact in failing to direct himself and/or the assessors on the fact that the prosecution had totally failed to establish as to how the Appellant came by the injury namely the contusion.’

[47] The Learned Trial Judge had asked for re-directions at the end of the summing up and both counsel had said ‘no re-directions’. The non-direction complained of by the Appellant could have been easily brought to the attention of the Trial Judge and therefore for this reason alone this ground of appeal need not be considered. The Court of Appeal has dealt with this type of omission which seems to be happening with alarming and embarrassing regularity giving rise to a plethora of appeal grounds. In **Prasad v State** Criminal Appeal No. AAU0010 of 2014: 4 October 2018 [2018] FJCA 152 the Court of Appeal stated as follows.

‘The appellate courts have from time and again frowned upon the failure of the defense counsel in not raising appropriate directions with the trial judge and said that if not, the appellate court would not look at the complaints against the summing-up in appeal based on such misdirections or non-directions favorably. The appellate courts would be slow to entertain such a ground of appeal. The Supreme Court said in Raj that raising of matters of appropriate directions with the trial judge is a useful function and by doing so counsel would not only act in their client’s interest but also they would help in achieving a fair trial and once again reiterated this position in Tuwai v State CAV0013 of 2015: 26 August 2016 [2016] FJSC 35 and in Alfaaz v State CAV0009 of 2018: 30 August 2018 [2018] FJSC 17.’

[48] Further, the Appellant had neither raised nor addressed this Court on this ground of appeal in his written submissions. However, I will proceed to consider the merits of this ground in absolute fairness to the Appellant. In my view, if the Appellant had wanted to cast a burden on the prosecution to explain how he had come by the contusion on his low back he should have elicited from the doctor the age of the contusion to show that it had happened during time he was in police custody. Without any evidence at all as to when the contusion had occurred I do not think that there was any burden on the prosecution to explain it. Further, the Appellant summoned Inspector Esira Bari who had supervised the investigation and had later completed

Part A of the medical report. At the request of the Appellant he had prepared the 'Police Page/Front Page', written the comments thereon and signed. Under cross-examination he had said that the Appellant was not assaulted by the police and no re-examination had been done on this evidence.

[49] I take the liberty to quote from the summing up the relevant paragraphs dealing with the caution interview.

'24. I now direct you Ladies and Gentleman how you should approach this interview and the consequent statement that he made in answer to the formal charge.

25. The prosecution say that the answers given in the interview were answers that he provided and that they are true. The accused's case is that he was assaulted in the Police Station and he was in pain and in order to stop the assaults he gave those answers but they are not true. He was forced to say that.

26. In deciding whether you can safely rely upon those admissions, you must decide two issues:

1. Did the accused in fact make the admissions? If you are not sure that he did then you must ignore them. If however you are sure that he did, then;

2. Are you sure that the admissions are true? In addressing that issue (whether they are true or not) decide whether they were or may have been, made or given as the result of assaults which may have rendered the answers unreliable. If you decide that the admissions were or may have been obtained as a result of assaults on him by the Police then you must disregard the admissions.

27. In this case the accused says that he was continually assaulted, sat on, beaten on his feet with sticks and nudged in the back, all of which forced him to give the answers that he did. If you conclude that those allegations are or may be correct and that the admissions were or may have been obtained as a result of that conduct, then you must disregard the admissions.

28. If however you are sure that the accused made the admissions and that they were not obtained in that way, you must nonetheless decide whether you are sure that the admissions are true. If, for whatever reason, you are not sure that the admissions are true then you must disregard them. If, on the other hand, you are sure that they are true, you may rely on them.

29. You will appreciate that the case against this accused depends almost entirely on his confessions to the Police. It is for this reason

that you should approach the evidence of the manner in which these answers were obtained with special caution.

30. The same directions apply to the statement he made in answer to his formal charge.'

- [50] In fact, the above paragraphs in the summing up make it clear that the Trial Judge had put the defence case fairly and fully to the assessors. The summing up as a whole does possess those essential qualities of objectivity, even-handedness and balance required to ensure a fair trial as discussed in detail in **Chand v State** AAU112.2013: 30 November 2017 [2017] FJCA 139 and does not offend the rules on directions to the assessors set out in **Tamaibeka v State** AAU0015u of 1997s: 08 January 1999 [1999] FJCA 1 and all other decisions cited therein.
- [51] There is no merit in ground 3 and I reject it.
- [52] I may also add that there is evidence of Mele Bete that she, Tema, Diana and the Appellant spent the night on 01 August 2008 at Lanny's night club in Ba. The evidence of Diana, whom the Appellant had been staying with for two weeks prior to the day of the robbery, that she, Tema, Meli and the Appellant had been at the club in the same night confirms or tallies with that part of the caution interview of the Appellant who also speaks to going to the said club in the night of 01 August with Diana, Meli and another girl after collecting his share of \$800 from the robbery during the day. Thus, there is independent evidence corroborating some parts of the caution interview adding more weight to it.
- [53] I am of the view that the conviction of the Appellant is neither unsatisfactory nor unsafe and should not be interfered with on any of the grounds set out in section 23 of the Court of Appeal Act.
- [54] Therefore, I conclude that the appeal should stand dismissed and the conviction should be affirmed.

Bandara, JA

- [55] I have read in draft the judgment of Prematilaka, JA and agree with the reasons and conclusions.

The Orders of the Court are:

1. *Appeal is dismissed.*
2. *Conviction is affirmed.*



S. Gamalath

.....
Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

C. Prematilaka

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

W. Bandara

.....
Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL