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

CRIMINAL APPEALS NO.AAU 98 of 2015 AND NO.AAU 105 of 2015
[In the Magistrates' Court at Suva Case No.714 of 2010

BETWEEN	:	**ASAELI VEIYAGAVI**
	:	**SAILOAMA VODA**
		Appellants
AND	:	**STATE**
		Respondent
Coram	:	**Basnayake, JA**
		Prematilaka, JA
		Bandara, JA
Counsel	:	**Mr. T. Lee for the Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**09 April 2021**
Date of Judgment	:	**29 April 2021**

JUDGMENT

Basnayake, JA

[1] I agree with the conclusions of Prematilaka, JA.

Prematilaka, JA

[2] The appellants had been charged with others in the Magistrates' Court at Suva on one count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 and another count of aggravated robbery contrary to section 311(1)(b) of the Crimes Act, 2009 committed on 23 April 2010 at Samabula in the Central Division.

[3] Upon being vested with extended jurisdiction the matter had been heard in the Magistrates' court and the appellant had been found guilty by the learned Magistrate on 17 July 2015 of both counts. On 07 August 2015, the first appellant Asaeli Veiyagavi and second appellant Sailoama Voda had been sentenced to 07 years and 06 months imprisonment and 09 years imprisonment respectively on both charges; both sentences to run concurrently subject to a non-parole period of 06 years.

[4] Both appellants had appealed against conviction in a timely manner to the Court of Appeal. The Legal Aid Commission had urged two grounds of appeal each against conviction at the leave to appeal stage on behalf of the first and second appellants. The single Judge had delivered two separate rulings on 16 August 2019 and allowed leave to appeal on the 01st ground of appeal canvassed by the first appellant and granted leave to appeal on both grounds of appeal urged by the second appellant. They are as follows:

01st appellant's ground of appeal

'1. The learned Magistrate erred in law and in fact when he admitted the confession in the record of interview when there was evidence by the prosecution itself that he was taken to hospital and no medical report was produced.

02nd appellant's grounds of appeal

*'1. **THAT** the admissibility of the caution statement was erroneous in law and fact and cannot be supported by having regard to the totality of the evidence of the trial-within-trial and the trial proper, in particular, to the following:*

(a) Admitting the caution statement of Mr. Vodo when there was evidence of injuries recorded in the Cell Book and that Mr. Vodo was taken to hospital.

(b) Accepting Mr. Veiyagavi's evidence as unreliable without independently assessing the totality of the evidence.

(c) Putting on record that Mr Vodo's alibi witness "is serving prisoner like the 1st accused in Naboro Prison" thus drawing the inferences that the alibi witness circumstances makes him an unreliable witness.

2. ***<u>THAT</u>*** *the conviction was unreasonable and cannot be supported by having regard to the totality of the evidence at trial, in particular, to the following:*

(a) Causing a miscarriage of justice by convicting the Appellants solely on the confession obtained in the Caution Interview.

(b) Causing a miscarriage of justice by convicting the Appellants on a defective charge."

[5] However, now it appears that what had been considered at the leave to appeal stage were the grounds of appeal tendered to court on behalf of the first appellant on 02 February 2018 but there had been amended grounds of appeal filed on 04 July 2019 just 11 days prior to leave to appeal hearing on behalf of both appellants. As for the second appellant the single judge had in fact considered the amended grounds of appeal filed on 04 July 2019.

[6] After the single Judge ruling the Legal Aid Commission had filed written submission on behalf of both appellants on 31 January 2020 setting out the grounds of appeal to be canvased before the full court and as far as the hearing before this court is concerned all grounds urged in the written submissions would be considered in order to avoid any prejudice to the appellants.

[7] It appears from the first appellant's written submission that the appeal grounds now being canvased before the full court are the single ground of appeal in respect of which leave to appeal had been granted and appeal grounds 1(b) [appeal grounds 1(a) & 1(c) relate only to the second appellant] and 2(a) [appeal ground 2(b) was abandoned at the hearing] in the amended grounds of appeal filed on 04 July 2019 in respect of which leave to appeal had neither been granted nor refused.

[8] Similarly, it is clear from the second appellant's written submission that the appeal grounds now before the full court are grounds 1(a), (1(c) [appeal ground 1(b) relates only to the first appellant] and 2(a) and (b) in the amended grounds of appeal filed on 04 July 2019 in respect of which leave to appeal had been granted.

[9] Thus this court would consider the following grounds of appeal regarding the first appellant.

01st appellant

'1. The learned Magistrate erred in law and in fact when he admitted the confession in the record of interview when there was evidence by the prosecution itself that he was taken to hospital and no medical report was produced.

*'1. **THAT** the admissibility of the caution statement was erroneous in law and fact and cannot be supported by having regard to the totality of the evidence of the trial-within-trial and the trial proper, in particular, to the following:*

(b) Accepting Mr. Veiyagavi's evidence as unreliable without independently assessing the totality of the evidence.

*2. **THAT** the conviction was unreasonable and cannot be supported by having regard to the totality of the evidence at trial, in particular, to the following:*

(a) Causing a miscarriage of justice by convicting the Appellants solely on the confession obtained in the Caution Interview.

Summary of facts

[10] Asbin Nitesh (PW1) and Jitend Kumar (PW2), the victims, were police officers. They had dinner together at PW1's house and come to the main road around 8.30 p.m. to catch a taxi. While they were waiting, 05 people had come and one of them had hit PW2 from behind and some others had grabbed him and attacked him on his jaw causing blood to come out. Another had grabbed PW1 and attacked him. They had taken PW2's bag which contained police uniforms, shoes, a wallet and a mobile phone amounting to a total value of $500.00. In the meantime, one person had run towards PW1's home followed by PW1. When PW1 had yelled at the stranger standing at the door, he had turned back and run towards the road. PW1 had come back to the road to find PW2 lying in a pool of blood. However, neither of the witnesses had been able to identify the assailants.

[11] Both appellants had confessed to their involvement in their cautioned interviews. The appellants had challenged the confessions on the basis of police threat and assault amounting to oppression. After a *voir dire* inquiry both statements had been ruled admissible by the learned Magistrate in his ruling on 14 July 2014 and admitted into evidence at the trial proper.

[12] The 01st appellant had remained silent and the 02nd appellant had given evidence at the trial and called one witness in support of his *alibi* defense. According to the 02nd appellant he was attending a fund raising event on the day in question in front of his house till 12.30 a.m. and did not go anywhere. His witness had stated that the 02nd appellant was with him till 10.00 p.m. or 10.30 p.m.

[13] I shall now proceed to consider the grounds of appeal:

> *'1. The learned Magistrate erred in law and in fact when he admitted the confession in the record of interview when there was evidence by the prosecution itself that he was taken to hospital and no medical report was produced.*

[14] The appellant argues that the Magistrate should have warned and cautioned himself about the medical report when considering the voluntariness and truth of the cautioned statement. His complaint relates to the admissibility of the appellant's interview at the *voir dire* inquiry and perhaps the Magistrate's reliance on it at the trial to convict him.

[15] The appellant had alleged at the *voir dire* inquiry that he was assaulted, threatened and forced to make the confession. The evidence of the police officers was that at the point of arrest or at no stage thereafter the appellant was he assaulted prior to or during the interview on the same day. After the interview on 27 April 2010 the appellant had been taken to hospital. The medical officer's report dated 28 April 2010 shows that the appellant had been produced for a medical examination for 'court purpose' and it had not revealed any injuries. When confronted with it, the appellant seems to have taken up the position that the doctor had lied in the report.

[16] The Magistrate had been conscious of the medical report and the appellant's explanation for the absence of any injuries in it. The interviewing officer and other police officers had explained at the trial proper that it was part of the usual procedure adopted to take suspects for medical examinations after the cautioned interviews were recorded in case they would falsely complain to court of assaults. There was no material for the Magistrate to doubt the integrity of the medical report. In addition, the Magistrate had given his mind to the shifting of positions on the part of the appellant under cross-examination that he was assaulted only at the police station as opposed to

his stand that he was assaulted upon arrest and the fact that he had complained of any police assault only on 17 January 2011 though he was produced in court from time to time since 28 April 2010.

[17] Therefore, there is no merit in the above ground of appeal:

> *'1. **THAT** the admissibility of the caution statement was erroneous in law and fact and cannot be supported by having regard to the totality of the evidence of the trial-within-trial and the trial proper, in particular, to the following:*
>
> *(b) Accepting Mr. Veiyagavi's evidence as unreliable without independently assessing the totality of the evidence.'*

[18] Though the scope of this ground of appeal is not clear it looks to me that what the appellant complains of is that the Magistrate in the judgment had not considered the weight and truthfulness of his cautioned interview after determining the voluntariness of it at the *voir dire* inquiry.

[19] **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017) the Court of Appeal set down the required approach to evaluate a confessional statement in a trial presided over by the judge assisted by the assessors as follows:

> *'[20] The following principles could be deduced from the said decisions:*
>
> *(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness.*
>
> *(ii) Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial ('second bite at the cherry') but such evidence goes to the weight and value that the jury would attach to the confession (Chan Wei Keung, Prasad and Murray) inter alia on the premise that there might be cases in which the jury would conclude that a statement is involuntary according to the rule relating to inducement, but nonetheless it is manifestly true (Wendo).*
>
> *(iii) Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the*

trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them.'

[20] In **Noa Maya v State** Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30] His Lordship Justice Keith had stated that that judges (in Fiji) should for the time being, tell the assessors that *'even if they are sure that the defendant said what the police attributed to him, they should nevertheless disregard the confession if they think that it may have been made involuntarily'.* In **Volau v State** (supra) the Court of held that this direction appears to be necessarily required only in a situation where the trial judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the confession is voluntary ***Noa Maya*** direction seems irrelevant and not required [see **Lulu v. State** Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19 and **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017].

[21] The Supreme Court made the following remarks recently in **Tuilaselase v State** CAV0025 of 2018: 25 April 2019 [2019] FJSC 2 where the complaint was that the trial judge had misdirected himself when he failed to give any direction to the assessors and to himself on the truth and weight of the caution statement, by stating as follows:

> *'26. The enquiry into whether the directions to the assessors were sufficient must therefore be fact specific. The weight to be afforded to the confession in this case, was clear. The detailed nature thereof would almost inevitably give rise to a conviction. As to the truth of the statement, there was never any suggestion by the petitioner that even if voluntarily made the statement may be untrue. In this light, I believe the direction given by the trial judge in paragraph 38 of his summing up was quite sufficient....'*

In paragraph 38 referred to by the Supreme Court in ***Tuilaselase*** in the summing up as given below has no specific reference to the aspect of 'truth' and or 'weight'.

> *".....However, if you are satisfied beyond reasonable doubt, so that you are sure, that the accused gave those statements voluntarily, as judges of facts, you are entitled to rely on them for or against the accused".*

[22] However, it must be remembered that the trial against the appellant had been concluded before a Magistrate who was a trained judicial officer presumably learned and knowledgeable in the relevant legal principles. Therefore, he need not set down the applicable legal principles verbatim in the judgment though it might be a useful exercise when his decision is reviewed by the appellate courts.

[23] The Magistrate had reconsidered even the question of voluntariness in the judgment possibly due to the appellant's suggestion to the interviewing officer that he had assaulted him. However, the appellant did not give evidence at the trial or kept the question of voluntariness a live issue anymore at the trial. Having given his mind to this issue in the judgment the Magistrate had correctly concluded that he still maintained his position on the voluntariness of the cautioned interview as no additional material surfaced on that issue during the trial proper. In fact, the allegation of oppression had become significantly weaker and muted during the trial.

[24] The Magistrate had concluded at paragraphs 33-35 that the appellant was part of a group that committed the offences and his conduct as admitted in the cautioned interview made him liable on the basis of joint enterprise in terms of section 46 of the Crimes Act, 2009. Though, the Magistrate was brief in his analysis it is clear that he had evaluated the cautioned interview for its weight and truthfulness in arriving at the conclusions.

[25] I have examined the appellant's cautioned interview carefully and found it to contain a probable and sequential account of events that had happened and could not find anything that would give rise to a reasonable suspicion of its authenticity or lead to any doubt that it was a fabrication by a third party. From all accounts, the appellant's confession appears to be a truthful account of the complete scenario and of his involvement as an active participant as opposed to being a mere bystander in the robberies. The evidence of reconstruction of the crime scene by him adds more credibility to the appellant's cautioned interview.

[26] The appellant was standing near PW2 who had fallen to the ground as a result of the punch delivered on him by one of the group members while three of the rest of the group were searching the victim's pockets obviously for money or any other valuables and then the appellant alerted the group and urged them to flee the scene for safety when he heard the cries for help by PW1. This account by the appellant in his cautioned interview demonstrates that he was acting in conjunction with the rest of the group members in committing the robberies. Thus, I am convinced that the confessional statement is true and the contents of it are sufficient for the conviction.

[27] Therefore, there is no merit in the above ground of appeal and leave to appeal is refused:

> *'2.**THAT** the conviction was unreasonable and cannot be supported by having regard to the totality of the evidence at trial, in particular, to the following:*
>
> *(a) Causing a miscarriage of justice by convicting the Appellants solely on the confession obtained in the Caution Interview.'*

[28] The counsel for the appellant has contended that the evidence led by the prosecution was not enough to bring home the charges against the appellant. While submitting that the cautioned interview was not enough to prove elements of aggravated robbery the counsel had not pointed out what element of the offence of aggravated robbery was not proved. However, the appellant's liability is not based on his direct involvement in the robbery. His is a vicarious liability based on the application of legal principles of criminal liability.

[29] Considering the details of appellant's own admissions of his role there can be a doubt whether the elements required under section 46 of the Crimes Act, 2009 have been established, particularly regarding the formation of a common intention to prosecute an unlawful purpose. However, the degree of his participation in the robbery as described above shows that he could be liable for aggravated robbery under section 45 of the Crimes Act, 2009 on the basis of aiding and/or abetting the offence. There is nothing to indicate that he had terminated his involvement and taken all reasonable steps to prevent the commission of the offences by others to exclude him from liability under section 45(4).

[30] Therefore, even if the Magistrate was wrong, as it might appear to be, to have assigned criminal liability on the appellant based on 'joint enterprise' in terms of section 46, I think the appellant could have been made liable under section 45(1) of the Crimes Act, 2009 in as much he by his conduct had aided and abetted his co-accused who committed the offence of aggravated robbery and the appellant had clearly intended that his conduct would aid and abet the commission of an offence or been reckless about the commission of the robbery by the others. His act of refraining from walking away from the crime scene even after one of them punched PW2 to the ground, his staying near the fallen victim without doing anything to prevent the victim being robbed while watching the rest of them searching the victim's pocket and then alerting all of the group to possible oncoming danger encouraging them to leave the scene on hearing the sounds for help from PW1 are indicative of the above essential elements of criminal liability under section 45(1) of the Crimes Act, 2009. Therefore, the conviction under the first count could be sustained on the evidence available.

[31] However, it does not appear from the appellant's cautioned interview or the evidence of PW1 and PW2 that the members of the group that overpowered the victims were armed with an offensive weapon as defined in section 311(3) of the Crimes Act, 2009. The second count alleges that the appellant had committed an aggravated robbery contrary to section 311(1)(b) of the Crimes Act, 2009 and therefore there should be evidence that at least one member of the group should have been armed with an offensive weapon at the time of the robbery. In the circumstances, I think the conviction on the second count cannot stand and should be quashed.

[32] Therefore, there is no merit in the above ground of appeal as far as the conviction on the first count is concerned and leave to appeal is refused:

02nd appellant's grounds of appeal

*'1. **THAT** the admissibility of the caution statement was erroneous in law and fact and cannot be supported by having regard to the totality of the evidence of the trial-within-trial and the trial proper, in particular, to the following:*

(a) Admitting the caution statement of Mr. Vodo when there was evidence of injuries recorded in the Cell Book and that Mr. Vodo was taken to hospital.

(c) Putting on record that Mr Vodo's alibi witness "is serving prisoner like the 1st accused in Naboro Prison" thus drawing the inferences that the alibi witness circumstances makes him an unreliable witness.

[33] The appellant's first complaint is based on the admissibility of his cautioned interview. The appellant had taken up the position that after he was arrested on 26 April 2010 he was assaulted at the police station and forced to confess. Thus, he had alleged that his confession was not voluntary. Though, he had also stated that no family member was allowed to accompany him and he had not been allowed to contact a legal practitioner, I find from the cautioned statement that the appellant's constitutional rights including contacting legal practitioners and a family member had been explained which he had understood but declined to avail himself of any of them.

[34] The appellant heavily relies on the cell diary entry and the trip to hospital to challenge the Magistrate's decision to rule his confession voluntary. According to the *voir dire* ruling the cell diary of 26 April 2010 had noted injuries near the appellant's eye. The cautioned interview had been taken from 2.00 p.m. – 2.45 p.m. on 27 April 2010 and he had been taken to the hospital on 28 April 2010. The medical officer's report signed by the examining doctor, however, has not recorded any injuries on the appellant. The interviewing officer had stated that he could not remember having seen any injuries on the appellant at the time of the cautioned interview. Thus, it is possible that the injuries noted in the cell diary were pre-existing injuries which were not significant enough to be recorded by the doctor, if they still existed by 28 April 2010. No doctor had given evidence either at the *voir dire* inquiry or the trial proper. The appellant on his part does not appear to have specifically refereed to such injuries received at the hands of the police in his *voir dire* testimony. Therefore, the cell diary entry is inconclusive and not supported by the medical report. Thus, the reasoning in **Nacagi v State** [2015] FJCA 156; AAU49 of 2010 (03 December 2015) on evaluation of medical evidence *vis-à-vis* voluntariness of the cautioned interview has no material bearing here.

[35] The Magistrate had been conscious of the cell diary entry. However, he had looked at the inconsistent positions taken up by the appellant regarding his allegation of oppression forcing him to confess. Under cross-examination at the *voir dire* inquiry he had stated that the police had forged his signature. In re-examination his position had been that he signed the cautioned interview but did not know what he was writing. In addition, the appellant had complained of police assault only on 17 January 2011 though he was produced in court from time to time since 28 April 2010.

[36] In the light of principles of law laid down in **Noa Maya v State** (supra), **Volau v State** (supra) and **Tuilaselase v State** (supra) the Magistrate was justified in revisiting the issue of voluntariness in the judgment as the appellant had raised it as an issue at the trial. When confronted with the medical report that had not shown any injuries the appellant at the trial had no explanation to offer. The police officers had while denying any assault on the appellant had explained that it was part of normal police procedure to take the suspects for medical examinations after interviews to guard themselves against false allegations of misconduct. The Magistrate had found no reason to change his opinion of the voluntariness of the cautioned interview.

[37] In the circumstances, I conclude that there is no merit in the above ground of appeal.

[38] The appellant's next complaint is the reference by the Magistrate in the judgment to his witness Salesi Balekivuya (DW2) as a serving prisoner as evidence of the Magistrate drawing an adverse inference on his credibility.

[39] It was a fact that DW2 was in fact a serving prisoner as the Magistrate had to issue a production order to secure his presence at the trial to bolster the *alibi* defense of the appellant. However, the Magistrate had objectively analyzed his evidence to the effect that the appellant was attending a fund raiser on the day of the incident and was with him till 10.30 p.m. but was not sure whether the appellant had stepped out and returned later. The distance between the crime scene and the fundraising venue had been very short. The appellant had in fact confessed to having joined a fundraising event after the robbery but does not appear to have mentioned DW2's name as a person he knew at the event. In the circumstances the Magistrate had correctly rejected the *alibi*. There is no merit in the above complaint.

2. ***<u>THAT</u>*** *the conviction was unreasonable and cannot be supported by having regard to the totality of the evidence at trial, in particular, to the following:*

(a) Causing a miscarriage of justice by convicting the Appellants solely on the confession obtained in the Caution Interview.

(b) Causing a miscarriage of justice by convicting the Appellants on a defective charge."

[40] The appellant had confessed to be part of the group of people that robbed PW2 Jitendra Kumar. When the complete allegation with details of stolen items was put to the appellant at the beginning of the cautioned statement he had admitted that he committed the offences with others. He had also admitted that while the others were engaged in overpowering PW2, searching his pockets and eventually removing the bag from the victim he assaulted PW1 and attempted to rob him. PW1 had said in his evidence that one of the people had grabbed him. According to the appellant's confession, when PW1 ran towards the house the appellant also had run behind him but turned back when he realized that some people were awake after hearing cries for help from PW1. Therefore, the appellant's grabbing or assaulting PW1 had prevented PW1 coming to the rescue of PW2 and made PW1 run away from the scene for safety calling for help. This obviously had enabled the rest of the group to rob PW1 without any resistance and take away the bag containing several items. Therefore, the appellant's action had clearly facilitated the robbery of PW2.

[41] In the circumstances, though the appellant was not directly involved in the robbery of PW2 he was by his own conduct vicariously liable for the actions of the others who robbed PW2 under the principles of joint enterprise in terms of section 46 of the Crimes Act, 2009. Accordingly, the conviction on the first count could be sustained.

[42] However, it does not appear from the appellant's cautioned interview or the evidence of PW1 and PW2 that the members of the group that overpowered the victims were armed with an offensive weapon as defined in section 311(3) of the Crimes Act, 2009. The second count alleges that the appellant had committed an aggravated robbery contrary to section 311(1)(b) of the Crimes Act, 2009 and therefore there should be evidence that at least one member of the group should have been armed with an

offensive weapon at the time of the robbery. In the circumstances, I think the conviction on the second count cannot stand and should be quashed.

[43] The appellant's last argument is on the alleged 'defective' charge in the first count on the basis that it only mentions that the appellant with others stole several items from PW2. The complaint appears to be that the drafter had omitted the words 'use of force' or 'threat to use force' either before, during or after the commission of the theft.

[44] In **Saukelea v State** [2019] FJSC 24; CAV0030.2018 (30 August 2019) the Supreme Court dealt with the issue of a defective charge as follows:

> *'[36] The main consideration in situations similar to this where there is some infelicity or inaccuracy of drafting is whether the accused knew what charge or allegation he or she had to meet: **Koroivuki v The State** CAV 7 of 2017; [2017] FJSC 28. Secondly it was important that the accused and his counsel were not embarrassed or prejudiced in the way the defence case was to be conducted: **Skipper v Reginam** Cr. App. No. 70 of 1978 29th March 1979 [1979] FJCA 6. The Court of Appeal whilst not conceding merit in the point properly applied the proviso under section 23 of the Court of Appeal Act and dismissed the ground of appeal. Similarly in this Court, Ground 2 fails.'*

[45] **Vakatalai v State** [2017] FJHC 228; HAA035.2016 (17 March 2017) sheds more light on how to look at the issue of 'defective charge' as follows:

> *[4] The appellant was charged with robbery contrary to section 310(1) (a) (i) of the Crimes Decree 2009. The particulars of the offence alleged that the appellant 'on 4th day of June 2016 at Suva in the Central Division robbed and stole an I Phone 5c valued at $800.00 the property of the said Sean Fraser'. The appellant's contention is that the charge was defective because the particulars did not allege that the appellant used force to steal, which is an essential ingredient of the offence. I accept that the use of force to steal is an essential ingredient of the offence of robbery contrary to section 310(1) (a) (i) of the Crimes Decree 2009. But I do not think the charge was defective.*
>
> *[5] All criminal charges filed in court must comply with section 58 of the Criminal Procedure Decree 2009 (CPD). The charge must contain a statement of offence and such particulars that are necessary for giving reasonable information as to the nature of the offence charged. The statement of offence must be described in an ordinary language, avoiding as far as possible the use of technical terms and without necessarily*

stating all the essential elements of the offence (section 61(2) of the CPD). Particulars of the offence must be set out in ordinary language, and the use of technical terms is not necessary (section 61(4) of the CPD).

*[6] It has been said in many cases that that while the particulars of offence should be reasonably informative, it is not necessary slavishly to follow the section in the Act that creates the offence (**Shekar v State** [2005] FJCA 18; AAU0056.2004 (15 July 2005); **Mudaliar v State** [2007] FJCA 16; AAU0032.2006 (23 March 2007)). Even if the particulars lack an essential element of the offence, the charge may be defective but not bad. In such a case, the question is whether the accused was prejudiced by the defect (**McVitie** (1960) 44 Cr App R 201; **Skipper v R** [1979] FJCA 6; **Tavurunaqiwa v State** (2009) FJHC 198; HAA022l.2009 (10 September 2009)).*

[7] ..... Although the particulars did not expressly state that the appellant used force, the element of force was subsumed in the definition of robbery, thus, making the charge reasonably informative for the appellant to know what was being alleged by the prosecution. In my judgment, the charge was not defective.

*[8] But if I am wrong in my conclusion that the charge was not defective, I am not convinced that the appellant was prejudiced by the charge not stating that the appellant used force to steal the complainant's mobile (see, **Kirikiti v State** [2015] FJCA 150; AAU005.2011 (3 December 2015).The appellant's case was that he was mistakenly identified by the complainant as the person who had robbed him. The issue was whether the appellant was the robber. That is how the appellant presented his case at the trial. Whether force was used or not to steal the complainant's mobile phone was not an issue at the trial.'*

[46] In **Deo v State** [2011] FJHC 372; HAA010 of 2011 (06 July 2011) the High Court had usefully remarked on the same matter:

'23. Considering decided cases in Fiji and other similar jurisdiction it is clear that the Accused should be given reasonable details of the charge against him. In simple term the Accused should clearly identify and understand the charges levelled against him. There should not be any ambiguity in the details of charges against him. This Court is of the view if the Accused is given the name of the offence (if provided by the law) or the relevant section is sufficient. Providing more details will be helpful to the Accused but it is not mandatory.

[47] In **Shekar v State** [2005] FJCA 18; AAU0056.2004 (15 July 2005) decided prior to the promulgation of the Crimes Act and the Criminal Procedure Act in 2009, the appellant argued that charges did not disclose any offence known to law or were defective in substance and form**.** The court dealt with it as follows:

'[6] At the trial in the Magistrates' Court, the appellants were represented by counsel but no challenge was raised to the suggested defects in the charges. In face of that, the respondent suggests that the terms of section 342 of the Criminal Procedure Code were a bar to the ground being raised in the High Court and they are also a bar in this Court:

*[7] Counsel for the appellants cited the case of **DPP v Solomone Tui** [1975] 21 FLR 4 in which Grant CJ considered the authorities and the similarly worded provision in section 100 of the English Magistrates Courts Act 1952 and accepted that:*

> *"Despite its apparent scope, it has been held that the provisions of this section cannot validate a fundamental error going to the root of the matter; such as the failure to include in the charge a necessary ingredient of the offence in question, duplicity of a charge, want of jurisdiction, or a charge which discloses no offence known to law".*

[14] We cannot accept that those omissions were such as to render the charges defective. The purpose of the charge is to ensure that the accused person knows the offence with which he is being charged. Whilst the particulars should be as informative as is reasonably practicable, it is not necessary slavishly to follow the section in the Act.

[15] Section 119 of the Criminal Procedure Code requires that:

> *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

[18] It is and has long been counsel's responsibility to ensure the charge is correct. In this case the prosecution could and should undoubtedly have worded the charges better. Equally it is defence counsel's duty to ensure that his client understands the nature of the charge before he enters a plea. If the charge does not give sufficient or clear information, an application should be made to the court for correction. The court's duty, if amendment is permitted, is to allow the defence time to deal with the changes. Section 242 makes that clear.

[19] That section is based firmly on the duty of counsel to which we have referred. The proviso gives a strictly limited discretion to the appellate judge to consider alleged defects in the charge in cases where the accused did not have the advantage of counsel's advice in the trial. It does not affect the position where the appellant was legally represented in the magistrates' court as was the case here.

[20] Tui's case was one in which the appellant had not been represented. The decision was that the defects in that case were fundamental and could not

be cured. It does not state any novel proposition of law but simply states the basic rule. In the present case, whilst the charge should have been better worded, there was no fundamental fault with the wording and the charge was not defective.

[21] If counsel at the trial had felt the charges were not clear, he should have raised the matter at that time. He did not and he is precluded by section 242 from raising it on appeal.'

[48] Section 58 of the Criminal Procedure Act, 2009 is similar to section 119 of the Criminal Procedure Code while current section 279 of the Criminal Procedure Act, 2009 is similar to section 342 of the Criminal Procedure Code. Section 214 of the Criminal Procedure Act, 2009 is similar to section 274 of the Criminal Procedure Code.

[49] Coming back to the current appeal, the defense counsel had not raised any objection based on a defective charge in respect of the first court. The appellant had pleaded guilty to the information without any reservations and proceeded to trial. The appellant had been clearly told at the time he was interviewed that he was facing charge of aggravated robbery. He knew what charge or allegation he or she had to meet. Both counts clearly identify the charges as aggravated robbery and the mention of section 311 of the Crimes Act, 2009 makes it abundantly clear. There was no way that the appellant could have been misled or prejudiced in his defense by the omission complained of because his defense was an *alibi*. Thus, whether the charge was theft, robbery or aggravated robbery his defense would have been the same.

[50] Therefore, in the light of the principles of law discussed above the contention of the appellant cannot succeed.

[51] Therefore, I see no merits in the appellants' appeals in so far as the convictions on the first count are concerned and both appeals should stand dismissed.

Bandara, JA

[52] I have read the draft judgment of Prematilaka, JA and agree with his reasoning and conclusions.

Orders

1. Appellants' appeals against convictions on count 02 are allowed and convictions on count 02 are set aside.
2. Appellants are acquitted of count 02.
3. Appellants' appeals against convictions on count 01 are dismissed and convictions on count 01 are affirmed.

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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Mr. Justice Chandana Prematilaka
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice Wasantha Bandara
JUSTICE OF APPEAL