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

CRIMINAL APPEAL NO.AAU 111 of 2018
[High Court at Suva Criminal Case No. HAC 403 of 2016S]

BETWEEN

: **ASESELA NIUBASAGA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Appellant in person**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **05 January 2021**

Date of Ruling : **06 January 2021**

RULING

[1] The appellant had been indicted in the High Court on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act. 2009 committed with others on 28 October 2016 at Samabula in the Central Division. The charge against the appellant was as follows.

'Statement of Offence

AGGRAVATED ROBBERY: Contrary to section 311(1)(a) of the Crime Act 2009

Particulars of Offence

ASESELA NIUBASAGA and SAMISONI WAQAVATU WITH OTHERS on the 28th day of October 2016, at Samabula in the Central Division, robbed one

NITYA NAND SHANKAR and stole 1 x steel safe valued at $1,000.00, cash $11,000.00 (FJD), assorted liquor valued at $1,100.00, assorted jewelleries valued at $15,000.00, cash of AUD $4,000.00, 1 couch brand bag valued at $2,000.00, assorted clothes valued at $300.00, 1 x Samsung mobile phone valued at $800.00, 1 x Suzuki van registration FH 170 valued at $8,000.00, all to the total value of $43,200.00, the property of NITYA NAND SHANKAR.

[2] After the summing-up, the assessors had expressed a unanimous opinion of guilty against the appellant on 12 October 2018 and the learned High Court judge had found him guilty in his judgment delivered on the same day. The appellant had been sentenced on 16 October 2018 to an imprisonment of 14 years with a non-parole period of 13 years.

[3] The appellant had tendered a timely appeal against conviction and sentence on 02 November 2018. He had filed amended grounds of appeal and written submission on 25 May 2020. He had tendered further amended grounds of appeal and written submission on 22 July 2020 which he relied on at the leave to appeal hearing. The appellant had also tendered a notice dated 30 September 2020 in Form 3 seeking to abandon his sentence appeal. The state had responded by its written submissions on 01 October 2020.

[4] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The threshold test applicable is **'reasonable prospect of success'** to determine whether leave to appeal should be granted (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173 and **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87.

[5] Grounds of appeal urged by the appellant are as follows.

'[1]. THAT, the Learned Trial Judge erred in law during voire dire by ruling police records of interview and charge statements 'admissible' despite the presence of Medical Report, clarifying that the injuries sustained were injuries inflicted to the Appellant whilst held in Police Custody negating voluntariness.

[2] THAT, the Learned Trial Judge erred in law when he failed to evaluate and consider the independent police medical report of the appellant confirming the injuries being sustained whilst in police custody, thus negating voluntariness.

[3] THAT, the Learned Trial Judge made a pure error of law by admitting the police records of interview and charge statement into evidence when

(a) the Prosecution failed to establish and/or prove to the required standard, beyond reasonable doubt that the Appellants interview were a voluntary admission; and

(b) when there were sufficient independent evidence, inevitably and credibly indicating that, the injuries sustained by the Appellant were those inflicted whilst the Appellant was in police custody.

[4] THAT, the Learned Trial Judge erred in law by failing to consider the evidence of the Appellant given on oath this is especially since the version of evidence given by the Appellant on Oath were purely consistent and corroborative with the Police Medical Report – indicating police misconduct and impropriety.

[5] THAT, the Learned Trial Judge erred in law when he placed too much emphasis and weight on the ONLY EVIDENCE of confession which was evidence in his summing up by misdirection to the Assessors causing a miscarriage of justice along the way where they found the Appellant guilty without any other evidence to establish a concrete and reliable conviction.

[6] THAT, the Learned Trial Judge erred in law and in fact to find the Appellant guilty on the charges of Aggravated Robbery when there was no evidence other than confession to prove or substantiate the elements of the charge. No direct or solid material evidence to prove and link the Appellant to the crime.

[7] THAT, the learned Trial Judge erred in law by failing to consider and ponder on the inconsistency of the two medical reports negating fabrication by the police and coaching of the doctors by police – a practice employed by the police over decades of breaching Judges Rule causing a substantial miscarriage of justice and thereby making the conviction unsatisfactory and unsafe to stand, in all the circumstances of the case.

[8] THAT, the Learned Trial Judge erred in law when he convicted the Appellant on a defective charge and particulars contrary to the Procedural Rule set out in CPA (2003), form B to fulfil one of the essential elements, namely, force.

[6] The learned trial judge had summarised the facts of the case as follows in the sentencing order.

15. The prosecution's case was as follows. On 28 October 2016, the day of the alleged "aggravated robbery", the complainant (PW1) was 68 years old and a businessman. Asesela Niubasaga (DW1), the first accused, was 31 years old. He reached Form 4 level education at Saraswati College, and was living with his defacto wife at Kalabu village. He was a subsistence farmer by profession. Samisoni Waqavatu (DW2), the second accused, was 26 years old and single. He reached Form 4 level education at Kalabu Secondary School. He was living with his mother and other relatives at Kalabu village. He was a subsistence farmer by profession.

16. According to the prosecution, Asesela allegedly met Samisoni on 27 October 2016. Asesela allegedly invited Samisoni and another to a robbery to be done early morning on 28 October 2016, at Tamavua. On 27 October 2016, late at night, Asesela allegedly met Samisoni and another at Kalabu. They allegedly took a taxi to Princes Road, Tamavua. According to the prosecution, they met 4 other youths at Tamavua. The group then identified the complainant's two storey concrete house to break into. According to the prosecution, the group allegedly planned to break into the house early morning on 28 October 2016.

17. Early morning on 28 October 2016, Asesela and his friends put on their masks, and allegedly broke into the complainant's house at Princes Road, Tamavua. They were allegedly armed with pinch bars, bolt cutters and cane knives. They got hold of the complainant (PW1) and his wife, and allegedly threatened them not to resist. They tied them up. Later they ransacked the house and allegedly stole the items mentioned in the information. They later fled the crime scene in PW1's car. The matter was later reported to police. An investigation was carried out. The two accused were arrested by police. They were cautioned interviewed. They allegedly confessed to the above crime to the police. They were later charged with "aggravated robbery".

18. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find both accuseds guilty as charged. That was the case for the prosecution.

[7] Then the trial judge had narrated the defence case as follows.

19. On 5 October 2018, the first day of the trial proper, the information was put to both accused, in the presence of their counsels. They pleaded not guilty to the charge. In other words, they denied the allegations against them. When a prima facie case was found against each of them, at the end of the prosecution's case, wherein they were called upon to make their defence, both of them choose to give sworn evidence in their defence. Accused no. 1 called Doctor Archana Prasad (DW3) as his supporting witness. Accused no. 2 called no witness. What the accused did was totally within their rights.

20. The accused's cases were very simple. On oath, they both denied the allegations against them. They each said, they did not rob the complainant as alleged in the information. In their closing submission, they appeared to say that no eye witness saw them at the crime scene. They appear also to say that the complainant (PW1) did not identify then, at the crime scene, at the material time. They said, the only evidence against them, appear to be their alleged confession to the police, when they were caution interviewed by them.

21. However, they ask you, as assessors and judges of fact, to ignore and disregard their alleged confessions to the police. They say, this was because the police force the confessions out of them. They said, the police repeatedly assaulted them and ihreatened them, and as a result, they allegedly confessed to the police. They said, their alleged confessions were given involuntarily by them and without their own free will. They appear to say that the police also fabricated the answers allegedly given by them in the interview notes. As a result of the above, they say the alleged confessions were not true.

01st and 03rd grounds of appeal

[8] Both relate to the admissibility of the cautioned interview of the appellant recorded on 03 and 04 November 2016 at the *voir dire* inquiry. Contrary to the appellant's submissions there was no medical evidence before the trial judge at the *voir dire* inquiry to confirm that the appellant had carried some injuries after his arrest by the police. The only evidence available to the trial judge at the *voir dire* inquiry was that of Dr. Ashneel Singh (PW6) who had testified that when he examined the appellant on 06 November 2016 he did not observe any injuries. The appellant does not seem to have complained to the doctor of any assault either. Therefore, the only evidence of police assault had come from the appellant at the *voir dire* inquiry.

[9] The trial judge in those circumstances had remarked at the *voir dire* ruling on 15 October 2016 that

5. I have carefully listened to and considered the evidence of all the prosecution and defence's witnesses. I have carefully examined their demeanours when they were giving evidence in court. I have carefully considered the parties closing submissions.

6. The dispute between the parties were somewhat similar to what transpires in a voir dire hearing. Both accused alleged the police repeatedly assaulted and threatened them to confess, while they were in police custody. They said, they were so frightened that they confessed. They said their confessions were not given voluntarily nor given out of their own free will. The

police witnesses said the opposite. They said, they did not assault, threaten nor made any promises to the accused, while they were in police custody.

7. I have carefully listened to and considered the evidence of Doctor Ashneel Singh (PW6). He medically examined both accused on 6 November 2016. PW6 said he saw no injuries on both accused.

8. After looking at all the evidence, I accepted the prosecution's witnesses' version of events, and ruled the accused's caution interview statements as admissible evidence. However, I said, the acceptance or otherwise of the accused's' alleged confessions, will be a matter for the assessors at the trial proper."

[10] In **Ganga Ram & Shiu Charan v R**, Criminal Appeal No. AAU0046 of 1983 (13 July 1984), the Court of Appeal held:

> *"It will be remembered that there are two matters each of which requires consideration in this area. **First,** it must be established affirmatively by the Crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force, threats of prejudice or inducement by offer of some advantage – what has been picturesquely described as 'the flattery of hope or tyranny of fear." **Second**, even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which the police behave, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or unfair treatment."*

[11] In the light of the material available to the trial judge at the *voir dire* inquiry and his analysis of the evidence including that of the appellant, I cannot see these two grounds of appeal succeeding in appeal.

02nd, 04th, 05th, 06th and 07th grounds of appeal.

[12] The gits of all the above grounds of appeal is the unreasonableness of the conviction based only on the cautioned interview of the appellant. The appellant argument is built on the medical evidence that was led on his behalf at the trial proper namely that of Dr. Archana Prasad who deputised for Dr. Edwin Kumar who had examined the appellant on 08 November 2016. The appellant had complained to Dr. Kumar that the police officers hit him with batons and also kicked him. Dr. Kumar had observed abrasions *i.e.* minor soft tissue injuries on the appellant's left chest over the rib and on his left foot and right foot. According to the doctor the said injuries would most likely

have resulted from frictional force acting along the skin surface. These superficial abrasions cannot be the result of severe and brutal assault the police is alleged to have inflicted on the appellant.

[13] The appellant complains that the observations of Dr. Kumar (as explained in his absence by Dr. Archana) substantiates his allegation of police assault which led him to confess to the crime and therefore, he never made the confessional statement voluntarily and should not have been relied upon to bring home the charge of aggravated robbery against him.

[14] The appellant was entitled to canvass the issue of voluntariness of his cautioned interview at the trial proper making it a live issue. Every accused has a right to canvass the voluntariness for the second time at the trial proper after the *voir dire* inquiry *i.e.* getting a second bite at the cherry (vide paragraph [56] of **Chand v State** [2016] FJCA 61; AAU0015.2012 (27 May 2016). 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 (vide paragraph [20](ii) of **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017)].

[15] In **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017) the Court of Appeal analyzing previous decisions stated the correct approach to be adopted by trial judges regarding a confession as follows.

> *'The correct law and appropriate direction on how the assessors should evaluate a **confession** could be summarised as follows.*
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> *(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 (vide **Volau v State** Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51).*
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> *(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 but such evidence goes to the weight and value that the jury would attach to the **confession** (vide **Volau**).*
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> *(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. (emphasis added) (vide* ***Volau*****).**

(iv) Even if the assessors 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 (vide* ***Noa Maya v. State*** *Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30])*

(v) However, ***Noa Maya*** *direction is 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 is irrelevant and not required (vide* ***Volau*** *and* ***Lulu v. State*** *Criminal Appeal No. CAV 0035 of 2016: 21 July 2017* [2017] FJSC 19.

[16] The learned trial judge's directions at paragraph 29 of the summing-up on how the assessors should approach the cautioned interviews are in substantial compliance with the law set out above.

'29. If you accept the two accuseds' above confessions, you will have to find them guilty as charged. If you reject the two accuseds' above confession, you will have to find them not guilty as charged. It is a matter entirely for you. However, in approaching the two accuseds' alleged confession, I must direct you as follows as matter of law. A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements contained in his police caution interview statements? If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the circumstances surrounding the taking of the statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If it's otherwise, you may give it less weight and value. It is a matter entirely for you.'

[17] The trial judge's directions to the assessors on the medical evidence are found at paragraphs 31-34 of the summing-up.

31. However, the two accuseds said exactly the opposite. You have heard them give evidence in court and I am sure their evidence is still fresh in your mind and I don't want to bore you with the details. Suffice to say that they said they were arrested by police on 3 November 2016 and were in police custody from then until taken to court on 7 November 2016. Both appear to say they were interviewed on 3 and 4 November 2016. Both appear to agree they were taken by police to Raiwaqa Health Centre on 6 November 2016 and were seen by Doctor Asheel Singh (PW7). Asesela agreed he was seen by Doctor Edwin Kumar on 8 November 2016 at Samabula Health Centre. Both accused said that the police repeatedly assaulted them while in their custody. As for Asesela, he said he was repeatedly punched in the ribs at Rifle Range Vatuwaqa by the police on 3 November2016. On 4 November 2016, Asesela said, he was repeatedly punched by police on the right temple at Samabula Police Station. He said, he was also repeatedly kicked in the ribs. He said, police slammed his head to the back of a police vehicle in Colo-i-Suva.

32. ... . Both accuseds were taken by police to Raiwaqa Heath Centre on 6 November 2016 to be medically examined. It must be noted that this was 2 days after their caution interview statements were taken on 3 and 4 November 2016. Doctor Ashneel Singh (PW7) medically examined both accuseds. Doctor Singh said none of the accused made any complaints to him. Nevertheless, he examined them. According to Doctor Singh, he found no injuries on them. Doctor Singh tendered the accuseds' medical reports as Prosecution Exhibit no. 3 and 4 in the trial. Please, read the reports carefully. On 8 November 2016, Asesela was further medically examined by Doctor Edwin Kumar at Samabula Health Centre. He produced a medical report. However, on the day of trial, Doctor Kumar was sick. Doctor Archana Prasad (DW3) stood in for him. This was permitted by section 133 (5) of the Criminal Procedure Act 2009. Doctor Prasad said, Asesela had no major injuries on him on 8 November 2016. Doctor Prasad said, he only had abrasions. On Asesela's allegation of repeated assaults at Rifle Range and Samabula Police Station, Doctor Prasad said she would expect more severe injuries than abrasions. Doctor Prasad tendered Doctor Kumar's medical report of Asesela as Defence Exhibit no. 1.

33. How you view the prosecution's version of events as against the accuseds, on the basis of the above evidence, is entirely a matter for you. If you accept the prosecution's version of events, you must find the accuseds guilty as charged. If otherwise, you must find them not guilty as charged. It is a matter entirely for you.

34. I have summarized the accused's cases to you from paragraphs 19 to 22 hereof. I repeat the same here. If you accept the accuseds' version of events, you must find the accuseds not guilty as charged. If you reject the accuseds' version of events, you must still consider the prosecution's case as a whole. If you are not sure of the accuseds' guilt, you must find them not guilty as charged. If otherwise, you must find them guilty as charged. It is a matter entirely for you.'

[18] Therefore, one cannot say that the trial judge had not adequately analyzed medical evidence alongside the totality of other evidence to the assessors. The judge had addressed the same in his judgment too as follows.

> *6. The prosecution's case largely depended on the acceptance or otherwise of the two accuseds' alleged confessions. I have heard the prosecution's witnesses' evidence on the same. I have also heard the two accuseds' version of events on the same. The police said, they did not assault or threaten the two accuseds while in their custody. The two accuseds said they were repeatedly punched and kicked by the police officers. At the end of the day, I had to look at what Doctor Singh and Doctor Prasad said. Both doctors said the two accuseds suffered no injuries that is major, while in police custody. Doctor Prasad said, given the two accuseds' complaints of assault by police officers, major injuries should be present on their bodies, not abrasion.*
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> *7. I have come to accept the doctors' evidence, that both accuseds suffered no major injuries, while in police custody. Doctor Singh said he found no injuries on both accuseds on 6 November 2016. Doctor Kumar only found abrasion on Accused No. 1. According to Doctor Prasad, an abrasion is not a cut. Given the punches they allegedly received from police, I expected major injuries on their bodies. None was found.'*

[19] The appellant alleges that Dr. Singh who examined him on 06 November 2016 had acted in collusion with the police not to have reported any injuries that had been seen by Dr. Kumar on 08 November 2016. However, there is nothing to indicate in the summing-up or the judgment that the appellant's trial counsel who obviously was acting on his instruction had sought to discredit Dr. Singh on that basis.

[20] The appellant has cited the decision in **Nacagi v State** [2015] FJCA 156; AAU49.2010 (03 December 2015) which dealt with the importance of medical evidence to determine the voluntariness of a confession and in what circumstances an appellate court should disturb the findings of a trial judge. **Sugu v State** AAU44 of 2012: 27 May 2016 [2016] FJCA 69 had followed ***Nacagi.***

[21] In **Rahiman v State** CAV0002 of 2011: 24 October 2012 [2012] FJSC 24 the Supreme Court stated

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

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

[22] The Court of Appeal in **Kacivakawalu v State** [2018] FJCA 202; AAU0053.2015 (29 November 2018) [affirmed by the Supreme Court in **Kacivakawalu v State** [2019] FJSC 28; CAV0009.2019 (31 October 2019)] considered a similar complaint as urged in ***Nacagi*** , ***Sugu*** and in the current appeal and remarked that the judicial approach suggested in those decisions would apply where there had been medical evidence but the trial judge had not considered or properly analyzed such evidence in the light of allegations of oppression in deciding to admit the confessional statements. The court held

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

[23] As pointed out earlier the trial judge had considered and analyzed the medical evidence adequately in the summing-up and the judgment and there is no reason to disturb the verdict of guilty based on ***Nacagi*** *and* ***Sugu*** decisions.

[24] Further, contrary to the assertion of the appellant a conviction could be based on a confession alone [vide **Lutumailagi v State** [2018] FJSC 18; CAV008 of 2018 (30 August 2018) and **Alfaaz v State** [2018] FJSC 17; CAV0009 of 018 (30 August 2018)]. Therefore, there is nothing objectionable in the trial judge having emphasized to the assessors that the only evidence against the appellant was his confessional statement.

[25] Therefore, I have no legal basis to conclude on the material available to me at this stage that the appellant has a reasonable prospect of success with the above grounds of appeal.

08th ground of appeal

[26] The appellant argues that the charge against him was defective in that it had failed to state the element of 'use of force' as part of the particulars of the offence of aggravated robbery. He relies on the decision of **Kirikiti v State** [2015] FJSC 13; CAV17.2014 (20 August 2015) where Calanchini J sitting in the Supreme Court had remitted the matter to the Court of Appeal stating

> *'[29] The particulars allege that the Petitioner stole cash in company. The offence created by section 311 (1) (a) is rob in company. The difference between rob and steal is the use of force. It is not frivolous to claim that the charge was defective because there was no reference to the use of force or any reference to a fact or acts that might constitute the use of force. In my judgment a ground of appeal that has the effect of claiming that the charge is defective on account of non-compliance with sections 58 and 61 of the Criminal Procedure Decree is not a frivolous ground. This is even more so the case when the particulars have not been drafted in accordance with Form 8 in the Criminal Procedure Decree 2009 (Forms) Rules.*

[27] The above statement was made in the context that the particulars of the offence had stated that *"Alifasi Kirikiti on the 9th day of July 2010 at Suva in the Central Division with others stole cash $345.00 from one Ashwant Nagaiya s/o Nagaiya"* (no reference to 'robbery') and a single judge of appeal had dismissed the appeal on the basis that the ground of appeal was frivolous.

[28] In contrast, in the appeal before me the particulars of the charge clearly informed the appellant that he with others had robbed the complainant and stole several items to the total value of $43,200.00. Thus, the appellant had been informed unequivocally that he was being charged for robbery in an aggravated form.

[29] To my mind, the approach in **Vakatalai v State** [2017] FJHC 228; HAA035.2016 (17 March 2017) is more appropriate to address the appellant's grievance.

> *'[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; HAA022I.2009 (10 September 2009)).

[7] In the present case, the particulars alleged that the appellant robbed and stole the complainant's mobile phone. Ordinarily, robbery involves stealing using force, and therefore, the word 'stole' was a mere surplusage. 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. Ground one fails.*

[30] The appellant's counsel had not raised any objection to the inadequacy of particulars of the charge when the penal section *i.e.* section 311(1) (a) of the Crimes Act clearly indicated that he was being charged for aggravated robbery. The appellant's defense was one of total denial and not that what he indulged in was only theft. The omission complained of had no bearing on the defense.

[31] Therefore, I have no reason to doubt that the appellant had not been misled in his defense as a result of the manner in which the charge had been drafted without the words 'use of force'.

[32] This ground of appeal has no reasonable prospect of success.

Order

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL