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

CRIMINAL APPEAL NO. AAU 135 OF 2015
(On Appeal from Magistrate Court Case No. 1489/09)

BETWEEN : **OSEA VAKACEREIVALU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**
Basnayake JA
Nawana JA

Counsel : **Mr S Waqainabete for the Appellant**
Mr M Vosawale for the Respondent

Date of Hearing : **18 September 2019**

Date of Judgment : **3 October 2019**

JUDGMENT

Calanchini P

[1] The appellant was one of four accused tried on two counts of robbery with violence. The appellant was also charged on one count of resisting arrest. In a written judgment

delivered on 2 July 2015 by the Magistrates Court at Suva exercising extended jurisdiction the appellant was convicted on all 3 counts. On 21 September 2015 the appellant was sentenced to six years imprisonment with a non-parole term of 4 years.

[2] The appellant subsequently filed a timely application for leave to appeal against conviction relying on one ground, namely:

> *"The learned Magistrate erred in law and fact when he did not properly consider the evidence and more particularly the professional opinion including the summary and conclusion of Dr Jacinta Taylor concerning the visible injuries found with (sic) the appellant during the time of the medical examination."*

[3] In the written submissions filed by the Appellant (p.56 – 58 Record) on this ground of appeal at paragraph 9 the appellant concludes by submitting:

> *"In addition there is no other evidence that could possibly link the Appellant to the crime. Therefore, we submit _ _ _ that the learned Magistrate should have ruled that the caution statement should not have been admitted and an acquittal be given to the appellant."*

In support of that submission the appellant relied on the decision of this Court in **Nacagi –v- The State** [2015] FJCA 156; AAU 49 of 2010, 3 December 2015. That decision was concerned with the requirement to analyse independent medical evidence and the allegations of assault at the voir dire stage of a criminal trial.

[4] In a Ruling delivered on 7 February 2017 a single judge of the Court of Appeal granted leave to appeal on that ground. The admissibility of the caution interview was challenged on the basis of a wrong assessment of the evidence. As the learned Judge noted the admissibility of evidence is a question of law alone for which leave is not required. However, the Judge concluded that the ground was arguable and therefore did not warrant the application of section 35(2) of the Court of Appeal Act 1949 (the Act). The learned judge appeared to rely on the decision of **Nacagi** (supra).

[5] The admission into evidence of the appellant's caution statement was critical for the respondent since the only evidence of the appellant's involvement in the alleged robberies was his confession made under caution. The complainants were not able to identify the appellant. A voir dire was held to determine the admissibility of the confession. The basis of the challenge to admissibility was that the police had extracted the confession using assault, threats and inhuman tactics. The police denied the allegations and adduced medical evidence. Following his arrest the appellant had been taken by police for a medical examination. The medical report was tendered in the voir dire. The examining doctor also gave evidence. The appellant claims that the learned Magistrate made a wrong assessment of the evidence before admitting the confession into evidence.

[6] At the voir dire hearing the prosecution called 11 witnesses including the doctor who had examined the appellant. The appellant also gave evidence. The evidence for the prosecution was to the effect that the appellant had sustained injuries while he was resisting arrest. The witnesses denied that the appellant had been assaulted or threatened while he was in custody at the police station or during the caution interview.

[7] The evidence of the appellant was to the effect that he was assaulted by police on 19 November 2009 while being arrested at Samabula. He stated that on the same day he was again assaulted by police at the Raiwaqa Police Station during questioning by officers about a robbery at Vatuwaqa earlier that day. The appellant denied any knowledge of the robbery. Later, on the same day, he was taken to hospital and examined. In his evidence at the voir dire hearing he stated that on the following day (20 November 2009) he was interviewed while he was still in pain and taking medication given to him the previous day at the hospital. He stated that he did not mention anything about the robbery in the interview. He also stated that he did not read the caution interview before signing it. (page 316 of the record).

[8] The learned Magistrate referred to the medical evidence only once in his Ruling and that is a dismissive observation of about 3 lines. There is no reference to the contents of the

medical report and there is no analysis of the medical evidence and its apparent consistency with the allegations of the appellant. (page 224 of the Record).

[9] The Magistrate stated that he preferred the evidence of the police officers over that of the appellant without any reference to the medical evidence. The Magistrate concluded that there was no evidence before the Court of oppression which would result in the exclusion of the caution interview.

[10] The Ruling gives rise to some immediate observations. First, the appellant did not allege in his voir dire evidence that he had been assaulted during the caution interview. He did state that he was in pain and taking medication at the time of the caution interview.

[11] Secondly, the medical examination took place on the day before the caution interview. As a result the medical report and the doctor's evidence relate to the injuries suffered at the time of the appellant's resisting arrest and at the time of the alleged assaults at the Raiwaqa Police Station later on the same day as the arrest, but clearly the day before the caution interview.

[12] Apart from accepting the evidence of the prosecution witnesses and without in any way considering the contents of the medical report the learned Magistrate has not stated on what basis he concluded that there was no evidence of oppression. In my judgment if the learned Magistrate had considered and analysed the evidence before the Court he could not have concluded that he was satisfied beyond reasonable doubt that the confession had been made voluntarily. In other words, the Magistrate should have determined after an analysis of the evidence that the prosecution had failed to establish beyond reasonable doubt that confession had been made by the appellant in the exercise of his own free will. This involved the Court considering whether the confession had been made without any assault, without any inducement and without fear. The inquiry should have extended to asking whether the timing of the interview and the conditions of custody were not oppressive and whether the confession was obtained fairly.

[13] It is clear that on the evidence, some of which was not disputed by the prosecution, the appellant suffered injuries at the hands of the police. Whether these injuries were caused by the use of force that was excessive whilst arresting the appellant and or subsequently on the same day at the Raiwaqa Police Station was not the subject of any analysis by the Magistrate.

[14] I have concluded that, given the short lapse of time between the arrest and the injuries suffered on 19 November and the time of the caution interview on 20 November, the learned Magistrate, on a proper analysis of the evidence, could not have been satisfied beyond reasonable doubt that the confession had been made voluntarily. In my judgment the prosecution failed to establish beyond reasonable doubt that the confession had been made by the appellant in the absence of fear that he may be subjected to further assaults in the event that he did not admit to the allegations.

[15] Although the appellant, during his evidence in the voir dire, appeared to claim that he did not make any admissions and had signed the caution interview without reading it, that aspect of the appellant's evidence was not pursued by Counsel before the Court. Furthermore, in view of my finding that the confession was wrongly admitted into evidence, I do not propose to consider the issue of voluntariness that arose at the trial for the purposes of determining truthfulness and whether the appellant made the confession.

[16] For all of the above reason I would allow the appeal and quash the conviction. As I have concluded that upon a proper analysis of the evidence the caution interview should have been ruled inadmissible I would enter a verdict of acquittal in favour of the appellant.

[17] There is one final matter. Although my brothers sitting on this appeal are not inclined to do so I would order that the appellant's passport (if any) and travel documents (if any) be retained by or surrendered to the Chief Registrar until the expiry of 42 days from the date of this judgment or until the completion of any appeal lodged by the appellant within the said 42 days. This order would be in keeping with the directions given by the Chief Justice (Gates CJ) dated 4 November 2010.

Basnayake JA

[18] This is an appeal against a conviction by the Magistrate Court exercising powers under extended jurisdiction. The accused appellant (appellant) was charged with three others in the Magistrate Court for committing robbery with violence under Section 293 (1) (b) of the Penal Code (Cap 17) (pg. 232, vol. 2 of the Record of the High Court (RHC). The appellant was also separately charged under Section 247 (b) of the Penal Code for resisting arrest. After trial the appellant was convicted of all the charges (Judgment at pgs. 387-395) and sentenced on 21 September 2015 to a total of 6 years imprisonment with a non-parole period of 4 years (pgs. 396-399).

[19] The appellant appealed against the conviction. In an amended grounds of appeal (vol. 1 pg. 84 of the RHC) the appellant relied on a single ground, namely;

> "*The learned Magistrate erred in law and fact when he did not properly consider the evidence and more particularly the professional opinion including the summary and conclusion of Dr. Jacinta Taylor concerning the visible injuries found with the appellant during the time of medical examination*".

[20] On 7 February 2017 a Justice of Appeal, having found that the ground of appeal is arguable, granted leave.

[21] There are two sets of evidence that need to be considered. The evidence given at the *voir dire* inquiry and the evidence adduced at the trial.

Voir Dire

[22] I will summarise the evidence of the significant witnesses at the *voir dire* inquiry.

(a) Doctor Taylor (Pgs. 266-272) produced the Medical Examination Form (MEF) (pgs. 405-410) issued to the appellant on 19 November 2009. Cage A (4) of the MEF contained the background information which states *"during the chase at Moti Street during the*

robbery". The doctor stated that this part was already filled in when the form was sent to her. The history given by the injured (appellant) was filled in cage D (10). According to the history the appellant was allegedly assaulted by cops, punched on the chest wall/face. The doctor found the following injuries; (a) Left periorbital swelling and bruise; (b) Multiple right shoulder and neck bruise noted; (c) Laceration right knee. These injuries are consistent with blunt trauma within 24 hours. Her summary was that the patient (appellant) sustained muscular skeletal injuries as a result of the assault and fracture to the left anterior of the 10th rib. She had also observed a black eye. She said that there were hardly any physical injuries. She stated that if the appellant went through a clothes line he may have received a black eye from that.

She said that she began the examination at 14.30 on 19 November 2009. The doctor said that it is possible to get these injuries due to a fall. She said that, *"if the history given to me by the patient is a lie, my professional opinion will be wrong to the extent of causation of injuries. But still the injuries are there (pg. 269). The history given by the suspect was that he was assaulted by the police; punched on body, sustained laceration to left knee and bruises on body and neck. She said he had multiple injuries on the left side of the neck, laceration to the left knee with a 5cm open wound and multiple bruises on the back. The injuries were consistent with trauma having been caused within 24 hours. She specifically said that, "my conclusion was that the above injuries are caused due to an assault".*

(b) PC 2982 Lemeki (pgs. 275-278) said that on 19. 11. 2009 in the morning he saw P.C. Eparama and S.C. Epeli had arrested a suspect. He denied causing injury either to the appellant's eye, body or knee. He said that at the time of the arrest there was a cut on the knee and blood was coming from the knee.

(c) SC 1742 Epali (pgs. 278-280) said that he arrested the appellant and saw that the appellant had injuries on his right knee and on the left eye. He said that the appellant tried to escape and he together with P.C. Eparama cuffed him. He said that he did not ask as to

how he got his injuries. He denied that the appellant was assaulted and forced to admit to the offence. He denied to having punched the ribs of the appellant.

(d) P.C. 2990 Isireli Tora (pgs 293-295) said that he caution interviewed the appellant on 20 November 2009. He denied to having punched the face and the chest of the appellant.

(e) The Appellant (pgs. 316-318) giving evidence said that when he was arrested he was punched on the face. He said that he had a cut on his right eyebrow and the face was swollen. He said that when he fell down the police started to punch and kick on his ribs and the knee. He said that there was blood all over his clothes. He said the police took him to hospital in the afternoon. The police had helped him as he could not walk. In the hospital a chest x-ray had been taken. He also said that he complained to the doctor of the assault. He was caution interviewed on the next day. He denied admitting the robbery in his statement.

(f) Voir dire Ruling (pgs. 221-226) (pgs 221-226) The learned Magistrate has allowed the caution interview statement on the basis that it was given voluntarily. The learned Magistrate said that according to the police witnesses the appellant came by his injuries while resisting the arrest. Referring to the evidence of the doctor the learned Magistrate said that according to the doctor the injuries could be consistent with what the appellant related to her. However this was qualified by stating that the injuries could be caused by other means as well. The learned Magistrate states at page 225 as follows; Referring to the appellant, *"The 2nd accused told the court that he had injuries and was seen by the doctor. He had not told the doctor the injuries. He had body pains as a result of the punches to his ribs. This was however not stated in his examination-in-chief".*

The learned Magistrate held that the medical report by the doctor showed no injuries. The learned Magistrate has found the evidence of all the police witnesses to be truthful. At page 225 he further stated that, "The court noted that he (the appellant) stated that he had injuries, while the medical examination proved that there were no injuries. The appellant raised for the first time in court that, he *"had blood all over his clothes and pants***.** *He had*

worn the same clothing to hospital. The doctor did not note blood all over his clothes and pants". The learned Magistrate said that, *"the court prefers the evidence of the police officers over that of the accused person"*. The learned Magistrate by giving those reasons held that the interview had been made voluntarily.

[23] I am of the view that an analysis with regard to the *voir dire* is more appropriate at this stage for the reason of the lack of attention or no attention given to the evidence relating to the injuries of the appellant. There is nothing to indicate that the learned Magistrate has disbelieved the doctor. However, according to the analysis in the Ruling on the voir dire, the learned Magistrate has found no injuries on the appellant. The appellant said that he was assaulted by the police. He described the injuries he had. It is evident from the testimonies of several police witnesses of the injuries the appellant had. One of them speaks of seeing blood. The doctor describes this as an open lacerated wound of 5cm on the knee. The doctor herself had noted the injuries on the MEF. The doctor had given evidence relating to these injuries. There is also an un-contradicted evidence of an x-ray taken of the chest area of the appellant on 19 November 2009. The doctor has observed a broken 10^{th} rib on the chest. With all this evidence I am surprised that the learned Magistrate came to the conclusion that the medical examination found no injuries on the appellant. The learned Magistrate does not reject the evidence of the doctor. As per **Nacagi v The State** [2015] FJCA 156; AAU 49 .2010 (3 December 2015) the trial Judge is required to analyse the evidence and determine whether he accepted the medical evidence and indicate the weight to be given to that evidence. Calanchini P held in **Nacagi** (supra) that, "*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 appellants challenging the admission into evidence of their caution statements. 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 caution statement has been made voluntarily*".

[24] There is no evidence of resistance while arresting the appellant. It appears as if the learned Magistrate was searching for ways to justify the police action. The resistance is required to justify the cause for wounds. When the doctor states that the injuries could be caused by other means as well, the learned Magistrate clung on to that to justify the explanation given by the police that the appellant did not come by his injuries due to an assault. The injuries could have come by other means, may be whilst resisting arrest. There should be evidence of such resistance. No such evidence has been found. When the appellant states that he had blood all over his clothes and pants, the learned Magistrate states that the doctor has not recorded so. Therefore the evidence of the appellant could not be believed. In the MEF there is no place to describe the wearing apparel of patients. However the prosecution witness P.C. Lemeki has observed blood coming out of the wound from the knee. According to the doctor this was an open wound. Apart from this for the learned Magistrate to choose the evidence of the police and not the appellant shows that a burden has been placed on the appellant to prove his innocence. It is the duty of the prosecution to prove the case beyond reasonable doubt and there is no burden on the appellant to disprove it. However considering all the evidence I am of the view that the prosecution has failed in its obligation to prove that the caution interview was made voluntarily. I am also of the view that the learned Magistrate has erred in summarising the doctor's evidence which has caused a miscarriage of justice. If properly analysed, the learned Magistrate could have come to a finding that the caution interview of the appellant was not made voluntarily.

Summary of evidence at the trial

[25] I will give below a summary of some of the important witnesses at the trial;

(a) Krishna (pgs. 93/348); She said on 19 November 2009 two men came inside her shop in the morning by breaking open the padlock. They tied her and took all her jewellery. They also tied Reshmi who lived in the same premises and took cash and many items that were in the shop for sale. Reshmi (pgs. 114/350) corroborated Krishna.

(b) Epeli (pgs 131/352) said that he got the appellant to get up as he was lying on the floor and handcuffed him with the assistance of the other officers. He said the appellant was not in possession of anything when he was arrested. He said that the appellant was already injured when he arrested him and could not say how the appellant came by his injuries. He said the injuries were on his knees and eyes. Eyes were black and bruised. He could not say how the appellant got them.

(c) Cpl 3008 Serukaloe (pgs. 169-182) said that he was the interview officer. He denied assaulting the appellant with P.C. Tora. He denied kicking his chest while the appellant lay on the floor and slapping and swearing at him.

(d) P.C. 2990 Tora Isireli (pgs. 183-193) denied kicking the ribs of the appellant and beating him on the knees. He said that he was not aware as to how the appellant came by his injuries.

(e) The appellant (pgs. 212-219/375) giving evidence stated how he was punched on his face to give a black eye and a swollen face. He said that he was punched and kicked on the chest while lying down and his knees were hit with a stick. He said that he was "*hammered*" while in the police cell before being taken to hospital. He said that he told the doctor who examined him of police assault. He said that he was threatened at the caution interview. He denied to climbing a fence. He said the interview was not voluntary.

(f) Judgment (pgs. 387-) The learned Magistrate held that the appellant suffered injuries in his leg and bruised the face while resisting arrest. The learned Magistrate said (pg. 394) that, *"The medical report revealed that there were some injuries in the body and the accused is lying on this report to confirm his version. But the doctor in the voir dire, having said even though the injuries were consistent with the history given by the accused, if he was lying to her this would*

change and also the injuries would be caused also when a person is jumping from a compound".

The learned Magistrate further states in the judgment that, *"From the record I also note that the accused did not inform about these allegations to the Magistrate when he was produced to court thus* ***shifting the burden of proof on the appellant****"* (emphasis added). The learned Magistrate further states (pg. 394) that, *"I find that the* ***accused is not a novice to the court and has appeared previously before the court*** *(emphasis added). Therefore his silence about reporting these allegations to the court raises doubts about his allegations. Therefore I am also satisfied after considering the evidence of the police officers as well as the accused that his statement was given voluntarily".* The learned Magistrate also states that the accused also submitted that there is no supporting evidence to show that the accused resisted arrest. But I am satisfied about the evidence of pw 4 (CPC 4606 Epeli Tukana) who said the accused pushed him when he tried to arrest him. Further at page 395 the learned Magistrate said that, *"Even though the accused said he was assaulted by the police officers during the arrest, the arresting officer said the accused was trying to run and already injured in his face and leg when he was arrested even though the accused claimed that he was assaulted during the interview he did not complain about this to the Magistrate".* The learned Magistrate further said that, *"I am also satisfied the 3rd accused (the appellant) was arrested whilst trying to jump over the fence".*

[26] I have already dealt with regard to the voluntariness of the caution interview and the burden of proof. In the Judgment the learned Magistrate not only imposed a burden on the appellant to prove that he was assaulted and sustained injuries; the appellant was considered as a criminal with a record. That itself would be sufficient to set aside the judgment. Although the appellant was convicted on a charge of resisting arrest, no evidence was led to prove resistance. I do not think it is necessary to analyse in detail the judgment for the reason that the absence of voluntariness in the caution interview statement could be decided in favour of the appellant. For the reasons given above, the appellant is acquitted from all the charges. The appeal is allowed.

Nawana JA

[27] I agree with the reasons and conclusions of Basnayake JA.

Orders of Court:

1. *Appeal allowed.*

2. *The convictions are quashed and verdicts of acquittal are entered on all charges.*

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Hon. Justice W Calanchini
PRESIDENT, COURT OF APPEAL

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Hon. Justice E Basnayake
JUSTICE OF APPEAL

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Hon. Justice P Nawana
JUSTICE OF APPEAL