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

CRIMINAL APPEAL NO. AAU 55 OF 2018
High Court Criminal Case No. HAC 128 of 2011

BETWEEN : **VALAME TURAGAKELI**

Appellant

AND : **THE STATE**

Respondent

Coram : Mataitoga, RJA

Qetaki, JA

Clark, JA

Counsel : Appellant in person

Dr. Lake A. for the Respondent

Date of Hearing : 2 November 2023

Date of Judgment : 29 November 2023

JUDGMENT

Mataitoga, RJA

Introduction

[1] The appellant had been tried with another in the Magistrates Court at Nausori on **extended jurisdiction** on a single count of aggravated robbery contrary to section 311(1) (b) of the Crimes Act, 2009 committed on 15 November 2010 at Nausori in the Central Division. The charge against the appellant was as follows.

> '*Statement of Offence*
> ***AGGRAVATED ROBBERY**: Contrary to section 311 (1)(b) of the Crimes Act 2009.*
> ***Particulars of Offence:***
> ***VALAME TURAGANIKELI**, and others, on the 15th day of November, 200 Nausori in the Central Division, robbed **JAG RAM** of cash $200. wrist watches valued at $190.00, two mobile phones valued at $314. school bag valued at $20.00. one gold bracelet valued at d at $100.00 and one Adidas Canvass valued at $85.00, all to the value of $1049.00, and immediately before such robbery, used personal violence on the said **JAG RAM** armed with a cane knives, pinch bars and stones.*'

[2] After trial, the Magistrate delivered the judgment on 4 May 2017 and convicted the appellant. He referred the case to the High Court for sentencing in terms of section 190(1) of the Criminal Procedure Act and the learned High Court judge in his sentencing order dated 09 February 2018 had imposed a sentence of 10 years and 04 months of imprisonment with a non-parole period of 09 years on the appellant.

[3] The appellant had lodged an application for leave to appeal against conviction on three grounds on 8 June 2018 which was out of time by about 3 months. However, the state has submitted that they would not object to the delay as the appellant had represented himself at the trial and filed his appeal in person and also because the delay was about 3 months. As confirmed by the appellant at the leave to appeal hearing, he had not filed written submissions on his original grounds of appeal. The appellant's 3 amended grounds of appeal and submissions thereon had been filed on 23 July 2020. The State had filed its written submissions on 22 October 2020.

Summary of Facts

[4] The sentencing order of the High Court contains the following summary of the evidence led against the appellant.

> '5. *Before proceeding to sentence both accused, it is prudent to give a summary of the case. On 15 November 2010, at about 3 am, Mr. Jag Ram and his wife were fast asleep in their family home at Waila Feeder Road, Nausori. They were asleep in their bedroom. In the next bedroom, was their son, Mr. Jason Shagnil, and his grandfather. They were also fast asleep. Unknown to them, Accused No. 1 and 2, with two others, had already planned to rob them early that morning. <u>In fact, they had broken a window and crawled through the same into the house. When in the house, the group woke Mr. Shagnil by force and demanded money. Mr. Ram awoke from his bedroom. The accused and their friends were armed with pinch bars, and cane knives.</u>*
>
> 6. *The accused and their friends confronted Mr. Ram and his son with the pinch bars and cane knives. <u>They fought each other. Mr. Ram managed to cut a robber in the head with a cane knife in self-defense. His son managed to knock one of the robbers down with a piece of timber.</u> However, Mr. Ram and his son were later knocked unconscious by the robbers. <u>Mr. Ram was cut on the right side of his head with a cane knife. The accused and their friends later ransacked the house and stole the items mentioned in the count.</u> They later fled the crime scene on foot. The matter was later reported to the police. An investigation was carried out. Both accused were arrested at Lautoka and were caution interviewed by police on 19 November, 2010 – 4 days after the alleged incident. They both admitted the offence to police.*'

Preliminary Issues

[5] At the appeal hearing on 2 November 2023, the following were clarified with the appellant:

> i) *that since the ruling by the Judge alone on 1 December, 2020, he had filed 2 sets of submission in the court registry the first on 22 July 2022 and the second on 15 March 2023.*
>
> ii) *the submissions filed on 22 July 2022 raises totally new grounds alleging breach of the appellant's rights under the Constitution. The essence being that the trial was unfair due to inadequate disclosure of documents. On this latter claim there is no specific*

reference to what were not disclosed to the appellant and for which prejudice or unfairness may have incurred.

Before the Judge Alone

[6] The grounds of appeal urged by the appellant against conviction in seeking Leave to Appeal before the Resident Justice of Appeal were as follows:

Ground 1 *That the learned trial Magistrate erred in law and in fact in ruling the confessional statement as admissible evidence when:*

i. *There was sufficient suggestion via the medical report and the evidence that the injuries were sustained whilst in police custody, thereby negating voluntariness.*

ii. *He failed and erred in law in not applying the burden and standard of proof when he ruled that the answers given in the caution interview were given voluntarily.*

iii. *That the learned trial Magistrate erred in law and in fact when he gave an indication of his own view that the injuries the appellant sustained were from the complainant not police contradicting the original copy record.*

Ground 2 *That the trial Magistrate was totally bias in his voir dire ruling that resulted in the appellant's option to remain silent in the trial proper.*

Ground 3 *That the conviction is recorded unsafe, unreliable and unsatisfactory in all circumstances of the case.*

Ground 4 *That the appellant did not receive a fair trial by reason of the learned magistrate and prosecution not providing adequate and full disclosures for the purpose of voire dire hearing. Failure to do so prejudiced myself and my right for fair trial was denied is miscarriage of justice in the circumstances of the case and to the appellant*

Ground 5 *That I did not receive a fair trial within reasonable time.*

Ground 6 *That the learned Magistrate and trial Judge erred in law that I was in pain whilst being interviewed.*

[7] After a careful review of the above grounds of appeal and applying the relevant principles of law, the Judge Alone issued a ruling on 1 December 2020, in which he dismissed all the grounds of appeal submitted by the appellant as having no merit except the following in reference to grounds 1 (i), (iii) and 6 above:

> *[17] Therefore, in the absence of the complete appeal record it cannot be unequivocally stated at this stage that the Magistrate had erred in the assessment of evidence before him at the voir dire inquiry. However, I am doubtful whether the Magistrate had adequately analyzed medical evidence alongside the totality of other evidence before he decided that the appellant had made the confessional statement voluntarily. The full court would be in the best position to undertake that task with the assistance of all proceedings before the Magistrates court.*

Full Court

[8] The appellant had submitted 2 sets of submission to the Court Registry after the single judge gave his ruling of 1 December 2020: first on 27 July 2022 and the second on 14 December 2022. These submissions claim that the confessional statement was given under duress due to the injuries suffered by the appellant and therefore should not have been used in the trial by the Magistrate because it is unfair and prejudicial. In support of these grounds of appeal the appellant claimed that he had not made the confessional statement voluntarily, as evidenced by the alleged injuries suffered at the hands of the police whilst in police custody and it should not have been admitted in evidence. The appellant claimed that his caution interview was not voluntarily given.

[9] The appellant submitted the following in his written submission dated 15 March 2023.

> *'Humbly submits that the prosecution has failed to prove beyond reasonable doubt that there was no force such as assaults, duress, unfairness, and unprocedural practice during the investigation, therefore the learned Magistrate to rule the fabricated statement as admissible without making proper and scrupulous assessment on the evidence of defence with the evidence of the police has therefore shifted the burden to the appellant.'*

[10] These submissions clearly implies that there was 'force such as assaults, duress, unfairness and unprocedural practices' inflicted on the appellant by the police. But this claim was not supported by any specific reference to evidence in the court record, that establish the claim was raised by him at the voir dire hearing. At the Magistrate Court trial, the appellant did not give evidence at all.

[11] The only reference in the court record of the voir dire on assault on the appellant was from the police officers who confirms that the injuries suffered by the appellant was inflicted on him by the victim of the aggravated robbery on the night of the commission of the offence, not by the police during his arrest in Lautoka or during his conveyance to Nausori for charging and trial. According to the voire dire ruling, the appellant had given evidence at the voire dire inquiry. However, he remained silent at the trial proper.

[12] This appeal is being heard pursuant to section 21(1) (b) and/or (c) Court of Appeal Act and it is important to refer to the guideline judgement regarding the principles of law to guide courts determinations of the issues raised by the appeal. The Court of Appeal in **Waqasaqa v State** [2019] FJCA 144 stated the test for leave to appeal in these terms:

> '*[3] For many years the accepted test for granting leave to appeal 'against conviction has been stated as being whether there is a ground of appeal that is arguable. The test was considered by the Supreme Court in* ***Naisua v The State*** *[2013] FJSC 14*
>
> *"It is settled that the test for granting leave to appeal against conviction on mixed grounds of law and fact in the Court of Appeal is whether an arguable point is being raised for the Full Court's consideration. We must add that* ***it is not appropriate to reach any conclusion on the merits of the proposed grounds when considering leave****. That conclusion should be left to the Full Court."*
>
> *[4] The Supreme Court appears to draw a distinction between considering the appeal in its totality and considering the merits of any of the proposed grounds of appeal. At the leave stage the single judge of the Court should step back and assess whether the appeal is genuinely arguable before the Full Court. Although a particular ground of appeal may raise an arguable point, it does not necessarily follow that the appeal is arguable before the Full Court. Issues raised in grounds of appeal may fall in favour of the appellant as arguable. However, when considered in the context of the*

*appeal as a whole it may become apparent that the appeal is not arguable before the Full Court. The question for this Court is what did the Supreme Court in **Naisua** (supra) mean when it referred to the test as being whether there is an arguable point raised for the Full Court's attention without considering the merits of the proposed grounds*

*[5] The nature of the test has become a matter of some interest more recently because of the significant increase in the number of successful applications for leave to appeal against conviction. In a recent decision of this Court in **Sadrugu v The State** [2019] FJCA 87 (per Prematilaka JA) the test for leave to appeal against conviction was considered in terms of how does the Court distinguish between arguable and non-arguable appeals at the leave stage. In paragraph 13 of that decision the Judge concluded, having reviewed a number of authorities, that:*

> *"... the test of reasonable prospect of success as described in **Smith** [2011] ZASCA 15; [2012] 1 SACR 567 (SCA) should be used to differentiate arguable grounds from non-arguable grounds at the stage of leave to appeal."*

*[6] For my part and more in keeping with the observations of the Supreme Court in **Naisua** (supra) I would suggest that the test be reworded so that the test is understood to refer to **the appeal itself as having a reasonable prospect of success rather than any particular ground of appeal.**"* [emphasis added]

Review of Ground 1 - Voir Dire challenge by Appellant

[13] Section 288 of the Criminal Procedure Act provides statutory sanction for voire dire inquiries to Judges and Magistrates. The Court of Appeal in **Rokonabete v The State** [2006] FJCA 40; AAU0048.2005S (14 July 2006) had earlier laid down some guidelines as to when and how to conduct a voire dire inquiry.

> *"[24] Whenever the court is advised that there is challenge to the confession, it must hold a trial within a trial on the issue of admissibility unless counsel for the defence specifically declines such a hearing. When the accused is not represented, a trial with a trial must always be held. At the conclusion of the trial within a trial, a ruling must be given before the principal trial proceeds further. Where the confession is so crucial to the prosecution case that its exclusion will result in there being no case to answer, the trial within a trial should be held at the outset of the trial. In other cases, the court may decide to wait until the evidence of the disputed confession is to be led.*

> *[25] It would seem likely, when the accused is represented by counsel, that the court will be advised early in the hearing that there is a challenge to the confession. When that is the case, the court should ask defence counsel if a trial within a trial is required and then hear counsel on the best time at which to hold it. If the accused is not represented, the court should ask the accused if he is challenging the confession and explain the grounds upon which that can be done."*

[14] 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."*

[15] On the basis of **Ganga Ram & Shiu Charan** (supra) the appellants need to show from the evidence at his trial the exact nature of acts or omissions or threats of inducement or offer of advantage that caused him to make the confessions. This is to show that he did not give the cautioned interview freely. The appellant did not specify the nature of acts that would have compromised his interview statement. However, he did claim that he informed the court that he was suffering pain.

[16] At page 137 of the copy record the Magistrate court at Nausori directed that the appellant be taken for medical treatment because he had told the court of pain he was suffering. The appellant claimed that he was in pain from the injuries he had sustained during interrogation and the cautioned interview he had signed was fabricated by the police. The evidence is contrary to this claim. At page 109 of the copy record at the Voir Dire hearing the evidence of DC Misidomo on this aspect of the case was:'

'I knew this suspect he had a case in Lautoka once – where I knew him from. His name is Valame Turaganukeli. We did search – we asked about injuries he told was injured with knife………

Valame had facial injuries asked him about injuries and he said he had a scuffle with house owner in Nausori'

[17] Further the Magistrate in the voir dire ruling had adverted to the appellant's failure to allege any assault by the police officers prior to the voir dire inquiry. Even on the first day in court all what the appellant had sought from court was attention to his injuries but not complained that the injuries had been caused by the police. At page 126 of the Court Record the following:

> *"The Court has perused the records of the Court when the accused persons first appeared in custody. The prosecution informed the Court that the accused person received injuries from a knife in Waila. The 1st accused informed the Court that he was treated at Nausori hospital. The 2nd accused asked to be taken to Nausori hospital. The 2nd accused asked to be taken to Nausori hospital as his right ankle, left knee, left ribs, left forearm was paining. The 1st accused also sought follow up on his dressing. The Court ordered follow up on the dressing for the 1st accused and medical attention to the 2nd accused. After numerous adjournments in the Court the matter was transferred to the High Court. Both accused persons appeared before Justice Temo. In the High Court the 1st accused was present and the 2nd accused was not present. The matter was remitted back to this Court.*
>
> *This Court has carefully scrutinized the records of the Courts and finds from the records that at no stage the accused persons made any allegations of assault by any police officers. The accused persons had appeared a number of times in this Court, before RM Naivalu who had ordered medical attention to the accused persons. All they sought was attention to themselves for the injuries they had received. The prosecution had mentioned in Court on the first instance that the accused persons were injured in Waila. The accused persons who were present and must have heard what the prosecutor said in Court however the records do not reflect then telling the Court that they did not receive the injuries in Waila or that it was inflicted by the police officers. Even in the High Court no record is made of any complaint to Justice Temo of any assault, threats or intimidation by any police officers."*

[18] The Magistrate had further mentioned in the voir dire ruling that before the commencement of the cautioned interview the appellant had expressed no reservation to the conduct of the

cautioned interview and informed the interviewing officer that he was feeling well and physically fit for the interview. The learned Magistrate had examined the cautioned interview and observed that the appellant's constitutional rights had been given and he had provided details in the cautioned interview which could not be fabricated by the police. He was satisfied that the appellant's cautioned interview had been given freely and voluntarily in the sense that it had not been procured by improper practices and general fairness had existed in the way in which the police had behaved.

[19] This court in reviewing the totality of the evidence is satisfied that the vior dire hearing was properly conducted and that the ruling admitting the cautioned interview statement of the appellant was proper. The ground of appeal by the appellant challenging the voluntariness and therefore the admissibility of the statement in evidence has no merit and is dismissed.

Claim of Unfairness Due to Non-disclosure of certain documents

[20] Nevertheless, it appears that the appellant had been given some medical attention for possible injuries details of which are not clear from the voir dire ruling. He may well have received those injuries during the robbery as alleged by the prosecution or may have been inflicted on him by arresting police officers before he was received by Nausori police station as alleged by the appellant. Inspector Ino had stated in evidence that the search for the meal book and the station diary drew a blank and they could not be found. Station diary may have revealed some details as to the injuries the appellant allegedly carried when he reached Nausori police station.

[21] For this appeal hearing the Court have received the complete appeal record. The following is clear from the record of evidence:

(i) the injuries sustained by the appellant were inflicted on him on the night of the robbery 15 November 2010 at Waila, Nausori by the victim of the aggravated burglary.

(ii) No evidence that the appellant was subjected to assault by the police from when the appellant was arrested in Lautoka and transferred to Nausori for their processing for their trial hearing. DC Eseroma in his evidence in chief at the trial; the record state '2 suspects were assaulted on the way to Suva... On way to Suva. They were not given food. They did not request food.' The Trial Magistrate dealt with this claim at page 126 of copy record quoted in full at paragraph 16 above.

(iii) In total 28 documents which included witness statements, caution interview record of the appellant, medical reports of both accused and victims. A diligent search for the meal book and station diary was made but could not be located. The cell block diary was also disclosed to the appellant.

(iv) the claim that the medical report would have cast doubt on the voluntariness of the caution interview of the appellant is not supported from the evidence. The injuries sustained by the appellant were from the scuffle he had with victims on the night of the aggravated robbery. There is no evidence that any of the injuries were inflicted by the police, except when he claimed in his evidence during the voir dire hearing at page 116 of copy record referred to below. His evidence as recorded is:

> 'they verbally and physically assaulted me ... I was beaten and torture I received those injuries. On held an iron rod 1½ m beating in hand – my knee together with team from Suva to Lautoka.'

[22] The appellant had claimed the following, in his submission received in the court registry on 15 March 2023:

> *(i) there was sufficient suggestion via the medical report and the evidence of that the injuries were sustained whilst in police custody, thereby negating voluntariness. On this point the copy record of the evidence given by the appellant during his voir dire hearing is the claim that he was assaulted and beaten with an iron rod.*

(ii) the learned Magistrate erred in law and in fact when he gave an indication of his own view that the injuries were from the complainant not police contradicting the original record. The appellant did specifically refer to the injuries he sustained. What the learned Magistrate did was that he reviewed all the evidence at the voir dire hearing and concluded that the caution interview was given voluntarily.

[23] In seeking to evaluate the appellants submission, the decision in **Nacagi v State** [2015] FJCA 15 U49.2010 (3 December 2015) is relevant on 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 will be of help to the full court to address the appellant's argument meaningfully.

> *'[14] The question at this stage is what approach should be taken by this Court to an appeal that challenges confessions made by the Appellants in caution statements that, after a voir dire hearing, were found by the trial Judge to have been made voluntarily, that is, without violence or the threat of violence. In **Rahiman v The State** (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:*
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> > *"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 rep 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."*

[24] The Trial Magistrate in his voire dire ruling and with specific reference to the medical report which Dr Jack Karaai a Medical Officer at Nausori Health Centre gave to the court was not relevant because it was about injuries sustained by Jag Ram the victim of the robbery, not the appellant. The appellant had complained of pain in his lower limbs during the voir dire hearing and the court ordered that the appellant be taken to Nausori Hospital for medical examination due to the pain he claims. Prior to this he had appeared a number of times before RM Naivalu in the Lautoka Magistrate's Court, who had ordered medical

examination. The prosecution had informed the court at the beginning that the accused persons were injured in Waila.

[25] I am conscious that in this court we do not have the advantage of observing the demeanor of the witnesses firsthand and thereby are unable to evaluate the reliability and credibility of the witnesses as they give evidence. In this case there are issues of concern surrounding the voluntariness of the caution interview statements and the need to ensure disclosures procedure are followed precisely and properly recorded. They are in themselves insufficient to undermine the ruling of the trial magistrate. In any case, it is a well-established principle that courts of appeal will not tamper lightly with the trial court's credibility findings: **R. Dhlumayo & Anor** [1948] 2 All SA 566E]. Absent demonstrable, material misdirection and clearly erroneous findings, the appellate court will not disturb the trial court's factual findings (vide **Naidoo v The State** (333/20160; [2019] ZASCA 52 (1 April 2019) para 46). Upon examination of the record of the voir dire evidence and ruling and the judgment of the trial magistrate, I am of the view that upon the totality of the evidence it was open to him to find as he did that the appellant was guilty as charged.

[26] The overall assessment of the trial and the evidence, that despite the minor discrepancies referred to in this judgement, the proviso of section 23(1) Court of Appeal Act is applied and the conclusion is that there is no substantial miscarriage of justice have occurred. The appeal has no merit and is dismissed.

Qetaki, JA

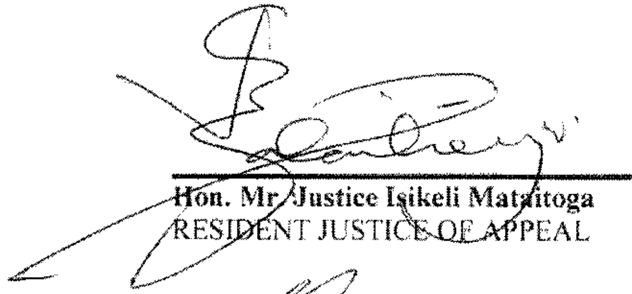
[27] I have had the opportunity to read and consider the judgment of Mataitoga, RJA in draft. I agree with the judgment, its reasoning and the Orders.

Clark, JA

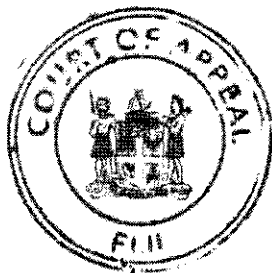
[28] I have had the opportunity to read the judgment of Mataitoga JA in draft. I agree with the orders made and His Honour's reasoning. In particular, I endorse His Honour's observations about the importance of pre-trial disclosure by the prosecution. As the Prosecution Code 2003 emphasises, the continuing duty of the prosecutor to disclose material that may assist the defence is an integral aspect of a fair trial to which every accused has a right and which right the courts will be vigilant to protect.

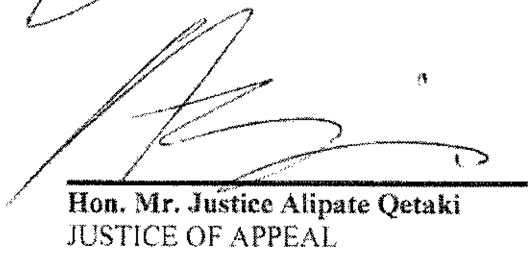
ORDERS:

1. *Leave to appeal is dismissed.*
2. *Conviction in the Magistrate Court is affirmed.*
3. *Sentence in the High Court is affirmed.*

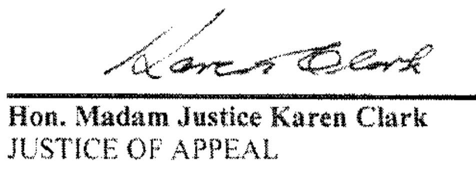


Hon. Mr. Justice Isikeli Mataitoga
RESIDENT JUSTICE OF APPEAL





Hon. Mr. Justice Alipate Qetaki
JUSTICE OF APPEAL



Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL