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

CRIMINAL APPEAL NO.AAU 36 of 2018
[In the High Court at Lautoka Case No. HAC 154 of 2014]

BETWEEN : **SULIASI NASARA**

Appellant

AND : **STATE**

Respondent

Coram : **Mataitoga, JA**
Qetaki, JA
Rajasinghe, JA

Counsel : **Mr. M. Fesaitu, Mr. T. Varinava for the Appellant**
: **Dr. A. Jack for the Respondent/State**

Date of Hearing : **4th May 2023**

Date of Judgment : **25th May 2023**

JUDGMENT

Mataitoga JA

[1] I have read the Judgment of Rajasinghe JA, I agree with the reasoning and the conclusion he has reasoned.

Qetaki JA

[2] I agree.

Rajasinghe JA

[3] The Appellant was charged in the High Court of Lautoka with one count of Murder, contrary to Section 237 of the Crimes Act and one count of Aggravated Robbery, contrary to Section 311 (b) of the Crimes Act. The particulars of the offences as in the Information are that:

FIRST COUNT

Statement of Offence

MURDER: *Contrary to Section 237 of the Crimes Act 2009.*

Particulars of Offence

SULIASI NASARA *on the 16th day of November 2014, at Lautoka in the Western Division, murdered* ***NITIN NAVINESH KUMAR***

SECOND COUNT

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to Section 311 (b) of the Crimes Act 2009.*

Particulars of Offence

SULIASI NASARA *on the 16th day of November 2014, at Lautoka in the Western Division, robbed* ***NITIN NAVINESH KUMAR*** *of Nissan Vanette Van Registration Number CG 638 valued at $3000 belonging to Vijay*

Lakshmi and at the time of the robbery used an offensive weapon namely, a wheel spanner.

[4] Consequent to the plea of not guilty entered by the Appellant, the matter proceeded to the hearing. The Prosecution wanted to adduce the admissions made by the Appellant in his Caution Interview and the Charge Statement in evidence, to which the Appellant objected. Therefore, a *voire dire* hearing was conducted in order to determine the admissibility of the Caution Interview and the Charge Statement in evidence. In his ruling dated the 02nd of February 2017, the learned trial Judge found the Caution Interview and the Charge Statement were obtained voluntarily and fairly. His Lordship, accordingly, admitted the Caution Interview and Charge Statement in evidence.

[5] The substantive hearing commenced, and the learned trial Judge delivered his summing up on the 02nd of June 2017. The three Assessors, in their unanimous opinion, found the Appellant not guilty of Murder but found him guilty of the lesser offence of Manslaughter. In respect of the second count, the three Assessors unanimously opined that the Appellant was guilty of Aggravated Robbery. The learned trial Judge, in his judgment dated the 06th of June 2017, disagreed with the unanimous opinion of the Assessors regarding the first count. Consequently, His Lordship found the Appellant guilty of Murder and convicted of the same accordingly. The learned Trial Judge accepted the unanimous opinion of guilty given by the Assessors for the second count and found the Appellant guilty of the Aggravated Robbery and convicted of the same. Subsequently, on the 13th of June 2017, the Appellant was sentenced to life imprisonment with a minimum term of 18 years before he will be considered for any pardon for Murder and ten years and nine months imprisonment for Aggravated Robbery.

[6] Being aggrieved with the said conviction and sentence, the Appellant appealed against the conviction and sentence but was out of the appealable time. Hence, the Appellant made an application before the single Judge of the Court of Appeal, seeking an enlargement of time to appeal out of time on the following appeal grounds that:

Conviction

Ground 1

THAT the conviction for both counts are unreasonable and not supported by the totality of the evidence in terms of the fault element or intention.

Ground 2

THAT the Learned Trial Judge erred in law and in fact by not providing cogent reasons to differ with the unanimous opinions of the Assessors on the first count of Murder.

Ground 3

THAT the Learned Trial Judge erred in law and fact when he admitted the caution interview of the Appellant without independently assessing the same against the medical findings.

Sentence

Ground 1

THAT the Learned Trial Judge erred in law and fact in imposing a sentence with a high minimum term of 18 years.

[7] Prematilaka RJA, in his ruling, dated the 01st of October 2021, refused to grant leave to file an appeal against the conviction but allowed against the sentence.

[8] The Appellant then filed this Notice of Renewal pursuant to Section 35 (3) of the Court of Appeal Act against the conviction. During the hearing, the Appellant withdrew his appeal against the sentence. Furthermore, the learned Counsel for the Appellant informed the Court that the Appellant only wishes to rely on the third ground of appeal against the conviction, thus, effectively abandoning the first two grounds of appeal.

[9] The learned Counsel for the Appellant filed his written submissions, while the learned Counsel for the Respondent relied on the same submissions filed before the single Judge of

the Court of Appeal. Besides that, the Court heard the oral submissions of the Counsel of both parties during the hearing of this matter.

[10] The law pertaining the leave to appeal out of time is settled in this Jurisdiction. The factors that are considered in the matter of enlargement of time are (i) the reason for the failure to file within time, (ii) the length of the delay, (iii) whether there is a ground of merit justifying the Appellate Court's consideration, (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed, (v) if time is enlarged, will the Respondent be unfairly prejudiced, (***vide Kumar v State; Sinu v State CAV001 of 2009; 21 August 2012 (2012) FJSC 17***,)

[11] During his oral submissions, the learned Counsel for the Appellant stated that he is focusing on the merits of the appeal ground, thus making no submissions on the other factors the Court must consider in an appeal of this nature.

Ground 3

[12] The Appellant contends that the learned trial Judge erred in law and facts in admitting the caution interview of the Appellant without independently assessing the medical findings. The Court heard the submissions of the learned Counsel for the Appellant, arguing that the learned trial Judge's conclusion that the injury found on the lip of the Appellant was not a result of police brutality is unfounded on the evidence presented during the *voire dire* hearing.

[13] According to the Appellant, a Police team came to his residence at Namoli village on the night of the 18th of November 2014 to arrest him. He recognized one of the Police officers in the team as Cpl. Senitiki, as he had known him before. The Police did not inform him of the reason for his arrest and pulled him out of the house. They then punched him on the side of his ribs and stomach. Cpl. Senitiki back-slapped him, forcing him to sit down on the ground. The Police officers then kicked him on his thighs. They then threw him into the Police vehicle. Inside the Police vehicle, Cpl. Senitiki started to nudge his ribs, demanding

to tell them where he kept his clothes. They then took him to his sister's place, where they found his clothes. Afterwards, they escorted him to the Police Station. During the course of this process, Cpl. Senitiki threatened him, saying that they would put chilli powder on his body and assault him.

[14] The Appellant had testified in the High Court during the *voire dire* hearing, stating that he was kept in the Police cell till the following morning. He was then taken to the hospital for a medical examination, which was after he had his breakfast. As per the evidence of the Appellant, he had requested the Police to take him to the hospital, so he could report to the Doctor that the Police assaulted him. However, Cpl. Senitiki, once again, came forward and took him to the hospital. The Appellant was handcuffed when he was produced to the Doctor for the medical examination. Cpl. Senitiki was present during the medical examination, preventing the Appellant from raising his allegation with the Doctor.

[15] Subsequent to the medical examination, the recording of the caution interview began. The Appellant claimed in his evidence that there were a few police officers present during the recording of the Interview, threatening him that they would assault him and put chillies on his body. At the conclusion of the Interview, he was not given a chance to read the printout of the caution interview or read it over to him. However, he had read the caution interview on the laptop before printing it out. He was then forced to sign it.

[16] On the contrary, the Prosecution presented evidence to establish that the Appellant was never subjected to any assault, force or ill-treatment during the arrest or the recording of the caution interview and charge statement. According to the Prosecution, the Appellant was arrested by DC Jone Sauqaqa on the 18th of November 2014. The Appellant is DC Sauqaqa's nephew. According to DC Sauqaqa, the Appellant was not assaulted at the time of the arrest or escorting him to the Police Station. During the arrest, DC Sauqaqa had observed a cut on the upper lip of the Appellant. On the same day, a little after midnight, the Appellant was taken to the Hospital for a medical examination. Doctor Jona Nabaro then medically examined the Appellant and found a laceration on the inner aspect of the upper lip. According to his professional opinion, the Appellant would have sustained the injury within 24 to 48 hours.

The Doctor had not found or observed any other physical injuries as he noted no hematoma, no laceration and no contusions.

[17] The following day, the 19th of November 2014, at 11.30 am, DC Colati commenced the caution interview with the witnessing officer. The caution interview lasted two days and concluded on the 20th of November 2014.

[18] In an appeal like this, the Court must recognize and indeed keep in mind the advantage that the learned trial Judge had in seeing and hearing the witnesses and all the material exhibits presented before the trial Court. This Court had no such benefit of seeing the witnesses and observing their demeanour in giving evidence. Hence, this Court must not lightly intervene unless it has scrutinized the impugned judgment/ruling of the learned trial Judge to determine whether His Lordship had erred in fact and law in concluding that the injury found on the lip of the Appellant was not a result of police brutality; hence, the Caution Interview and the Charge Statement were obtained voluntarily and fairly. In doing that, the Appellate Court must not substitute its own view about the evidence presented in the trial. Therefore, the Appellate Court must consider the evidence presented and determine whether the above conclusion of the learned trial Judge is unreasonable or cannot be supported. (***vide Section 23 (1) (a) of the Court of Appeal Act, Sahib v State [1992] FJCA 24; AAU0018u.87s (the 27th of November 1992), Kumar v State [2019] FJCA 191; AAU149.2015 (the 03rd of October 2019***).

[19] The learned Counsel for the Appellant submitted that the evidence given by the arresting officer DC Sauqaqa is not credible on the basis that he had failed to give his statement to the Police immediately after the arrest. DC Sauqaqa had given his statement to the Police nearly after two years of the arrest. Therefore, the learned Counsel for the Appellant submitted that his evidence was fabricated and should not be considered as credible evidence.

[20] The statement made to the Police by a potential witness during the investigation is considered a previously made statement. A previous statement means a statement made by a witness at any time other than at the hearing in which the witness gives evidence. There are two types

of previous statements; previous consistent and previous inconsistent statements. A previous inconsistent statement is admissible in evidence as evidence of inconsistency that eventually links to the credibility or the reliability of the evidence given by the witness. Previous consistent statements are presumptively inadmissible at common law with a few exceptions. One of such exceptions is to respond to a claim of invention.

[21] In this matter, the issue of the previous statement of DC Sauqaqa was raised by the Appellant in order to impeach his credibility on account of the delay in making the statement. The learned Counsel for the Appellant argued that the learned trial Judge should have considered the delay in making his statement to the Police in determining the credibility of the evidence given by DC Sauqaqa. In paragraph 49 of the *voire dire* ruling, the learned trial Judge discussed the issue of delay and the reasons DC Sauqaqa gave for the delay. Having considered that His Lordship had concluded, the reason given for the delay was acceptable.

[22] The learned trial Judge then outlined his reasons for accepting DC Sauqaqa's evidence as credible and reliable evidence. His Lordship had considered the close relationship between DC Sauqaqa and the Appellant. The learned trial Judge then concluded that there was no *mala fide* motive to fabricate or to invent false evidence against his nephew. (*vide paragraph 48 of the voire dire ruling*).

[23] Moreover, the learned trial Judge had carefully examined the contradictory nature of the evidence given by DC Sauqaqa with his previous statement regarding the place of the arrest. During the evidence in chief, DC Sauqaqa had testified that he arrested the Appellant at Vunato village. However, his statement to the Police states that the arrest was made at Namoli village. DC Sauqaqa provided an explanation for this inconsistency during the re-examination, explaining that the arrest was made between the borders of those villages. (*vide page 28 of the Supplementary Record of the High Court*). Having considered the explanation given by DC Sauqaqa, the learned trial Judge found that it was not a material contradiction (*vide paragraph 50 of the voire dire ruling*).

[24] In view of the reasons discussed above, it is clear that the learned trial Judge had taken into consideration the delay in making the statement to the Police, the reasons given for such a delay and the contradictory nature of the evidence given by DC Sauqaqa with his previous statement made to the Police regarding the place of the arrest, in determining the credibility and reliability of the evidence presented by DC Sauqaqa.

[25] DC Sauqaqa's evidence was materially relevant to the issue of this appeal, as he had administered the arrest of the Appellant and escorted him to the Police Station on the 18th of November, 2014. On the contrary, the Accused's claimed that he was arrested by Cpl. Senitiki and subjected to brutal assault unleashed on him by Cpl. Senitiki and other arresting officers. Under such circumstances, the veracity of the evidence given by DC Sauqaqa is essentially important to determine whether the Appellant was assaulted at the time of arrest and then on the way to the Police Station, as he claimed. Hence, Doctor Jona Nabaro's evidence is substantially helpful in assessing the veracity of evidence given by DC Sauqaqa.

[26] According to the testimony given by Doctor Nabaro, he found a laceration on the inner aspect of the upper lips. Doctor Nabaro further said that he did not observe any other apparent physical injuries. He had not observed any hematoma, laceration or contusions. Per his professional opinion, the said laceration on the lips was likely sustained within the first 24 to 48 hours. During the re-examination, Doctor Nabaro explained that if the Appellant were punched on his face, he would have had abrasions, scratch marks, and even soft tissue swelling or maybe lacerations elsewhere on his face besides the injury on his lips.

[27] In his evidence, the Appellant stated that he was dragged to the Police vehicle, and then the Police officers started to punch him on the side of his ribs and stomach. Cpl. Senitiki gave him a back slap on his mouth. Then, he was thrown into the Police vehicle. Cpl. Senitiki nudged his ribs, asking him where he had left his clothes. According to the Appellant, he had sustained injuries on his chest, back and side of the chest. (*vide page 54 of supplementary record of the High Court*). The Appellant said that Doctor medically examined his lips.

[28] It is noteworthy to mention that the Appellant never testified, stating that the Doctor only examined his lips. (*vide page 54 of the supplementary record of the High Court*). Moreover, the learned Counsel for the Appellant had not questioned the Doctor during the cross-examination suggesting that he only examined the lips of the Appellant and not his body, allowing Doctor Nabaro to respond to the contention of the Appellant. Furthermore, the Appellant said that he was taken to the medical examination on the morning of the following day by Cpl. Senitiki. However, Doctor Nabaro had recorded in the medical examination report, which he made contemporaneously with the medical examination, that the medical examination was conducted at around midnight, and Timoci Vuli escorted the Appellant.

[29] The learned trial Judge had considered the different versions of the event given by the Appellant and Doctor Nabaro with other evidence presented during the hearing. His Lordship held that the Doctor was an independent witness. Thus, he had no *mala fide* intention in lying. The facts in the medical examination report were recorded contemporaneously with the medical examination. His Lordship then found that if the Appellant were assaulted and injured, as he claimed in his evidence, those injuries would have undoubtedly attracted the attention of the Doctor. However, the Doctor had emphasized that he found no other physical injuries other than the laceration on the upper lip of the Appellant.

[30] Consequently, it is apparent that the learned trial Judge had given a thorough and detailed assessment of the evidence presented by DC Sauqaqa, the Appellant and Doctor Nabaro in determining the credibility and reliability of the evidence of DC Sauqaqa and Doctor Nabaro and his medical finding. Wherefore, it is the considered opinion of this Court that the learned trial Judge had analyzed the medical findings with all other evidence presented during the *voire dire* hearing, including the Appellant, in making His Lordship's conclusion that the caution interview of the Appellant was obtained voluntarily and fairly.

[31] Thus, this Court finds no merits on the ground of appeal. Therefore, there is no real prospect of this ground of appeal succeeding.

[32] The orders of the Court:

(i) The enlargement of time to appeal out of time is refused.

(ii) Appeal dismissed.

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Hon. Mr. Justice I. Mataitoga
JUSTICE OF APPEAL

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Hon. Mr. Justice A. Qetaki
JUSTICE OF APPEAL

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Hon. Mr. Justice R.D.R.T. Rajasinghe
JUSTICE OF APPEAL

Solicitors:

Office of the Legal Aid Commission for Appellant.

Office of the Director of Public Prosecution for the Respondent.