IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 44 OF 2012
(High Court No. HAC 77 of 2010)

BETWEEN	:	1.	**TEVITA SUGU**
		2.	**RONALD J COLATI**
		3.	**JOSAIA KOROINAVOSA**
			Appellants
AND	:	**THE STATE**	
			Respondent
Coram	:	**Calanchini P**	
		Gamalath JA	
		Fernando JA	
Counsel	:	**Mr J Savou for the 1st Appellant**	
		Mr S Waqainabete for the 2nd Appellant	
		3rd Appellant in person	
		Mr S Vodokisolomone for the Respondent	
Date of Hearing	:	**12 May 2016**	
Date of Judgment	:	**27 May 2016**	

JUDGMENT

Calanchini P

[1] I agree with the conclusions of Gamalath JA.

Gamalath JA

[1] On 8 May 2012 , in the High Court of Suva the three Appellants were found guilty on the charges of Aggravated Robbery of cash and Theft of a van..In as much as the three appellants had allegedly acted together in a joint enterprise to commit the offences, in the instant appeal as well, the appellants are sailing together to assail the conviction and the sentences of imprisonment imposed by the learned High Court Judge.

[2] It should be mentioned at the outset, that since the order of the names of the appellants appears differently between the appeal brief and the indictment, lest this discordance be a cause for confusion, for the purposes of this appeal, the appellants shall be referred to by their names alone.

[3] The three appellants faced trial in the High Court, Suva on the following charges;

> "***First Count***
> ***Particulars of Offence***
>
> *JOSAIA KOROINAVOSA, TEVITA SUGU and RONALD JEREMIAH COLATI, on the 1st day of February, 2010 at Suva in the Central Division, with others being armed with an offensive weapon stole a van registration EQ 860 the property of ALVIN NARAYAN.*
>
> ***Second Count***
> ***Particulars of Offence***
>
> *JOSAIA KOROINAVOSA, TEVITA SUGU and RONALD JEREMIAH COLATI, on the 1st day of February, 2010 at Suva in the Central Division, with others being armed with an offensive weapon stole $21,130.00 cash the property of HARUN HUSSEIN.*

The Sentences

[4] At the conclusion of the trial, in accordance with the majority opinion of the assessors, the learned High Court Judge found all three appellants guilty as charged and the following sentences were imposed:

(1) Josaia Koroinavosa and Ronald Colati have been sentenced to a period of 12 years imprisonment.

(2) Tevita Sugu has been sentenced to a period of 12 years imprisonment, and 3 years of this sentence to be consecutive to the 13 years imprisonment he is already serving due to a conviction for another offence; making it a sentence of 16 years imprisonment in total.

The Facts

[5] The facts of the case are not in dispute and therefore, there is no need to be engaged in a lengthy discussion on them .As can be seen ,in the trial, the main source of evidence for the prosecution has been the caution statements of the appellants Colati and Koroinavosa. In addition, the victims Narayan, the van driver whose van was stolen to be used in the commission of the robbery of Harun Hussein, whose money was robbed, have also been vital witnesses for the prosecution. Another witness who was called in by the prosecution was one Saimoni Qumiwaimaro, who had provided transport to some of the appellants in his taxi, at the request of his friend Colati. This was after the commission of the offences and his evidence does not shed much light to establish the identity of the persons who he road in his taxi in the evening of the day of the commission of the crime.

[6] As alleged by the prosecution, the appellant Colati is the mastermind behind the robbery in which on 1 February 2010, the appellants acting together had robbed the money and a cheque worth $29,805 belonging to Harun Hussain, the Director of Colour Market (Ltd) at Samabula.

[7] In order to carry out the robbery they used the van driven by the witness Alvin Narayan, who used to hire the van from Tiwari Shopping Centre at Narere.

[8] The planning of the escapade was on 31 January 2010, whereas its execution was on 1 February 2010.

[9] On the day of the incident on 1 February 2010, at around 1:00 pm when the witness Narayan was at Narere, the appellant Tevita Sugu, feigning to offer a hire wanted Narayan to take him in his van to Wainibuku, a place situated about 8 miles away. At one point along the way, three friends of Sugu also boarded the van and sat in the back seat.

[10] It is alleged that half way through the journey, after passing Nasese Police Post, Sugu, whilst pointing a knife ordered Narayan to stop the van. The other three had pulled him over the seat from behind and forced him into the rear of the van; he was gagged with tapes; his hands were tied up and forced to stay under the seat face down wards.

[11] The next phase of the prosecution's case started near Westpac Bank at Nabua, around 3:00 pm, when Harun Hussein was robbed of his money and a cheque. Harun was on his way to the bank to deposit his day's collection of money contained in an envelope and as he alighted from his car to walk towards the bank the appellant Sugu accosted him and twisted his arm and snatched away the envelope.

[12] While Harun gave pursuit to Sugu, the other members of the crime who were waiting at a place close by started to hurl empty bottles at Harun and prevented him from resisting Sugu.

[13] The gang fled the scene, all the way up to Marcellin Primary School in Narayan's van as the getaway vehicle and reaching that place they were transported in the taxi of Saimoni, the witness for the prosecution, who met them at that point as prearranged by the appellant Colati. Narayan who was abandoned in the van was later

rescued by the people passing by the area. The perpetrators having shared the loot had dispersed to their respective homes.

[14] As already mentioned, the taxi that was arranged to transport the offenders belonged to the witness Saimoni Qumiwaimaro, who was a friend of Colati. Accordingly, on the day of the incident, around 3:00 pm Colati wanted the witness to drop him at Nabua Town, in his taxi. After dropping Colati at Nabua Town, Colati wanted him to go to Rifle Range to pick up four of his friends ,who were supposed to be the perpetrators including Sugu, who carried out the robbery.

[15] At Rifle Range, near Marcellin Primary School, the witness met them and gave them transport to Caubati Stage 3. None of those persons were known to the witness prior to this date.

[16] Later in the evening Colati had asked Saiomi to pick him up from the place where he dropped the other 4 persons. Saiomi was paid $1500 for the job done.

The Identification Evidence

[17] Inevitably ,the identification evidence plays a pivotal role in a case of this nature which is primarily based on the accuracy of the visual identification made by the prosecution witnesses. It is thread bear law that a case based on visual identification should be dealt with carefully and scrupulously to ensure that the possibility to make mistakes in identification is eliminated to the greatest extend possible.

[18] In this context, since the witnesses Narayan and Harun, were also relying on their memory of the visual identification of the appellants made at the scene of the crime ,it is important to examine the manner in which the Learned Trial Judge had dealt with their evidence at the trial. As admitted in their evidence at the trial , none of the

witnesses have had prior knowledge of the appellants and the encounter they had with Sugu during the pendency of the crime had been brief and lasted only for a few minutes, if not for few seconds.

Narayan's evidence of identification of the appellant Sugu is such, he places complete reliance on the memory of the glances he has had of Sugu whilst driving towards the place of the crime, with having Sugu sat next to him in the front seat. They were travelling together for about 15 minutes prior to the incident in which Narayan was bundle up and forced under the back seat of the van.

In the words of Narayan at the trial, "I looked at him occasionally while driving. I looked at him more than 10 times. I looked at him occasionally while driving. These glances would not last in more than 5 seconds. I can tell his face from glances."

However, although the man who robbed his van was sporting a beard on the day of the commission of the crime, the person Narayan identified at the trial did not have a beard but was fully shaven.

Answering the cross examination, Narayan further stated that "the description I gave does not match the person, I identified in Court, but for that he shaved his beard." Continuing his testimony he further stated that after the day of the incident he had not sighted the appellant again until he came to the High Court to testify where he saw Sugu in the dock, facing the trial. That is on 20 April 2012, almost after a gap of a 2 years period from the day of the incident. Thus, this is a dock identification and in the eye of law this is not the best form of evidence of identification to establish the connection of an accused person to a crime. The legal authorities on the subject have shown clearly the need to be circumspective of dock identifications. The rationale involved on the subject is compatible with the appreciation of the possible frailty of varying degrees of the human memory based primarily on perception. Thus, the law has been quite understandably slow in acting on such evidence, especially when the perception is based mainly on visual identification. Turning to the evidence of identification of Sugu by Narayan, obviously there is an inherent weakness of the evidence and consequently it begs the question as to the extent to which a Court of law can rely on such evidence to prove the identity of an accused person.

[19] This same inherent weakness can be seen when it comes to evaluate the evidence of Harun Hussein, who was robbed of his money in that evening. According to the evidence of Harun at the trial, it was the appellant Sugu who twisted his arm and robbed him.

His encounter with the appellant Sugu had also been brief and lasted for almost one to two minutes. Few weeks after the incident, on the arrest of Sugu, he had seen the appellant in custody at the police station. Unfortunately at the trial this matter has not been probed into further to unearth more details about that encounter and as such we are bereft of any details relating to that episode at the police station. Similar to Narayan, the next time Harun sighted the appellant Sugu was in the dock, when he came to give evidence.

In addition, preening through the evidence I find certain significant discrepancies in the manner of description of Sugu by Narayan and Harun. For instance Narayan's description of Sugu as a bearded man cannot be found in the description given by Harun who maintained that the person who robbed him was wearing a pair of sunglasses whilst approaching him.

[20] The ultimate reflection of any decision on the probative weight to be accorded to such evidence impregnate with inherent weaknesses on identification of an accused person should be found by referring to the approach a learned trial judge would adopt in dealing with them within the four corners of law, at a trial.

Turning to the instant appeal, in the light of similar complex legal issues arising in this case in the area of evidence of identification ,I consider it as permissible to digress for a moment to pose the question as to what may have held back the investigators in holding identification parades or even resorting to other legal methods such as photographic identification of the accused at the pre trial stage of conducting investigations, enabling the witnesses to test their memory powers and its accuracy, so that the due process involved in conducting proper investigations could have been ensured .Further, in a general sense , by following such well entrenched age old procedural steps , an authentic system of sieving the innocent from the actual criminals could have been ensured. In the absence of any initiatives being taken in

that direction, what is left is a system prone to be trounced in a court of law, paving the way for criminals to take advantage of the gaping lapses allowed to be crept into the system through sheer lackadaisical attitude towards the conduct of proper investigations.

It is important to borne in mind that placing reliance on a tenuous system of establishing identity through dock identification of perpetrators must be viewed as detrimental to the due process. In that context the appellants in the instant appeal have raised the issue of dock identification as a significant moot point stand in their favour.

[21] As already referred to above, in addition to the dock identification of the appellants the prosecution relied heavily on the impugned caution Statements of the appellants Josaia Koroinavosa and Ronald Colati, to prove, *inter alia*, the identity of the actual perpetrators of the crime.

[22] However, as far as Tevita Sugu is concerned, since there was no confession made by him, the prosecution had relied solely on the visual identification of the appellant by both prosecution witnesses Alvin Narayan and Harun Hussein. The fact that this identification is primarily based on the dock identification of Sugu, the weight that must be attached to such evidence is frowned upon by the appellants in their grounds of appeals.

The Grounds of Appeal

[23] As can be seen through the ruling of the Learned Single Judge, each appellant had relied on a catalogue of grounds of appeal. However, the Learned Single Judge hearing the leave to appeal application had confined the leave against the conviction to the following ground only.

> *"The admissibility of the two disputed confessions was determined in a voir dire. The trial judge after hearing the evidence ruled the confessions were freely and voluntarily given by Koroinavosa and Colati. However, when the trial judge directed the assessors on the disputed confessions, he left the issue of voluntariness to the*

assessors to decide. Arguably, this was a misdirection because the assessors are not concerned with the voluntariness but the weight or the truth of the confessions. Furthermore, the trial judge directed the assessors at paragraph 36 that they can use Koroinavosa's confession to assess the credibility of Saimoni's identification evidence. The issue was not credibility of Saimoni's evidence. The issue was the reliability of Saimoni's identification evidence. Arguably a disputed confession cannot enhance the quality of disputed identification evidence."

[24] In his final decision the Learned Single Judge granted leave to appeal against the conviction of the appellants Koroinavosa and Colati. Leave to appeal application against conviction of Sugu was refused. Leave to appeal against sentences refused to all three appellants.

[25] The ground of appeal on which the leave had been granted has become a common feature in the renewed grounds of appeal of all three appellants. In the circumstances, therefore, it will be dealt with on a common basis as the discussion unfolds on the grounds of appeal on a general basis. Anyhow, for the purpose of clarity and comprehensibility, the grounds of appeal of each appellant would be considered separately.

[26] **Josaia Koroinavosa's amended grounds of appeal against conviction**

Ground One

The learned trial judge erred in law and in fact when he allowed the State witness namely Mr Saimoni Qumiwaimaro during the trial to identify the Appellant in the witness box without a prior foundation of identity parade or photograph identification.

Ground Two

The learned Trial judge erred in law and in fact when he failed to consider the medical report of the Appellant where the medical doctor confirmed that the appellant

was assaulted by the Police officer at the time of caution interview that resulted in the alleged confession which has caused a grave miscarriage of justice.

Ground Three

The learned trial Judge erred in law when he misdirected the assessors to consider and decide on the issue of voluntariness instead of the weight of the truth of the confession.

Ground Four

The learned trial judge erred in law when he directed the assessors that they can use the appellant's confession to enhance Saimoni's identification evidence.

[27] **Ground of Appeal One of Koroinavosa;**

Echoing what has been discussed in the preceding paragraphs, simply stating, the appellant is taking umbrage at the manner in which the dock identification was allowed at the trial.

At the trial, it is the evidence of the witness Saimoni Quimwaimaro that he could identify the Appellant as the person who travelled in his taxi around 3p.m. on the day of the robbery; at the request of his friend Colati he had gone to Riffle Range to pick up the gang of Colati. He did not know who he was going to pick up until he reached the Marcellin Primary School ,Riffle Range. There were four boys and he gave them a ride to Caubati Stage 3.It had taken 10 minutes for the witness to traverse the distance. The one who sat along with him in the front seat, he had seen the man before at Nabua Town. He had seen him a couple of times. He had later qualified the position by stating that he saw the person twice before. He recognized the appellant Koroinavosa as the person who travelled in the front seat with him while they were travelling in his taxi.

Answering the cross examination he had categorically stated that he watched the appellant for more than five seconds and it was through the side mirror and the front mirror that the witness had seen the appellant Koroinvosa. He had no special reason to remember this appellant and he was unable to remember any other passenger who

travelled with him that day. Ironically, he had seen a bearded person holding a brown envelop sitting in the back seat. According to the witness that person was not present in court on the trial day. His concentration had been on the road and there had been no special reason for him to remember the appellant Koroinvosa, in particular. There had been no identification parade held to identify the appellant , however, on a subsequent day he had seen the appellant at the police station , prior to the trial.There are no particulars given to explain this position in his evidence.

Clearly, in the Summing up the learned Trial Judge had acknowledged the fact that in the absence of an identification parade being held, the evidence of Saimoni suffers an inherent weakness.

In his direction to the assessors the learned Trial Judge had the following observation to make with regard to the weaknesses;

> *"36. Saimoni (PW3) said, he drove four 'i-taukei' boys from Marcellin Primary School to Caubati Stage 3. He said, Accused No. 1 Koroinavosa sat in the front passenger seat. He said, he had seen him twice before, at Nabua. He said, he had no special reason for remembering his face. He said, it was daylight. He admitted, he did not attend any Police identification parade. Saimoni's identification evidence suffered from a weakness that no Police identification parade was done, to test the veracity of Saimoni's identification evidence. This will somewhat decrease its credibility. However, as a counter to this, the accused admitted Saimoni's evidence, in his confession. If the confession is February, 2010, at Nabua Police Station. The caution interview notes were tendered as Prosecution Exhibit No. 1(a) – handwritten version, and 1(b) – typed version. You must carefully read and consider the caution interview notes."*
>
> (Accused no. 1 in the High Court Proceedings was this appellant Koroinavosa).

[28] It is clear from the tone of the above passage, notwithstanding the inherent weakness of the dock identification of the appellant, the learned High Court Judge had left the decision making in the hands of the assessors so that they can determine whether they still wish to act on such tenuous evidence of the dock identification of Koroinavosa.

[29] According to the learned Trial Judge that the negative impact caused by relying mainly on a dock identification had been countervailed by the fact that there was material in his caution statement to establish the participatory presence of the appellant Koroinavosa in the commission of the alleged crimes. This indeed is a situation of "skating on thin ice", for as would be discussed later, in the light of the damning medical evidence proving the facial injuries to the Appellant, it is doubtful whether the caution statement can stand the test of voluntariness. This will be discussed at the relevant time of this judgment.

[30] This I consider as the opportune time to look at the legal position on the dock identification as it stands in Fiji. It is axiomatic, that the evidence of a dock identification is wholly undesirable and unacceptable to prove the identity of a perpetrator and in the case of **Peni Lotawa v. State** Criminal Appeal No. AAU 0091 of 2011 this matter had been dealt with by the Court of Appeal.

> *"[7] Dock identification is completely unreliable in the absence of a prior foundation of identity parade or photograph identification because it then becomes the ultimate leadiung question. The answer is obvious to any witness – the person to be identified is sitting in the dock. The Privy Council has examined the merits and demerits of such identification in the case of Holland v. HM Advocate (the Times June 1, 2005) where it was held that such an identification was not per se is incompatible with a fair trial but other factors must too be considered such as whether the accused was legally represented, what directions the Judge gave to the finders of fact on this identification and how strong the prosecution case was in all other respects. It has been decided now in a line of English cases that it should be refused by a trial Judge except in situations where the accused has refused to participate in a formal identification. Even then very strong directions must be given as to how little weight is to be placed on such identification." [emphasis added]*

[31] According to the available material in this case, there was no identification parade or a photographic identity carried out by the police, enabling the witnesses/victims to identify the perpetrators and in the absence of such age old basic procedural steps being taken, to bolster the identification evidence, I am inclined to be guided by the

citation of **Peni Lotawa**. In addition , in my opinion the evidence of this witness is based on an identification more akin to that of a dock identification for although he maintained that he had seen the appellant twice before , no particulars had been elicited from him to elaborate on that matter which bears a significant importance as far as the veracity to be attached to the identification evidence is concerned.

[32] However I am also mindful of the fact that in recognizing the discretion of the trial judge to entrust the assessors with the task of making the decision to act upon the evidence of a dock identification, in the case of **Vulaca v. The State** (2011) FJCA 39, AAU0038.2008 (29 August 2011) the majority judgment had decided in the following manner;

> *"... the decision to allow the dock identification was within the discretion of the trial judge. The circumstances by which the deceased's mother identified the second appellant were not fleeting. The witness had seen the second appellant on two occasions under good lighting conditions, first at the station and second at the hospital. We agree that the learned trial judge's conclusion that the inherent dangers of identifying one accused in the dock was diminished in the present case because there were eight men in the dock. No error has been shown in the learned trial judge's exercise of discretion to allow dock identification of the second appellant by the deceased's mother. These grounds fail."*

[33] As against the unanimous decision of the Court of Appeal in the case of **Peni Lotawa** the decision in **Vulaca** is a majority decision. As I have stated earlier I am inclined to be guided by the substratum of the decision of **Peni Lotawa** for in my view, to rely on a dock identification of an appellant, especially after considerable lapse of time like in the instant case where the gap has been over 2 years, it is dangerous and it can be a denial of the right to have a fair trial for an accused person. As already stated earlier, if the investigators had been lackadaisical in the manner of conducting investigations into serious crimes and if they have left open for infirmities and weaknesses to creep into the system, under our system of law the benefit of such lapses would be accrued by the offenders in their favour, for the benefit of a reasonable doubt is always for an accused.

Having said these, however I believe there is a need to take steps to evolve a proper legal and procedural mechanism through which the competing two views expressed by the Court of Appeal in the aforementioned two decisions to be reconciled. In that endeavors in my view, turning to the common law conceptualization on this matter could provide us with guidance as to the manner in which this desired reconciliation can be made possible.

[34] For the purpose of emulation I wish to turn to the citation in *Archbold* 2012, para 14 – 42 at page 1546, which has the following elucidating observations to make on this subject;

> *"(i) The identification of a defendant for the first time in the dock is an undesirable practice; R v. Cartwright 10 Cr. App. R. 219 CCA.*
>
> *(ii) In jurisdictions where procedures have been devised to deal even with the suspects who are unwilling to participate in formal procedures, the dock identification or the first time is undesirable;*
>
> *(iii) Although a trial judge retains a discretion to permit a dock identification, it is submitted that in practice the exercise of such discretion should not even be considered unless the failure to conduct an identification procedure was as a result of the defendant's default. See for example – Barnes v. Chief Constable of Durham [1977] 2 Cr. App. R. 505.*
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> > *'Where a dock identification is admitted, it will always be necessary to give the jury careful directions as to the dangers of relying on that evidence and, in particular, to warn them of the disadvantages to the accused of having been denied the opportunity of participating in an identification parade, if indeed he has been deprived of that opportunity; in such circumstances, the judge should draw directly to the attention of the jury that the possibility of an inconclusive result to an identification parade, if it had materialized, could have been deployed on the accused's behalf to cast doubt on the accuracy of any subsequent identification; the jury should also be reminded of the obvious danger that a defendant occupying the dock might automatically be assumed by*

even a well-intentioned eye-witness to be the person who had committed the crime with which he was charged:

Where a witness volunteers a dock identification, the summing up should make it plain that such evidence is undesirable; that the proper practice is to hold a parade; and that the evidence should be approached with great care. Williams (Noel) v. The Queen [1997] 1 WLR 548, PC. In Edwards v. Queen (2006) 150 SJ. 570, PC [2006] UKPC 23), it was said that if the jury are not discharged after such an identification, it is incumbent upon the judge to direct them to give it little or no weight."

[35] In the light of the legal discourses referred to above, unless an accused person shows some degree of intransigency and refused to cooperate in the conduct of an identification parade, evidence of identification through dock identification should not be encouraged as clearly explained in the citation of *Archbold.*
In the circumstances this ground of appeal should succeed.

Ground Two

[36] The learned Trial Judge erred in law and in fact when he failed to consider the medical report of the Appellant where the medical doctor confirmed that the appellant was assaulted by the police officer at the time of caution interview that resulted in the alleged confession which has caused a grave miscarriage of justice.

[37] The above ground of appeal carries a close affinity to the only ground of appeal that the Learned Single Judge had allowed in his ruling against the conviction.

[38] Unfortunately in this appeal, I find a glaring omission in the "Ruling on trial within a trial", in which there are no directions on the relevance of the medical evidence nor that there is any direction on how to assess the evidence of the medical officer who testified to the injury in the eye area of the appellant, causing "hematoma".

Undoubtedly this omission had a ripple effect on the part of the summing up dealing with the voluntariness of the confession of Koroinavosa.

[39] As discussed earlier, it is the evidence of the medical officer 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 face. Further elaborating this position the Doctor had stated in the re-examination that "hematoma" could be caused by "an indirect blow, i.e. a blow to the side of the head". The absence of any signs of the skin injury or bone injury is suggestive, that if "hematoma" was as a result of a blow to the head, it couldn't have been caused by a direct blow.

[40] I find that in the ruling on the "trial within trial" the learned Trial Judge had referred to the correct legal principles applicable in deciding on voluntariness of a caution statement.

[41] However, at the same time there is nothing in the ruling to demonstrate that the learned High Court Judge had made an accurate evaluation of the medical evidence and its impact on the voluntariness of the caution statement.

[42] In the *voire dire*, the appellant Koroinavosa testified and described the way he was man handled by the police, prior to the recording of his statement.

[43] He was arrested on 17 February 2010 and released on 25 February 2010.

[44] He testified that he was assaulted brutally on 22 February 2010. His face received several severe blows and the injury around the eye with hematoma was a result of such blows to the head.

[45] In the light of the evidence of this kind, there is a legal responsibility on the learned Trial Judge to evaluate the evidence in its totality and to make a determination whether the prosecution has satisfied the legal requirement of proving the voluntariness beyond any reasonable doubt.

[46] The decision on the voluntariness of a caution statement is primarily a matter for the trial judge, while the probative value that should be attached to the impugned caution statement should be left to be decided by the assessors along with the trial judge. Finally, it is for the trial judge to accept or reject the confession on the basis of voluntariness. Emphasis should be made that the burden of proving the voluntariness of a caution statement shall always reside in the prosecution.

[47] Although, this is trite law, it is important for trial judges to recall the principles involved regularly, lest that some inadvertence may creep in, paving the way to assail the propriety of a conviction of a case which is otherwise based on a strong footing.

[48] In the case of **Nacagi v. State** [2015] FJCA 156; AAU49.2010 (3 December 2015), in the Court of Appeal of Fiji, this exact issue was discussed by His Lordship Calanchini J, President of the Court of Appeal and His Lordship's exposition of the law is as follows:

> *"[10] So far as the admissibility of the caution interviews is concerned, it is not in dispute that the learned trial judge did fairly summarize the evidence given by the prosecution witnesses and the three appellants who were challenging the admission into evidence of their caution interviews on the basis that they had not been made voluntarily. The same evidence has been summarized by Waidyaratne JA in his judgment. I do not consider it necessary to repeat the evidence in this judgment. However, having read the voire dire ruling I am not satisfied that the learned judge summarized the medical evidence called by the appellant to support their claim that they had been assaulted before and during the making of their caution statements.*

[12] The significance of the medical evidence adduced during the voire dire by the appellants is that it is independent evidence. The issue is whether it supports the allegations of assault by the appellants. As the learned trial judge noted in his Ruling the Respondent's version of events is completely at odds with the three appellants' versions of events. If that remained the position without any other evidence, then clearly the trial judge must ask himself, based on credibility, has the respondent established beyond reasonable doubt that the caution statements were made voluntarily. However, the introduction of independent medical evidence called by the appellant's added a further dimension to the issue which must be considered by the trial judge. It is not just a matter of assessing the credibility of the Respondent's witnesses and the Appellant's. Nacagi produced a medical report dated 10 July 2008 following a medical examination at the Valelevu Health Centre on the same day. As the learned Judge noted that are some injuries listed on page 2 of that report. Nacagi also called Doctor Nakabea who produced a report concerning the result of Nacagi's xray on 1 April 2010 which revealed a healed bone injury on his right leg. The Doctor's conclusion appears on page 246 of the record.

[15] In my judgment the absence of any analysis of the independent medical evidence and the absence of any indication as to how much, if any, weight ought to be attached to that evidence represent a wrong assessment of the evidence. The task of assessing the evidence went beyond merely assessing the credibility of the Respondent's witnesses and the evidence given by the three appellants challenging the admission into evidence of their caution statements. Furthermore I am satisfied that had the learned judge assessed the independent medical evidence he would have reached the conclusion that the Respondent had failed to establish beyond reasonable doubt that the three caution statements had been made voluntarily. I find that this ground of appeal raised by three of the appellants has succeeded. The caution statements should not have been admitted into evidence. The remaining appellant Nagalu had not made any confession in his caution statement. It should be noted that the appellant Nagalu was, however, convicted on all seven counts in the amended information along with the other three appellants whose caution statements had been admitted into evidence." [emphasis added]

The above lucid exposition is on all fours with the instant appeal.

[49] Another prominent issue that has come up for discussion in this appeal is whether the issue of voluntariness should also be left to be decided by the assessors. As already discussed, and as the Learned Single Judge also had raised in the sole ground of appeal allowed by him is it incorrect for a trial judge to invite the assessors to make a determination with regard to the voluntariness of a caution statement? On this issue, quoting from the Ruling of the learned Single Judge would be that;

> *"However, when the trial Judge directed the assessors on the disputed confessions, he left the issue of voluntariness to the assessors to decide. Arguably this was a misdirection because the assessors are not concerned with the voluntariness but the weight or the truth of the confessions."*

[50] In the Summing up, the following passages are dealing with this subject directly;

> *"32. During the hearing, you heard the different position of the prosecutor and the accused on the issue of whether or not, he gave his statements voluntarily. In his answer to Question 111 in Prosecution Exhibit No. 1(b), Accused said, he gave his statements voluntarily. All the police witnesses who came into contact with accused no. 1 including his caution interview officer, said, they did not assault, threaten or made promises to him, while he was in their custody. The accused, when he was cross-examining the State witnesses, suggested he was beaten by Police. He pointed to his medical report, which was tendered as Prosecution Exhibit No. 4, as evidence of Police assault.*
>
> *33. Doctor Pita Vuniqumu (PW12) gave evidence on Accused No. 1's medical report. Consider the doctor's evidence very carefully, as it related to Accused no. 1 medical complaint. Also carefully read and consider the medical report. In cross-examination, counsel for accused no. 1 suggested that accused no. 1 was severely beaten by police with an iron rod i.e. on the back, head, chest, sole of his feet. Doctor Vuniqumu found no injuries to support these claims. However, he found 'hematoma' on his left eye. Accused no. 1 complained to him that he was assaulted by police, who denied these claims. In cross examination, accused no. 1 was clam and not in distress, when he visited him on 24th February, 2010. He said, his general health condition was good and his movement was normal.* Whether or not accused no. 1 gave his confession voluntarily, is a matter for you." [emphasis added].

[51] In the case of **Noa Maya v The State**, Criminal Petition No. CAV009 of 2015 (Criminal Appeal No. AAU 0053/2011), 23 October 2015, the Supreme Court of Fiji delved into this issue to a great extent.

[52] One of the main issues that came up for decision was about the extent to which the issue of voluntariness of a caution statement should be left in the hands of the assessors for their determination, so that the trial judge may be assisted in arriving at the correct decision eventually. The decision goes as follows;

> *"19. There have been two schools of thought in the common law world about this topic in the context of trial by jury. One is that jurors should be told that they should disregard the confession altogether if they are not sure that it was made voluntarily. After all, what weight can be placed at all on a confession which may have been made as a result of ill-treatment or oppression, or which may have been induced by a promise of some kind, and which made the suspect confess when he might otherwise not have done so? He may have been confessing his guilt, not because he was guilty, but, for example, because he wanted the ill-treatment to stop. The other school of thought takes as its starting point the fact that questions of admissibility of evidence are for the judge to decide, whereas the evaluation of such evidence as has been ruled admissible is for the jurors to make. If the judge is required to direct the jurors to disregard the confession if they are not sure that it was made voluntarily, that would be tantamount to the judge usurping the jurors' function of evaluating the evidence for themselves. On this school of thought, the appropriate direction is to tell the jurors that the weight which they should give to the confession is for them to decide. That is the school of thought which the Privy Council adopted in* ***Chan Wei Keung v The Queen*** *[1967] 2 AC 160.*
>
> *20. A different view has been taken relatively recently in England by the House of Lords. In R v Mushtaq [2005] UKHL 25, a majority of the House of Lords held that jurors should be directed to disregard a confession if they think that the confession may have been made involuntarily. However, two things influenced their view. One was the terms of section 76(2) of the Police and Criminal Evidence Act 1984. The other was the right against self-incrimination implied in the right to a fair trial embodied in Art 6(1) of the European Convention on Human Rights. The right against self-incrimination is enshrined in section 14(2)(j) of the Constitution of Fiji, but there is no statutory provision in Fiji equivalent to section 76(2) of the Police and Criminal Evidence Act*

*1984. To that extent, the reasoning of the majority in **Mushtaq** does not apply to Fiji."*

[53] However His Lordship the Chief Justice, expressing his opinion in this very same appeal commented that the preferred approach in Fiji should be the one contained in **Mushtaq** [2005] UK HC 25.

> *"In Fiji the judge may admit the confession into evidence after the voire dire, and yet subsequently at the conclusion of the trial proper he or she may arrive at a different opinion. The defence may pursue in cross examination in the trial proper the same issues of involuntariness in order to persuade the judge as well as the assessors of the rightfulness of such an allegation. The prosecution however bears the burden in the trial proper, as in the voire dire to proving that the confession was voluntary, and must do so to the standard beyond reasonable doubt, as with all other elements of proof required to prove the charge. The position in Mushtaq 2005) UKHC 25 is to be preferred to that of Chan Wei Keung v. The Queen [1967] 2 AC 160." [emphasis added].*

[54] The causal evolvement of the conceptual matrix of the approach to this legal issue can be found in the passage in **Lam Chi-Ming v. The Queen** [1991] AC 212, 220E where Lord Griffiths stated:

> *"Their Lordships are of the view that the more recent English cases established that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilized society to proper behavior by the police towards those in their custody. All three of these factors have combined to produce the rule of law applicable in Hong Kong as well as in England that a confession is not admissible in evidence unless the prosecution establish that it was voluntary."*

[55] Based on the above statement containing mostly policy to be followed, it is stated in **Mushtaq** [2005] UK HC 25, that;

> *"Therefore, even if a jury would be unlikely to rely on a confession which they considered had been obtained by compulsion the question shall remain whether having regard to the principle that a*

man cannot be compelled to incriminate himself and having regard to the importance attached to proper behavior by the police, the jury are entitled to rely on a confession which they consider was, or may have been, obtained by oppression or other improper means.

Since the three considerations mentioned by Lord Griffiths lie behind section 76(2), it respectfully seems to me that it is inconsistent with the very purpose of that provision to affirm that the jury are entitled to rely on a confession in such satisfied beyond a reasonable doubt that it was not obtained by oppression or any other improper means. The evidence is excluded because, for all the kinds of reasons explained by Lord Griffiths, Parliament considers that it should not play any part in the jury's verdict. It flies in the face of that policy to say that a jury are entitled to rely on a confession even though, as the ultimate arbiters of all matters of fact, they properly consider that it was, or may have been, obtained by oppression or any other improper means.

In my view, therefore, the logic of section76(2) of PACE really requires that the jury should be directed that, if they consider that the confession was,, or may have been, obtained by oppression or in consequence of anything said or done which was likely to render it unreliable, they should disregard it. In giving effect to the policy of Parliament in this way, your Lordships are merely reverting to the approach laid down by the Court of Criminal Appeal (Lord Goddard CJ, Byrne and Parker JJ) in R v Bass [1953] 1 QB 680. Giving the judgment of the court, Byrne J quoted the well known words of Lord Summer in Ibrahim v R [1914] AC 599, 609:

> *'It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.'*

It is to be observed, as this court pointed out in Rex v Murray [1951] 1 KB 391, that while it is for the presiding judge to rule whether a statement is admissible, it is for the jury to determine that weight given to it if he admits it, and thus, when a statement has been admitted by the judge, he should direct the jury to apply to their consideration of it in the principle as stated by Lord Summer, and he should further tell them that if they are not satisfied that it was made voluntarily, they should give it no weight at all and disregard it." [emphasis added].

[56] In the light of the judgments cited above and having regard to the observation made by his Lordship the Chief Justice on the preferred approach for Fiji, the learned trial judge's directions to the assessors on the need to examine whether the confession has been obtained voluntarily is not objectionable and has not caused any prejudice to the appellants.

[57] Reverting back to the Second Ground of Appeal, it is crystal clear having regard to the medical evidence that the Appellant Koroinavosa had received the injuries while in the police custody. Most importantly, in the trial he choose to testify on his behalf and threw down the gauntlet to the prosecution that the confession is not voluntary. As I pointed out earlier, this issue seemed to have escaped the attention of the Learned Trial Judge while evaluating the *voire dire* evidence. Since it is the burden of the prosecution to establish the voluntariness beyond any reasonable doubt, in the light of the totality of the evidence involved, it is unsafe to allow the evidence of the caution statement to be admitted in evidence.

In the light of these material the second ground of appeal of the appellant should also succeed.

The Grounds of Appeal of the Appellant Ronald Colati
The first ground of appeal

[58] That the Learned Trial Judge has erred in law when he misdirected the assessors on the evidence contained in the caution interview of the appellant in respect of its truth and/or credibility and the weight to be given to the confession.

[59] In the summing up, one could find that the learned trial judge had taken pains to take the assessors through the entirety of the evidence led by the prosecution against Colati and in doing so, the relevant excerpts from the caution interview that reveal his involvement in the crime has been placed before the assessors for the determination on its weight.

[60] Referring to the directions he left with the assessors on how to determine the voluntariness of a confession, the Learned Trial Judge, reminded the assessors that in the absence of any evidence of "assaults, threats or unfair promises", the assessors can accept the contents of a caution statement against the maker and act upon it to determine his culpability.

[61] In so far as these directions are concerned, there is absolutely nothing to point out as objectionable and quite to the contrary, it contains the correct position of law and facts of the case, and I see no reason, therefore, to interfere with these directions of the Learned Trial Judge.

[62] In order to accentuate my position on this, I wish to revisit the proceedings contained in the *voire dire* inquiry, and I do this with a particular emphasis being attached to the relevant portions of the evidence that deals with Colati's caution statement.

[63] In the *voire dire,* there were a number of police witnesses testified about the arrests and interrogation of the appellants. The evidence of Sgt. 1844 Epeli Vamosi who gave evidence explained the manner in which Colati's caution statement was recorded.

[64] Colati, in cross examination of the police officer had suggested that when the police arrested him in Nadi, he was assaulted and chillie powder was rubbed on his body. This was denied by the officer. They denied that they stomped on his thumb and pressurized him to make a statement.

[65] It is settled law of evidence, that unless there is evidence to substantiate what contains in a suggestion, there is no evidential value that is possible to be attributed to a suggestion; unless of course a suggestion is admitted by the witness to whom it was directed.

[66] It is clear from the line of cross examination adopted by Colati, both at the *voire dire* as well as in the trial, apart from making mere suggestions that he was subject to cruel and illegal methods to force him to make a confession , there had been no evidence placed before the trial court to establish this position.

[67] Another aspect of the matter comes from the striking difference between the approaches taken by the Appellant Koroinavosa and Colati in assailing the voluntariness of their caution statements.

[68] Unlike in the case of Koroinavosa who chose to testify on his behalf and explained the way the police brutally assaulted him and caused an injury to his eye, in the case of Colati, neither at the *voire dire*, nor at the trial proper he testified on his behalf to establish the allegation that he was subject to cruelty by the investigators who were eager to obtain a caution statement.

In the circumstance I find no merits in this ground of appeal and thus it should be dismissed.

The Second Ground of Appeal;

(2) The appellant submits that the Learned Trial Judge has misdirected the assessors to take for granted that the evidence contained in the caution interview statement were the truth or is credible and since he left the issue of voluntariness for the assessors to decide, these arguably is a misdirection because the assessors are not concerned with the voluntariness but the weight or truth of the confessions.

[69] In a preceding paragraph under the grounds of appeal of Koroinavosa this issue had already been dealt with and it was held that the approach adopted by the Learned Trial Judge is much in accordance with the law. In view of that finding I see no basis to allow this ground.

In so far as the third ground of appeal is concerned , The Learned Trial Judge had dealt with the evidence sufficiently on this issue and I see no reason to entertain this ground , either.

[70] In the light of the above reasons the appellant Colati's grounds of appeal should not succeed, and thus his appeal against conviction should not be allowed.

Grounds of Appeal of Tevita Sugu

[71] Tevita Sugu also challenges his conviction and the sentence. In the preceding paragraphs, at the beginning of the decision ,while discussing the facts of the case I have extensively discussed the nature of the evidence in existence against Sugu. Accordingly the evidence against Sugu was primarily based on the testimonies of Narayan and Hussein who have made dock identification of Sugu at the trial.

[72] In addition to this evidence Sugu has not made a caution statement nor that there was any other incriminating evidence placed before the trial to implicate him with the charges preferred against him.

[73] In my discussion on the inadmissibility of the dock identification I have dealt with this matter to demonstrate why it is undesirable to place reliance on a dock identification to connect an accused with a crime.

[74] Since the same position with equal force is applicable in the appeal of Sugu as well, his appeal against the conviction should be allowed.

The appeal against the sentences

[75] The other aspect of the appeal in this case is to consider whether there is a possible revision of imprisonment imposed against the remaining appellant in this case Colati.

[76] Colati in his appeal against the sentence states that the learned trial judge has erred in law in which he did not deduct the period that the appellant was held in remand and this is a breach of the guidelines in the Sentencing and Penalties Decree.

The learned trial judge in imposing the sentence of imprisonment on the appellant has correctly taken all the aggravating and mitigatory circumstances into account. Although technically speaking he could have taken into account the period of remand of the appellant and reduce that period from the total period of his imprisonment, the fact that he magnanimously reduced 4 years from the period of total imprisonment based on the mitigatory circumstances would nullify the effect of the non reduction of the period in remand.

[77] Therefore, there has been no miscarriage of justice caused to Colati in the manner of computing the total quantum of imprisonment and as such I see no reason to interfere with the present sentence of imprisonment imposed by the learned trial judge.

[78] Finally in the circumstances the appeals against the sentence and conviction of both the appellants Josaia Koroinavosa and Tevita Sugu should be allowed and the appeal of Ronald J Colati is disallowed.

[79] Encapsulating the essential factors of the judgment above, the following can be stated in support of the conclusion that has now been arrived at.

[80] In the case of Koroinavosa, the only evidence upon which the prosecution relied was to impugned caution statement and the dock identification made by the witness Saimoni.

[81] In so far as the Ruling on the caution statement is concerned what is conspicuous in the absence is a proper evaluation of the medical evidence on the Appellant, where the Doctor had made reference to the finding of an injuring around the eye and the resultant situation of the setting of Hematoma.

[82] As pointed out in the discussion above, the injury had occurred whilst he was in police custody. In the ruling on the caution statement, the Learned Trial Judge had made no reference to the medical evidence to demonstrate how and to which extent his decision making process on the voluntariness had been impacted by that evidence. If we are to be guided by the decision of **Nacagi v. State** on this same issue, the failure to analyse the evidence on voluntariness in the backdrop of the medical evidence is a *sine quo non* to demonstrate that the Learned Trial Judge had the necessary sensitivity and regard for the legal yard stick to be used in making that determination, namely, beyond any reasonable doubt.

[83] As stated in the preceding paragraphs dealing with this subject, the decision on voluntariness had a direct ripple effect on the decision on the weight to be attached to the caution statement.

[84] In the light of the medical evidence, showing the injury to the eye area of the appellant Koroinavosa, the caution statement could never have been admitted in evidence as voluntary. The evaluation of its validity saw any reference to the medical evidence is misdirection and has caused a substantial prejudice to the case of the Appellant.

[85] In the absence of the caution statement, what is left against Koroinavosa, is a dock identification made after 2 years by the witness Saimoni.

[86] Although Saimoni had alleged of having two encounters with the Appellant it was years prior to the incident, no specific details of that evidence had been elicited by the prosecution to demonstrate that that was reliable evidence based on a strong factual footing. In the backdrop of such evidence there is no value that can be attached to the dock identification that comes into existence after 2 years from the incident. Moreover, the evidence of Saimoni was that, it was whilst his concentration was on the road only he has had glances at the appellant and then in effect was fleeting glances taken under trying circumstances.

[87] Another significant fact in relation to Koroinavosa was that the, took to the stand in a forthright manner and testified to the fact that he was assaulted by the investigating officers. His testimonial trustworthiness is unchallenged and impeccable.

[88] Taking all these matters into account it is safe to decide that this conviction cannot sustain.

[89] Against the appellant Sugu, we had only the evidence of the dock identification made by the two witnesses Narayan and Harun, who maintained that they identify the appellant after 2 years from the incident. The fragility of such evidence and the unreliability of it trustworthiness have been extensively discussed earlier and to take that path again would not serve any purpose in this Appeal.

[90] This now leave us with the position of Colati, who neither gave evidence on his behalf at the *voire dire* inquiry nor called in any witnesses in his support of his innocence. Evidence lead in the case against him is impeached and had withstand the test of

credibility. Although he alleged that on his arrest in Nadi, he was subject to cruelty such as rubbing chili powder on his body and assaulting him.

[91] In conclusion for the reasons stated above I would allow the appeals by Josaia Koroinavosa and Tevita Sugu and dismiss the appeal by Ronald Colati

Fernando JA

[92] I agree with the conclusions of Gamalath JA.

Orders

1. *Appeal by Josaia Koroinavosa against conviction is allowed and his conviction is set aside and the sentence quashed.*
2. *Appeal by Tevita Sugu against conviction is allowed and his conviction is set aside and the sentence is quashed.*
3. *Appeals by Ronald Colati against conviction and sentence are dismissed.*

Hon. Mr Justice Calanchini
PRESIDENT, COURT OF APPEAL

Hon. Mr Justice Gamalath
JUSTICE OF APPEAL

Hon. Mr Justice P. Fernando
JUSTICE OF APPEAL