IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 0053 OF 2015
(High Court HAC 76 of 2008)

BETWEEN : **JOJI KACIVAKAWALU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Appellant in person**
Mr L Burney for the Respondent

Date of Hearing : **2 June 2017**

Date of Ruling : **22 June 2017**

RULING

[1] There are two applications filed by the Appellant presently before the Court. The first is a timely application for leave to appeal against conviction and sentence. The second

application, filed on 20 October 2016, is for bail pending appeal. That application was supported by an affidavit sworn on 26 October 2016 by Joji Kacivakawalu. The second application is to be heard on a date to be fixed following the filing of written submissions by the parties.

[2] The Appellant and one other were both charged with two counts of robbery with violence contrary to section 293(1)(b) of the Penal Code Cap 17 and one count of unlawful use of a motor vehicle contrary to section 292 of the Code.

[3] At the trial both accused challenged the admissibility of their respective caution interviews on the basis that the admissions contained therein had not been made voluntarily. The admissions in the caution interviews constituted the evidence against the two accused. In a voir dire Ruling delivered on 18 December 2014 the learned High Court Judge ruled that the caution interview made by the Appellant was admissible. He rule inadmissible the caution interview made by the co-accused in respect of whom a "*nolle prosequi*" was subsequently filed by the State.

[4] On 17 April 2015 the Appellant was convicted following a trial before a judge sitting with assessors. He was sentenced to 11 years imprisonment with a non-parole term of 9 years.

[5] It is against that conviction and sentence that the Appellant applied for leave to appeal by way of notice dated 4 May 2015 and filed on 6 May 2015. However, by way of a notice to amend grounds of appeal filed on 12 January 2016 the Appellant indicated that he was now seeking leave to appeal conviction only on amended grounds that relate to the voir dire Ruling and the directions given to the assessors concerning the admissions in the caution interview.

[6] The substantive issue raised by the grounds of appeal relates to the voir dire Ruling concerning the assessment of the independent medical evidence by the learned Judge. At the voir dire the prosecution called five Police witnesses. The first four police witnesses

gave evidence to the effect that the arrest and subsequent caution interview of the Appellant were both conducted lawfully. They all stated that at no stage did the Appellant make any complaint.

[7] The Appellant elected to give evidence at the voir dire. He did not call any other witnesses. However he did produce his medical report in evidence which he claimed was not the full report. The report revealed that the Appellant had complained about pain in his back. The doctor observed *"contusions in the lower back area."* Although a copy of the medical report is not available to the Court at this stage of the proceedings, Counsel for the Respondent conceded that the report indicated the contusions appeared to be fresh.

[8] The learned Judge in his Ruling sated that he preferred the evidence of the prosecution and that he did not believe the evidence of the Appellant. The learned Judge did not specifically state why he disregarded the evidence adduced in the form of the medical report. It is, in my opinion, arguable that the learned Judge has not sufficiently considered the medical report. In other words, it is arguable that the learned Judge has not sufficiently explained why he remained satisfied beyond reasonable doubt that the admissions in the caution statement were made voluntarily in the light of the supporting independent medical evidence. This Court in **Nacagi and Others v The State** ([2015 FJCA 156] AAU 49 of 2010; 3 December 2015) has considered the approach that should be adopted by the trial judge in a voir dire when there is independent medical evidence that supports the complaint made by an accused.

[9] In his submissions before me Counsel for the Respondent argued that the decision in **Nacagi** (supra) imposed too stingiest a requirement on a trial Judge that might otherwise result in a flood of applications for leave to appeal when similar circumstances exist. However that is a matter for the Court of Appeal to consider. The Appellant has raised an arguable ground on the basis of the decision in **Nacagi** (supra)

[10] Furthermore, on the basis that the directions in the summing up to the assessors reflect the approach of the judge as stated in his voir dire Ruling, it is arguable that the learned Judge may have misdirected the assessors and himself on the question of weight.

[11] As a result leave to appeal against conviction is granted specifically on grounds 2.2, 2.3 and 2.4. The remaining grounds appear to be repetitive and/or overlapping.

<u>*Order*</u>*:*

1. *Leave to appeal against conviction is granted on the ground specified in paragraph 11 above.*

2. *Application for bail pending appeal is to be listed for hearing before a justice of appeal on a date to be fixed.*

W. Calanchini

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Hon. Mr. Justice W D Calanchini
<u>PRESIDENT, COURT OF APPEAL</u>