IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT
CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU 95 OF 2008
(High Court HAC 118 of 2007)

BETWEEN : **GUSTON FREDERICK KEAN**
Appellant

AND : **THE STATE**
Respondent

Coram : **Calanchini P**
Chandra JA
Temo JA

Counsel : **Appellant in person.**
Mr M Korovou for the Respondent

Date of Hearing : **16 September 2013**

Date of Judgment : **13 November 2013**

JUDGMENT

Calanchini P

[1] Following a trial in the High Court at Suva by a judge sitting with three assessors, the Appellant and three others were convicted on 10 September 2008 on one count of robbery with violence under section 293 (1) (b) of the Penal Code Cap 17. The

Appellant was sentenced to a term of imprisonment of 14 years, five years of which was to be served concurrently with an existing sentence of 11 years which meant that the Appellant would serve a total of 20 years (11 years existing and nine years cumulative) in respect of what then became a total of four separate robbery with violence convictions. (See P26 of the Record). There was no minimum term imposed by the trial Judge.

[2] The three co-accused were sentenced to terms of imprisonment of in the case of two of them, 14 years and the third for 13 years. There were no minimum terms specified in the sentence judgment for the three co-accused.

[3] The amended information which was filed on 11 July 2008 by the Respondent charged the Appellant and the three co-accused with robbery with violence contrary to section 293 (1) (b) of the Penal Code. The particulars of the offence were stated to be that the Appellant and his three co-accused *"on the 7th day of July 2007 at Samabula _ _ _ robbed the MH Superfresh Supermarket, Tamavua of $21,583.73 cash and immediately before such robbery threatened to use personal violence on the cashiers and customers at the MH Superfresh Supermarket."*

[4] As it is only the fourth accused whose appeal is before this Court, the word Appellant in the singular will be used from this point in the judgment, to refer to the fourth accused.

Proceedings in the court below

[5] The Appellant pleaded not guilty to the charge. He challenged the admissibility of his caution interview and his charge statement. A voir dire was conducted by the learned trial Judge. The basis of the challenge to admissibility had two limbs. The first was that the caution statement was obtained by the use of assaults, threats and oppressive conduct by the Police. The second limb was that the record of interview tendered by the Respondent was a photocopy. Included in this objection was the claim that the photocopy contained admissions that had been fabricated and that his signature had been forged.

[6] Having considered the demeanour of the witnesses and their evidence the learned trial Judge concluded that he was satisfied beyond reasonable doubt that the Appellant's caution statement was obtained voluntarily and not by unfairness or oppression. The learned Judge was also satisfied beyond reasonable doubt that there was no assault or threats to the Appellant.

[7] The learned trial Judge also considered whether a photocopy of the caution interview made by the Appellant was admissible. Applying the principles set out in **R v Lobendahn** (1972) 18 F.L.R 1 and after hearing evidence and submissions, the learned trial Judge concluded that he was satisfied beyond reasonable doubt that the original of the statement made by the Appellant was lost and that a true and faithful copy was in the Respondent's possession. He was satisfied that the original would have itself been admissible and that a diligent search for the original had been conducted by the Police without success. As a result the learned Judge concluded that the photocopy was admissible and that the weight to be attached to it was a matter for the assessors. His decision was pronounced on 14 August 2008 at 10.30a.m in an ex tempore ruling. He indicated that he would give written reasons on notice. The Record at page 509 indicates that the Appellant then sought to tender written submissions. The Record also shows that the Court indicated that the submissions would be considered. The written reasons were subsequently delivered and a copy is included in the Appeal Record (at page 30).

[8] At the trial the Respondent called twenty witnesses (to prove its case against all four accused). The Appellant gave evidence and called two alibi witnesses.

[9] The case for the Respondent rested upon the admissions made by the Appellant in his interview by the Police. As the Appellant was masked there were no witnesses to identify the Appellant as being present at the crime. The Respondent relied on the contents of the Appellant's caution interview to establish what had occurred on the day of the offence. The Respondent's witnesses gave evidence to the effect that at around 5.00p.m. on 7 July 2007 a group of masked men arrived with beer bottles and a pinch bar and started throwing bottles around the cashier area. The masked men were shouting and threatening the customers. The men approached the cashiers and took off with cash register tills containing cash in the amount of about $21,000.00.

Two customers also gave evidence that the men had taken property from them when they entered the store with bottles and a knife. The Police later found a brown minivan abandoned in Nakasi which the Respondent alleged was used in the robbery. Bottles were found in a sack inside the van and a knife was found under the driver's seat. The Appellant was arrested on 5 August 2007. He was taken to the Samabula Police Station and locked up in a cell. The following morning, on 6 August 2007, he was interviewed. The Respondent's case was that during interview the Appellant gave a detailed account of his involvement in the robbery. He said he joined the plan when it was being made. When he reached the supermarket he got out of the van and was a party to taking two tills from the cashiers.

[10] In his defence, the Appellant relied on alibi. He did not dispute that a robbery had taken place as alleged. He maintained that he played no part in the robbery and was not even at MH Superfresh on the day in question. The Appellant's evidence was to the effect that at the time of the robbery he was at his brother's house in Lautoka attending his nephew's birthday party. He also stated that two of his co-accused were also present at the party although he did not know them before meeting them at the party.

[11] Following the learned trial Judge's summing up, the assessors by a majority found the Appellant guilty. The learned trial Judge agreed with the majority and on 10 September 2008 convicted the Appellant as charged. The Appellant was sentenced on 15 September 2008. The Appellant's appeal is against both conviction and sentence.

Leave to appeal

[12] In a Ruling delivered on 13 October 2009 a single Judge of this Court granted to the Appellant leave to appeal against conviction and sentence on the following grounds:

> *"1. That the learned trial Judge erred in law and fact when his Lordship did not deliver a written ruling entered against the admissibility of the disputed photocopy caution and charge interview statements of the voir dire.*
>
> *2. That the learned trial Judge erred in law and in fact when his Lordship wrongly admitted evidence of photocopy caution and charge interview statements.*

3. That the learned trial Judge erred in law and fact when his Lordship denied an adjournment for time to find counsel from Legal Aid Commission Board."

[13] There was initially a fourth ground of appeal alleging bias on the part of the trial Judge. However this ground of appeal was withdrawn by the Appellant at the leave hearing.

Amended grounds of appeal

[14] In a typed document signed by the Appellant and filed on 6 August 2013 the Appellant set out his amended grounds of appeal against conviction and sentence and his submissions on those grounds. The amended grounds of appeal against conviction are:

"1. Wrongful admission of photocopy caution and charge interviews.

2. Wrongful admission of photocopy of confessional caution and charge interview on voir dire.

3. Wrongful admission of the interviews in regards to unproven signatures by expert evidence.

4. Failure to direct the assessors on dangers of conviction on uncorroborated confessional statements made alone.

5. Failure to direct an adjournment in order to:

a secure back disclosures from Legal Aid
b. read, study and prepare a defence from additional disclosures
c. secure legal aid assistance on an application for reconsideration of director's decision to LAC board.

6. Misdirection assessors in regards to my defence."

[15] The amended grounds of appeal against sentence are:

"1. That the sentence offends the totality principle.

2. Starting point being excessive.

3. Consideration of impermissible aggravating features.

4. The sentence being harsh and excessive."

[16] To the extent that these amended grounds of appeal against conviction and sentence fall outside the grounds of appeal for which the Appellant had been granted leave to appeal on 13 October 2009, this judgment will proceed on the basis that the Appellant is required to establish an arguable point on each ground and if satisfied that an arguable point exists proceed to consider the appeal itself.

[17] The Respondent filed written submissions on 23 October 2012 for the appeal against sentence and on 18 January 2013 for the appeal against conviction.

[18] In his submissions the Appellant deals with the first three grounds of appeal on the basis that they relate to the learned trial Judge's decision at the conclusion of the voir dire to admit the Appellant's caution interview into evidence. The Appellant submits that the caution interview should not have been admitted into evidence because it was a photocopy (ground 1), it was not made voluntarily (ground 2) and because his signatures were not verified and in fact the original caution interview was not the same as the copy document produced and relied upon by the Respondent at his trial (ground 3). It should be noted that although these three grounds of appeal seek to challenge the learned trial Judge's Ruling at the conclusion of the voir dire, the third ground relates more to the learned trial Judge's summing up in respect of the evidence thus ruled admissible. The issues raised in this ground were questions of fact.

Ground one – admission into evidence of the photocopy caution interview

[19] In relation to ground 1, this Court confirmed in **Drodroveivali –v- The State** (unreported AAU 19 of 2003; 4 March 2005) that the law relating to the admission into evidence of photocopies in the course of a criminal trial was correctly stated in the decision of **R v Lobendahn** (1972) 18 F.L.R. 1. In particular this court at paragraph 17 of the **Drodroveivali** decision (supra) quoted with approval the following from the head note of the reported **Lobendahn** decision (supra):

> "_ _ _ *it is sufficient to refer to the Fijian authority on the law (**R v Lobendahn**). The head note reads:*

> *"The law on this question required:*
>
> *(a) It must be established that the original itself formerly existed, would have been admissible in evidence and that the copy tendered is a true and faithful reproduction of the original.*
>
> *(b) The original must be proved to have been lost or destroyed and if lost, due and diligent search must be established.*
>
> *(c) It must be shown what happened to the original up to the time when it was lost, and how the copy was made and came into hands of the person tendering it."*

[20] It will be noted from the above statement of the law concerning the admissibility into evidence of photocopies of original documents that amongst other matters, the Respondent was required to establish that the original itself would have been admissible into evidence. The admissibility of a photocopy of the original caution interview claimed to have been lost and the admissibility of the original caution interview were preliminary questions of law that were both properly considered by the learned Judge in the voir dire that took place at the commencement of the trial.

[21] The issue of the admissibility of the original caution interview was considered first by the learned trial Judge. The only issue to be determined in relation to admissibility of the original caution interview was whether the admissions in the interview had been made voluntarily. On that issue the learned trial Judge stated that he was satisfied beyond reasonable doubt that the Appellant's caution interview was obtained voluntarily and not by unfairness or oppression. Once found to have been made voluntarily the original caution interview would have been admitted into evidence. Once admitted into evidence any question of fact arising during the trial concerning the caution interview, such as its truthfulness or its authenticity as the caution interview of the Appellant, was a matter for the assessors.

[22] On the other requirements that the Appellant needed to establish in order for the photocopy caution interview to be admitted into evidence, the learned trial Judge said in his Ruling on page 36 of the Record:

> *"In order to admit photocopies of any documents the prosecution must prove firstly that the original existed which would have been admissible in itself, that the copy is a true and faithful copy of the original, that the original is lost or destroyed, that a diligent search was conducted, that the original was kept safely before it was photocopied and a copy made from it.*
>
> *– – –*
>
> *The State called Cpl. Ana Vuniwaqa. Cpl Ana said in July 2007 she was based at Samabula Police Station. She provided administrative support for the Strike Back Unit. She typed and photocopied the hand recorded caution statements of the accused persons. She photocopied the statements from the originals and placed them in a folder. The originals were kept by the investigating officer who currently is on an overseas mission. She searched for the originals but could not locate them. She conducted her search in the exhibit room and the lockers at the Samabula Police Station. Constable Maria assisted her to search for the documents. The originals were missing.*
>
> *She was shown the photocopied statements. She said she was the one who made the photocopies. She said the statements are true copies of the originals. In cross-examination she denied altering the documents."*

[23] In my view it was open on the evidence for the learned trial Judge to come to the conclusion that the Respondent had established the basis for the photocopy of the caution interview to be rendered admissible as evidence. I cannot find any error in the Ruling. Although the Appellant disputed its authenticity and denied making the statement and signing the document, they were issues of fact to be considered by the assessors. There was no requirement for the Respondent to lead further evidence corroborating the evidence of Cpl. Vuniwaqa in order for the copy document to be rendered admissible.

Ground 2 – voluntary confession

[24] Ground 2 challenges the admissibility into evidence of the confession on the basis that it was not a voluntary confession. Whether the confession was made voluntarily was a question of law to be determined by the trial Judge usually at the commencement of the trial in a procedure known as a voir dire. In the voir dire the onus was on the Respondent to establish beyond reasonable doubt that the confession was voluntary.

The learned trial Judge, after considering the evidence given by the Respondent's witnesses and the evidence of the Appellant, concluded that the Appellant's caution interview was obtained voluntarily and not by unfairness or oppression.

[25] The Appellant claimed that whilst at the Samabula Police Station he was denied meals, proper sleeping facility, toilet facilities and drinking water. He also claimed to have been assaulted. However the Appellant is not really challenging the admissibility of the caution interview on the basis of whether it was made voluntarily, because at paragraph 31.0 on page 7 of his submissions, the following appears:

> *"It is submitted that although I was assaulted, threatened and subjected to oppressive treatment as above summarised, I nevertheless did not make those statements and I did not sign those photocopy interviews. Police fabricated those statements and fraud (perhaps should read forged) these signatures."*

[26] It is apparent that the issue raised by this paragraph is not so much whether the caution statement was made voluntarily but rather the Appellant is claiming that he never made the caution interview admissions and that his signature had been forged. The Appellant cannot rely on both grounds. He cannot claim that the caution interview was obtained by oppression force and unfairness on the one hand and on the other hand claim that he never made the caution interview and that his signature was forged. When this was raised with the Appellant during the course of the hearing before this Court, the Appellant indicated that he was pursuing the claim that he did not make the caution interview in the photocopy and that his signature had been forged.

[27] Although on the one hand the issue whether the caution interview admissions were made voluntarily was a question of law for the judge at the voir dire stage whilst the authenticity of the interview was a question of fact for the assessors to be decided after all the evidence has been heard, the Appellant cannot nevertheless maintain both positions in this appeal. As a result it is not necessary to consider further ground 2 which is rejected.

Ground 3 – Did the Appellant make and sign the confession

[28] Ground 3 is related to the claim by the Appellant that the photocopy version of the caution interview was not made by him and that his signatures on the photocopy document were forged. Whether the Appellant had made and signed the caution interview was a matter for the assessors.

[29] In paragraph 13 of his summing up the learned trial Judge told the assessors that:

> *"Before you can act on the confessions of each accused person you have to be satisfied beyond a reasonable doubt of two things:*
>
> *(1) Firstly, that the accused did make the confession.*
> *(2) Secondly, that the confession is true.*
>
> *In this case all four accused persons say that the confessions were not made by them but were fabricated by the police _ _ _."*

[30] At paragraph 33 the learned trial Judge reminded the assessors that the Appellant had been interviewed on the morning of 6 August 2007 by DC Joape and witnessed by DC Matai. Then at paragraph 37 the learned trial Judge explained to the assessors the position in relation to the photocopies of his caution interview and charge statement:

> *"The caution interviews and the charge statements before you are not original but photocopies. Cpl. Ana Vuniwaqa said she made the photocopies from the originals. The originals were given to the investigation Officer who is on overseas mission. Cpl Ana searched for the originals but could not locate them. It is for you to decide having heard the evidence of Cpl Ana and of each accused how much reliance you can place and what weight you can give to the photocopy documents."*

[31] The issues raised by the learned trial Judge in paragraph 37 of his summing up were the same as those considered by the Judge in his voir dire Ruling. The issue before the Judge in the voir dire was whether it would be proper to admit into evidence the photocopied versions of the Appellant's caution interview and charge statement. In my view the appropriate legal tests were considered and applied. The issue for the assessors was not so much whether they could rely on the photocopies, but whether the admissions made in the original caution interview and charge statement (photocopies of which had already been admitted into evidence) were those of the

Appellant or whether they had been fabricated by the Police. There was also the issue of whether the signatures on the caution interview were the signatures of the Appellant. In my judgment the learned Judge has adequately explained the issues in relation to the admissions made in the original caution interview a copy of which had been admitted into evidence. He had stressed that they had to be satisfied beyond reasonable doubt as to the truthfulness of the admissions.

[32] The Appellant gave evidence and, as with his co-accused, relied on the defence of alibi which was appropriately explained to the assessors. Then in paragraph 35 the learned trial Judge again identified for the assessors the issue that is raised in this ground of appeal.

> *"He said the confession is not true. It was not made by him. The Police fabricated the statements in (Police exhibit 9 – charge statement) and (Police exhibit 5 – caution interview) after assaulting him. It is not his signature on (P9) and (P5)."*

[33] The evidence on the issue can be found at page 546 of the Record. DC Joape in evidence in chief stated:

> *"I interviewed the 4th Accused. DC Matai was present. The interview was conducted in Samabula Police Station. The interview was in English. I recorded the interview. He was given breaks during the interviews. The 4th Accused signed the interview in my presence."*

[34] The caution interview in the form of the photocopy of the original was then tendered by DC Joape and admitted into evidence as P9. In cross-examination the Appellant put question to DC Joape in relation to the caution interview and the signatures. In all his answers to those questions DC Joape unequivocally confirmed that the Appellant had made and signed the caution interview.

[35] The Appellant elected to give sworn evidence and to call witnesses. In his evidence the Appellant stated that *"the contents of his caution interview are not true. I did not give any statement regarding the alleged robbery. I did not sign the interview."*

[36] During the course of his evidence the Appellant stated that after he returned to the Samabula Police Station from the Suva Cemetery, *"the interview continued."* When this was raised by the Court during the appeal hearing, the Appellant stated that the interview that he was referring to was not the interview that was tendered as evidence and allegedly signed by him. Under cross-examination (Record P583) the Appellant admitted that an interview had been conducted but claimed that the parts of the caution interview that implicated him were fabricated and that the signatures were not his but had been forged. Interestingly when the Appellant was asked whether he had admitted to the offence as a result of assaults, replied no. The reason being, of course, was that he maintained that he never made any admissions.

[37] All the evidence to which reference has been made was before the assessors. It was a matter for the assessors to determine whether they were satisfied beyond reasonable doubt that the Appellant had signed the caution interview. The interviewing officer said the Appellant made and signed the statement in his presence. The Appellant denied making the admissions and denied signing the statement. The issue before the assessors was not one of signature identity, the issue was whether the Appellant had signed the statement. After all the Appellant denied signing any statement whether the original of the photocopy tendered or some other statement which he admitted making. It was the act of signing a statement that was in issue. It was a matter for the assessors to determine who should be believed and then whether such evidence was sufficient to establish the issue beyond reasonable doubt. The learned trial Judge had reminded the assessors several times during the course of his summing up that it was for the Respondent to establish its case beyond reasonable doubt.

[38] In my judgment under those circumstances it was not necessary for the Respondent to call expert evidence. The testimony of DC Joape who stated that he saw the Appellant sign the original, the photocopy of which was in evidence, was direct evidence of a fact.

[39] The requirement for expert opinion or comparison evidence by an expert arises when there is no direct evidence given by a witness who has claimed to have observed the writing or signing of a document by a person who disputes the same. For all of the above reasons I would reject ground 3 of the appeal.

Ground 4 – uncorroborated confession

[40] Ground 4 of the grounds of appeal claims that the learned trial Judge failed to direct the assessors on the danger of conviction on the uncorroborated confessional statement made alone.

[41] In this jurisdiction there is no rule of practice that requires a trial judge to always include in his directions to the assessors a warning of the danger of acting upon the evidence of an alleged confession even when that confession is uncorroborated. However it has been accepted that there are cases in which such evidence should be scrutinized carefully. In some circumstances it may be appropriate for the trial judge to direct the attention of the assessors in his summing up to those features of the evidence which may be thought to warrant closer attention. Ordinarily whether such comment should be made and the content of that comment is a discretionary matter for the trial judge. It is apparent that where there is a signed caution interview containing admissions with no independent corroboration as to its making or signing and where the accused claims that the interview was fabricated and his signature forged then there are significant matters for the judge to consider in the exercise of his discretion.

[42] In my judgment the learned trial Judge in his summing up has directed the attention of the assessors to the relevant facts established by the evidence. First, in paragraph 11 the Judge pointed out that the Respondent relied substantially on the Appellant's interview to the police. The State relied on the interview to establish what had occurred on the day of the offence. It is appropriate to set out the directions in paragraph 13:

> *"You should take into account all the circumstances in which the statements were made in assessing their value. The State says each accused has made some sort of confession to the police. You can convict a person on his/her confession alone. _ _ _ Before you can act on the confession of each accused person you have to be satisfied beyond a reasonable doubt of two things:*
>
> *(1) Firstly, that the accused did make the confession and*
> *(2) Secondly, that the confession is true."*

[43] In his summing up the learned Judge had fairly summarised both the Appellant's and the Respondent's evidence in relation to the caution interview. It was made clear to the assessors that (a) the only evidence against the Appellant was the caution interview and (b) that it was a matter for them to determine whether they accepted the State's evidence given by the interviewing and witnessing police officers or whether they accepted the evidence given by the Appellant that he did not make the admissions in the interview and that his signature was forged. In my judgment the learned trial Judge has adequately addressed the issue in his summing up and has as a result alerted the assessors to the fact that in order to convict the Appellant they must be satisfied beyond reasonable doubt about the Respondent's witnesses version of how the caution interview was made and signed.

[44] It must be acknowledged that the Appellant's submission on this ground of appeal is not without merit. The Appellant relies on the decision of the Australian High Court in **McKinney v The Queen** (1991) 171 CLR 468. This was a four to three majority decision in favour of the proposition that *"whenever police evidence of a confessional statement allegedly made by an accused while in police custody is disputed and its making is not reliably corroborated, the judge should, as a rule of practice, warn the jury of the danger of convicting on the basis of that evidence alone" (*from the headnote).

[45] However, it is the judgment of Dawson J at page 487 that best reflects the argument for not favouring such a rule of practice:

> *"Trial judges have long been required to warn juries of the danger of convicting on the uncorroborated evidence of witnesses who fall into certain categories. _ _ _.*
>
> *Yet the applicants seek to have this Court create a new category of suspect witnesses, namely, police giving evidence of a confession alleged to have been made by an accused in respect of whom a compulsory warning of an undefined but necessarily of a depreciatory kind must be given. The reason for the traditional warning is said to be the common experience of the courts that the evidence of witnesses in the recognised categories is inherently unreliable in a way which may not be readily apparent to a jury. That has never been said of police evidence, whether it be of a confession or otherwise. And if it could be said of evidence of a confession, then it is difficult to see why*

> *it could not be said of other police evidence, for the opportunities open to the police to fabricate evidence are certainly not confined to the taking of a confession. _ _ _".*

[46] In **R v Spencer** [1987] AC 128 Lord Ackner at page 141 declined to consider a submission that patients in hospitals under the Mental Health Acts should be added to the established categories of witnesses where a full warning is required. More importantly, Lord Ackner also noted that there was *"no magic formula which has to be used with regard to any warning which is given to juries."*

[47] Far from increasing the established category of witnesses whose evidence without corroboration requires a full standard warning, the tendency, as Dawson J observed in **McKinney** (supra) at page 488, has been in recent times to limit as far as possible the range of compulsory, standard directions which a trial judge is required to give to juries and in Fiji, assessors. In Fiji, as a result of section 129 of the Criminal Procedure Decree 2009, a trial judge is no longer required to give a standard warning to the assessors where the evidence of a complainant in a trial for an offence of a sexual nature is not corroborated. Except for the two remaining categories of witnesses, the preferred approach has been to allow the trial judge to craft his summing up to suit the circumstances of the case before the court (per Lord Ackner in **R v Spencer** (supra) at page 141).

[48] Certainly it is clearly desirable that caution interviews should be conducted with facilities that allow audio and video recording and no doubt that will come about. The issue presently before this Court would not have arisen had the caution interview been appropriately recorded. However to require a standard warning to be given by the trial judge to the assessors when a disputed confession is uncorroborated independently of the police or even a warning that it should be regarded with suspicion in order to encourage the introduction and use of audio and visual recordings falls outside the role of a trial judge. In **Mckinney** (supra) Dawson J at page 490 regarded such an approach as going beyond whatever may be "the proper limits of judicial activism."

[49] In my judgment this Court should not adopt the majority view in **McKinney** (supra). The position in Fiji should continue to follow the position adopted by Lord Ackner in

R v Spencer (supra). A disputed confession without corroboration does not require a standard warning nor does it necessarily require a warning that it should be regarded with suspicion. This was not a case where the evidence of the interviewing officer and the witnessing officer should have been regarded as potentially unreliable. The trial judge has clearly set out the evidence upon which the Respondent relied and what the Appellant said about the evidence during the course of his evidence. In my judgment in this case he was required to do no more, than indicate to the assessors that it was a matter for them to be satisfied beyond reasonable doubt that the caution interview was made and signed by the Appellant. This he did. For all of the above reasons I would reject this ground of appeal.

Ground 5 – refusal to grant adjournments

[50] Ground 5 of the Appellant's grounds of appeal concerns the refusal of the learned trial Judge to grant any of the Appellant's applications for an adjournment.

[51] On 20 August 2007 the trial of the Appellant's charges was transferred by the Magistrates Court to the High Court pursuant to section 223 of the Criminal Procedure Code (now repealed). The Appellant was ordered to appear in the High Court at Suva on 31 August 2007.

[52] When the Appellant appeared before the learned trial Judge on 14 November 2007 he indicated that he was pleading not guilty and that he would seek Legal Aid. The learned Judge noted that all the accused (including the Appellant) were to seek legal representation and that additional evidence was served on the accused. When the Appellant appeared before the learned Judge on 21 November 2007 he indicated that there was no issues in relation to bail that he wished to raise as he was a serving pensioner. He made no other request.

[53] On 11 January 2007, in the presence of the Appellant, the learned Judge fixed the trial date for 28 January 2008 and directed a pre trial conference for 23 January 2008 by which time all disclosures were to be served. At the request of the Respondent, for reasons not relevant to the appeal, on 23 January 2008 the learned Judge vacated the trial date. The proceedings were relisted for mention on 1 February 2008. On that day, due to an administrative failure, the matter was again relisted for mention on 8

February 2008 and for the same reasons subsequently relisted for mention on 15 February, 3 March and 18 March 2008.

[54] On 18 March 2008 the Respondent informed the Court that it intended to file an amended information. The matter was adjourned to 28 March 2008 for plea and on that day was relisted for mention on 11 April 2008. On that day the Appellant indicated that he understood the charge and confirmed his plea of not guilty. He also informed the Court that he understood his rights including the right to counsel of choice and the right to apply for Legal Aid. The Appellant then made an application to have his trial remitted to the Magistrates Court. In an ex tempore ruling the learned trial Judge refused the application. The Record indicates that on the same day the Appellant informed the Court that his application to Legal Aid had been rejected. He indicated that he would lodge an application to appeal to the Legal Aid Commission Board.

[55] On 18 April 2008 the learned trial Judge advised all accused to engage counsel or apply to the Legal Aid Commission. On 19 May 2008 the trial Judge informed the Appellant that the trial was fixed for the period 28 July to 8 August 2008. The Respondent informed the Court that the Appellant's caution interview (along with the other caution interviews) contained admissions. The Appellant had already given his objections. The learned Judge explained the voir dire procedure to the Appellant. Any further objections were required to be filed by 29 May 2008.

[56] After a number of subsequent mention appearances, the Appellant appeared before the Court on 25 July 2008. An amended information was filed by the Respondent. The Court informed the Appellant that the trial would start on 28 July 2008. The Appellant made no application of any description on that day. On 28 July 2008 the Appellant made an application for a separate trial. The application was rejected by the trial judge in an ex tempore ruling delivered on the same day. The Respondent applied for the trial to commence on 30 July as Counsel had filed additional voir dire evidence which had only been served on the Appellant on that day. The Court granted the application. The Appellant informed the Court that he had given his alibi notice.

[57] On 30 July 2008 the Appellant was delivered to the Court late and claimed to have been ill. He admitted that he didn't have a medical certificate. He applied for an adjournment of the trial as he wanted legal aid. The Court rejected the application. The learned trial Judge noted that the Appellant's application had been refused by Legal Aid. He had been given ample opportunity to secure legal representation. As his Legal Aid application had been refused, the learned Judge indicated that he would ensure that the Appellant received a fair trial and understood the proceedings.

[58] The Record indicates that the Appellant's application for an adjournment on 30 July 2008 was for the purpose of securing legal aid. However as the learned Judge noted, the Appellant's application for legal aid had been refused.

[59] The Appellant did not put forward any other reason for seeking the adjournment and the Record indicates that the Appellant did not make reference to any issue concerning his disclosures on that day.

[60] In my judgment the learned trial Judge was required to follow the guidance of this Court that was provided in **Asesela Drotini –v- The State** (unreported AAU 1 of 2005; 24 March 2006) at paragraph 10:

> *"It is preferable that anyone facing a serious charge should be able to be represented by counsel. Unfortunately the limited resources of the State and the financial circumstances of many defendants mean they are unrepresented. In such circumstances the trial court should ensure that the defendant has been allowed reasonable time to instruct counsel. Once he has, the court also has a duty to hear the case as expeditiously as possible. Whenever an accused is unrepresented the court should explain the procedure sufficiently for the accused to be able to conduct his defence."*

[61] The issue before this Court is whether the Appellant was prejudiced by his lack of legal representation. The record indicates that on a number of occasions the Appellant was advised that he should seek legal representation and was given sufficient time to find counsel. The record shows that the Appellant was correctly advised of his rights and that the procedure of the voir dire was correctly explained to the Appellant by the learned trial Judge.

[62] Although the Respondent's case against the Appellant was based on a disputed confession alone, the learned trial Judge properly conducted a voir dire (a trial within a trial) before admitting the confession into evidence. In the voir dire and in the trial itself the Appellant cross-examined the police officers at length and challenged their evidence. The record shows that the Appellant competently cross-examined the Respondent's witnesses and in doing so clearly put his case to the Respondent's witnesses. The majority of the assessors and the learned trial Judge found that the confession had been made by the Appellant and it was both credible and reliable. I find that there has been no prejudice and hence no merit in this aspect of the Appellant's ground 5 of the Appeal.

[63] As far as the Record is concerned there is no indication that the Appellant had sought an adjournment on the basis that he did not have in his possession the disclosures provided to him by the Prosecution. The disclosures initially provided to the Appellant were included in the list set on pages 44 – 47 of the record. The Appellant acknowledged that he had received documents (1), (2), (3 (i) – (vii)), (15) and (16). In my view if the Appellant did not see fit to raise this matter with the trial judge, he cannot now claim that he should have been given an adjournment to retrieve some or all of the documents.

[64] The Appellant also claims that he was short served with additional notices of further evidence on 28 July 2008 and 30 July 2008 (see pages 334, 375 and 397 of the Record). He submits that he should have been given an adjournment to read, study and familiarise himself with the new additional statements. However it is not indicated in the record that the Appellant had sought an adjournment on either 28 or 30 July to enable him to consider the material. The applications on 30 July (p430), 4 August (p458) and again on 18 August 2008 (p522) were made for the purpose of obtaining legal representation. In any event I am not satisfied that the additional evidence about which the Appellant had received notice was directly related to the case against him. The evidence concerning his confession in the form of statements taken by the interviewing officer and witnessing officer had been provided to the Appellant. It does appear that the Appellant was not provided with a copy of any statement made by Cpl Ana Vuniwaqa. However her evidence was necessary to

establish the legal basis for the admission into evidence of photocopy caution interviews. The learned trial Judge concluded that her evidence established a legal basis for admissibility. The record indicates that the Appellant also cross-examined this witness during the voir dire (p433) and again during the trial proper (p533). In my view the Appellant had not been prejudiced on account of not having received a copy of Cpl Vuniwaqa's statement. Her evidence concerned matters of fact about which the Appellant did not have any knowledge and could not have disputed.

[65] I am satisfied that there was no basis upon which the Appellant should have been granted an adjournment. There is no basis for concluding that the Appellant did not receive a fair trial and I would reject all aspects of ground 5 of his grounds of appeal.

Ground 6 – Appellant's Defence

[66] Ground 6 is concerned with the Appellant's claim that the learned Judge misdirected the assessors in his summing up concerning the Appellant's defence. In his written submissions the Appellant pointed to that part of the summing up which refers to (P9) and (P5) (see paragraph 50 of the summing up). The Appellant claims that the assessors are likely to be misled by those directions and as a result concluding that the Appellant was only disputing pages 9 and 5 of his interview.

[67] However it is apparent that what the learned trial Judge was referring to were prosecution exhibit numbers 9 and 5. On page 327 of the record there appears a list of State (i.e. Prosecution) exhibits tendered during the trial and admitted into evidence. Exhibit 5 is the charge statement and exhibit 9 is the caution interview. The use of P9 and P5 in the written version of the summing up can only be the learned trial Judge's shorthand for that which appears on page 327. There is no merit in this ground of appeal and it is rejected.

Appeal against sentence

[68] The Appellant has put forward four grounds of appeal against sentence; namely that (1) the starting point was excessive, (2) the learned trial Judge considered "*impermissible*" aggravating features, (3) the sentence was harsh and excessive and (4) the sentence offends the totality principles.

[69] This Court may interfere with the sentence imposed by the learned trial Judge if it considers that a different sentence should have been imposed (section 23 (3) of the Court of Appeal Act Cap 12). As to when that situation may exist was discussed by this Court in **Kim Nam Bae –v- The State** (unreported AAU 15 of 1998; 26 February 1999):

> *"It is well established law that before this Court can disturb the sentence, the Appellant must demonstrate that the court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (**House –v- R** (1936) 55 CLR 499)."*

Starting point

[70] The Appellant submitted that the circumstances of the offence justified a starting point of nine years instead of the 12 years selected by the learned trial Judge. The maximum penalty for the offence of robbery with violence under section 293 (1) (b) is life imprisonment. In my view the remarks of Madigan J in **State –v- Rasaqio** (unreported HAC 155 of 2007; 9 August 2010) correctly state the position in Fiji. The tariff for robbery with violence or, as it is now known, for aggravated robbery is 10 to 16 years. I am also satisfied that the selection of 12 years as the starting point by the learned trial judge was appropriate in the circumstances of this case and is consistent with the decision of this Court in **Wainiqolo –v- The State** (unreported AAU 27 of 2006; delivered 2006). There has been no error of law in respect of the selection by the learned trial Judge of 12 years as the starting point in this case. A group of men armed with bottles threatened employees and shoppers with violence. The circumstances justified a starting point above the minimum of the range.

Aggravating factors

[71] The next ground of appeal against sentence is related to the decision by the learned trial Judge to add five years for aggravating factors. The aggravating factors that the learned Judge took into account were listed in paragraph 18 of his sentencing judgment. It must be recalled that the Appellant was convicted of the offence under section 293 (1) (b) of the Penal Code. The offence involves robbing and threatening

to use personal violence immediately before the robbery. Aggravating factors in sentencing are those factors that relate to the Appellant's involvement in the crime. The Appellant was one of four offenders who were convicted. He was a member of a gang. The personal violence that this gang threatened was with a knife and bottles. He played an active part in the robbery by removing "*tills*" from two cash registers. The gang of which the Appellant was part also robbed some of the female shoppers and those threatened by the gang also included children. The gang took a large amount of cash and they were intoxicated at the time of the offence. He was an active member of the gang and participated fully in the robbery. His was not a minor or insignificant role in the actions of the gang. In my view these were all matters that were appropriate aggravating factors to be taken into account in sentencing the Appellant. I find no error of law in the addition of five years to the starting point for these aggravating matters. This ground of appeal is rejected.

Harsh and excessive

[72] The next ground is that the sentence is harsh and excessive. There is no basis for this submission. The sentence is within the range, although at the higher end, and there is no error in law. The sentence is not wrong in principle.

Totality

[73] The final ground of appeal against sentence is that the sentence offends the totality principle. This ground relates to the decision of the learned Judge to order five years of the fourteen years sentence imposed for this offence to be served concurrently with an existing sentence and nine years to be served cumulatively. The effect of this order was that the Appellant was required to serve twenty years imprisonment.

[74] The sentencing judgment was dated 15 September 2008. Since that date the Sentencing and Penalties Decree 2009 has come into law. There are two provisions in that Decree which are relevant to this ground of appeal. The first is section 61 (2) which states:

> *"On the hearing of any appeal against a sentence imposed by a court prior to the commencement of this Decree, the court hearing the appeal may -*

> *(a) confirm the original sentence to apply in accordance with any law under which it was made at the trial of the offence or*
>
> *(b) vary the original sentence and impose any sentence in accordance with this Decree."*

[75] At the time the learned trial Judge delivered his sentencing judgment, the appropriate provision concerning this issue was section 28 (4) of the Penal Code. This provision stated that a subsequent sentence was to be served consecutively with any existing sentence unless the court directed that it be served concurrently with the existing sentence. At the same time, the sentencing judge was required to step back and assess whether the total sentence reflected the total nature of the offending. This was an exercise that was particularly necessary where the offender was already serving a long period of imprisonment (i.e. a long existing sentence). If the total sentence appeared excessive, it would be necessary to adjust the sentence by ordering a concurrent term so that the length of the total sentence was reduced to reflect the totality of offending. This is known as the totality principle.

[76] In my judgment a total sentence of 20 years is excessive, even though there were a total of four robberies involved in that sentence. In my judgment the 14 years term of imprisonment for the present offence should have been made concurrent with the existing sentence of 11 years. I therefore would not be prepared to confirm the original sentence.

[77] The second provision under the Decree that is relevant is section 22 (1) which states:

> *"Subject to sub-section (2) every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment."*

[78] In view of the comments expressed above, it seems to me that this is an appropriate case for proceeding under section 61 (2) (b) of the Decree and for applying section 22 (1) of the Decree. I would therefore vary the sentence of the Court below by ordering that the sentence of 14 years for the present conviction be served concurrently with

the existing sentence. Incidentally, section 22(2) has no application to the present case.

[79] Proceeding as I am under the Decree, it is also necessary to consider the issue of a non-parole period pursuant to sections 18 of the Decree. I would propose fixing a non-parole period of 13 years.

Conclusion

[80] The end result is that I would dismiss the appeal against conviction and allow the appeal against sentence in part by varying the order of the Court below and direct that the sentence imposed by the Court below be served concurrently with the existing sentence with a non-parole term of 13 years.

Chandra JA

[80] I agree with the judgment and reasoning of Calanchini P.

Temo JA

[81] I also agree with the judgment of Calanchini P.

Orders:

1. *Appeal against conviction dismissed.*

2. *Appeal against sentence allowed in part by varying the sentence so that the Appellant is sentenced to 14 years imprisonment to be served concurrently with his existing sentence with a non-parole term of 13 years.*

....

HON. MR JUSTICE CALANCHINI
PRESIDENT

....

HON. MR JUSTICE CHANDRA
JUSTICE OF APPEAL

....

HON. MR JUSTICE TEMO
JUSTICE OF APPEAL