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

CRIMINAL APPEAL NO: AAU0135/2015
[Magistrates' Court Case No.1489/2009]

BETWEEN	:	**OSEA VAKACEREIVALU**
		Appellant
AND	:	**THE STATE**
		Respondent

Coram	:	Hon. Mr. Justice Daniel Goundar
Counsel	:	Mr M Yunus for the Appellant Ms P Madanavosa for the Respondent
Date of Hearing	:	1 February 2017
Date of Ruling	:	7 February 2017

RULING

[1] This is an appeal from the extended jurisdiction of the Magistrates' Court. Following a trial, the appellant was convicted of offences of robbery with violence and resisting arrest. He was sentenced to a total term of 6 years' imprisonment with a non-parole period of 4 years. This is a timely application for leave to appeal against conviction only pursuant to section 21(1) of the Court of Appeal Act, Cap. 12. The appellant may appeal on any question of law alone as of right. To appeal on a ground that involves a mixed question of law and fact, or fact alone, leave is required. Section 35(1) of the Court of Appeal Act, Cap. 12 gives a single judge power to grant leave. The test is whether the appeal is arguable (*Naisua v State* unreported Cr App No CAV0010 of 2013; 20 November 2013).

[2] The appellant was jointly tried with two others. The victims were two women. One of them was operating a shop in Vatuwaqa, Suva. The other victim was a tenant in the

same premises. The evidence of the shop owner was that two men forced their way into her shop by breaking the burglar bars and threatened her by placing a pinch bar to her neck. The intruders stole liquor and cigarettes from the shop and the victim's personal jewellery and mobile phones. They also dragged the victim by her hair to a vacant room and gagged her. Apparently, the second victim witnessed the assault on the first victim. The intruders threatened the second victim and stole her personal jewellery. The intruders left the premises after stealing.

[3] At trial, the two victims gave evidence. They did not identify the appellant as one of the intruders. The only evidence of the appellant's involvement in the alleged robbery was his confession made under caution. The admissibility of the confession was challenged at the trial on the ground that the police had extracted the confession using assault, threats and inhumane tactics. A voir dire was held to determine the admissibility of the confession. The prosecution led evidence from the police officers who denied assaulting, threatening or treating the appellant inhumanely. The prosecution also led medical evidence. Following arrest, the appellant was taken by police for a medical examination. The medical report was tendered in the voir dire. The examining doctor also gave evidence. Counsel for the appellant has reproduced the doctor's evidence in his written submissions:

> In page 3 of the history given by the patient is that he was allegedly assaulted by cops, punched on the chest wall and face. My specific findings are sustained Muscular Skeletal injuries as a result of the assault, and the fracture to the left anterior 10th rib. Physical evidence hardly ever lies. But still the injuries are there.

[4] The appellant's sole ground of appeal reads:

> The learned Magistrate erred in law and fact when he did not properly consider the evidence and more particularly the professional opinion including the summary and conclusion of Dr Jacinta Taylor concerning the visible injuries found with (sic) the Appellant during the time of the medical examination.

[5] Counsel for the appellant submits that the learned magistrate had made a wrong assessment of the evidence before admitting the confession in evidence. Counsel cites the case of *Nacagi v State* unreported Cr App No AAU0049/2010; 3 December 2015, to support his argument. In that case the Full Court said at [14]-[15]:

> The question at this stage is what approach should be taken by this Court to an appeal that challenges confessions made by the Appellants in caution statements that, after a voir dire hearing, were found by the trial Judge to have been made voluntarily, that is, without violence or the threat of violence. In *Rahiman –v- The State* (CAV 2 of 2011; 24 October 2012) the Supreme Court referred to the observations of Lord Salmon in *Director of Public Prosecution –v- Ping Lin* [1975] 3 WLR 419 at page 445:
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> *"The Court of Appeal should not disturb the judge's findings merely because of difficulties in reconciling them with different findings of fact on apparently similar evidence in other reported cases, but only if it is completely satisfied that the judge made a wrong assessment of the evidence before him or failed to apply the correct principle – always remembering that usually the trial judge has better opportunities of assessing the evidence than those enjoyed by an appellate tribunal."*
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> In my judgment the absence of any analysis of the independent medical evidence and the absence of any indication as to how much, if any, weight ought to be attached to that evidence represent a wrong assessment of the evidence. The task of assessing the evidence went beyond merely assessing the credibility of the Respondent's witnesses and the evidence given by the three Appellants challenging the admission into evidence of their caution statements. Furthermore I am satisfied that had the learned Judge assessed the independent medical evidence he would have reached the conclusion that the Respondent had failed to establish beyond reasonable doubt that the three caution statements had been made voluntarily. (per Calanchini P).

[6] Counsel for the State concedes that the learned magistrate had not carried out any analysis of the independent medical evidence in his voir dire ruling. The only assessment of the medical evidence by the learned magistrate is as follows:

> The 3rd accused (the appellant) raised for the first time in Court that he (sic) 'blood all over clothes and pants'. He had worn the same clothing to hospital. The Doctor did not note blood over his clothes and pants.

[7] The question of admissibility of evidence is a question of law alone. In the present case, the admissibility is being challenged on the basis of wrong assessment of the evidence. In my judgment, the ground of appeal is arguable. The appellant also filed an application for bail pending appeal in person. At the hearing, counsel for the appellant did not pursue the application for bail.

Result

[8] Leave granted.

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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:
Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the State