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

CRIMINAL APPEAL NO. AAU 112 of 2016
[In the High Court at Suva Case No. HAC 310 of 2015S]

BETWEEN	:	**SENITIKI NABULU**
		Appellant
AND	:	**STATE**
		Respondent

Coram	:	**Prematilaka, RJA** **Gamalath, JA** **Bandara, JA**
Counsel	:	**Ms. B. Malimali for the Appellant** **Ms. J. Prasad for the Respondent**
Date of Hearing	:	**09 September 2022**
Date of Judgment	:	**24 November 2022**

JUDGMENT

Prematilaka, RJA

[1] I have had the benefit of reading in draft the judgment of my brother Bandara, JA. However, with all due respect to my brother, Bandara, JA, I am unable to agree with the reasons and the outcome proposed therein *i.e.* to dismiss the appeal against conviction. My reasons and proposed orders are as follows. Facts have been dealt with by Bandara, JA and I do not propose to repeat them except where necessary for my reasoning.

[2] Following a trial in the High Court at Suva, the appellant was convicted on one count of unlawful cultivation of an illicit drug being cannabis sativa with a weight of 59.5kgs. On 15 August 2016 the appellant was sentenced to 15 years imprisonment with a non-parole term of 14 years. The evidence led by the prosecution against the appellant consisted of his cautioned statement, charge statement and alleged verbal confessions made during the scene reconstruction visit.

[3] The appellant had challenged the admissibility of the cautioned interview and charge statement on two grounds namely that (i) what was sought to be produced was only photocopies of the originals contrary to *Lobendahn* rules and should not have been admitted into evidence (as articulated in the 01st to 03rd grounds of appeal) (ii) in any event the said confessional statements were involuntary and should have been ruled out (as stated in 04th to 06th grounds of appeal). The single judge had granted leave to appeal on the above grounds of appeal along with the 19th ground of appeal.

[4] If the answer to the first issue in not in favour of the prosecution, the second question does not require separate consideration. Similarly, it is not necessary to consider ground of appeal 19 in respect which leave was granted. Then, the only issue that needs consideration is whether the rest of the evidence sans the cautioned statement and charge statement is sufficient to uphold the conviction.

[5] *Lobendahn* rules were formulated in **Regina v Lobendahn** [1972] FijiLawRp 1; [1972] 18 FLR 1 (18 January 1972). Goudie J. had outlined the law in regard to the admissibility in evidence of copies of documents, the originals of which are said to have been stolen or lost as follows:

> 1. *It must be established that the original itself, in fact, formerly existed.*
>
> 2. *That such original itself would have been legally admissible in evidence.*
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> 3. *There must be clear and reliable evidence to establish that the copy which the party wishes to tender as secondary evidence is a true and faithful reproduction in all respects of the original document.*

4. *The original must be proved to have been lost or destroyed and the Court must have evidence before it from which it can be satisfied that the original is no longer in existence or that it could not, by any reasonable amount of effort be found.*

5. *If a document is said to have been lost or possibly destroyed it must be established that "due and diligent search" has been made for the missing document before a copy can be tendered.*

6. *It must be shown, if necessary by a proper chain of evidence, what happened to the original from the time the original was made out or first known to be in existence until it was lost. Similarly, it must be established when, where, and how the copy was made and how it came into the hands of the person seeking to tender it in evidence.*

7. *All of these matters must be established to the satisfaction of the trial Court "beyond reasonable doubt." What amounts to "due and diligent search" is a matter entirely for the determination of the trial Court and must be to such degree as the Court considers reasonable in the circumstances of the particular case.*

[6] *Lobendahn* test has been subsequently followed consistently in Fiji [for example see **Drodroveivali v State** [2005] FJCA 5; AAU0019.2003S (4 March 2005) and **Kean v State** [2013] FJCA 117; AAU 95.2008 (13 November 2013)]. At the conclusion of the *voir dire* inquiry the learned High Court judge had ruled photocopies of the cautioned interview and the charge statement to be admissible on the basis that the prosecution had satisfied *Lobendahn* test. The reasoning of the trial judge are given at paragraphs 08-11 of the voir dire ruling dated 31 August 2016 which my brother Bandara, JA had quoted in his judgment and needs no repetition.

[7] It is clear from the evidence of Detective Inspector Simione Tuivanuavou (PW2 at the *voir dire* on admissibility of photocopies) who had caution interviewed the appellant in January 2012 that he had he entrusted the original interview notes to Sergeant 1785 Sakaraia Tuberi (PW1) who was the investigation officer. According to PW1, the original caution interview notes were in fact handed over to him by PW2. PW1 had photo-copied the same and put the copies in the police file. PW1 had identified the copy

shown to him in court as a true and faithful reproduction of the original. PW1 had taken the original caution interview and the charge statement to Kadavu Police Station and left them in the exhibit room.

[8] PW1 had further testified that he rung up Kadavu Police Station exhibit writer to search for the original caution interview and charge statement. He had been briefed that the original documents were lost and could not be located. According to him, his briefing indicated that the police had conducted a due and diligent search in the exhibit room in Kadavu Police Station.

[9] I entertain no doubt that the originals of the cautioned statement and charge statement existed and there is also clear and reliable evidence that the copies which the prosecution wished to tender as secondary evidence is true and faithful reproductions. However, that alone is not enough to admit photocopies.

[10] The prosecution must also prove that the originals have been lost and the court must have evidence before it from which it can be satisfied that the originals are no longer in existence or that it could not, by any reasonable amount of effort be found which means that it must be established that 'due and diligent search' has been made for the missing documents before copies can be tendered. According to *Lobendahn* test these matters must be established to the satisfaction of the trial court 'beyond reasonable doubt.'

[11] The crucial question here is whether the prosecution had established beyond reasonable doubt that the originals of the cautioned statement and the charge sheet were not in existence and could not be found upon a 'due and diligent search' for them.

[12] On the first day of the trial (01 August 2016) the prosecution had sought a short adjournment to locate the originals of the cautioned interview and charge statement until the next day to locate the original caution interview and charge statement of the appellant on the premise that it was possible the originals were still in Kadavu Police Station. On

02 August 2016, the prosecution had informed court that it could not locate the original caution interview and charge statements but photocopies were available and requested a *voir dire* on the admissibility of the photocopies.

[13] Sergeant 1785 Sakaraia Tuberi (PW1), the investigation officer had stated in evidence that he was made aware of the trial just a day before the trial commenced or thereabouts and was told to search for the originals only on 01 August 2016, the day before the trial. Accordingly, he had asked 'the people' at Kadavu Police Station to look for the originals *via* telephone. The witness had admitted that 5 ½ hours available for the search of the originals kept at Kadavu Police Station 4 ½ years ago was not enough.

[14] Sergeant 1785 Sakaraia Tuberi was also not aware that there had been an unfinished *voir dire* inquiry at the Magistrates court in 2013 until the first day of the trial. It is not clear whether the originals were available for the said *voir dire* inquiry or whether the originals had been uplifted from Kadavu Police Station at that time and kept somewhere else.

[15] The evidence of Sergeant 1785 Sakaraia Tuberi with regard to the requirement of 'due and diligent search' is by and large hearsay in that it is based on what an unidentified exhibit writer at Kadavu Police Station had apparently told him over the phone. The said exhibit writer was not called to give evidence at the *voir dire* inquiry. No explanation had been forthcoming for the failure to call the so-called exhibit writer either. At the least his identity should have been disclosed. Thus, how the so called 'due and diligent search' was carried out and who did it at Kadavu Police Station and whether any such exercise was undertaken at all is not clear in evidence. It is also not revealed as to the source of PW1's briefing that such a 'due and diligent search' was carried out but the original documents could not be located. Assuming that it was the 'exhibit writer' (whoever he was) who was the source, what he had told PW1 was hearsay the truth of which was relied upon by the trial judge for his decision to admit photocopies. Therefore, there was no admissible evidence before court to satisfy the trial judge that a 'due and diligent search' had been carried out or a reasonable effort had been made to find the originals

and that exercise had proved beyond reasonable doubt that the originals were no longer in existence.

[16] Therefore, I am of the view that the prosecution's attempt to produce the photocopies of the originals should have failed in this instance in the light of the *Lobendahn* test. I am aware of the principle that the appellate court should not interfere with the trial judge's ruling on the admission in evidence of the statement unless satisfied that the judge had completely wrongly assessed the evidence or had failed to apply the correct principles [**Tuilagi v State** CAV 0013 of 2017: 26 April 2018 and **D.P.P v Ping Lin** (1975) 3 A.E.R 175]. I think that this is one such case where the trial judge had assessed the evidence available to satisfy *Lobendahn* test wrongly though he had cited part of the test in the *voir dire* ruling.

[17] The next issue is, excluding the cautioned interview and charge statement, whether there is sufficient evidence to sustain the conviction. My brother Bandara, JA had mentioned in his judgment that the police had begun to caution interview the appellant at 11.34 am on 07 January 2012 and suspended it at 12.20 pm for the appellant to be taken for a scene visit to marijuana plantation. The police team had first taken the appellant under their custody to his home and explained to the appellant, his wife and other family members the purpose of the visit. At that point, the appellant had admitted to the police officers that he was cultivating marijuana and led the police team to the farm. The appellant had admitted that marijuana plants found inside four sacks at the farm belonged to him. The appellant was, however, not charged with possession of marijuana plants. The question whether his direct admission on cultivation and admission on possession circumstantially could prove beyond reasonable doubt the charge of cultivation depends on the admissibility of those verbal confessions.

[18] D/Inspector Simione Tuivanuavou (PW6 at the *voir dire* into admissibility of the cautioned interview and charge statement) had caution interviewed the appellant on 07 and 08 January 2012 at Kadavu Police Station. He had also said that the appellant was

given all his legal rights and his right to counsel along with the standard caution, the standard rest and meal breaks during the interview.

[19] The crucial question here is whether the appellant was given a fresh caution upon arriving at his home and farm; particularly whether he was informed of his right to silence and that any statement (particularly self-incriminatory), if made, may be used against him at the trial.

[20] Section 13 (1) of the Constitution states *inter alia* that every person who is arrested or detained has the right to be informed of his right to remain silent, has the right to remain silent and also to be informed of the consequences of not remaining silent. The usual caution given by the police goes as *'Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down into writing and may be given as evidence.'*

[21] The above rights must be administered at the time of arrest, at the commencement of the interview and charging and must be reminded to the person under arrest or detention after every break during the interview (and charging) and before the reconstruction of the crime scene so that the person arrested or detained is able to make a considered decision at every stage whether to exercise his rights or not. The failure to do so could be fatal to the admissions given by that person.

[22] After question 18 of the cautioned interview, the interviewing officer had recorded as follows *'Interview concluded to check the area where he usually plant the Marijuana'. Interview commenced. Senitiki Nabulu I would like to inform you that you are still under caution…'*

[23] It does not appear that the appellant had been cautioned prior to his alleged confessions at home or at the farm. He had been cautioned at the commencement of the interview and after the crime reconstruction visit but not before the reconstruction of the crime scene.

When the interview was suspended for checking the area where the appellant allegedly planted marijuana, he should at least have been reminded of the caution administered at the beginning and informed him that he would be under that caution throughout his visit.

[24] Therefore, I am of the view that the alleged confessions made by the appellant at his home and at the farm are not admissible and cannot be relied upon to bring home the charge of cultivation of marijuana against him. Further, the appellant's admission that marijuana plants found inside four sacks at the farm belonged to him is also tainted as a result of the caution not being administered prior to the scene visit. In any event, the ownership allegedly claimed by the appellant to four sacks containing marijuana plants cannot circumstantially prove cultivation beyond reasonable doubt.

[25] In the circumstances, the conviction against the appellant is unreasonable or cannot be supported having regard to the evidence, for excluding the cautioned statement and charge statement there is no admissible evidence to prove the charge of cultivation beyond reasonable doubt. Therefore, conviction of the appellant should be quashed.

[26] The only question remaining for consideration is whether the appellant should be acquitted or a new trial be ordered. In **Abourizk and another** CAV 0012 of 2019 (25 August 2022) the Supreme Court at paragraph 12 had remarked without, however, making an authoritative pronouncement that section 23 (2) of the Court of Appeal Act gives two options to court while allowing an appeal namely (i) quash the conviction and direct a judgment and verdict of acquittal to be entered, or (ii) if the interests of justice so require, order a new trial.

[27] However, it is clear that without quashing an existing conviction a new trial cannot be ordered. Section 14(1)(b) of the Constitution would be an absolute bar for an accused to be tried again with an existing conviction for the same offence. Therefore, in my view, if an appeal against conviction is allowed, the Court of Appeal under section 23 (2) of the Court of Appeal Act shall quash the conviction and either (i) direct a judgment and

verdict of acquittal to be entered or (ii) if the interests of justice so require, order a new trial. In terms of the Court of Appeal Act no exceptional circumstances need to be present in order to order a new trial. However, the decision to order a new trial should be done considering the judicial guidelines already established.

[28] In **Laojindamanee v State** [2016] FJCA 137; AAU0044.2013 (30 September 2016) the Court of Appeal laid down some guidance for a retrial to be ordered as follows:

> *'[103] The power to order a retrial is granted by section 23 (2) of the Court of Appeal Act. A retrial should only be ordered if the interests of justice so require. In Au Pui-kuen v Attorney-General of Hong Kong [1980] AC 351, the Privy Council said that the interests of justice are not confined to the interests of either the prosecution or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be brought to justice. Other relevant considerations are the strength of evidence against an accused, the likelihood of a conviction being obtained on a new trial and any identifiable prejudice to an accused whilst awaiting a retrial. A retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (Azamatula v State unreported Cr App No AAU0060 of 2006S: 14 November 2008).'*

[29] The sequence of events leading to the *voir dire* inquiry on the admission of photocopies are set out by the trial judge in his ruling as follows:

> *3. On 20 November 2015, the information was put to the accused and he pleaded not guilty to the same. The prosecution needed time to explain their case theory and evidence they intend to call. On 4 December 2015, the prosecution explained their case theory and the evidence they were going to rely upon to ground a possible conviction. They told the court they were relying on an alleged confession by the accused to the police, and other evidence. The defence indicated they were going to mount a voir dire challenge against the accused's alleged confession. The case was then adjourned to 29 February 2016 for another pre-trial conference.*
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> *4. On 29 February 2016, the matter was adjourned for pre-trial conferences on 14 April, 21 April, 13 May, 20 May, 8 July and 21 July 2016. On 21 July 2016, the parties agreed for a trial date from 1 to 5 August 2016. Both parties indicated to the court that they were ready for trial. By virtue of this*

undertaking, the court assumed that all pre-trial matters had been sorted out.

5. *On 1 August 2016, the first day of the trial, the prosecution asked the court for an adjournment to the next day to enable them to locate the original caution interview and charge statements of the accused. They said, it was possible the same were still in Kadavu Police Station. On 21 July 2016, the prosecution told the court, they were ready for the trial. Obviously, they had misled the court. They were not ready for the trial, because they could not locate an important piece of their evidence. <u>These were matters that should have been attended to during the pre-trial conference, but obviously it was not attended to.</u>*

6. *On 2 August 2016, the prosecution told the court they could not locate the original caution interview and charge statements. However, they said, they had photocopies of the same, and asked for a voir dire on the admissibility of the photocopies of the above documents' (emphasis added)*

[30] Thus, it appears that the prosecution knew at least from 20 November 2015 that the cautioned statement and charge statement constituted major plank of its case. On 21 July 2016 the prosecution had agreed to have the trial from 01 to 05 August 2016 and indicated to court that it was ready for trial. On 01 August 2016, the first day of the trial, the prosecution had asked for an adjournment till the next day to enable it to locate the original caution interview and charge statement of the appellant. On 02 August 2016 the prosecution had informed court that it could not locate the original caution interview and charge statement and asked for a *voir dire* on the admissibility of the photocopies available with it.

[31] The prosecution should have been ready with the originals of caution interview and charge statement of the appellant before the trial and in any event it had ample time to look for the originals of caution interview and charge statement and if they were lost, should have got necessary witnesses arranged to establish that not only were they lost but also that a 'due and diligent search' had been carried out or a reasonable effort had been made to find the originals to prove beyond reasonable doubt that the originals were no longer in existence; in other words to satisfy the requirements of *Lobendahn* test.

[32] Clearly, the prosecution had been remiss in this instance. A retrial should not be ordered to enable the prosecution to fill in any gaps in evidence. On the available evidence considering the strength of evidence against the appellant and the likelihood of a conviction being obtained on a new trial, I do not think that this is a fit case to order a new trial. In addition, the appellant has already served over 06 years in imprisonment. Having considered all the circumstances, I am of the view that it is not in the interest of justice to order a new trial in this appeal.

[33] Therefore, the conviction against the appellant should be quashed and he be acquitted on the 01st to 03rd grounds of appeal. In view of above conclusion it is not necessary to consider the other grounds of appeal against conviction and sentence.

Gamalath, JA

[34] I have had the privileged of reading in draft the judgements of both my learned brothers Bandara JA and Prematilaka RJA, who in his dissenting judgement has disagreed with the conclusion of Bandara JA to affirm the finding of conviction of the appellants.

[35] Bandara JA, stating succinctly the case for the prosecution has enumerated the facts relating to arrest of the appellant in the case against him in which it was alleged that the appellant was involved in cultivating 59.5 kilograms of cannabis sativa ,an offence under section 5 (a) of the Illicit Drugs Control Act 2004. In so far as the initial detention of the appellant on the 5th January 2012 at Kadavu Police Station was concerned, as the learned trial Judge had also commented on it in the summing up, the detention had not been based on any "solid evidence against the appellant" but consequent upon "information from their sources that he was cultivating marijuana in his farm at Kadavu.

[36] This factual deduction based on the evidence of the police, suffice it to state, had been the initiation of the investigation that, as already stated, driven the police to detain him at the police station, until he was subjected to be caution interviewed on 7th January 2012 by Inspector Simione Tuvamuavou, the fourth prosecution witness.

[37] The record I must state with concern, does not reflect the nature of the steps taken by the investigators between the initial detentions on the 5th January 2012 and the administration of caution on the 7th January 2012, which I suppose ,must have been based on a well-founded suspicion that went beyond the apparent surmise of the initial arrest based mainly on some information of which there is no clear record in evidence, probably due mainly to its hearsay nature; however, paying no attention to the out weighting prejudicial power over its probation power, this evidence had found its way in to the main stream of evidence despite its prejudicial impact that outweighed its probative value.

[38] However, this clearly discernible lapses on the part of the investigators' failure to observe due process apart, the entire case for the prosecution had been founded upon the confessions the appellant supposed to have mad to the investigators disclosing his alleged involvement in cultivating marijuana.

[39] In relation to that there had been two streams of evidence, the confluence of which had formed the prosecution case, as discussed in detail in his reasoning by Bandara JA.

[40] The first stream comes from the caution interview statement of the appellant, an inculpatory one, regarding which deviating from the age old law on best evidence that should be the basis upon which the trials should be conducted, the prosecution had relied on not the primary evidence of the original document of the confession of the appellant but on a purported photocopy of it, which is indeed, as recognized in law a secondary evidence of a document. At the trial , the prosecution, claiming that the *original document* of the caution interview statement of the appellant has got lost sought to rely on the secondary evidence of a copy causing the serious contention as the defense objected to its admission at the trial. The objection was over ruled by the learned High Court Judge who admitted in evidence the caution interview statement of the appellant to determine the appellant's guilt.

[41] Also before us in this appeal, the learned counsel for the appellant reiterated the same submission and in support of her contention cited *Regina v Lobendahan* (1972) Fiji Law Rep 1; (1972) 18 FLR 1 (18th January 1972), in which Goudi J had stipulated the conditions precedent for admitting secondary evidence in place of a primary document – the original document – that had got lost beyond recovery.

[42] Commenting on this serious matter, Prematilake RJA in his reasoning has stated that "I entertain no doubt that the original of the cautioned statement and change statement existed and there is also clear and reliable evidence that the copies which the prosecution wished to tender as secondary evidence is true and faithful reproduction".

[43] In my opinion, if one could conclude beyond any reasonable doubt that what was relied on as secondary evidence of a document was indeed the true and authentic copy of the original document that was said to have gone missing with no trace, the application of dicta as per *Lobendhan* (supra) word become a mere technicality and as such the admission of secondary evidence should not be viewed with serious negativity for the detriment of the prosecution case.

[44] Stating briefly the legal position is that in relation to the division on relevancy of documentary evidence, "primary evidence" in that which does not, by its nature, suggest the existence of better evidence, while "secondary evidence" is that which does suggest the existence of better evidence - Cross and Wilkins; *An outline of the law of evidence* (2nd Ed. 1968, P.19 .Trite law is that primary evidence of a document is usually the original document itself; while authentic copy of a documents or oral evidence of its contents forms the secondary evidence, upon which the party that seeks to rely on its contents can depend, in the circumstances where the primary evidence cannot be produced owing to the reasons beyond its control. If the secondary evidence could be proved to be authentic, reliable and admissible beyond any reasonable doubt, the issues relating to its force in evidence would cease to exist and as such would be admitted and

acted upon as evidence based on its weight by a court of law in arriving at an appropriate conclusion.

[45] The Second stream of evidence for the prosecution springs form the evidence that transpired in the midstream of the recording of the confession of the appellant, in which he stated that the place where he maintained his marijuana cultivation can be shown to the investigators upon a visit being mode to the locus , his place of residence.

[46] According to the investigators evidence, upon arrival at his place of residence the appellant had made admissions that he had been cultivating marijuana and opted to lead the police team to the place in the bushes where he had been growing marijuana plants.

[47] Rightly placing an emphasis on the evidential weight to be attached to this piece of evidence, Prematilaka, RJA had raised a serious concern about the procedure that had been followed at the scene by the investigators, in which there is nothing on record to substantiate that the investigators cautioned the appellant prior to allowing him to make any oral admission of this involvement in marijuana cultivation.

[48] The possible justification that could be assumed having regard to the prosecution evidence as a whole is that as borne out by the evidence ,since the appellant had been under the full force of the original caution administered prior to the recording of his caution interview statement, in their view, the investigators may not have considered it as important to renew the administration of a caution at the scene prior to the receiving of the oral admission for in their view it may have been considered as superfluous.

[49] On this contentious matter put it simply, the question that begs for an answer is whether it is legal to act upon facts discovered as a result of a confession, irrespective of its nature of admissibility. If the confession is admissible in law, the answer is obvious and not a difficult one for what may be discovered in an integral part of what had been revealed through its contents.

[50] The difficulty is when the confession is considered inadmissible and deemed to be obtained outside of the norms of acceptable legal principles. In situations of such as well would the same logic be extended as a rule of evidential premise, where in cases that notwithstanding the deeming illegality of the confession, could the resultant discoveries of facts based on its contents be still considered as admissible in evidence and acted upon based on its relevancy?

[51] Applying the traditional common law principles in dealing with this opaque question, Phipson on Law of Evidence 19th edition (2018), p. 1348 under "*Admissibility of facts discovered on a result of and excluded confession"* deals the issue as follows*;*

> *(i) It has long been the law that facts discovered as a result of an inadmissible confession are admissible*
> - ***R.v. Warwicksall*** *– (1783) 1 Leach 298*
>
> *(ii) However, such evidence did not after all render the relevant part of the confession admissible:*
> ***R.v. Berrman*** *(1854) Cox 388 at 389*
> ***Law Chi Ming v. R****. (1991) 2 AC. 221*
> ***R. v Itertford Shies CC. Exp. Green Industries Ltd*** *(2000) 2 A.C 412 at 421 – 422*
> ***Timothy v. The State*** *(2000) I W.L.R. 485 as 490-493*
>
> *(iii) Dealing specifically on this issue of discovering fact as a result of and purported confession obtained following inflicting torture, the learned author states that the area of law is not clear with distinct authority on the subject (p.1349)*
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> *(iv) However, in the case of* ***A v. Secretary of State*** *(2004) EWCA Civ 123; [2005] I WLR 414, based on a hypothetical issue, the court of appeal had addressed the issue briefly;*
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> > *"There is plainly a distinction between (1) evidence directly attributable to torture, such as a statement got gorm detainee by means of torture, and (2) material indirectly so obtained, that is to say the existence of facts to which the questioner is alerted by the statement obtained under torture, which can then be followed up. The detainee may, e.g. reveal to his questioner the hidden location of terrorist equipment. The Secretary of State, apprised of the stated location, may go and dig up the equipment. Our attention was drawn to s.764 (4) of the Police and Criminal Evidence Act 1984 (PACE) which provides in the context of the criminal trial that where a confession is excluded under s.76(2) because it was*

or may have been obtained by oppression, the admissibility in evidence 'of any facts discovered as a result of the confession' is not thereby affected. It seems to be to be obvious SIAC, at least if the statement itself does not have to be deployed. The real debate on the torture issue is about the direct use of statement which may have been obtained by torture".

*(v) In **HM advocate v P**[253] the Supreme Court considered whether the exclusionary rule laid down in the important Scottish case of **Cadder v HM Advocate**[254] extended to the fruits of questioning of an accused without access to a lawyer. It held that derivative evidence such as a partly incriminating telephone conversation that had probative value independently of and inadmissible confession was, prima facie, admissible under Scots Law subject to consideration of fairness. The approach to improperly obtained evidence laid down in **Lawire v Muir**[255] was said to be consistent with Strasbourg jurisprudence and English law as found in s.76(4) and s.78 of the Police and Criminal Evidence Act 1984.*

Bandara, JA

[52] The appellant was charged with a count of Unlawful Cultivation of Illicit Drugs contrary to section 5 (a) of the Illicit Drugs Control Act 2004.

[53] Following a trial in the High Court at Suva, appellant was convicted on the 12th August 2016. On the 15th August 2016 the appellant was sentenced to 15 years imprisonment with a non-parole term of 14 years.

[54] This appeal arises out of the said conviction and sentence.

[55] The information read as follows:

*"**Statement of Offence***

***UNLAWFUL CULTIVATION OF ILLICIT DRUGS**: Contrary to section 5(a) of the Illicit Drugs Control Act 2004.*

Particulars of Offence

> ***SENITIKI NABULU*** *on or about the 6th day of January 2012 at Gasele Village in Kadavu in the Eastern Division, without unlawful authority, cultivated 59.5 kilograms of Cannabis Sativa, an illicit drug."*

[56] The three assessors had returned with a unanimous verdict finding the appellant guilty as charged. The Learned High Court Judge had concurred with the opinion of the assessors.

Facts of the case

The version of the prosecution

[57] At the time of the offence the accused was about 35 years old, and married with three children. He did subsistence farming for a living and planted yaqona, dalo, cassava and yam.

[58] Upon information received that the appellant was cultivating marijuana in Kadavu, the police arrested him at his home on the 5th January 2012.

[59] The prosecution case was entirely based on inculpatory admissions made by the appellant to the police during the investigation, in the caution interview, and the charge statement. Whether the prosecution had established, beyond reasonable doubt that the said admissions had been voluntarily made (in order to be admitted into evidence) is the central issue of the case.

[60] On the 7th January 2012 at about 11.34 a.m. the police began to caution interview the appellant on the allegation that he was unlawfully cultivating marijuana in Kadavu.

[61] The caution interview was suspended at 12.20 p.m., in order to make a scene visit to marijuana plantation belonged to the appellant. The police team formed for the purpose consisted of Sergeant 3131 Meli Bola (PW3 who led the team), Detective Corporal 2496 Filipe Puamau (PW1), Sergeant Manueli Radawa (PW2) and several other police officers.

[62] The team along with the appellant in their custody had first gone to the appellant's home explained to the appellant, his wife and family members the purpose of their visit.

[63] According to the police evidence led by the prosecution at that point the appellant had admitted that he was cultivating marijuana and led the police team to a farm.

[64] The police found four sacks of marijuana plants at the farm and questioned the appellant about them. The appellant had admitted that the marijuana plants belonged to him. Thereafter, the four sacks of marijuana plants were taken to the Kadavu Police Station, along with the appellant.

[65] On the 8th January 2012 at 3 p.m. the appellant's caution interview resumed and continued until 5 p.m. Thereafter, it had resumed again at 7 p.m. and continued until 9.34 p.m.

[66] The appellant had confessed to the crime on the 8th January 2012. He was formally charged where again he had confessed to the crime.

[67] The Government Analyst (PW5) had analysed the four sacks of marijuana on the 9th January 2012, and confirmed that the plants were cannabis sativa, which weighed 59.5 kilograms in totality.

[68] On the 10th January 2012 the appellant was produced before the Magistrate's Court in Suva and was formally charged with *"unlawful cultivation of illicit drugs"*.

The version of the defence

[69] At the conclusion of the prosecution case, when the appellant was called upon to make his defence he opted to give sworn evidence and call 8 witnesses in his defence.

[70] On oath the appellant denied the allegation that he cultivated marijuana plants in Gasele, Kadavu. He stated that he admitted the offence when he was caution interviewed and formally charged by police. He further stated that the inculpatory admissions were made by him, consequent to being continuously assaulted and threatened by the police to do so.

[71] Accordingly the inculpatory admissions made by the appellant in the course of the caution interview statements and the charge statements, had not been voluntary but done under police coercion. The appellant sought to substantiate the latter allegation through the 8 witnesses called on his behalf.

[72] As referred to in the foregoing, the prosecution case is entirely based on the inculpatory admissions made by the appellant to the police;

1) *when he was caution interviewed on the 7th January 2012.*
2) *when he made a verbal confession to the police at his home at Gasale Village.*
3) *when he confessed at Vuravu Estate, when the police discovered the four sacks of marijuana plants.*
4) *when he confessed at the resumption of the caution interview on the 8th of January 2012.*
5) *when he confessed in his police charge statement.*

[73] In relation to the issue of the voluntariness of the foregoing confessions made by the appellant the following observations made by the Learned High Court Judge in the following paragraphs of his summing up are relevant to be taken into consideration:

> *"26. When the police detained the accused on 5 January 2012 at Kadavu Police Station, it appeared they had no solid evidence against him, but information from their sources that he was cultivating marijuana in his farm in Kadavu. The accused was caution interviewed by Inspector Simione Tuivanuavou (PW4) on 7 January 2012, at Kadavu Police Station. The interview started at 11.34am and concluded at 12.20 pm on the same day. According to PW4 the accused was given his right to counsel and other legal rights. He was formally cautioned and he signed his interview notes, which were counter signed by him. In the 46 minutes of the interview, PW4*

said 18 questions and answers were made. PW4 said, he was asking the questions and the accused was giving the answers. According to PW4, the accused was normal and well, and he had no signs of injuries and he answered the questions voluntarily. In questions and answers 17 and 18 of Prosecution Exhibit 1 (B), the accused admitted planting marijuana in the bush. This was the accused's first recorded alleged admission. Thereafter, the police suspended the interview to locate the area in which the accused was planting marijuana.

27. *A police party was formed under the leadership of the Kadavu Police Station crime officer, Sergeant 3131 Meli Bola (PW3), to carry out the above task. Detective Corporal 2496 Filipe Puamau (PW1) and Sergeant 2547 Manueli Radawa (PW2) and other police officers were part of the group. The police took the accused with them. They went to the accused's house. At his house, the police sat down with the accused, his wife and their daughter and told them the reason for their visit and the effect of drugs. According to PW1, the accused and his wife began to cry in front of the police, the accused verbally admitted to his wife that he had been cultivating marijuana for sometime and he will stop doing the same. This was the second alleged confession (verbal) the accused made in the presence of the police. PW1, PW2 and PW3 admitted they didn't caution the accused after he made the above admission. In any event, the accused led the police to a nearby farm. The farm was 20 to 30 minutes' walk from the accused's house. This was at Vuravu. Four sacks of green marijuana plants weighing 59.5 kilograms were found among some banana plants. The marijuana plants were pulled out of the bag counted and they asked the accused whether or not he owned the same.*

28. *According to PW1, PW2 and PW3, the accused admitted to them verbally that the 59.5 kilograms of marijuana plants were his. This was the third alleged confession (verbal) the accused made to the police. PW3, as the crime officer of Kadavu Police Station and leader of the group, reminded the accused that he was still under caution, as his caution interview was still pending. The police seized the sacks of marijuana and return to Kadavu Police Station with the same. They also brought the accused back. The four sack of marijuana plants were put in the exhibit room for safe keeping.*

29. *On 8 January 2012, at Kadavu Police Station the accused's caution interview resumed at 3pm. It went on for 2 hours until 5pm. The interview was suspended for 2 hours to enable police to seize items allegedly bought with drug money. It resumed at 7pm and concluded*

2 ½ hours later at 9.34pm. According to PW4, the interview officer, he told the accused that he was still under caution and he reput the allegations to him. PW4 said, the accused acknowledge the same and he recorded it in question and answer 19 of Prosecution Exhibit No. 1(B). According to PW4, the accused was very co-operative during the interview. PW4 said, he was talking and laughing. PW4 said, he looked well and he was not tired. PW4 said, he saw no injuries on the accused. PW4 said, the accused was given the standard meal and rest breaks. PW4 said, he was given enough rest. PW4 said, the accused was not assaulted, threatened or made false promises during the interview, and while he was in police custody. PW4 said, he gave his answers voluntarily and out of his own free will. PW4 tendered the accused's caution interview statement as Prosecution Exhibit 1 (A) – "i-taukei" version and 1 (B) – the English version. In questions and answers 20,21,24,25,34,37,42,43,44,45,46,47,50, 53, 54 and 55, the accused admitted cultivating marijuana (ie. cannabis sativa) at Gasele in Kadavu. This was the fourth alleged confession the accused made to police."

[74] In relation to the same issue the prosecution has also highlighted the factors, that:

1) *if the appellant had sustained injuries he could have complained to the station officer at Kadavu Police Station.*
2) *he did not complain to the Magistrate of any exertion of coercive behaviour on the part of the police.*

[75] However, the Learned High Court Judge had made the following observations in relation to the defence version of the issue.

"34. The defence, on the other hand, said exactly the opposite. The accused (DW1) said, he was repeatedly beaten 80 times with a dalo stick by police on 4 and 7 January 2012. He said, he suffered injuries as a result. DW3, DW4, DW5, DW6 and DW9 in their evidence confirmed the above. Most of these witnesses were related to the accused. He also said, he was repeatedly punched and kicked in the Kadavu Police Station. He said, he was assaulted and threatened by the police to admit the offence. He said, he didn't plant marijuana in Kadavu, and the police pressured him to confess to the same. He said he didn't give his statements voluntarily and the same were false. He said, the caution interview and charge statements were not taken lawfully. He was forced to sign the same, and the

police did not follow the proper procedure. He said, his doctor (DW7), who examined him on 20 January 2012, found tenderness on his back and feet, which confirm the police assaults on 4 and 7 January 2012. You have heard the details of what the other defence witness said. The accused ask you to place no weight and value on his alleged confessions because they were not true."

[76] As regard to his verbal and written confessions to the police, the appellant stated that, he was repeatedly assaulted, threatened and given promises by the police, to confess to the crime.

[77] The appellant admitted having made inculpatory statements in his caution interview and charge statements, but vehemently denied that they were made voluntarily and with his own free will.

[78] Josefa Nabulu (DW3) the appellant's younger brother testified that the police repeatedly assaulted him and his brother on the 4th January 2012. Maiyale Ravutimabula (DW4) testified that he saw the police repeatedly assault the appellant and DW3 on the 4th of January 2012. DW4 and the appellant had been members of the same church. Meli Niumataiwalu (DW5) a close relation of the appellant testified that he saw the police beating the appellant and DW3 in January 2012.

[79] Aca Vitukawalu (DW6) had seen the police beating the appellant and DW3 at Vuravu Estate in January 2012. Laisane Davetawalu (DW9) the first cousin of the appellant, had stated that she saw the police beating the appellant. Sisilia Naivota (DW8) a nurse at Gasele Nursing Station stated that she saw the appellant on or about 3rd or 4th January 2012. She had further stated that she applied ice packs on his back, ribs, legs and advised him to see a doctor. However, that had not happened for the ensuing 16 to 17 days.

[80] Doctor Gene Bogitini (DW7) had done a medical examination on the appellant on the 20th January 2012 at his Valelevu Medical Clinic. In the course of his examination he had observed tenderness on the appellant's back, shoulder blade and left calf. He had not seen any visible injuries on the appellant.

[81] However, in regard to the medical expert's foregoing observations, the questions raised by the prosecution in the course of the cross-examination and the answers given thereto, are relevant to take into account.

> *"Ms. Prasad: Now Doctor, just confirming a few things. Tenderness is something the patient expresses to you, it is not something that you can physically see?*
> *Mr. Bogitini: Yes.*
> ***Judge: So tenderness is something.***
> *Ms. Prasad: That the patient expresses, it is not something he can physically see, My Lord.*
> *Mr. Bogitini: Can I provide my own definition of tenderness. Tenderness my definition is pain or discomfort.*
> ***Judge: Tenderness is pain or?***
> *Mr. Bogitini: Discomfort expressed by the patient when the affected part of his body is pressed.*
> ***Judge: So patient can telling me the truth and also telling lies?***
> *Mr. Bogitini: That can be possible.*
> *Ms. Prasad: And witness during your examination and even after the X-rays that you had ordered you saw no signs of injuries on this patient that you have examined?*
> *Mr. Bogitini: There were no visible signs, no.*
> *Ms. Prasad: Yes.*
> ***Judge: Okay no visible signs of injuries.***
> *Ms. Prasad: Thank you, witness. Now witness could you tell us this tenderness that you have described you said it would be caused by a hard object, could it be caused by falling as well?*
> *Mr. Bogitini: Yes that's possible.*
> *Ms. Prasad: How about if someone bumped on to the door you expect tenderness?*
> *Mr. Bogitini: Yes that's also possible.*
> *Ms. Prasad: Now witness you said you were asked that you have examined the patient about 16 days after the allegation had been made of assault. Now witness I am going to put in case you and I want you to tell us what injuries would you expect to see. Okay first 80 hard hits with a solid strong piece of wood about 1 ½ meter in length and the width of that top*

of the glass. What sort of injuries do you expect to see, 80 hard hits and about 1 ½ meter long? And the person being hit is lying down on a hard surface like sat?
Judge: Very hard hit on his back laid.
Ms. Prasad: On a hard surface.
Judge: Almost 80 times.
Mr. Bogitini: I expect pro-visible injuries conclusions.
Judge: If the patient is struck with a hard stick.
Ms. Prasad: 1 ½ meter long, My Lord and according to your clerk's measurement 3 inches wide.
Judge: 3 inches width, patient is hit 80 times.
Ms. Prasad: While he is lying on the hard surface.
Judge: While lying on the ground and I mean he was examined 16 days afterwards what would you expect?
Mr. Bogitini: 16 days later I would expect to find tenderness I would also expect to find internal injuries even the dimension of the objects and the impact."

The Appellate procedure

[82] The appellant had filed an appeal against conviction and sentence before this court on the 26th August 2016 setting out 22 grounds of appeal.

[83] In relation to the said grounds of appeal, the Single Judge of Appeal has made the following observation:

> *"[6] In my opinion the notice of appeal is overloaded with innumerable grounds most of which cannot be described as decisive in the sense that they will affect the result in terms of section 23 of the Act. These grounds are sometimes referred to as "shot gun" grounds intended to maintain every potential and even remote basis for overturning the court below."*

[84] The Single Judge of Appeal granted leave to appeal on grounds 1-3, 4-6 and 19 which were advanced before the Full Court. I now turn to consider them.

Grounds of Appeal against Conviction consideration of Grounds 1, 2 and 3

"1. That the Learned Trial Judge erred in law when he failed to consider that the State had not exhausted all avenues to locate the original of the Record of Interview and the Charge Statement.

2. That the Learned Trial Judge made an error of law in his Ruling when he failed to consider that the Investigation only spent about 5 hours to search for the original Record of Interview and Charge Statement and even then, the Search was done by Telephone.

3. That the Learned Trial Judge erred in law when he failed to consider that the State had not proved beyond reasonable doubt as per Lobendahn the chain of evidence to show where and when the Record of Interview and the Charge Statement had last been seen up until where the State lost track of it. In this case, the last time the Record of Interview and Charge Statement were seen were in Kadavu sometime in 2012 and no one seems to know what happened to the originals since."

[85] Dealing with errors in the trial within trial, in relation to the missing original caution and charge statements, the defence had drawn attention, to the following rules set down in **Regina v Lobendahn** [1972] FijiLawRp 1; [1972] 18 FLR 1 (18 January 1972)*:*

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

[86] It was the stance of the defence that the said rules have not been complied with by the prosecution in proof of the copies of the records in question. The Learned High Court Judge in his voir dire ruling has considered the following observations made in the same case.

"...At the commencement of the trial of an accused person in the Supreme Court on the charges of fraudulent false accounting, counsel for the Crown said he would be tendering in evidence a number of Photostat copies of documents, the originals of which had been irretrievably lost. As a question of law, in the absence of the assessors, the court considered the admissibility of one of the Photostat copies (Exhibit 2) and heard the evidence tendered on that issue.

Held: 1. The law on this question required –

(a) It must be established that the original itself formerly existed, would have been admissible in evidence, and that the copy tendered is a true and faithful reproduction of the original.

(b) The original must be proved to have been lost or destroyed and, if lost, due and diligent search must be established.

(c) It must be shown what happened to the original up to the time when it was lost, and how the copy was made and came into the hands of the person tendering it.

(2) This entails that there must be sworn testimony from a person who saw the original and can swear to the whole of the details from personal recollection, or who had checked the copy with the original, and can swear that it is a faithful reproduction thereof, and this principle is not affected by reason of the fact that the copy tendered is a Photostat.

(3) In the instant case the Court was not satisfied with the evidence as to the existence of an original document, or of a due and diligent search for the same, and Exhibit 2 would not be admitted in evidence..."

[87] The evidence led by the prosecution amply demonstrates that the police had conducted a due and diligent search in the exhibit room at Kadavu Police Station where the exhibits had been lastly seen.

[88] The evidence led by the prosecution clearly shows that the original existed and that the copies tendered were made from the original which were verified and certified to be accurate. Moreover, evidence has also been led to show that a diligent search for the

originals has been made at the place where they were last seen and they could not be found.

[89] The Learned High Court Judge's ruling reflects that he had been satisfied that all likely places had been diligently searched for the recovery of original record of the caution interview.

[90] In this regard it is relevant to note the following paragraph of the written reasons given on the voir dire ruling, on the admissibility of copies of the accused's caution interview, and charge statements, which indicate that the Learned High Court Judge had been well possessed of the applicability of the Lobendahn rule.

> *"8. A voir dire on the admissibility of the photocopies of the accused's caution interview and charge statements began on 2 August 2016. The prosecution called two witnesses – both police officers. Sergeant 1785 Sakaraia Tuberi (PW1) said, he was the police investigation officer in the case. He said, he was also the charging officer. He said, he formally charged the accused on 8 January 2012 and recorded the same in his own hand writing. He said, the accused signed and he counter-signed the same. PW1 said, he made photocopies of the same and put the same in the police file. PW1 said, the copy shown to him in court is a true and faithful reproduction of the original. On the caution interview notes, PW1 said, the original caution interview notes were handed to him by the interview officer when he completed the same. He said, he photo-copied the same and put the copies in the police file. PW1 said, the copy shown to him in court is a true and faithful reproduction of the original. He said, he took the original caution interview and charge statements to Kadavu Police Station and they were left in the exhibit room.*
>
> *9. PW1 said, he rang Kadavu Police Station exhibit writer to search for the original caution interview and charge statements. PW1 said, he last left it there in 2012. Four years had passed. He was briefed that the original documents had been lost and could not be located. PW1 said, his briefing indicated the police had conducted a due and diligent search in the exhibit room in Kadavu Police Station. Detective Inspector Simione Tuivanuavou (PW2) was the second prosecution witness. He said, he caution interviewed the accused in January 2012 and recorded the same in his own hand writing. PW2 said, after the interview, he handed the original interview notes to PW1 as the police investigation officer. PW2 said, that was the last he saw of it. When shown a copy of the same in the courtroom, he said it was a true and faithful reproduction of the original. That was the case for the prosecution."*

"11. I had listened very carefully and carefully considered the two prosecution's witnesses evidence. Looking at their evidence in their totality, I find them credible and I accept their evidence. In my view, the prosecution had satisfied the test laid down in ***Regina v Vincent Lobendahn*** *(supra), and thus I ruled the photocopies of the accused's caution interview and charge statements as admissible evidence. The photocopies of the caution interview and charge statements may be used as evidence in this criminal proceeding. The above are my reasons for declaring the same as admissible evidence on 2 August 2016. I rule so accordingly."*

[91] The foregoing 3 grounds of appeal lack merit.

Consideration of Grounds 4, 5 and 6

"4. That the Learned Trial Judge erred in fact and in law when he failed to consider that the Appellant was assaulted by the Police.

5. That the Learned Trial Judge erred in fact and in law when he only considered the number of beatings rather than the fact of the beating when deciding the question of admissibility.

6. That the Learned Trial Judge erred in fact and in law when in his questioning of the Appellant when the Appellant was giving evidence during the Voir Dire, he only focused on why the Appellant did not ask the Magistrate at his first appearance in the Magistrate's Court on 10/01/16, to be taken for a medical examination."

[92] In consideration of these three grounds of appeal it is important to note paragraphs 10, 11 and 12 of the *"Written Reasons for Voir Dire Ruling"* of the Learned High Court Judge which amply demonstrates the latter has well considered the allegations of the alleged assault of the appellant, the testimony of the appellant's witnesses in that regard, and the medical evidence of the nurse and the doctor.

"10. As for the defence, the story was completely different. The accused (DW1) said, he was building his home on 4 January 2012. DW1 said, the police arrived at about 12 pm to 1 pm. He identified the police officers as PW1, PW2 and PW5. DW1 said, the police took him to a beach near the Nursing Station. They repeatedly hit him with a stick at

the beach. Later, they took him to Vuravu. At Vuravu, DW1 said, he was again repeatedly beaten with a stick. When cross-examined, he said he was beaten 80 times. DW1 said, the police repeatedly swore at him, and threaten to take him to the military camp to be tortured. DW1 said, the police left after a while. They went to a Nursing Station and were treated by DW8. DW1 said the police returned on 5 January 2012 and took him to Kadavu Police Station. DW1 said, on 6 January 2012, the police again repeatedly tortured him in the police station. DW1 said, the police delivered a total of 50 hard "rugby kicks" to his ribs and body. DW1 said, he was also forced to do multiple press-ups. He said, he felt weak and was scared.

11. *On 7 January 2012, DW1 said he decided to co-operated with police. DW1 said, PW6, the caution – interview officer, threatened him to co-operated and admit the offence, or he will take him to the army camp to be tortured. DW1 said, he was not taken for medical examination. DW1 said he was frightened. He admitted the offence to police to avoid further assaults and threats. DW1 said, he did not admit the offence voluntarily and they were not out of his own free will. DW2, DW1's brother, confirmed in his evidence that, police assaulted DW1 and him repeatedly on 4 January 2012. DW3 said he saw the police repeatedly beating DW1 and DW2 on the beach on 4 January 2012. DW3 was DW1's lay Methodist preacher. DW4, DW1's uncle, said he saw the police repeatedly assaulted DW1 on the beach in January 2012.*

12. *DW5, DW1's cousin brother said, he saw the police repeatedly assault DW1, as mentioned above. DW6, DW1's grandfather, said he saw the police repeatedly assault DW1 at Vuravu. DW7, DW1's cousin brother, said he saw the police repeatedly assault DW1 at Vuravu. DW8, the Nasele Nursing Station nurse, said she saw the accused on 3 January 2012. DW8 said, the accused complained of body pains. She said, she treated him with ice packs and told him to see a doctor. DW10 is a doctor. DW10 said, he medically examined the accused on 20 January 2012. He tendered in evidence his medical report as Defence Exhibit No. 1. I have carefully read and considered the medical report. In D(10) of the report, the accused only complained to the doctor of the alleged police assaults on 4 January 2015. The accused never complained to the doctor of the alleged assaults by police on 5, 6, 7 and 8 January 2012. In D(12) of the report, he listed the injuries he saw on the accused, that is, "tenderness over left upper back and shoulder blade...tenderness over left calf". In D(16) of the report, DW10 wrote his summary and conclusion. He said, he saw no visible signs of any injury."*

[93] The factors that undermine the credibility of the defence witnesses who testified on the instant issue had been:

> *(1) that they were related to the accused and hence there exists an element of bias.*
> *(2) the days of the alleged assaults by the police had not been disclosed to the doctor.*
> *(3) the medical report does not reveal any visible injuries compatible with the 50 kicks, 80 beatings given by the police officers as per the testimony of the appellant.*
> *(4) a complain in relation to the assaults done by the police had not been made to the Magistrate at the earliest opportunity available to the appellant.*

[94] The assessors and the Learned High Court Judge had the precious advantage of seeing the demeanor and the deportment of the witnesses which the Appellate Court does not have.

[95] The role of demeanor evidence for determining the credibility of witnesses' testimony in fact finding has been assumed to be crucial for determining whether a witness is telling the truth or fake hood.

> *"Demeanor evidence refers to the nonverbal cues given by a witness while testifying, including voice tone, facial expressions, body language, and other cues such as manner of testifying, and the witnesses attitude while testifying"*(Wellborn, Demeanor 76 Cornell, L. Rev 1075, 1078 (1991).

[96] The Learned High Court Judge had disbelieved the appellant and his witnesses and believed the police witnesses. He states in his written reasons on the voir dire ruling that, *"I had listened very carefully and carefully considered the two prosecution's witnesses evidence. Looking at their evidence in their totality, I find them credible and I accept their evidence."*

[97] The Voir Dire Ruling of the Learned High Court Judge amply reflects the basis for his decision to rule, the copies of the record of the interviews of the appellant, to be admissible.

[98] This grounds of appeal lacks merit.

Ground of Appeal 19

> ***"19. The Learned Trial Judge erred in fact and in law when he disregarded the evidence of the Defence witnesses purely on the basis that they were either related to him or in the case of the law preacher, that the Appellant was part of his congregation."***

[99] As has been discussed elsewhere in this judgment the Learned High Court Judge has given ample reasons, as to why he found the prosecution witnesses credible.

[100] In **Rahiman v The State** FJSC Crim App. No CAV 2 of 2011, 24 October 2012 the Supreme Court referred to the observations of Lord Salmon in **Director of Public Prosecution v Ping Lin** [1975] 3 WLR 419 at page 445:

> *"The Court of Appeal should not disturb the judge's findings merely because of 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."*

[101] The appellant's whole case is based entirely on the claim that he confessed to the crime (with which he was charged) due to coercion exerted by the police.

[102] As against this allegation the State led the evidence of police officers who made the arrest, interview and charge statement of the appellant and even produced the court record of the Magistrate's Court.

[103] However, as indicated elsewhere in this judgment even the medical expert's evidence led on behalf of the appellant had not fallen in line with his defence.

[104] This ground of appeal lacks merit.

Ground of appeal against the sentence

"That the Learned Trial Judge erred in law when he used the amount of the drugs as an aggravating factor when arriving at his sentence."

[105] In **Kini Sulua and Anor v The State** [2012] FJCA Crim. App. No. 93 of 08, 31 May 2012 it has been held that in relation to matters involving cannabis sativa weight is to be used for identifying band under which the sentence would fall. It is stated in judgment that, *"the weight of the particular illicit drug will determine which category the case falls under, and the applicable penalty that will apply."*

Consideration of the weight of the drugs in sentencing is correct in law

[106] However, the consideration of the weight of the drugs as an aggravating factor again amounts to double counting.

[107] In the circumstances I am of the view that substitution of the sentence passed by the Learned High Court Judge with a sentence of 13 years would meet the end of justice.

Orders of the Court (by majority):

1. Appeal against conviction dismissed.
2. Appeal against the sentence partly allowed.
3. The sentence passed by the High Court is substituted with a sentence of 13 years with a non-parole period of 12 years with effect from 15th August 2016.

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....

Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

.....

Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL