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

CRIMINAL APPEAL NO.AAU 086 of 2015
[In the Magistrates' Court at Suva Case No.318 of 2013
HAC 82 of 2013]

BETWEEN	:	**MAIKA VAKATAWABAI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Lecamwasam, JA** **Prematilaka, JA** **Bandara, JA**
Counsel	:	**Mr. S. Waqainabete for the Appellant**
	:	**Ms. S. Kiran for the Respondent**
Date of Hearing	:	**08 April 2021**
Date of Judgment	:	**29 April 2021**

JUDGMENT

Lecamwasam, JA

[1] I agree with the judgment of Prematilaka, JA.

Prematilaka, JA

[2] The appellant had been charged in the Magistrates' Court at Suva with one count of conspiracy to commit aggravated robbery contrary to section 49 of the Crimes Act, 2009 by conspiring with others to commit aggravated robbery at Suva in the Central Division.

[3] Upon being vested with extended jurisdiction the matter had been heard in the Magistrates' court and the appellant had been found guilty by the learned Magistrate on 09 January 2015. He had been sentenced to 06 years and 02 months of imprisonment with a non-parole period of 05 years on 29 June 2015.

[4] The appellant had appealed in person against conviction and sentence within time followed up by several amended grounds of appeal from time to time. Finally, the Legal Aid Commission had tendered amended grounds of appeal against conviction and sentence on 20 March 2017.

[5] The appellate had urged the following grounds of appeal at the leave stage but the single Judge had refused leave to appeal on all grounds except the first ground of appeal on 27 October 2017:

> *'(i) The learned Magistrate erred in law when he failed to consider in his Voir Dire Judgment whether or not the confession was truly made by the Appellant before considering whether the confession was made voluntarily or not and its truth.*
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> *(ii) The learned Magistrate erred in law and in fact when he failed to warn himself in his Judgment about the unreliability of the dock identification without laying prior foundation through a photo identification parade unless with your Appellant's objection.*
>
> *(iii) The learned Magistrate erred in law when he failed to consider the fact that while the Appellant was charged with this offence, no one else was charged for the offence of aggravated robbery that the appellant was alleged to have conspired with.*
>
> *(iv) The learned Magistrate erred in law when the Appellant was found guilty of the charge of conspiracy to commit aggravated robbery but was sentenced for the offence of aggravated robbery.'*

[6] The appellant represented by the counsel for the Legal Aid Commission at the hearing of the appeal pursued only the first ground of appeal in respect of which the single Judge had granted leave to appeal. He relied on the written submissions dated 20 March 2017 filed at the leave stage while the state had filed written submissions dated 07 August 2029 for the full court hearing.

[7] While granting leave to appeal the single Judge had stated as follows regarding the first ground of appeal:

> *'[3] The error alleged in ground one is confusing. It appears that the complaint is that the learned magistrate did not consider in his judgment whether the appellant did in fact make the confession before considering whether the confession was true.*
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> *[4] Voluntariness of the appellant's confession was an admissibility issue that the learned magistrate was obliged to determine in a voir dire. The learned magistrate complied with that obligation and ruled the confession admissible after holding a voir dire. After ruling the confession admissible, the learned magistrate was required to consider in his judgment whether the confession was in fact made by the appellant and whether the confession was true before he could rely on it to convict the appellant. In his judgment, the learned magistrate briefly referred to his voir dire ruling on the issue of voluntariness, but he did not expressly direct his mind whether the appellant in fact made the confession and that the confession was true before relying on the confession to convict the appellant. This ground is arguable.'*

[8] The counsel for the appellant in his oral submissions before this court confirmed that his real complaint under the sole ground of appeal is that the learned Magistrate should have first considered the issue as to whether the appellant had in fact made the confession or not before looking into the question as to whether it was true or not.

[9] The appellant's confession was the only evidence relied on by the prosecution to prove the charge against the appellant. The learned Magistrate in the *voir dire* ruling delivered on 25 June 2014 had ruled it to be admissible where he had fully ventilated the issue of voluntariness. The appellant has not challenged the decision to admit his confession before the single Judge or the full court.

[10] The prosecution had led the evidence of the interviewing officer DC 4096 Maciu Vakatutu at the trial proper who *inter alia* had stated that he recorded the appellant's cautioned interview and the appellant had signed on all pages. Appellant's counsel had not cross-examined the witness at all. The appellant had in his evidence at the trial repeated the allegations of police assault and torture but also said that *'I do not admit what I said in caution interview'*. His position had been that he admitted to his

involvement in the crime in the cautioned interview as a result of alleged police brutality which, of course, the Magistrate had rejected.

[11] Therefore, it is clear that the appellant had not run his defense on the basis that he never made the confession but on the footing that he made it under oppression.

[12] In **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017) the Court of Appeal summarized the law relating to directions to the assessors on a confessional statement as follows:

> *'(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness (vide **Volau v State** Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51).*
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> *(ii) 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 but such evidence goes to the weight and value that the jury would attach to the confession (vide **Volau**).*
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> *(iii) Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them. (emphasis added) (vide **Volau**).*
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> *(iv) Even if the assessors are sure that the defendant said what the police attributed to him, they should nevertheless disregard the confession if they think that it may have been made involuntarily (vide **Noa Maya v. State** Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30])*
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> *(v) However, **Noa Maya** direction is required only in a situation where the trial Judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the confession is voluntary, Noa Maya direction is irrelevant and not*

*required (vide **Volau** and **Lulu v. State** Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19.'*

[13] The Supreme Court made the following remarks recently in **Tuilaselase v State** CAV0025 of 2018: 25 April 2019 [2019] FJSC 2 where the complaint was that the trial judge had misdirected himself when he failed to give any direction to the assessors and to himself on the truth and weight of the caution statement, by stating as follows:

> *'26. The enquiry into whether the directions to the assessors were sufficient must therefore be fact specific. The weight to be afforded to the confession in this case, was clear. The detailed nature thereof would almost inevitably give rise to a conviction. As to the truth of the statement, there was never any suggestion by the petitioner that even if voluntarily made the statement may be untrue. In this light, I believe the direction given by the trial judge in paragraph 38 of his summing up was quite sufficient....'*

In paragraph 38 referred to by the Supreme Court in ***Tuilaselase*** in the summing up as given below has no specific reference to the aspect of 'truth' and or 'weight':

> *".....However, if you are satisfied beyond reasonable doubt, so that you are sure, that the accused gave those statements voluntarily, as judges of facts, you are entitled to rely on them for or against the accused."*

[14] However, it must be remembered that the trial against the appellant had been concluded before a Magistrate who was a trained judicial officer presumably learned and knowledgeable in the relevant legal principles. Therefore, he need not set down the applicable legal principles verbatim and in great detail in the judgment but it would still be necessary for the trial judge or the Magistrate to set down the guiding principles of law briefly so that when his or her decision is reviewed in appeal the appellate court could examine the impugned judgment or order to see whether the trial judge or the Magistrate had directed himself on the correct law and whether such law had been applied correctly to the facts of the case.

[15] The analysis of evidence by the learned Magistrate in his judgment is as follows:

> *'At the outset this Court was notified that the accused had confessed in his caution. Therefore a voir dire was required. Following the voir dire this Court found that the caution interview was voluntarily undertaken and was therefore admitted as evidence in this case. [A separate ruling has been given for the voir dire]*
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> *Following the hearing this Court has noted all the evidence given in Court, together with the exhibits and documents that were tendered. This Court notes that the onus on proving that the accused person committed the offence that he was charged with rested with the prosecution. The standard of proof is beyond reasonable doubt. This Court has further noted the main elements of the offence of conspiracy to commit aggravated robbery which need to be proven by the state.*
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> *The evidence of the witnesses which included the prosecution witnesses, the police officers and the accused himself were considered by this Court. The Court found that the accused gave the interview to police voluntarily. He admitted the offence. A reconstruction was done. He co-operated with the police and showed them what was planned. In the reconstruction the accused pointed out the houses where he and his partners had gone to.*
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> *In giving evidence in Court the accused was evasive. He did not give response to simple questions like why he was not able to call his sister and de facto partner to support his case. He could not give any justification for the watch that was recovered from him, apart from saying bought from a neighbour. This Court believes the prosecution witnesses and does not believe the accused person. The accused also lied in the voir dire proceedings.*
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> *Having noted all the evidence and the laws this Court is satisfied that the prosecution has proven all the ingredients of the offence of conspiracy to commit aggravated robbery charge that was laid against the accused person. The Court is satisfied beyond reasonable doubt as to the guilt of the accused person. The Court finds the accused guilty of the charge of conspiracy to commit aggravated robbery and convicts him accordingly.*

[16] It appears from the third paragraph that the Magistrate had not seen any reason to change his opinion on the issue of voluntariness after the trial proper. Having perused the evidence of the appellant at the trial, I have no reason to doubt the Magistrate's conclusion that the cautioned interview had been voluntary as the appellant had simply repeated the same evidence given at the *voir dire* inquiry on police oppression which the Magistrate had already rejected. Secondly, though the Magistrate had been economical with his words he had decided that the appellant had indeed made the

confession, for he had considered the contents of it to conclude that the appellant had admitted the offence meaning the elements of conspiracy to commit aggravated robbery. He had also proceeded to consider the aspects of reconstruction of the crime scene including how the robberies were planned and pointing out the houses by the appellant that he and co-accused had planned to rob as appearing in the cautioned interview.

[17] When questioned by this court, the counsel for the appellant stated that at least one of the methods whereby the question whether the appellant had made the confession could be answered is to look at the confessions itself. On further questioning, the counsel admitted that upon a perusal of the appellant's cautioned interview, nothing therein appears to suggest any foul play. I have examined it carefully and found it to contain a probable and sequential account of events that had happened and could not find anything that would give rise to a reasonable suspicion of its authenticity or lead to any doubt that it was a fabrication by a third party. From all accounts, the appellant's confession appears to be an authentic account of the complete scenario relating to his involvement as a conspirator in the robberies. Thus, I am convinced that the confessional statement is true and the contents of it are sufficient for the conviction.

[18] I also find that one of the lost items namely a watch had been found in the custody of the appellant though he had attempted to explain that it was given to him by another.

[19] Therefore, I see no merits in the ground of appeal urged on behalf of the appellant and accordingly leave to appeal should be refused and appeal should stand dismissed.

Bandara, JA

[20] I have read the read the draft judgment of Prematilaka, JA and agree with his reasoning and conclusions.

Orders of the Court:

1. Leave to appeal is refused.
2. Appeal is dismissed.

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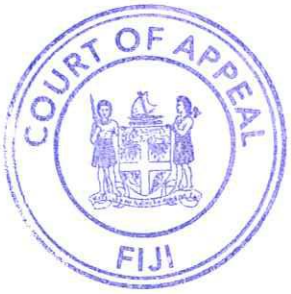
Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL



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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL