

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 195 OF 2016

STATE

-v-

1. ASELAI WAQANIVALU

2. ISAAC JAMES

3. MAIKA TOVAGONE

4. JOELI NUKUNAWA

5. EMOSI BALEIDROKADROKA

Counsel : Mr A. Singh for Prosecution
: 1st & 2nd, Accused in Person
: Ms L. Naikawakawavesi for 3rd Accused
: Ms K. Vulimainadave for 4th and 5th Accused

Dates of Hearing : 01 May 2024 – 22 May 2024

Date of Judgment : 24 May 2024

JUDGMENT

1. This case generated much public interest when the CCTV footage that captured the alleged robbery went viral on social media. The robbery was committed under horrific circumstances in the full view of the public in Kashmir, a suburban city of Lautoka. Five Accused persons (The Accused) stood trial on the following amended information filed by the Director of Public Prosecution after a lengthy *voir dire* hearing which excluded the caution statements of three Accused.

FIRST COUNT
Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (b) of the Crime Act 2009.

Particulars of the Offence

ASELAI WAQANIVALU, ISAAC JAMES, MAIKA TOVAGONE, JOELI NUKUNAWA AND EMOSI BALEIDROKADROKA on the 22nd day of September 2016 at Lautoka in the Western Division robbed IMTIAZ SHAUKAT ALI of 1 Toyota Prado valued at \$115,000.00, \$16,550 cash, 1 Samsung Galaxy S7 Edge mobile phone valued at \$2,100, all to the total value of \$133,650.00 the property of IMTIAZ SHAUKAT ALI.

COUNT 2
Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (b) of the Crimes Act 2009.

Particulars of Offence

ASELAI WAQANIVALU, ISAAC JAMES, MAIKA TOVAGONE, JOELI NUKUNAWA AND EMOSI BALEIDROKADROKA on the 22nd day of September 2016 at Lautoka in the Western Division, robbed SHAHINA NAZMEEN HUSSEIN of 1 Samsung Galaxy J5 valued at \$650.00, 1 Suitcase with clothes valued at \$200.00, 1 gold chain valued at \$500.00 and 2 kids' carry-bags valued at \$30.00, all to the total value of \$1,380.00 the property of SHAHINA NAZMEEN HUSSEIN.

2. The Accused pleaded not guilty to the charges. At the ensuing trial, the Prosecution presented the evidence of 11 witnesses and closed its case. At the close of the Prosecution case, the Court being satisfied that there was a case for each Accused to answer on each count, put them to their defence. All of them elected to give evidence under oath.
3. The 1st and 2nd Accused were unrepresented at the trial. They were properly explained their rights and the right to cross-examine the witnesses called by the Prosecution. The 1st, 2nd

Accused waived their right to legal representation and legal aid. They exercised their right to cross-examine and proved themselves to be able cross-examiners. The cross-examination was sound and thorough.

4. Soon after the *voir dire* inquiry, the Court held the confessions allegedly made by the 1st, 2nd and 5th Accused to be inadmissible at the trial proper.
5. The written submissions were filed by the Counsel and by the unrepresented Accused themselves. Having considered the evidence presented at the hearing and the respective submissions of the parties, I now proceed to pronounce the judgment as follows.

Burden of Proof and Standard of Proof

6. The Accused are presumed innocent until they are proven guilty. The onus or the burden of proof rests on the Prosecution throughout the trial, and it never shifts to the Defence. There is no obligation or burden on the Accused to prove their innocence. The Prosecution must prove each Accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the Court is not sure of their guilt, the Accused must be found not guilty and acquitted.

The Elements of Offence of Aggravated Robbery

7. The Accused are jointly charged with two counts of Aggravated Robbery on the doctrine of joint enterprise. The Prosecution must prove beyond reasonable doubt that each Accused in the company of others committed the robbery. There are five Accused and the evidence against each Accused and each count must be considered separately.
8. A person commits robbery if he immediately before or at the time or immediately after committing theft, uses force or threatens to use force on another person with intent to commit theft or to escape from the scene. A person commits theft if that person dishonestly appropriates the property belonging to another with the intention of permanently depriving the other of that property.

9. I shall now summarise the evidence led at the trial which I consider to be important to arrive at my decision.

The Summary of Evidence

PW 1- Imtiaz Shaukat Ali

10. Imtiaz is married to Shahina Nazmeen Hussein with two children, a son aged 10 and a daughter aged 9. He runs a business in Lautoka market.
11. On 22 September 2016, when the market was closed at 5 pm, he came home. He took his wife and the two kids and left for Kashmir in his black Toyota Prado, FW-260 to pick up her sister, who had come from New Zealand. In his Prado, there were two bags containing clothes, a gold chain, \$ 16,000.00 + money, and two phones, Samsung Galaxy 7 and S5. His wallet was in his pocket. The money collected from his business was to be deposited in the bank the next morning.
12. On their way, he stopped his vehicle in front of Hari Lal Investment shop in Kashmir at around 7.20 p.m. and went inside the shop to buy some stuff for the kids while the engine was on. His wife was sitting in the front passenger seat with his daughter and his son in the back seat.
13. Suddenly, he heard his wife scream. When he turned back, he saw an iTaukei guy sitting at the steering wheel of his vehicle. He ran to the vehicle and forced himself inside the vehicle to get the iTaukei guy out of the vehicle. There were eight iTaukei people, and the others came and started to assault him. He went around the vehicle when one of them picked up his wallet. His wife managed to get out of the vehicle with their daughter. They tried to move the vehicle while his son was still inside. He opened the door and told them to drop his son. Six of them were already inside the vehicle. One of them dropped his son and the vehicle moved ahead. The other two ran and boarded the moving vehicle. He received injuries to his face when they punched him.

14. The movement was very fast. He was so scared that he could not recognize any of them. They were wearing caps and T-shirts and ¾ pants. Some of them were tall and some of them were slim. The police managed to locate the car from Saru but nothing was left inside.
15. On the same day, he was informed that the CCTV cameras installed at Hari Lal Investment shop had captured the incident. He watched the CCTV footage at Hari Lal Investment shop and also when it went viral on Facebook. He last saw the footage in the DPP's Office before coming to give evidence. When the video footage was screened in Court, Imtiaz confirmed that it was the video that he viewed at Hari Lal Investment shop. He identified himself, his wife, the children and his vehicle in the video footage that was shown in Court.
16. Under cross-examination, Imtiaz said that when he viewed the video at Hari Lal Investment shop, the police were not present. He did not give a statement to police after watching the footage. He did not identify himself or his family in the presence of the police through the video.

PW 2 - Shahina Nazmin Hussein

17. Shahina is married to Imtiaz Ali (PW 1). On 22 September 2016 after visiting her mother-in-law, she came with his husband and the children to pick up her sister at around 7.20 p.m. in their Toyota Prado, FW 260. On their way, they stopped at Hari Lal Investment shop in Kashmir. They had two bags in the trunk with clothes, a gold chain, two phones and a bag of husband's business money close to \$16,500 which was to be banked the next day.
18. Her son (2 Y old) was sleeping in the back seat and her daughter (1Y old) was in her arms. Her husband got off and went to the shop. While on a call, somebody suddenly opened the door and sat in the driver's seat. Somebody sitting at the back blocked her mouth. Her husband came and punched the driver while she was still trapped inside the vehicle. She managed to come out while her son was still trapped in the vehicle. When they moved the vehicle, she saw her son lying down on the footpath.
19. After they had taken the vehicle, the owner of the shop informed them about the CCTV cameras installed at his shop. She watched the footage the same night and thereafter on her phone plenty of times when it went viral on Facebook. When a video was being played in Court Shahina confirmed it to be the same video she had viewed earlier. She identified herself, her husband,

the children and their vehicle in the video and confirmed that it portrayed the incident that took place on 22 September 2016 in front of Hari Lal shop. She said that they did not get anything back except the vehicle. After this incident, they were in such a trauma that it was very hard for her and her family to come out of that situation for months. They kept the doors and the windows locked and curtains down.

20. Under cross-examination by Isaac James, she said that she watched the video soon after the incident but could not recall if it was shown to her by the police officers when her statement was being recorded on 28 September 2016. Under cross-examination by Ms Vulimainadave, Shahina said that she could not recall if she watched the video with the police before she made the statement to police.

PW 3 - Sosefina Rokosuli

21. Sosefina is a schoolteacher by profession. In 2016, she was 19 years old and had a boyfriend by the name of Maika Tovagone. Maika was living with his parents in Tacirua. She met Maika at Nabua Secondary School where both were studying in Year 13. They met each other every day in school. The relationship with Maika was good and it lasted for 3 months. Even before they started the relationship, they knew each other. They both had mobile phones which they used to converse when they could not meet. They continued their relationship and were seeing each other even after the incident.
22. Sosefina gave a statement to police in 2016 when she was taken from home because she had identified Maika through a video featuring the car-jacking incident in Lautoka. She watched the video when Maika told her to watch it on FM 96 Facebook page where it had gone viral. When she watched it on her mobile phone, she was able to identify Maika. She watched the same video at the police station and gave a statement to police.
23. Her two brothers who went to school with Maika could also recognize it was him. They had told her cousin, who was a CID officer. The police could not find Maika so they approached her because she was his girlfriend. She described Maika's characteristics and how she was able to recognise him in the video. Maika used to wear the same cap and the T-shirt frequently. When the video (PE1) was being played in Court she confirmed that it was the same video she had watched before and pointed to Maika. She positively identified Maika Tovagone in Court.

24. Under cross-examination by Ms Naikawakawavesi, Sosefina agreed that her statement was taken on 28 September 2016. She denied that the officer who had recorded her statement was her uncle. She denied that the relationship with Maika started in 2013 and broke off in 2015. She agreed that the fact that she watched the CCTV footage at the CID office is not recorded in her statement.

PW4 - Jeetendra Naveen Kumar

25. Jeetendra has been running a business called X-Tech Exciting Solutions since 2011. He has a diploma in IT. His business installs closed-circuit television (CCTV) systems and provides services and solutions. In 2009, he installed 16 CCTV surveillance cameras at Hari Lal Investments in Kashmir, Lautoka.
26. The CCTV cameras are wired to a decoder which has a hard drive. The hard drive records all the videos from each camera. To access data and watch the videos in a decoder, one must have the credentials (password) to log in.
27. On 22 September 2016, Hari Lal called him after 7 p.m. and informed him of an incident that had occurred right in front of his shop. It was also informed that the police wanted to extract the CCTV footages. He rushed there within minutes. He was given access to the decoder at Hari Lal Investment where he viewed the footages in front of the police officers. He extracted whatever the footages the police wanted. Footages from three main cameras in front of the shop were extracted. He saved them on a USB and gave it to the police. He later copied the footages onto a CD and played it back to view them. The CD was given to the police the very next day. He also uploaded the footages to the Facebook page of his company which he viewed plenty of times. When the footages in the CD were shown to the witness in Court, he confirmed that they were the ones he extracted from the decoder at Hari Lal Investment shop. He pointed to the time (19:31) and the date (22:9:2016) displayed on the screen to confirm that they correspond to the date and the time of the offence. The CD containing the footages was tendered marked as PE1.
28. Under cross-examination by the 1st Accused, Jeetendra agreed that he had given his statement to the police on 23 September 2016. He denied that the CCTV cameras at Hari Lal Investment were installed by somebody else and that he was not the one who extracted the footage.

29. Under cross-examination by the 2nd Accused, the witness agreed that the original footage was stored in the decoder. He disagreed that the process of downloading the original onto the USB and copying it from the USB onto the CD could be manipulated. He confirmed that the footage he viewed in Court was the same footage that he had extracted and burnt onto the CD. He agreed that if the decoder was produced in Court, the State would have proved that it was the original. However, he confirmed that the CD was sourced from the original.
30. Under cross-examination by Ms Naikawakawavesi, the witness said that the footages could not be viewed directly from the DVR recorder. A special app is required for that purpose. Under cross-examination by Ms Vulimainadave, the witness said that the USB he used was recycled after giving the footage to the police because a USB was an expensive device in 2016. The footage is still saved on his Facebook page and can be viewed at any time. He is the one who uploaded it with the permission of Hari Lal. He is not aware of the whereabouts of the original footage. What is available in evidence is the copy that he made. He did not do any marking on the CD he burnt. He transferred the data from the USB to the CD at his house in the absence of the police officers.
31. He agreed that, in his statement to the police, he did not include the whole process of viewing, extracting, burning and giving the CD and the USB to the police. He could confirm the authenticity of the video footage because he was the one who extracted it from the decoder. He said that he did not hand the CD over to the police, it was Mr. Lal who had done that. However, in re-examination, by looking at the statement he made on 23 September 2016, he confirmed that he was the one who had handed the CD over to the police.

PW5 – Sgt. Sailasa Kurikitoga

32. Back in 2016, Sgt. Sailasa was stationed at the Lautoka Police Station. On 27 September 2016, he made a statement regarding the identification of a suspect by the name of Joeli Nukunawa who resided in Suva. He had known Nukunawa for more than three years back in 2016 and had even spoken to him. He had met Nukunawa many times when he used to come and hang around in Lautoka and at the police station. He had last met Nukunawa back in 2015. He described the ethnicity, skin colour, build and age of Nukunawa.

33. He carried out the identification at the Lautoka Police Station by viewing the CCTV footage uplifted from a shop in Kashmir. Whilst viewing the CCTV footage he was able to recognise Nukunawa's face in the footage. The footage was played on a personal computer by Inspector Bimlesh. In that video, he saw a group of youths robbing a civilian who came to the shop in his car. He could recognise the person wearing a white cap and a black jacket to be Nukunawa from his face, his height, his build and his physical appearance. Nukunawa's face was clearly shown in the footage. He watched the footage a few times before confirming the identification of the suspect.
34. When the video footage (PE1) was shown in Court, the witness confirmed that it was the same footage he viewed at the Lautoka Police Station on 27 September 2016. In that video, he pointed out the man wearing a white cap and a black jacket as the person he identified as Joeli Nukunawa back in 2016. He identified the 4th Accused in Court as Joeli Nukunawa whom he knew and recognized through the video. He advised the Investigating Officer of Nukunawa's identification and made a statement on the same day.
35. Under cross-examination by Ms Vulimainadave, Sgt. Sailasa denied that the image of the face was of so poor quality that he could not even tell correctly whose face was it. He agreed that the top part of the face of the person whom he identified as Nukunawa was covered with a cap. He denied that his identification was mistaken.

PW6-DC Simone Yabia

36. On 27 October 2016, DC Simone interviewed Isaac James at the Lautoka Police Station in the presence of Corporal Ranadi. The original record of the interview of Isaac James was tendered as PE2 and read into evidence.
37. During the interview at question number 76, a break was given to play the CCTV footage on the computer. When the CCTV footage was played, Isaac James identified himself in the footage. He took James through the footage and from question 80 onwards James identified himself to be the person who kicked the Indian man and the one who lifted the baby and put it on the footpath and then ran after the car. The witness identified the 2nd Accused as the person whom he interviewed on 27 October 2016. When the footage (PE1) was played in Court, DC Simone confirmed it to be the same footage he played during the interview.

38. Under cross-examination by the 2nd Accused, DC Simone agreed that question 5 was not answered and not signed by James. Explaining why the interview was not suspended until James's uncle was present the next day, DC Simone said that James had been brought from Suva, and keeping him in police custody exceeding the 48-hour limit would have been contrary to his rights. He agreed that after each recommencement of the interview James was not cautioned. He said that James was cautioned as per Rule No. 2 at the beginning when the allegation was put.
39. DC Simone agreed that when the caution was put at question No.77, James had answered with a 'No' and admitted that he had not explained the suspect's right any further. He denied that after questions No.85 to 88, the Accused was not given his right to read through his caution interview. James was given time to read through the interview at the conclusion although it was not written in the record. At question 5, James was explained his right to read through the interview and the right to make any changes. He could not recall if he had made another statement after the one he had given on 27 October 2016. The witnessing officer IP Ranadi was present throughout the interview. He denied that he prepared the record of the interview in the absence of the accused and that the signature of James was obtained forcefully. He denied that he had refused the accused's request for a medical.

PW7 - A/Sgt. Barbara Salele

40. In 2016 Sgt. Barbara was stationed at Lautoka Police Station. On 7 October 2016, she interviewed Emosi Baleidrokadroka under caution in the presence of the witnessing officer Marika. Emosi gave the answers voluntarily. The record of the interview of Emosi was marked and tendered as PE3.
41. The video footage that went viral on social media was shown to Emosi as part of the interview. Inspector Bimlesh was present when the video was being played at the interview. The purpose of showing this video footage to Emosi was for him to identify where he was in that footage as he had already admitted to the offence. Emosi positively identified himself in that footage. As mentioned in the record of the interview, he was wearing a red bucket hat and a round-neck T-shirt which printed 'LOVE LUST' in front. She or any other officer put pressure on, assaulted or threatened Emosi to point it out.

42. When the footage (PE1) was shown in Court, Sgt. Barbara confirmed that it is the same footage that was shown to Emosi during the interview. She pointed out the person wearing the red bucket hat and the printed T-shirt as the person Emosi identified to be himself. The footage was played to Emosi twice just to give him a clear view. She identified the 5th Accused Emosi Baleidrokadroka in Court as the person she interviewed on 7 October 2016.
43. Under cross-examination by Ms Vulimainadave, Barbara denied that the signature appears in the record of the interview is not that of herself. She placed her signature on a blank paper to show that it is her signature. She denied that the questions were already typed when Emosi was brought to the interview room although she was already seated in the interview room. Emosi was sitting beside her reading whatever she was typing. All the answers she typed were given by Emosi and none of them were fabricated. The name of the shop where the scene reconstruction took place was mentioned when the allegation was put. She was part of the scene reconstruction. After viewing the footage, in answer to question 87, Emosi admitted that he was the one who was wearing the red bucket hat and round neck T-shirt with 'LOVE LUST' printed in the front.

PW 8 - Inspector Colati

44. In the presence of the witnessing officer Meena Kumari, IP Colati interviewed Aselai Waqanivalu on 27 and 28 September 2016 at the Lautoka Police Station. The record of the interview was tendered marked as PE4 and read it into evidence. The footage (PE1) was shown to Aselai on the screen of the computer. IP Colati confirmed that it was the same footage that was shown to Aselai during the caution interview. After viewing the footage, Aselai confirmed that he was part of the group that robbed the vehicle in front of Hari Lal Investment and identified himself in that footage. IP Colati identified the 1st Accused Mr Aselai Waqanivalu in Court as the person he had interviewed.
45. Under cross-examination by Aselai, IP Colati admitted that he was already in the Crime Office when Aselai was brought in. Once the interview was over for the day, Aselai read it and once he had agreed with the answers, a printout was obtained for him to sign. After question 76 was answered, the interview was suspended for Aselai to read through his interview before printing.

He was part of the reconstruction although his name is not written in the record of the interview. The interview was recorded on the same laptop that was used to show the footage.

PW 9 Inspector Ranadi

46. In the presence of the witnessing officer Ana Nai, IP Ranadi charged Aselai Waqanivalu on 29 September 2016 at the CID Office at Lautoka Police Station. She tendered the charge statement as part of her evidence (PE5). She read in evidence Aselai's statement recorded in question 10. Under cross-examination, the witness denied that she had used a standard format of a charge statement and fabricated his statement.

PW 10- Rusiate Kalouniviti (via Skype)

47. Rusiate gave evidence via Skype from England. He grew up in Tacirua. He is currently serving in the British Army as an infantry soldier. He was a driver by profession back in 2016, working for a solar company. On 20 September 2016, his long-standing friends Emosi and Maika came over and asked him to drive them to the West. They gave him money to arrange a rental car for the trip because he had PSV license. He knew Maika and Emosi from their childhood. They came with two other persons by the names of Isaac and Are.
48. They left for the West at around 10 a.m. on 20 September 2016. He was not sure why they were heading to the West. The reason for him to go to the West was just to drop them off. He didn't know what's going to happen there. Halfway through the journey, he heard a conversation where Emosi, Maika, Isaac and Are were planning to do a 'job'. He realized that it was wrong for him to take them but had no choice because the car was registered under his name. So, he decided to drop them off in the West. They reached Lautoka town at around 6 p.m. on the same day and met his nephew Aselai Waqanivalu. He knew Aselai since birth. Aselai grew up in Lautoka. He used to meet Aselai at his namesake's place in Tacirua. He could clearly recognize Aselai when he visited him in 2016 with the other boys.
49. He decided to take a nap at Aselai's place so that he could leave for Suva early morning. Aselai knew the boys who had come with him. They borrowed the car from him and went somewhere. He met the boys again the next morning. He took the car and came back to Suva. He did not know what happened thereafter.

50. The next day, there was a video went viral on FM96 social media of the carjacking incident in Lautoka. He was surprised to see the boys in the video. In the video he identified all the boys Aselai, Emosi, Maika, Are and Isaac. It came to his mind everything that was being planned by the boys. It was the same clothes they were wearing when they came down from Suva to the West.
51. He could recognise only Emosi in Court when ten people were called in front of the camera of the laptop. He could not recall what they were wearing on that particular day. In the video that was on social media, he could recognize Aselai as the person who grabbed the car owner outside. He did not meet Aselai thereafter.
52. Under cross-examination by the Defence Counsel, Ms Vulimainadave, Rusiate agreed that he did not turn the car back when he became aware of the wrong thing the boys were planning. He denied that he stayed that night in Lautoka because he knew that he would benefit if he stayed. The money was given only for the rental car. He agreed that he went back to Suva on 21 September 2016. He saw the video on the FM 96 page the next day, 22 September 2016.
53. He denied that the only reason he said he saw this video the next day was to save him from being blamed for taking part in the group. He denied that he was planning with the others to commit the robbery. He agreed that he did not inform the police about the planning he heard in the car. He agreed that he was taken in by the police and interviewed on 30 September 2016 and that he was not charged. Rusiate agreed that his wife was in the room when the Court inquired about the background noise of someone talking. He said under re-examination that he was confused under cross-examination when he said 'yes' to the question that he had mistakenly identified the 5th Accused as Emosi who had travelled with him on 20 September 2016.

PW11 Inspector Bimlesh Naicker

54. IP Bimlesh was the investigating officer in this case. In the process of investigation, he visited the scene, uplifted the evidence and compiled the docket. He uplifted the CCTV footage from the Hari Lal Investment Shop in Kashmir where the carjacking happened in Kashmir on 22 September 2016. He went to the shop where the footages were played by Jeetendra, the person who had fixed the system. They were stored in the hard drive of the camera device. He viewed

the footage where a few iTaukei boys were seen assaulting the driver, robbing him of his vehicle and driving it off, leaving the child behind on the road.

55. Upon his request, Jeetendra downloaded the footage from the device into a USB in his presence. Jeetendra took his USB and then made a CD copy which was given to him the next day. He identified PE1 as the CD he received from Jeetendra. He took it to the station and played it on a laptop about two times. The footages were also shown to the other police officers who were assisting in the investigation and to the suspects at their interviews. He could not recall the number of video footages it contained. To his recollection, they were obtained from 2 or 3 cameras. When the CD (PE1) was shown in Court, IP Bimlesh confirmed that it was the same video he had watched at the Hari Lal Investment on 22 September 2016 and later at the police station.
56. Under cross-examination by Aselai, the witness said that he could not recall if the complainants were still there at the scene when he watched the videos. When he went inside the shop, the IT man had already been called by the shop owner. Some other police officers were also present when it was being viewed. He received the CD from the IT guy at the shop.
57. Under cross-examination by Isaac James, Bimlesh admitted that he did not make a statement soon after watching the footage. He made the statement only on 23 April 2024. He admitted that the other police officers also joined him to watch the CCTV footage at the Hari Lal Investment. The original was saved in the decoder at the shop, but he did not take the decoder into police custody. It was not necessary as the IT guy had extracted the footage from the original saved in the decoder. He agreed that if the decoder was brought into Court, he could have proved that it was the original. Under cross-examination by Ms Naikawakawavesi, the witness said that, after viewing the CD footage with his fellow officers, it was exhibited with the exhibit writer and later handed it over to the DPP's Office.
58. Under cross-examination by Ms Vulimainadave, the witness admitted that the burning of the CD was not done in his presence. He admitted that he never recorded a statement as to the movement of the CD from the time it was given to him until it reached the Court. During the interview with Emosi, he did not come to assist Barbara in playing the video. The CD that was played in Court is the original that was given to the DPP's office.

The Case for Defence

DW1 - Asaeli Waqanivalu (The 1st Accused)

59. Aselai said that the day he was arrested, he was taken to the charge room and the police officers were asking about a case whose footage was viral on Facebook. They were telling him that he was one of the persons who was being shown in the footage. He denied knowing anything about that case. He couldn't even identify himself in that footage.
60. He was already injured after being punched by Saimoni Qase when Inoke Colati conducted his interview for two days. When the interview recommenced on the second day, the footage was shown to him again. The police officers kept forcing him to agree that it was him that was pictured in the footage. When he kept denying it, he heard one officer say for them to write in the record of the interview that he had watched the footage and that he had identified himself in that footage. The police officers were answering the questions themselves. He could not see what was being typed on the computer as it was facing the interviewing officer. After the interview was done, they printed it out and he was told to sign at all the places that he was supposed to sign. They did not let him read before signing. The same thing was repeated when he was being charged.
61. Under cross-examination, Aselai admitted that his personal information recorded in the interview was correct except that he is nicknamed 'Ninja'. Then he said his date of birth was not correct. He agreed that the questions and the answers up until question 21 were asked and answered during the interview and that they were correctly recorded. He denied that he was interviewed by DC Colati. Bimlesh was the one who interviewed him. He saw Sgt. Meena on the 2nd day. The answers were fabricated by the police officers. He admitted to signing when he was forced to sign on every page of the interview after it was printed out on the second day. He then said that, except for the first signature, the other signatures were different and fabricated by police officers. He was not taken to Hari Lal shop for scene reconstruction but was taken only to Saru where a police officer said that that was the place where the car was abandoned. He denied answering question 106 that he was part of the group that was shown in the footage.
62. He complained to his family that he was forced to sign. He admitted that he did not complain to the Magistrate or the Judge that he was forced to sign the interview. He agreed that he did

not raise any ground on the basis that he was forced to sign the interview. He explained that he did not make any formal complaint against the officers who fabricated his interview because he did not know anything about the law at that time.

63. Aselai admitted that he has an uncle by the name of Rusi. He confirmed that Rusiate Kalouniviti, who gave evidence over Skype, is the one whom he knew as Rusi, his distant family member. Rusiate once came and rested at his home when he was working at an air-con company. But he could not recall if Rusiate had come and met him on 20 September 2016 in Lautoka with Emosi, Maika and Isaac James. He said Rusiate was lying. He met Emosi, Maika and Isaac for the first time at the police station. He did not make the charge statement. It was fabricated. He admitted to signing the charge statement. The police officers, the doctor and Rusiate were all lying in Court.

DW2 - Isaac Mathew James (The 2nd Accused)

64. James was permitted to give evidence on affirmation as he refused to administer oath although he is a Christian. He came to know that the police were looking for him as a suspect in two cases. He indicated his willingness to surrender himself. The Police Commissioner gave an assurance that he will not be assaulted in police custody. He was arrested from home and taken to Totogo Police Station, a month after the other suspect were arrested. Despite the assurance, he was tortured at the Totogo and during the transit from Suva to Lautoka.
65. When he reached the Lautoka Police Station, Simone, the interviewing officer, asked him if he wanted someone to be present at the interview. He gave the number of his uncle and asked his uncle to be present. After that, he was threatened with assaults if he denied the allegation. He was then assaulted. He wasn't present at an interview to give his answers. Simone just prepared the interview on his own and forced him to sign it. He was assaulted and forced to sign the charge statement and the interview. His request for a medical examination was refused. During the first appearance in Court on the 28th, he informed of the police brutality and requested a medical examination. The medical reports could not be located because they were hidden by the police. He was forced to sign two different charge statements at the same time on 28 October 2016. He refused to sign both charge statements.

66. When he was brought to the Lautoka Police Station, CCTV footage was shown to him by Bimlesh and Simone pointing out that the one who kicked the Indian man was him. He denied the allegation. The police officers have fabricated the interview. On 22 September 2016, he was in Suva. He could not take up the defence of *alibi* because it was too late when he was informed.
67. Under cross-examination, James admitted that he did not complain about police brutality or fabrication when he was produced before the Magistrate. He didn't have visible injuries. His complaint was only about the officer's refusal to take him for a medical. He was medically examined at Punjas Health Centre and then referred to the Hospital for an X-ray. He made an application to the Court asking for the medical reports.
68. James agreed that he was interviewed by Simone on 27 October 2016 and that his personal information recorded in the interview was correct. He agreed that all the signatures were his, but they were obtained by force. He didn't contact his uncle Mark Black on the phone during the interview. He complained to his uncle when he visited him after the interview. He agreed that he did not make any incriminating statement in his charge, yet he was forced to sign it by the police officers. He agreed that he never complained to the Magistrate that his interview was fabricated. He refused to answer when it was put by the State Counsel that his answers from question 24 do correlate with the evidence given by Rusiate.

DW3 - Maika Tovogone (The 3rd Accused)

69. Maika said that he was in a relationship with Sosefina in 2013 and broke up with her in mid-2015 when he started a relationship with one Naomi Tuinakelo, with whom he carried on till 2016. He never conversed with Sosefina anytime in September 2016. He met Sosefina at school prom night, when Sosefina was schooling at St. Joseph Secondary School. Sosefina hated him when he started a relationship with Naomi and that was why the relationship with Sosefina broke-up.
70. The description of him given by Sosifina does not match with that of him including the height, the build and the skin colour. She did not describe his distinguishable features such as his tattoo and implanted gold tooth. The person Sosefina pointed out in the CCTV footage claiming to be her ex-boyfriend is not him. He knew that Sosefina had a relative by the name of Maciu who was a police officer. Maciu was the one who recorded Sosefina's statement and arrested him

on 28 September 2016. Sosefina was not on good terms with him and that's why she gave evidence against him.

71. Under cross-examination, Maika admitted that he and Sosefina used to meet twice a week and talked to each other on the mobile phone when he was dating her. He admitted being shown only one CCTV footage with the robbery by the police in 2016, but denied having seen the other video that was played in Court. He agreed that the person in the green T-shirt and the red cap was the same person that he had seen in the other video with the robbery that was shown to him at the police station in 2016. He denied that it was him. He knew Emosi and Joeli Nukunawa prior to 2016, but denied having known Aselai Waqanivalu and Isaac James. He denied attending Nabua Secondary School at any time.

DW4 - Emosi Baleidrokadroka (The 5th Accused)

72. In 2016, Emosi was residing at Vunaniu Settlement in Tacirua. On 5 October 2016, a police team led by Saimoni Qase came in two vehicles and arrested him whilst standing beside the road. They handcuffed him and brought him down to Nakasi Police Station where he was questioned about a Nakasi case while threatening him. He saw another suspect Joeli Nukunawa badly injured at the station.
73. He was then escorted down to Lautoka by the Nabua police team comprising Peceli and three other officers. The vehicle was stopped somewhere close to Volivoli beach where he was transferred to another vehicle that had come from Lautoka with Timoci. After handing him over to Timoci and his team, the Nabua team returned to Suva. Whilst in the Lautoka vehicle, the officers put a sack over his head and pretended that he would be taken to Malevu Hill Top. However, he was not taken to Malevu but taken to a gravel road where he was tortured by assaulting and rubbing chillies on his anus because he kept denying the allegation. They stopped the assault only when he admitted to the allegation.
74. He was then taken to Lautoka Police Station where he was interviewed on the next day. His hand was still swollen and his anus burning. A lady officer proceeded to interview despite his complaint about the burning sensation and pain. He provided his personal information only. They gave him a phone to call his wife. His sister and her husband answered the phone. He complained to them that he was being tortured to make him admit to the allegation. Being

overheard the conversation, Marika pulled the phone away from him and punched him in his mouth. He admitted the allegation because he was scared. He was taken for a scene reconstruction but Barbara was not present. During the scene reconstruction, he was not pointing out the spot where the vehicle was parked. It was Marika who was pointing to that place.

75. Barbara played the footage only once from the laptop. He did not identify himself in that footage. Barbara lied when she said that he pointed to that footage and identified himself in the footage. His request for a medical at the hospital was ignored. They printed out the record of the interview and told him to sign where he had to sign. Those answers were not given by him. He was only agreeing with them because he was scared. He did not see the interviewing officer signing the record. He forgot to make a complaint to the Magistrates as the courthouse was crowded with the media. He complained to the Judge who ordered him to be taken to the hospital where a medical report was done, and an x-ray taken. The reports could not be tendered at the *voir dire* hearing as they could not be located until May 2024.
76. He never met Rusiate on 20 September 2016. Rusiate lied in Court. He did not go to Lautoka with Maika and Isaac in the car driven by Rusiate to meet with Aselai. He was never raised in Tacirua with Rusiate. He denied that he was involved in the robbery that took place in Kashmir.
77. Under cross-examination, Emosi said that Barbara was not his interviewing officer. The lady who conducted his interview was an old lady. He admitted that his personal information recorded in the interview is correct, the signatures are authentic and that he signed on each page. He agreed that he did not make any formal complaint to any of the Magistrates or the Judge that he was forced to sign and that his interview was fabricated. He did not point out anything whilst the footage was being played. On 22 September 2016, he was in Tacirua at home, he did not go anywhere else. He did tell this to the interviewer and Ms Volau, his former counsel.

DW5 - Joeli Nukunawa (The 4th Accused)

78. Nukunawa said that the police officers arrested him in September 2016 and took him to Suva Cemetery. Having shown him the footage, they told him to identify himself in that footage. When he said he knew nothing about the footage, they hit him on his forehead. He was then taken to the hospital.

79. He came to know about Sgt. Sailasa only when he came to give evidence in Court. He had never seen or known Sailasa before. The description Sailasa gave of him in his evidence is wrong. He is not of dark complexion. He is not a short and slim person. In September 2016 he was 27 years old. He is originally from Tawake village, in Vanualevu. Sailasa was lying in his evidence. The person Sailasa pointed out in the footage wearing a white cap and a black jacket was not him. He does not know anything about the allegation or of this case.
80. Under cross-examination, Nukunawa denied that the person wearing a white cap and black jacket in the footage was him. He said that in 2016 he was not a skinny person. He lost weight when he was being kept in remand. He denied that his style of walking is different from that of other people. The police officers would have known everything about him from the information they had received from other police officers. The reason why Sailasa was lying is because he was hit in his head and injured when he was arrested. He agreed that Sailasa never assaulted him.
81. He knew Emosi and Maika in 2016 because they stayed together in Tacirua village. On 22 September 2016, he was home with his grandparents, changing her grandmother's diapers. He did not tell the police officers about his whereabouts on 22 September 2016 because they entered his house forcefully. He told his Counsel about his whereabouts, but his grandparents had passed by January 2017. When the police officers forcefully entered his house in Tacirua he was not there. His family members had told the police that he was in Lami and he was arrested in Lami.

Evaluation/Analysis

82. As far as I could see, there is no dispute that the complainants were robbed of their vehicle and belongings at around 7.30 p.m. on 22 September 2016 by a group of people in front of the Hari Lal Investment shop in Kashmir although some Accused persons disputed the ownership of the items stolen and the authenticity of the CCTV footage that allegedly captured the robbery. Each Accused denied any involvement in the robbery. The main dispute at the trial was over the identity of the Accused.
83. To prove the identity of each Accused, the Prosecution substantially relied on the video footage (PE1) allegedly obtained from the CCTV cameras installed at a nearby shop where the robbery

occurred. In addition to that, as against the 1st 2nd and 5th Accused, the Prosecution relied on the confessions allegedly made to the police at their respective caution interviews and the charge statement of the 1st Accused.

84. The Accused are jointly charged on each count. However, the evidence against each Accused must be considered separately. I bear that in mind.
85. The challenge to the caution interviews is twofold. The 1st, 2nd and 5th Accused challenged the admissibility of the caution interviews on the basis that they were obtained by force, using police brutality or violating their constitutional rights. After a lengthy *voir dire* hearing, the Court held the caution interviews of the 1st, 2nd and 5th Accused and the charge statement of the 1st Accused to be admissible. At trial proper, they took up the position that the record of caution interviews had been fabricated by the police officers.
86. One would understand these two challenges to be inconsistent with each other. When the admissibility is challenged, what the Accused are claiming is that, yes, we made the admissions/confession, but they should not be relied upon because they were obtained illegally. When they say the cautionary statements have been fabricated, they completely deny having made any admissions or confessions. The issue of fabrication is a matter entirely for trial proper. The Court is supposed to apply two different tests at two different stages of the trial process, but the evidence often overlaps.
87. The admissibility of evidence involves both the question of fact and the question of law and is a matter for the trial judge to decide. In jurisdictions where pure matters of fact are left to the fact finders (jury or assessors) to decide, the issue of admissibility is pre-decided by the trial judge in a trial-within-trial in the absence of the jury or the assessors because it involves a question of law. However, the judge sitting alone is not barred from running a *voir dire* hearing in the trial proper itself and decide on the admissibility as well as the truthfulness of the confessionary statements.
88. Even though, the assessors' system was recently done away with in Fiji, the judges seem to favour a separate pre-trial *voir dire* hearing because they know that some cases can be disposed of upon the conclusion of the *voir dire* hearing, if the Prosecution found the evidence inadequate to prosecute the case any further without the benefit of the confession. This is what happened

in this case when the Prosecution decided to drop the charges against three Accused by filing *nolle prosequi* at the conclusion of the *voir dire* hearing.

89. Having presented the evidence of 26 witnesses at the *voir dire* hearing over a period of approximately a month, the Counsel made me listen to almost the same evidence at the trial proper. It is worth mentioning that where a cautionary statement has been held admissible after a trial-within-trial by the judge who also runs the trial proper, it is an utter waste of time and resources to call all the witnesses in the trial proper and present the evidence that was already presented at the *voir dire* hearing and embark on lengthy cross-examination unless it could be shown that the Accused may not have told the truth in his /her confession for some reason that laid the basis for a *voir dire* hearing.
90. As a matter of policy, the confessionary statements voluntarily made to a police officer are admitted against the maker of that statement because the law deems that they are true, otherwise, he/she would not have made such statements against his/her own interest. Therefore, once the cautionary statements have been held admissible after a trial-within-trial, it is for the fact finders to decide at the trial proper the truthfulness of those statements. All in all, what the Court is looking at the trial stage is whether the Accused in fact made the confessionary statements and if they did, whether for whatever reason they did not tell the truth in those statements.
91. Let me now analyse the caution statements allegedly made by the 1st 2nd and 5th Accused. All of them took up the position that those statements were fabricated by the police officers.

Caution Statement and Charge Statement of the 1st Accused.

92. IP Colati said that he interviewed Aselai Waqanivalu on 27 and 28 September 2016. The record of interview was tendered marked as PE-4 and read it into evidence. IP Ranadi charged Aselai on 29 September 2016. She tendered the charge statement as part of her evidence (PE5).
93. After the *voir dire* hearing, the Court was satisfied that Aselai made those statements voluntarily. At trial, I revisited the evidence but found nothing substantial to change my mind as to the voluntariness. I also did not find anything credible to conclude that Aselai had not told the truth in those statements due to police brutality or for some other reason or that the

statements had been fabricated. I find Aselai's statements to be consistent with the other evidence presented at the trial.

94. Aselai said that the police officers were answering the questions themselves; that he could not see what was being typed on the computer and that once printed it out, he was forced to sign without allowing him to read it before signing. He said that, except for the first signature, the other signatures were fabricated (forged) by police officers. However, it was never suggested in cross-examination that the police officers had fabricated the answers or forged his signature. Under cross-examination, Aselai admitted to signing (when he was forced to sign) on every page of the interview after it was printed out on the second day. I do not find any marked difference between the first signature and the other signatures that appear on each page.
95. Aselai admitted that he did not complain either to the Magistrate or the Judge that he was forced to sign the interview. He agreed that he did not raise any ground on the basis that he was forced to sign the interview. The explanation for his failure to complain was that he did not know anything about the law. This explanation is not acceptable. He agreed that his personal information was recorded correctly; that the questions and the answers until question 21 were asked and answered and that they were correctly recorded. If not given by the 1st Accused, it would not have been possible for the interviewer to include this information in the record.
96. The mere fact that IP Colati was already in the crime office when Aselai was brought in there for the interview does not suggest that the interview was already pre-typed or fabricated. The evidence of IP Colati that Aselai read through the answers as they were being typed before being printed and signed was not discredited. The fact that Colati's name is not written in the record of interview as a party to the scene reconstruction does not necessarily suggest that he was not present during the reconstruction. It is not impossible to use one laptop to record the interview and show the footage at the same time.
97. I accept the evidence of the police officers and reject that of the 1st accused. I find that PE 4 and PE 5 contain the statements made by the 1st Accused and that he told the truth in those statements.

Caution Statement of the 2nd Accused

98. Isaac James was not present in Court to challenge the witnesses called by the Prosecution at the *voir dire* hearing where his caution interview was held admissible. Therefore, he was allowed to cross-examine the interviewing officer Simone Yabia (PW6) extensively. Simone said that he interviewed Isaac James on 27 October 2016, in the presence of Corporal Ranadi. Simone tendered the original record of interview of Isaac James marked as PE2 and read it into evidence.
99. James maintained that his caution statement was obtained using police brutality. He also said that the answers were fabricated by the police officers. DC Simone agreed that question 5 was not answered and not signed by James. This question concerned the Accused's right to read the contents of the interview and his right to make alternations, if any, before signing at the end of the interview. James has signed at the bottom of the page to acknowledge that he was given those rights. Furthermore, by affirmatively answering questions 85 and 88 and by signing, James has acknowledged that those rights were given. It is clear that James was allowed to speak to his uncle over the phone after question 7. If James was assaulted or forced to make admissions, the police officers would never have allowed to speak to his uncle.
100. Simone's explanation as to why the interview was not suspended until James's uncle was present the next day is acceptable. James admitted that his uncle visited him after the interview and that he complained to his uncle. If James had made any complaint to his uncle regarding police brutality, use of force or if he had any injuries, his uncle would have referred James's complaint to the Police Commissioner who had given an assurance that James would not be tortured. James admitted that he did not have any visible injuries; that he had not complained to the Magistrate on 28 October 2016 that he was assaulted by police officers or that he had injuries. His complaint confined itself to the alleged denial by police of his request for a medical examination.
101. James said that he was forced to sign the caution interview and the charge statement. However, there is no reason for the police officers to force James to sign the charge statement because he had not made any admission in his charge statement. Therefore, James's claim that he made the admissions because he was assaulted or threatened could not be believed.

102. Simone admitted that James was not cautioned after each recommencement of the interview and that, when answered in the negative to question No.77, James was not explained his right any further. However, the caution had been put to James at the beginning after question 8 where he has signed to acknowledge in questions 10 and 11 that he was cautioned. Therefore, no prejudice was caused to the 2nd Accused.
103. Simone said that James read through the interview at the conclusion although this was not written in the record. In question 5, James was explained his right to read through the interview and the right to make any changes. Affirmative answers given to questions 85 and 88 indicate that James was given his right to read through his interview. The evidence of the 2nd Accused is implausible thus should be rejected.
104. At trial, I found nothing to change my decision taken after the *voir dire* hearing that the confession was voluntary. There is no credible evidence to find that the police officers prepared the record of the interview in the absence of the 2st Accused or that his signature was obtained forcefully. I accept the evidence of the police officers. I am satisfied that the answers recorded at the caution interview were given by the 2nd Accused and that he told the truth in his caution statement.

Caution Interview of the 5th Accused.

105. Emosi repeated almost the same evidence that he gave at the *voir dire* hearing where he was disbelieved by this Court for the reasons recorded in the Ruling. In that Ruling, I found that there was no evidence that Emosi was assaulted or intimidated before or during the interview to obtain a confession. I held that Emosi made his caution statement voluntarily and that his constitutional rights were not violated.
106. At trial, Emosi's Counsel attempted to tender a so-called x-ray report to which the Prosecution vehemently objected. The Court upheld the objection for the reason that follows. Emosi admitted at the *voir dire* hearing that he did not complain to the two Magistrates before whom he was produced soon after the interview that he was assaulted by the police officers or that he had injuries. Even in the belted complaint made to the Judge, he did not blame of police brutality although he had requested a medical examination. He failed to tender a medical report or x-ray report to substantiate his claim that he had injuries. The letter dated 01/12/2022 issued by the

health authorities confirmed that Emosi was never admitted nor medically examined at the Lautoka Hospital after the interview.

107. Emosi at trial said that the medical report could not be located until May 2024 suggesting that it was made available after the *voir dire* hearing concluded. The application to tender the so-called x-ray report was made in that context. How would it be possible for him to be issued an x-ray report after the *voir dire* hearing when the health authorities in writing had confirmed that Emosi was not medically examined at the hospital? It was on that basis that the application of the Counsel was refused.
108. In her submission, the Counsel for 5th Accused contended that the right given at question 16 does not meet the requirements of Section 13(1) (a) (iii) of the Constitution because it read '*consequences of remaining silent*' when it should have been read '*consequences of not remaining silent*'. This contention should have been raised as a ground of *voir dire* but was never raised. The question is whether the 5th Accused was prejudiced by his right being not explained correctly. The consequence of not remaining silent meant that whatever he said at the interview will be put in evidence against him at the trial. That consequence has been properly explained after question 9 when he was cautioned. Therefore, no prejudice was caused to the 5th Accused. Having heard the evidence at the trial, I do not have any cogent reason to revisit the decision of the *voir dire* hearing and to find that Emosi gave a false confession at his interview because he feared police brutality.
109. Emosi was pretending that Sgt Barbara was not the lady officer who interviewed him. However, he never disputed this fact until he was cross-examined. He, in his EIC, in fact admitted that Barbara played the footage on the laptop once. The inconsistency between her evidence and that of Bimlesh as to Bimlesh's presence at the interview to help her run the video is not material to discredit Sgt. Barbara's evidence. The signature placed by Sgt. Barbara in Court on a blank paper (5DE1) confirmed (upon comparison) that she was the one who had signed the record of the interview.
110. Emosi admitted that his personal information recorded in the interview is accurate, the signatures are authentic and that he signed on each page. If not given by Emosi, his personal information could not have been reflected in the caution interview. Emosi agreed that he did

not make any formal complaint to any of the Magistrates or the Judge that he was forced to sign and that his interview was fabricated or pre-typed.

111. I accept the evidence of Sgt Barbara which is convincing and straightforward. I am satisfied that the answers recorded at the caution interview were given by the 5th Accused and that he told the truth in his answers. I find the caution statement of the 5th Accused to be truthful.

Evidence of Rusiate Kalouniviti (PW 10)

112. Rusiate gave evidence via Skype from England. Taking of his evidence via Skype was objected to by the Defence. The objection was overruled (the reason for the decision is given separately). Before taking Rusiate's evidence he took an oath on the Bible. He was explained the consequences of not telling the truth under oath even though he was giving evidence from overseas which he understood. He was subjected to cross-examination by the Counsel for 4th and 5th Accused although the unrepresented Accused waived their right to challenge his evidence.
113. Rusiate's evidence, if believed, is important in three ways. First, it placed the 2nd, 3rd, and 5th Accused in Lautoka where the offence was committed. Second, he put the 1st, 2nd, 3rd and 5th Accused persons together in a team. Third, he recognized the boys involved in the robbery to be the 1st, 2nd, 3rd and 5th Accused through the video footage that he viewed on social media the day after the robbery.
114. It was contended that Rusiate is an accomplice. If I were to accept that contention, Rusiate's evidence had to be corroborated by an independent source before it could be believed. Whether he is an accomplice or not should be decided on the evidence led at the trial. Rusiate denied any involvement in the robbery. However, he admitted to driving the 2nd, 3rd, and 5th Accused from Tacirua, Suva, to Lautoka where he met with the 1st Accused, his nephew. The question is whether the evidence is adequate to find that he participated in the robbery in some way.
115. Rusiate's evidence was that he was given money by the 3rd and 5th Accused to rent the car because he had a PSV license. When he accepted the (driving) job, he was not sure why they were heading to the West. The only purpose of his visit was to drop them off in Lautoka. It was only halfway through the journey that he realized that it was wrong for him to transport them

because of the conversation he overheard which involved a planning of a 'job'. By then, he had no choice but to proceed to the agreed destination because the car was registered under his name. It was night when they reached Lautoka, so he decided to have a sleepover at his nephew's place and came back to Suva the next morning (21 September 2016). He did not know what happened thereafter.

116. The Defence appeared to argue that by not turning the vehicle back when he heard the conversation, Rusiate had participated in the robbery. Rusiate's explanation was that by the time he heard the conversation, he had no choice because the car was registered under his name. He stayed in Lautoka because it was night and returned to Suva the next morning after sleeping the night at his nephew's place. His explanation is reasonable and plausible. There is no evidence that Rusiate knew that he was going to benefit from the planned 'job'. The money was given to him to rent the vehicle for their trip. There is no evidence that Rusiate was in Lautoka when the robbery took place. It took place on 22 September 2016 and by then he had returned to Suva on the 21 September 2016.
117. I am not convinced that Rusiate's agreement to facilitate transport for the Accused persons, two of whom were his friends, without any prior knowledge of their plan which he subsequently acquired make him an accomplice in the circumstances of this case merely because he had not refused to continue with the transport job. I concede that his failure to inform the police about their plan could make him responsible for some other offence but not for the robbery.
118. Rusiate admitted that he was arrested and interviewed for the robbery and released later without being charged. It was reasonable for the police to arrest and interview him if they received information that he was the one who transported the 2nd, 3rd and 5th Accused to the West and about his relationship with the 1st Accused. Therefore, it is reasonable to assume that Rusiate was not charged because the police were convinced after the investigation that he was not connected in some way to the robbery. For these reasons, I accept that Rusiate is not an accomplice.
119. Even if I were to accept that Rusiate was an accomplice, there is adequate corroboration from independent sources for me to find him to be a truthful witness. The 1st Accused in his evidence admitted that Rusiate who gave evidence over Skype is the one whom he knew as Rusi, his

distant family member. In his caution interview, the 1st Accused described Rusiate as his uncle. He admitted that Rusiate once came with his workmates and rested at his home when he was working at an air-con company although he could not recall the exact date. In the caution interview, in answer to question 37, the 1st Accused admitted that Rusiate was the one who was driving the fully packed car which he met with his friends from Suva. Although the CCTV footage (PE1) was not shown to Rusiate, we know from the evidence adduced in Court that what went viral on social media was the same footage that was uploaded by Jeetendra soon after the robbery.

120. Rusiate was straightforward and consistent in his testimony. Although he was not physically present in Court, his face was clearly focused and visible for me to observe his demeanour. I have no reason to doubt that he was influenced by anybody in his testimony although he acknowledged the presence of his wife in his room when a background noise was heard. I accept that Rusiate told the truth in his testimony.

Identification through the CCTV footage ('footage' is typically both the plural and singular form of the word and interchangeably used according to the context)

121. It appeared that in the process of cross-examination of the witnesses for Prosecution, the Defence was challenging the authenticity of the CCTV footage and the quality of their visuals. However, none of the Accused including those who were represented by legal counsel had disputed the admissibility of the CCTV footage at the pre-trial conference or any time before the trial, although they had been disclosed well in advance of the trial. In fairness to the Defence, the Court allowed cross-examination to challenge the authenticity of the footage so that the admissibility could also be determined in the trial itself.
122. The Prosecution maintained that the footage were captured by three CCTV (Closed Circuit Television) cameras installed at the Hari Lal Investment shop in front of which the robbery was committed and that they were contemporaneously recorded and retrieved in the decoder or Digital Video Recorder (DVR) owned by that shop. The important issues to be resolved were that whether the robbery, the subject matter of this case, was contemporaneously recorded in the said DVR and whether the footage that were used for identification purposes by the

Prosecution witnesses and the Court were the same footage that were retrieved by the said decoder.

123. To resolve these issues, the evidence of the complainants (PW1 and PW2), the IT specialist Jeetendra Kumar (PW4) and that of the investigating officer Bimlesh Naickar (PW11) should be carefully evaluated and analyzed.
124. Imtiaz Ali (PW1) and Shahina Hussain (PW2) were the eyewitnesses and two of the victims of the robbery. They explained what transpired at the crime scene at the time of the offence. However, none of them were able to identify or describe any of the culprits because of the trauma and the rapid speed at which the incident took place. Their evidence as to what they saw at the crime scene was never challenged by the Defence.
125. PW1 and PW2 corroborated each other on material particular as to what transpired after the robbery. They said that soon after the robbery, they were informed of the CCTV cameras installed at Hari Lal Investment shop where they watched the CCTV footage on the screen on the same night. Thereafter, they viewed it on Facebook when it went viral, then at the DPP's Office before coming to give evidence and finally in Court from the witness box. When the first video footage was being shown in Court, both PW1 and PW2 confirmed that it was the same video that they had watched at Hari Lal Investment shop. They also confirmed that it portrayed the incident that took place on 22 September 2016 in front of the Hari Lal shop and identified themselves, their children and their vehicle in the footage.
126. They were cross-examined on the basis that when they watched the video at the Hari Lal Investment shop, the police were not present, that they had not given a statement after watching the footage and that they had not identified themselves in the video in the presence of the police. PW2 said she could not recall if it was shown to her by the police officers when her statement was being recorded on 28 September 2016 or any time before she made her statement.
127. Her fading memory after eight years is quite understandable. The mere fact that they had not made a statement after watching the video or they made no reference to viewing it at the police station in their statements do not prevent me from believing PW1 and PW2 that they viewed it at the Hari Lal Investment shop. The police may not have recorded their statements after they viewed the footage at the police station as none of them were able to describe or identify any

of the culprits. They could have easily described the culprits after viewing if the footage was shown to them at the police station before or whilst the statements were being recorded. Therefore, the absence of any reference in their statements to the video footage being shown to them at the police station would rather bolster the integrity of the investigation process than affect the testimonial trustworthiness of PW1 and PW2 on this issue.

128. I trust that PW1 and PW2 told the truth in Court. I accept that the footage (PE1) portrayed the robbery, which is the subject matter of this case. I also accept that they viewed the footage on the screen at the Hari Lal Investment shop soon after the robbery and that the footage that was shown in Court (PE1) is the same footage that they had watched at the Hari Lal Investment shop.
129. The Defence embarked upon a lengthy cross-examination and attempted to convince this Court that the CCTV footage were tampered with before they reached the Court. However, the acceptance of the evidence of PW1 and PW2 who confirmed that PE1 is the same footage that they viewed at the Hari Lal Investment shop and that it portrayed what transpired at the crime scene on 22 September 2016 makes it futile for me to embark on a discussion on this subject any further.
130. However, a brief analysis of the evidence of the IT specialist, Jeetendra (PE4) and investigating officer Bimlesh, (PE11) will further strengthen the credibility of the evidence of PW1 and PW2 and my position that the CCTV footage were not tampered with until they reached Court.
131. Jeetendra, the IT specialist, who had installed the CCTV system had gone to the Hari Lal Investment shop within minutes after the robbery and, having been given credentials and access to the decoder, viewed the footage while they were still retrieved in the hard drive of the decoder. The police officers were also present at the shop when they were being viewed. He downloaded whatever the footage the police wanted him to copy onto a USB and taken the USB home where he burnt it onto a CD which was given to the police the next day.
132. It was contended that the process of downloading the original onto the USB and copying it from the USB onto the CD may have been manipulated. Jeetendra, having agreed that the original footage were stored in the hard drive of the decoder, disagreed that the process could be manipulated. He said that he could confirm the authenticity of the video footage because he

was the one who extracted it from the decoder. He confirmed that the footage he viewed in Court (PE1) was the same footage he had viewed, extracted, burnt onto the CD that was given to the police.

133. Jeetendra agreed that if the decoder was produced in Court, the Prosecution would have proved that it was the original. However, he confirmed that the CD was sourced from the original. CCTV footage is an electronic record and each copy generated by the mechanical process is considered to be an original. Therefore, the production of the decoder in Court is not required if the credibility of the copying process can be established through the witnesses who had handled it¹. If the Defence wanted to challenge the authenticity of the electronic evidence, there was a special pre-trial procedure for that. Once the footage were disclosed, they should have indicated their intention to challenge the admissibility and made a request at the pre-trial stage to inspect the recording device, in this instance the hard drive of the decoder, if they suspected that the footage were manipulated or tampered with. No such application was made.
134. As I said, the non-production of the decoder in Court is not fatal to establish the authenticity and credibility of the footage in this case, because four witnesses (PW1, PW2, PW4 and PW11) who testified at the trial confirmed that what they viewed in Court (PE1) is the same video footage that they had viewed on the screen at the Hari Lal Investment shop on 22 September 2016, when they were still retrieved in the hard drive of the decoder.
135. Although the copying from the USB to the CD took place at Jeetendra's house, in the absence of the police officers, investigating officer Bimlesh (PW11) confirmed that having received the CD from Jeetendra on 23 September 2016, he viewed the footage at the police station with his police team to be satisfied that if it contained the same footage that he had watched at the Hari Lal Investment shop. He gave the CD containing the footage to the interviewing officers for it to be shown to the Accused at their respective interviews and, after exhibiting it with the exhibit writer, to the DPP's office.

¹ The State Counsel confirmed that there is no legislation in Fiji governing admissibility of electronic records. Section 22A of the Evidence Act of India provides that if the genuineness of the electronic record is questioned, the oral evidence would be admissible as to the contents of the electronic record.

136. Jeetendra admitted that he did not put any identification mark on the CD before it was given to the police. In view of that, although Bimlesh said that it was the same CD, no one would be able to say that the CD tendered in Court is the same CD that Jeetendra burnt. However, what is important in the context of this case is not the CD itself but whether it contained the same footage that were uplifted from the hard drive at Hari Lal Investment shop.
137. PW1, PW2, PW4 and PW11 confirmed that the CD that was played in Court (PE1) contained the same footage that they had viewed at the Hari Lal Investment shop. I am satisfied that the CCTV footage that were played in Court were the ones Jeetendra retrieved from the hard drive at the Hari Lal Investment shop and that the same were not tampered with.
138. Jeetendra further said that with the permission of Hari Lal, he posted the footage on his company's Facebook page from where it could be viewed at any time. Because of the objection raised by the Defence, he was not allowed to display his Facebook page in Court. However, at least two witnesses (PW1, PW22), confirmed that they viewed the same footage on Facebook as well as at the Hari Lal Investment Shop. PW3 and PW10 had viewed it soon after the robbery. The fact that it had gone viral on social media soon after the robbery further confirms that the footage was not tampered with. Sosefina (PW3) confirmed that what she viewed on social media was the same footage that she viewed at the police station.
139. The evidence of Jeetendra and Bimlesh corroborated each other on material particular as to the chain of custody of the footage. I have no reason to reject their evidence which I accept as credible and reliable.
140. Let me now turn to the issue concerning the quality of the visual identification made through the CCTV footage. Two footage[s] were played in Court to establish the identity of the Accused. I had the opportunity to view the video footage several times during the hearing. I must concede that the quality of the video footage is such that it was not that clear enough to identify the faces of some of the men featured in it unless the viewer was acquainted with them. Therefore, the correctness of the identification should be scrutinized cautiously and holistically considering the evidence of the identifying witnesses, the caution statements and the comparison and observations that the Court on its own could make at the trial. In this exercise,

I warned myself of the dangers involved in identification through a video that even an honest witness can be mistaken.

141. I had to rule on the same issue of identification made via CCTV footage in State v Yalibula² when one of the Accused objected to the CCTV footage allegedly extracted from the crime scene being shown to the assessors on two grounds. Overruling the 1st objection, I ruled as follows:

[5] The 5th accused is not challenging the authenticity of the footage. Only challenge is to the quality of the film. There is no basis for the 1st objection raised by the 5th accused. As a matter of course, Courts have allowed the prosecution to establish identity of persons involved in crimes through CCTV video recordings obtained from cameras installed at the crime scene without it first being tested for quality. Whether it is clear enough to identify the perpetrators to be seen in it is a matter for the assessors to decide. In the summing up, assessors can be properly warned about the dangers involved in identification through a video recording.

[6] In ATTORNEY-GENERAL'S REFERENCE NO2 OF 2002 <http://www.bailii.org/ew/cases/EWCA/Crim/2002/2373.html> Cite as: [2003] Crim LR 192, [2003] 1 Cr App Rep 21, [2003] 1 Cr App R 21, [2002] EWCA Crim 2373 Lord Justices, considering a reference made by the Attorney General under Section 36 of the Criminal Justice Act 1972 did not see any objection to a CCTV footage of which 'quality was not of the best' being shown to the jury where a witness knows the defendant sufficiently well to recognise him as the offender depicted in the photographic image.

Identification of the 1st Accused - Aselai Waqanivalu

142. DC Colati said that the footage (PE1) was shown to the 1st Accused at the caution interview on the monitor of the computer and confirmed that what was played in Court was the same footage that was shown to the 1st Accused during the caution interview. He further said that after viewing the footage, the 1st Accused confirmed that he was part of the group that robbed the vehicle in front of the Hari Lal Investment shop and identified himself in that footage. IP Colati identified the 1st Accused in Court as the person he interviewed.
143. The answers given by the 1st Accused to questions 105 and 106 in the caution interview (PE4) are consistent with the evidence of DC Colati. Although as per the record, the 1st Accused had

² [2016] FJHC 450; HAC47.2014 (25 May 2016)

not pointed himself out in the video, he has described the role he played during the robbery in answer to Q 67 as follows:

Q67: Then what happened?

Ans: I then went inside the shop and stood behind the driver of that vehicle to block him from seeing what we were going to do. I came out to the door for a final check then I saw the man's wife was sitting in the front passenger seat by that time Mana had sat inside the vehicle to drive, so we all got in and I opened the backdoor behind the driver to get in but the owner of the vehicle came out and tried to stop Mana from driving the vehicle so I got out again and pushed the owner of the vehicle away then I went to the other side and tried to get in but their baby was lying in the back seat and I had to carry the baby again and give the baby to their mother.

144. The physical characteristics, the face, the body language of the person who was engaged in the said activities, wearing an orange cap, as seen in the video footage, resemble those of the 1st Accused who is present in Court.
145. Evidence of Rusiate (PW10) is also relevant in this regard. In answer to question 37, the 1st Accused confirms that Rusiate, who is his uncle from Suva, was the driver of the fully packed car which he met in Lautoka with his friends who had come from Suva on 21 September 2016. In his evidence, Rusiate said that in the video that was on social media, he recognized Aselai as the person who grabbed the car owner outside. However, in the identification conducted in Court via Skype, Rusiate was not able to recognize the 1st Accused. Rusiate said he could clearly recognize Aselai Waqanaivalu when he met him (Aselai) in September 2016. It is quite understandable given that Rusiate had last met the 1st Accused as far back as September 2016, he would not have been able to recognize the 1st Accused on the screen of a laptop after a long time. Added to that difficulty would have been the tactic the 1st Accused used to mislead Rusiate by wearing a pair of spectacles borrowed from Ms Vulimainadave before coming in front of the camera of the laptop.
146. During the scene reconstruction, answering question 102 and 103, Aselai admitted pointing out the places where the stolen car was parked before it was robbed and where it was later abandoned. The inference that the Court could draw from Aselai's knowledge of those two places is that he acquired this knowledge because he participated in the robbery.

147. In answers to questions 63 to 73, the 1st Accused admits how he participated in the robbery with others. Considering all the evidence which I discussed above, I am sure the 1st Accused participated in the robbery by playing the role he admitted in his caution interview.

Identification of the 2nd Accused- Isaac James

148. DC Simione who interviewed the 2nd Accused said that when the CCTV footage was played at the caution interview, the 2nd Accused answering questions 80 onwards identified himself to be the person who kicked the Indian man, who lifted the baby and put it on the footpath and then ran after the car. DC Simione identified the 2nd Accused as the person whom he interviewed on 27 October 2016 and confirmed that PE1 is the footage that was shown to James at the interview. The physical characteristics of the person who is seen engaged in those activities in the video footage resemble those of the 2nd Accused.

149. Although Rusiate (PW10) was not able to identify the 2nd Accused in the identification conducted in Court via Skype, he mentioned the name 'Isaac' in his evidence as one of the persons whom he travelled together from Suva to Lautoka and added that he identified all the boys in the video footage he viewed later on social media. Having agreed with the 1st Accused's contention that Isaac is a common name in Fiji, I am sure the 2nd Accused participated in the robbery by playing the role he admitted in his caution interview.

Identification of the 3rd Accused -Maika Tovagone

150. To establish the identity of the 3rd Accused, the Prosecution relied on the CCTV footage (PE1), and the evidence of his ex-girlfriend Sosefina (PW3) and Rusiate (PW10). Sosefina said she gave a statement to police in 2016 when she was taken from home because she had identified the 3rd Accused through a video featuring the carjacking incident in Lautoka. On her mobile phone, Soefina recognized her boyfriend (by then) Maika when she viewed the video on FM 96 Facebook page where it was on viral. Maika was the one who told her to watch it. She watched the same video at the police station and gave a statement to police.

151. Maika in his evidence admitted that Sosefina was his girlfriend from 2013 to mid-2015 until he started a relationship with another girl. He denied having had any relationship with Soesfina or

having conversed with her at any time in September 2016. He appeared to say that Sosefina lied in Court because she hated him for breaking off the relationship back in 2015.

152. The 1st Accused appeared to be challenging both the credibility as well as the reliability of Sosefina's evidence. Let me first see if Sosefina was a credible and honest witness. She is at present a school teacher by profession, married and expecting a child. It is hard to believe that she fabricated her evidence to send her ex-boyfriend to prison merely because she was jilted way back in 2015, nearly a decade ago.
153. According to Sosefina, she had given her statement to police when she was still in relationship with Maika. Then the question is whether she would ever come forward to give a statement adverse to her lover back in 2016? The circumstances under which she had given her statement justify her conduct. She had not gone to police on her own, but has given the statement when she was taken from home. Her two brothers who went to school with Maika had recognized him (Maika) on the video and passed the information to her cousin, who was a CID officer. By then, the police could not locate Maika, so they approached Sosefina because she was his girlfriend.
154. In her statement dated 28 September 2016, Sosefina has not mentioned that she watched the CCTV footage at the CID office. However, that omission is not material to discredit her evidence. I watched Sosefina give evidence in Court. She was straightforward and her demeanour was consistent with her honesty. I accept Sosefina told the truth in Court.

Was the identification Sosefina made through the video unreliable or mistaken?

155. It was a recognition rather than an identification. Sosefina had met Maika at Nabua Secondary School where both were studying in Year 13. They used to meet each other every day in school even before the relationship started. The relationship lasted for 3 months. Maika also admitted that he and Sosefina used to meet with each other twice a week when they were dating. Although Maika said he never went to Nabua Secondary School, this position was not put to Sosefina by his Counsel in her cross-examination. I am satisfied that Sosefina was acquainted with the 3rd Accused in so far her ability to recognise him through the video that she had viewed on social media as well as at the police station.

156. The description she gave of Maika is consistent with the characteristics of the person she pointed out in the video (PE1) and that of the 3rd Accused in Court. I am unable to agree with the 3rd Accused when he said that the description of him given by Sosefina does not match with that of him including the height, the built and the skin colour. It is true that she did not describe the so-called distinguishable features such as his tattoo and implanted gold tooth. It is understandable that she did not have to describe Maika's distinguishable features such as his tattoo and implanted gold tooth which are not conspicuous because she was explaining to Court how she managed to identify her ex-boyfriend through the video footage. Further, in cross-examination, she was not asked to describe his distinguishable characteristics such as his tattoo and the gold tooth.
157. The identification by recognition of her boyfriend through the video was further strengthened when she saw the clothes he was wearing. She said Maika used to wear the same cap and the T-shirt frequently during the period the recognition was made. It is noteworthy that the recognition was first made by Sosefina not by accident, but when she was asked to view the video on her phone by Maika himself.
158. Sosefina had seen only the first CCTV footage (the one featuring the robbery) in 2016 and denied having seen the second video that was played in Court. She agreed however that the person in the green T-shirt and the white cap in each footage was the same and that that person was none other than her ex-boyfriend whom she identified in the video she viewed at the police station in 2016.
159. The face of the person clad in the green T-shirt and the white cap is clear compared to the faces of the other people featured in the footage and it resembles that of the 3rd Accused. The face, the physical characteristics, such as the built, colour of the skin and the height of the person featured in both footage that were played in Court are consistent with those of the 3rd Accused.
160. The facts of High Court case **State v Maikeli Scott Manuwave and others**³, cited by Ms Naikawakawavesi in her submission are drastically different from Maika's case thus irrelevant.

³ HAC 203 of 2021S (15 September 2023)

In that case the accused were masked with Covid masks, and the identifying police officer was not acquainted with the accused prior to the identification via CCTV footage was made.

161. Having viewed both footage, I am sure that Sosefina correctly identified the 3rd Accused through the video footage she viewed.
162. Evidence of Rusiate (PW10) whose evidence I accept is also important in this regard. Rusiate drove Maika, whom he knew from his childhood from Tacirua to Lautoka and overheard the conversation they had about the planned 'job' in the West. Upon his return to Suva, he viewed the video footage that was viral on social media to identify the boys whom he drove to the West as the culprits who had participated in the carjacking in the West. In the identification conducted in Court via Skype, Rusiate was not able to recognize the 3rd Accused. However, Rusiate said he could recognize all the boys including Maika when he viewed the footage on social media in September 2016. It is quite understandable given that Rusiate had last met the 3rd Accused as far back as September 2016, he would not have been able to recognize the 3rd Accused on laptop after a long time. I am satisfied that the identity of the 3rd Accused was established.

Identification of the 4th Accused -Joeli Nukunawa

163. The Prosecution relied on the CCTV footage (PE1) and the evidence of Sgt. Sailasa (PW5) to establish the identity of the 4th Accused. The Counsel for the 4th Accused challenged both credibility and reliability of Sgt. Sailasa's identification evidence. Sgt. Sailasa said he viewed the video footage (PE1) at the police station and recognized Nukunawa as one of the culprits and made a statement on 27 September 2016. According to him, he had known Nukunawa for more than three years back in 2016 and had even spoken to him. He had met Nukunawa many times when he used to come and hang around in Lautoka and at the police station. He had last met Nukunawa back in 2015. He said he recognized Nukunawa from his face, height, build and his physical appearance.
164. Nukunawa denied knowing or having seen Sgt. Sailasa until he saw him (Sailasa) for the first time in Court. However, his Counsel in her cross-examination did not challenge Sailasa's evidence that he was known to her client before 2016. Sailasa is a police officer. He was not allowed to explain how he came to know Nukunawa before 2016 as his explanation would have been prejudicial to Nukunawa. The police detectives are trained to observe carefully the people

with whom they come into contact in their day-to-day duties in and out of the police station. It is possible that Nukunawa may not have known Sailasa, but it is possible that Sgt. Sailasa knew Nukunawa in the course of his duties. I accept that Sailasa knew Nukunawa before 2016.

165. Nukunawa said that he was wrongly implicated in this case because he received injuries from police assaults when he was arrested in Suva. However, he admitted that Sgt. Sailasa took no part in arresting or assaulting. There is no reason for Sgt. Sailasa to falsely implicate the 4th Accused. I accept Sailasa to be a credible witness.
166. Sailasa described the ethnicity, skin colour, built and the rough age of Nukunawa. The description he gave of Nukunawa matches with that of the 4th Accused. He said Nukunawa's face was clearly shown in the footage and he viewed the footage a few times before confirming the identification. When the video footage (PE1) was shown in Court, the witness confirmed that it was the same footage he viewed at the Lautoka Police Station on 27 September 2016. In that video, he pointed out the man wearing a white cap and a black jacket as the person he identified as Joeli Nukunawa back in 2016. He identified the 4th Accused in Court as Joeli Nukunawa whom he knew and recognized through the video.
167. The Counsel for the 4th Accused did not object to the admissibility of Sgt. Sailasa's evidence nor the CCTV footage. Her contention was that the visual face image in PE1 of the person whom Sgt. Sailasa said to be Nukunawa was not clear enough to identify the 4th Accused so that Sailasa's recognition may have been mistaken and dangerous to be acted upon.
168. The Ruling in Yalibula (supra) where this Court referred to the judgment of the Court of Appeal of England and Wales in Attorney General's Reference No 2 of 2002 (supra) is very relevant to the present case.
169. In that case defendant (G) was tried on indictment on one count of riot, contrary to section 1(1) of the Public Order Act 1986 [England]. A video film was taken. The quality was not of the best. It was the Crown's case that G was one of those to be seen in the film. The Crown sought to prove his identity through the evidence of two police constables.
170. The first was D, who was a member of the police video viewing team set up after the riot. He spent a considerable number of hours viewing the film and, in consequence, became familiar

with the appearance of persons to be seen in it. In consequence, he was put forward as a witness with specialist knowledge. He did not know G. By chance, after he had viewed the film many times, D saw G and, because of his study of the films, he recognised him as being one of those depicted. His identification was proffered in evidence, in accordance with *Clare & Peach* [1995] 2 Cr App R 333. No objection was taken to the admissibility of that evidence and the witness was cross-examined on the basis that he was mistaken.

171. The second police officer was Police Constable G. He was a uniformed community constable, who had, over a period of time, had a number of dealings with G, whom he had known for about 5 years reasonably well. Because of his local knowledge, Police Constable G was asked to look at the film. When he saw it, under controlled conditions, he identified from his own knowledge of him, G as being one of the rioters. Just before Police Constable G was called to give evidence, the trial judge invited submissions as to the admissibility of his evidence. Having heard submissions, he ruled that the identification, through recognition, was, in principle, inadmissible.
172. He said that where a witness: *"has no specific skills, has no abilities and has no experience other than that which the jury themselves have,"* caution should be exercised in allowing evidence from such a witness to go before the jury. The judge described such evidence as being of *"very light weight"* and questioned the extent to which it might help the jury. He ruled that because in the case before him the original evidence upon which the recognition had been made was available to the jury, that is to say the video film taken at the scene, Police Constable G's evidence should not be admitted. He added that the jury was in a better position than Police Constable G if the man on the film was the defendant because, unlike Police Constable G, the jury could view the film and at the same time compare the images on the screen with the defendant in the dock. The judge went on to rule that the prosecution could call Police Constable G to describe any peculiarities about the defendant, which the jury could not glean from looking at or listening to him, such as his gait and any changes in his appearance since the officer had last seen him.
173. Accordingly, Police Constable G's identification, through recognition, not having been admitted, at the close of the prosecution case, the judge directed that the jury return a verdict of not guilty because of the insufficiency of the evidence on the question of identity. The Attorney

General referred the Judgment to the Court of Appeal of England and Wales (Criminal Division) under Section 36 of the Criminal Justice Act 1972 seeking the answer to three questions in relation to evidence where there are photographic images from the scene of the crime.

174. Answering the questions posed by the Attorney General, Lord Justices held:

In our judgment, on the authorities, there are, as it seems to us (at least four circumstances in which, subject to the judicial discretion to exclude, evidence is admissible to show and, subject to appropriate directions in the summing-up) a jury can be invited to conclude, that the defendant committed the offence on the basis of a photographic image from the scene of the crime:

(i) where the photographic image is sufficiently clear, the jury can compare it with the defendant sitting in the dock (Dodson & Williams);

(ii) where a witness knows the defendant sufficiently well to recognise him as the offender depicted in the photographic image, he can give evidence of this (Fowden & White [1982] Crim LR 588, Kajalave v Noble 75 Cr App R 149, Grimer [1982] Crim LR 674, Caldwell & Dixon and Blenkinsop 99 Cr App R(S) 73); and this may be so even if the photographic image is no longer available for the jury (Taylor v The Chief Constable of Chester);

(iii) where a witness who does not know the defendant spends substantial time viewing and analysing photographic images from the scene, thereby acquiring special knowledge which the jury does not have, he can give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the photograph are available to the jury (Clare & Peach);

(iv) a suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images from the scene, (whether expertly enhanced or not and a reasonably contemporary photograph of the defendant, provided the images and the photograph are available for the jury (Stockwell 97 Cr App R 260, Clarke [1995] 2 Cr App R 425 and Hookway.

175. Although the Accused in this case were not tried by a judge sitting with a jury or assessors, the same principles should apply. It was contended that the image of the face of the person alleged to be that of Nukunawa was of so poor quality that Sgt. Sailasa would not have been able to tell correctly whose face was that. Sgt. Sailasa denied that. Although the top part of the face was covered with a cap, I accept that a person acquainted with Nukunawa will not find it difficult to recognize him especially given his typical manner of walking. The person Sgt. Sailasa pointed out in the video has all the characteristics of Nukunawa.

176. Nukunawa has been coming to this Court for a long time for his remand extensions and for bail matters. I have had the benefit of observing him for a long time. I have had the benefit of viewing the video footage and at the same time compare the image on the screen with the 4th Accused in Court. Given his typical manner of walking and other physical characteristics such as his height, built, skin colour which I observed in the video, I am sure the person pointed out by Sgt. Sailasa is the 4th Accused.

Identification of the 5th Accused - Emosi Baleidrokadroka

177. Apart from the confession made to police, the Prosecution relied on the CCTV footage (PE1) and the evidence of Rusiate (PW10) to prove the identity of the 5th Accused.

178. A/Sgt. Barbara (PW7) said that the video footage was shown to Emosi as part of the interview for him to identify where he was in that footage as he had already admitted to the offence. In his caution interview (PE3), Emosi had confessed to the offence in his answers to questions from 57 to 77. Sgt. Barbara said that Emosi positively identified in that footage the person wearing a red bucket hat and a round-neck T-shirt which printed 'LOVE LUST' in front to be himself. At question 87, after viewing the video footage, Emosi acknowledged that it was him that was in the video.

179. Sgt. Barbara confirmed that the video footage that was played in Court (PE1) is the same footage that was shown to Emosi during the interview. She pointed out to the Court the person Emosi identified to be himself and confirmed that the 5th Accused is the person she interviewed on 7 October 2016.

180. Emosi admitted that Barbara played the footage once from the laptop. He also admitted that he was taken for a scene reconstruction to the place where the vehicle was parked but denied having pointed out the spot where it was parked and that Barbara was part of the scene reconstruction. He denied identifying himself in that footage and maintained that Sgt. Barbara lied when she said that he pointed to that footage and identified himself in the footage.

181. I have no reason to reject the evidence of Sgt. Barbara whose evidence is consistent with the caution interview of the 5th Accused. I have had the benefit of viewing the video footage and at the same time compare the image on the screen with the 5th Accused in Court. The physical

characteristics of the person who was engaged in the activities reflected in Q62 and Q63, wearing a red bucket hat and a round-neck T-shirt as seen in the video footage, resemble those of the 5th Accused who is present in Court. I accept that the 5th Accused told the truth in his answers and identified himself in the video at the caution interview.

182. Barbara in her statement recorded on 08 October 2016 has mentioned that Emosi left out ‘with the officers’ for scene reconstruction. She confirmed in her evidence that she was one of the officers who left out with Emosi. I accept her evidence that she took part in the scene reconstruction which she said was part of the interview. During the scene reconstruction, answering question 82 and 83, Emosi admitted pointing out the places where the stolen car was parked before it was robbed and where it was later abandoned. The inference that the Court could draw from Emosi’s knowledge of those two places is that he acquired this knowledge because he participated in the robbery.
183. Rusiate’s (PW10) evidence is also important in this regard. During the identification conducted in Court, out of the ten people who came in front of the camera of the laptop, Rusiate recognized Emosi and confirmed that he was one of the boys whom he drove from Tacirua to Lautoka. Rusiate had also recognized Emosi in the video footage that went viral on social media soon after the robbery. The identification conducted in Court is safer than a typical dock identification because the Accused was not a sitting duck in the dock. Emosi was picked out from the ten people who came before the camera. Emosi said that he was never raised in Tacirua with Rusiate. However, his Counsel did not challenge Rusiate’s evidence that Emosi was raised in Tacirua with Rusiate. I am sure that Rusiate knew Emosi prior to 2016 and that the 5th Accused participated in the robbery which is the subject matter of this case.
184. Although in their evidence only the 4th and 5th Accused said that they were elsewhere at the time of the offence, none of the Accused put forward the defence of *alibi* before trial, which is very popular among defendants in cases where the Prosecution case is weak. However, that would not make the Prosecution case any stronger because the legal burden is on the Prosecution to prove the identity and the case against each accused.
185. The Counsel for the 3rd Accused contended that the 3rd element of the offence of Aggravated Robbery was not made out because the Prosecution failed to prove that her client had an

offensive weapon with him at the time of the offence. It seems that the Counsel has not read Section 311 (1) of the Crimes Act carefully. When the offence of robbery is committed in the company with one or more other persons the offence of Aggravated Robbery is constituted even when they did not have an offensive weapon with them.

186. I am satisfied that the Prosecution proved the charges against each Accused beyond reasonable doubt. I find all the Accused persons guilty on each count of Aggravated Robbery as charged in the information. I convict all the five Accused accordingly.



Aruna Aluthge
Judge

24 May 2024

At Lautoka

Solicitors:

Office of the Director of Public Prosecutions for State

Legal Aid Commission for 3rd, 4th and 5th Accused

1st and 2nd Accused are in Person