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

**CRIMINAL APPEAL NO.AAU 53 of 2018**
**[High Court at Suva Criminal Case No. HAC 128 of 2011S]**
[Magistrates Court at Nausori No. 764/2010]

**BETWEEN** : **VALAME TURAGANAKELI**

***Appellant***

**AND** : **STATE**

***Respondent***

**Coram** : **Prematilaka, JA**

**Counsel** : **Appellant in person**
: **Mr. Y. Prasad for the Respondent**

**Date of Hearing** : **30 November 2020**

**Date of Ruling** : **01 December 2020**

# RULING

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

'***Statement of Offence***

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

***Particulars of Offence:***

***VALAME TURAGANIKELI , NACANIELI VUKILECA*** *and others, on the 15th day of November, 2010 at Nausori in the Central Division, robbed* ***JAG RAM*** *of cash $200.00, three wrist watches valued at $190.00, two mobile phones valued at $314.00, one school bag valued at $20.00, one gold bracelet*

*valued at $100.00 and one Adidas Canvass valued at $85.00, all to the value of $1049.00, and immediately before such robbery, used personal violence on the said **JAG RAM** with cane knives, pinch bars and stones.*

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

[3] The appellant had lodged an application for leave to appeal against conviction on three grounds of appeal on 08 June 2018 which was out of time by about 03 months. However, the state has submitted that they would not object to the delay as the appellant had represented himself at the trial and filed his appeal in person and also because the delay was about 03 months. As confirmed by the appellant at the leave to appeal hearing, he had not filed written submissions on his original grounds of appeal. The appellant's 03 amended grounds of appeal and submissions thereon had been filed on 23 July 2020. The state had filed its written submissions on 22 October 2020.

[4] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144: AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

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

*'5. Before proceeding to sentence both accused, it is prudent to give a summary of the case. On 15 November 2010, at about 3 am, Mr Jag Ram and his wife were fast asleep in their family home at Waila Feeder Road, Nausori. They were asleep in their bedroom. In the next bedroom, was their son, Mr. Jason Shagnil, and his grandfather. They were also fast asleep. Unknown to them, Accused No. 1 and 2, with two others, had already planned to rob them early that morning. In fact, they had broken a window and crawled through the same into the house. When in the house, the group woke Mr. Shagnil by force and demanded money. Mr. Ram awoke from his bedroom. The accused and their friends were armed with pinch bars, and cane knives.*

*6. The accused and their friends confronted Mr. Ram and his son with the pinch bars and cane knives. They fought each other. Mr. Ram managed to cut a robber in the head with a cane knife in self-defense. His son managed to knock one of the robbers down with a piece of timber. However, Mr. Ram and his son were later knocked unconscious by the robbers. Mr. Ram was cut on the right side of his head with a cane knife. The accused and their friends later ransacked the house and stole the items mentioned in the count. They later fled the crime scene on foot. The matter was later reported to the police. An investigation was carried out. Both accused were arrested at Lautoka and were caution interviewed by police on 19 November, 2010 – 4 days after the alleged incident. They both admitted the offence to police.*

[6] *Grounds of appeal against conviction*

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

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

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

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

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

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

*(additional grounds of appeal)*

*Ground 4 - That I did not receive a fair trial by reason of the learned magistrate and prosecution for not providing adequate and full disclosures for*

*the purpose of voire dire hearing. Failure to do so prejudiced myself and my right for fair trial was denied is miscarriage of justice in the circumstances of the case and to the appellant.*

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

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

***Grounds 01 (i), (iii) and 06.***

[7] The gist of these grounds of appeal is that the appellant had not made the confessional statement voluntarily as evidenced by the alleged injuries suffered at the hands of the police whilst in police custody and it should not have been admitted in evidence. According to the *voir dire* ruling, the appellant had given evidence at the *voir dire* inquiry. However, he remained silent at the trial proper.

[8] Section 288 of the Criminal Procedure Act provides statutory sanction for *voir dire* inquiries to Judges and Magistrates and at a trial before assessors a *voir dire* may be conducted prior to swearing in of the assessors but after the accused has pleaded to the information. **Rokonabete v The State** [2006] FJCA 40; AAU0048.2005S (14 July 2006) had earlier laid down some guidelines as to when and how to conduct a *voir dire* inquiry.

> *'[24] Whenever the court it advised that there is challenge to the confession, it must hold a trial within a trial on the issue of admissibility unless counsel for the defence specifically declines such a hearing. When the accused is not represented, a trial with a trial must always be held. At the conclusion of the trial within a trial, a ruling must be given before the principal trial proceeds further. Where the confession is so crucial to the prosecution case that its exclusion will result in there being no case to answer, the trial within a trial should be held at the outset of the trial. In other cases, the court may decide to wait until the evidence of the disputed confession is to be led.*
>
> *[25] It would seem likely, when the accused is represented by counsel, that the court will be advised early in the hearing that there is a challenge to the confession. When that is the case, the court should ask defence counsel if a trial within a trial is required and then hear counsel on the best time at which to hold it. If the accused is not represented, the court should ask the accused if he is challenging the confession and explain the grounds upon which that can be done.*

[9] In **Ganga Ram & Shiu Charan v R.** Criminal Appeal No. AAU0046 of 1983 (13 July 1984), the Court of Appeal held:

> *"It will be remembered that there are two matters each of which requires consideration in this area. **First,** it must be established affirmatively by the Crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force, threats of prejudice or inducement by offer of some advantage – what has been picturesquely described as 'the flattery of hope or tyranny of fear.' **Second**, even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which the police behave, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or unfair treatment."*

[10] According to the said ruling, the appellant had been arrested in Lautoka, taken to Suva and then to Nausori where the cautioned interview was recorded. The appellant had alleged that he had been beaten and tortured after arrest. At Nausori, he had been taken to hospital by the police and treated. He had taken up the position that he was in pain from the injuries he had sustained during interrogation and the cautioned interview he had signed was fabricated by the police. When he appeared for the first time in court the Magistrate had ordered to follow up on his dressing though the *voir dire* ruling has not mentioned what injuries he had allegedly sustained as per the medical report.

[11] The prosecution had argued that the appellant had received injuries from a knife in Waila, the place of offence, during the robbery. However, according to the judgment dated 04 May 2017, the complainant Jag Ram had engaged in a fist fight with the robbers and his son had hit one of them on the head with a piece of timber. The sentencing order of the High Court, however, states that Jag Ram had cut one of the robbers on his head with a cane knife.

[12] The Magistrate in the *voir dire* ruling had adverted to the appellant's failure to allege any assault by the police officers prior to the *voir dire* inquiry. Even on the first day in court all what the appellant had sought from court was attention to his injuries but not complained that the injuries had been caused by the police. Even when he appeared in the High Court the appellant had not made any allegations against the police.

[13] However, the said ruling also states that Cpl Jolame had stated in evidence that the appellant had alleged to have been injured by the police before he was brought to Nausori where he was taken for medical attention.

[14] The Magistrate had further mentioned in the *voir dire* ruling that before the commencement of the cautioned interview the appellant had expressed no reservation to the conduct of the cautioned interview and informed the interviewing officer that he was feeling well and physically fit for the interview.

[15] The learned Magistrate had examined the cautioned interview and observed that the appellant's constitutional rights had been given and he had provided details in the cautioned interview which could not be fabricated by the police. The Magistrate had been satisfied that the appellant's cautioned interview had been given freely and voluntarily in the sense that it had not been procured by improper practices and general fairness had existed in the way in which the police had behaved.

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

[17] Therefore, in the absence of the complete appeal record it cannot be unequivocally stated at this stage that the Magistrate had erred in the assessment of evidence before him at the *voir dire* inquiry. However, I am doubtful whether the Magistrate had adequately analysed medical evidence alongside the totality of other evidence before he decided that the appellant had made the confessional statement voluntarily. The full court would be in the best position to undertake that task with the assistance of all proceedings before the Magistrates court. The decision in **Nacagi v State** [2015]

FJCA 156; AAU49.2010 (3 December 2015) on the importance of medical evidence to determine the voluntariness of a confession and in what circumstances an appellate court should disturb the findings of a trial judge will be of help to the full court to address the appellant's argument meaningfully.

> *'[14] The question at this stage is what approach should be taken by this Court to an appeal that challenges confessions made by the Appellants in caution statements that, after a voir dire hearing, were found by the trial Judge to have been made voluntarily, that is, without violence or the threat of violence. In* ***Rahiman –v- The State*** *(CAV 2 of 2011; 24 October 2012) the Supreme Court referred to the observations of Lord Salmon in* ***Director of Public Prosecution –v- Ping Lin*** *[1975] 3 WLR 419 at page 445:*
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> > *"The Court of Appeal should not disturb the judge's findings merely because of difficulties in reconciling them with different findings of fact on apparently similar evidence in other 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."*
>
> *[15] 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..... '*

[18] Therefore, though I cannot affirmatively state that there is no reasonable prospect of success of the appellant's above grounds of appeal at this stage due to the lack of Magistrates court proceedings , think they deserve to be examined by the full court as the only evidence against the appellant was his cautioned interview. Therefore, I allow leave to appeal on the above grounds of appeal.

***Ground 01(ii)***

[19] The appellant argues that the Magistrate had not applied the proper burden and standard of proof in admitting the cautioned interview after *voir dire* inquiry.

[20] In the *voir dire* ruling dated 27 April 2017, the Magistrate had reminded himself that the burden of proof of voluntariness of the cautioned interview of the appellant was on the state and such voluntariness had to be proved beyond reasonable doubt.

[21] There is no merit on this ground of appeal and it is frivolous.

***Ground 02***

[22] The appellant has alleged bias on the part of the Magistrate to the extent that it resulted in exercising his option to remain silent at the trial proper. There is hardly any material to substantiate this allegation.

[23] The appellant had no obstacle to canvass the issue of voluntariness of his cautioned interview at the trial proper making it a live issue. Every accused has a right to canvass the voluntariness for the second time at the trial proper after the *voir dire* inquiry *i.e.* getting a second bite at the cherry (vide paragraph [56] of **Chand v State** [2016] FJCA 61; AAU0015.2012 (27 May 2016). Failing in the matter of the *voir dire*, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial (vide paragraph [20](ii) of **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017)]

[24] Therefore, there is no merits at all of this ground of appeal which frivolous too.

***Ground 03***

[25] The appellant also argues that the conviction based on the confession is unsafe, unreliable and unsatisfactory.

[26] This is necessarily connected particularly with appeal grounds 01 (i), (iii) and 06. The answer to those grounds of appeal by the full court would determine whether the conviction is unreasonable or cannot be supported having regard to the evidence. However, the test in Fiji is not whether the judgment is unsafe, unreliable and unsatisfactory.

[27] It has been held in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) that the test of a verdict being unsafe and unreasonable does not apply in Fiji.

[28] In **Sahib v State** (supra) the Court of Appeal stated as to what approach the appellate court should take when it is complained that the verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act.

> *.....Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based.....'*

[29] A more elaborate discussion on this aspect can be found in **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020).

[30] In **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict is challenged on the basis that it is unreasonable the test is whether the trial judge could have reasonably convicted on the evidence before him (see **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[31] Therefore, this ground of appeal has no reasonable prospect in appeal on its own and in any event the test mentioned by the appellant is not applicable in Fiji.

***Ground 4***

[32] The appellant complains that he was not given adequate and full disclosures for him to face the *voir dire* trial causing prejudice and a denial of a fair trial to him.

[33] As stated earlier Inspector Ino had stated in evidence that the search for the meal book and the station diary drew a blank and they could not be found. All other disclosures had been made available to the appellant before the *voir dire* inquiry. Station diary may have revealed some details as to the injuries the appellant allegedly carried when he reached Nausori police station.

[34] Therefore, the absence of the meal book and the station diary had not been a deliberate omission by the prosecution or the Magistrate but they had not been available to the prosecution. However, how far the appellant's defence at the *voir dire* had been affected by the absence of these two documents could be examined by the full court under the broad complaint set out in grounds 01 (i), (iii) and 06 above.

***Ground 5***

[35] The appellant argues that he had not received a fair trial within a reasonable doubt.

[36] The reasons for the delay cannot be ascertained from the ruling on the *voir dire* inquiry or the judgment of the Magistrate. But, the state had submitted that the proceedings were to a great extent delayed due to the actions on the part of the appellant's co-accused. The High Court judge in the sentencing order had remarked on this matter as follows.

> *'3. On 3 June 2011, both Accused appeared in the Nausori Magistrate Court. The trial did not start until approximately 6 years later on 25 April 2017. A perusal of the court record saw various reasons why the trial did not start until 2017. Part of the problem was the non-attendance of both Accused. There was also no determined effort to bring the case to a conclusion until 2017. Be that as it may, the charge was read and explained to both Accused on 7 January 2013. Both Accused said they understood the charge. They pleaded not guilty to the same. In other words, they denied the allegation against them.*

[37] However, the delay in concluding proceedings in the Magistrates court by itself is not a reason to intervene in the matter of conviction though it may have been a ground for a constitutional redress application.

[38] There is no merit in appeal on this ground of appeal and it is frivolous.

**Order**

1. Leave to appeal against conviction is allowed.


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**Hon. Mr. Justice C. Prematilaka**
**JUSTICE OF APPEAL**