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

CRIMINAL APPEAL NO. AAU 160 of 2016
AAU 168 of 2016
AAU 170 of 2016
AAU 174 of 2016
AAU 165 of 2016
[In the High Court at Suva Case No. HAC 202 of 2015]

BETWEEN	:	**MOSESE TARAU** **TEVITA QAQANIVALU** **UATE BALEIONO** **SEREMAIA MUDURA** **JEKE VAKARARAWA**
		Appellants
AND	:	**STATE**
		Respondent

Coram	:	**Prematilaka, RJA** **Gamalath, JA** **Bandara, JA**
Counsel	:	**Ms. S. Ratu for the 1st Appellant** **Ms. N. Mishra for the 2nd and 3rd Appellants** **Ms. T. Kean for the 4th Appellant** **5th Appellant in person** **Mr. R. Kumar for the Respondent**
Date of Hearing	:	**15 September 2022**
Date of Judgment	:	**24 February 2023**

JUDGMENT

Prematilaka, RJA

[1] I have read in draft the judgment of Bandara, JA and agree with the outcome proposed. Since Gamalath, JA was no longer available to sit on the panel of Justices of Appeal, this Court on the 3rd of February 2023 inquired from all appellants and their counsel who represent them except the 5th appellant who is in person whether they agreed to have the judgment delivered by the other two members of the Bench that heard the appeal on the 15th of September 2022.

[2] All the appellants including the 5th appellant and their counsel agreed and consented to having the judgment delivered by myself and Bandara, JA and all appellants accordingly signed the consent forms which are filed of record.

Bandara, JA

[3] The Appellants with the exception of the 3rd Appellant Uate Baleiono were charged with two counts of Aggravated Robbery contrary to section 311 (1) of the Crimes Act of 2009.

[4] All Appellants were charged with one count of Acts intended to cause Grievous Harm contrary to section 255 (a) of the Crimes Act of 2009.

[5] The 3rd Appellant was charged with one count of Aggravated Robbery contrary to section 311 (1) (a) of the Crimes Act of 2009, and along with the other Appellants he was further charged with one count of Acts Intended to Cause Grievous Harm contrary to section 255 (a) of the Crimes Act of 2009.

[6] On the 11th October 2016 the trial commenced before the High Court at Suva on the following information:

*"**FIRST COUNT***

Statement of Offence

***AGGRAVATED ROBBERY**: Contrary to Section 311 (1)(a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

***JEKE VAKARARAWA, MOSESE TARAU, SEREMAIA MUDURA and TEVITA QAQANIVALU**, on the 21st day of May, 2015 at Suva in the Central Division, in company with others stole a billabong wallet containing $250.00 cash and a black and white alcatel phone valued at $150.00 the property of **SHER DIL** and a motor vehicle Registration No. LT 4626 the property of **RAJNEEL CHAND**, and immediately before committing the theft used force on the said **SHER DIL**.*

SECOND COUNT

Statement of Offence

***AGGRAVATED ROBBERY**: Contrary to Section 311 (1)(a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

***JEKE VAKARARAWA, MOSESE TARAU, SEREMAIA MUDURA, TEVITA QAQANIVALU and UATE BALEIONE** on the 21st day of May, 2015 at Suva in the Central Division, in company with others stole a cash register valued at $1,500.00, cash of $500.00, a bottle of Yellow Tail Shiraz valued at $21.85, and a bottle of Grandial Sparkling wine valued at $18.95 the property of Distill (Lawhill Companies Ltd) and immediately before committing the theft threatened **JODI BACCHIOCHI CHANG** and **ELISHA LAVULO** with a cane knife, steel rod and bottles.*

THIRD COUNT

Statement of Offence

***ACTS INTENDED TO CAUSE GRIEVOUS HARM**: Contrary to Section 255(a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

JEKE VAKARARAWA, MOSESE TARAU, SEREMAIA MUDURA, TEVITA QAQANIVALU and UATE BALEIONO*, on the 21st day of May, 2015 at Suva in the Central Division with intent to maim, disfigure or disable or do some grievous harm unlawfully wounded* ***BERNADUS GROENEWALD*** *on the forehead."*

[7] At the conclusion of the trial the four assessors returned with a mixed opinion.

> *"Assessors No. 1 and 2 found Accused No. 1,2,3 and 4 guilty as charged on Count No. 1. They also found Accused No. 1,2,3,4 and 5 guilty as charged on Count No. 2 and 3. Assessors No. 3 and 4 found Accused No. 1,2,3 and 4 not guilty as charged on Count No. 1. They also found Accused No. 1,2,3,4 and 5 not guilty as charged on Counts No. 2 and 3."*

[8] The Learned High Court Judge concurred with the guilty opinion of assessors No.1 and 2, stating that;

> *"I accepted the opinion of Assessors No. 1 and 2 and did not accept the opinions of Assessors No. 3 and 4. I found Accused No. 1,2,3 and 4 guilty as charged on Count No. 1, and also found Accused No. 1,2,3,4 and 5 guilty as charged on Count No. 2 and 3. I convicted them accordingly. I said, I would give my reasons today. Below are my reasons."*

[9] Section 237 (1), (2), (4) and (5) of the Criminal Procedure Act 2009, reads as follows:

> *"237. — (1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.*
>
> *(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.*
>
> *(4) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be —*
>
> *(a) written down; and*
> *(b) pronounced in open court.*

> *(5) In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for.....all purposes."*

[10] The prosecution case against the 5 Appellants is based on the acceptance of respective inculpatory answers in their caution interviews and charge statements, the admissibility of which in evidence, had been robustly challenged.

[11] Moreover, 1st 2nd 3rd and 4th Appellants had also raised alibi defences, whilst the 5th Appellant had exercised his right to remain silent at the trial.

[12] The five Appellants stood before the High Court as accused in the following numerical order:

JEKE VAKARARAWA	-	First Accused
MOSESE TARAU	-	Second Accused
SEREMAIA MUDURA	-	Third Accused
TEVITA QAQANIVALU	-	Fourth Accused
UATE BALEIONO	-	Fifth Accused

Factual background

[13] On the 20th May 2015 at Nadonumai, Lami, 1st, 2nd, 4th and 5th Appellants planned to rob the Chinese Supermarket beside the mobile service station along Bau Street at Flagstaff.

[14] The four Appellants further planned to rob a taxi for the purpose of using it as their *"get-away"* vehicle to and from the crime scene. The 5th Appellant was to be their *"get-away driver".*

[15] They also armed themselves with cane knives, pinch bars, iron rods, empty bottles and *lovo* stones. They intended to rob the Chinese Supermarket fast, steal as much as they could, flee in the stolen taxi and thereafter to share the loot.

[16] On the 21st May 2015 the 5th Appellant and another had gone to Suva Market. Around 7.30 p.m. they picked up the taxi belonging to Sher Dil (PW4), which bore the registration No. LT 4626. The 5th Appellant got into the taxi driven by PW4 Sher Dil and told him to take him to Bryce Street and thereafter to Avon Place.

[17] There, the 5th and another attacked PW4 and robbed him of his cash $250 and the mobile phone. He was then blind folded, tied up and put at the back of the taxi. The 5th Appellant then proceeded to pick up the 1st, 2nd, 3rd and 4th Appellants and put their plan into action.

[18] They drove the robbed taxi to the Chinese Supermarket. However, the taxi's door jammed and the Appellants couldn't get out. The area was crowded with busy people. The Appellants having got panicked had given up their plan to rob the Supermarket.

[19] The time at that point was around 7.30 p.m. to 8 p.m., and Appellants having dropped the idea of robbing the Supermarket left it, and decided to rob the *"Distill Wine Shop"* instead, which was situated in the Rewa Street.

[20] According to Jodi Chang (PW1) the Distill's Managing Director, at the time in question there had been around 40 customers in the shop, having a wine and food pairing function. Around 7.45 p.m. to 8 p.m. the witness saw three males wearing balaclavas and dark clothings enter the shop.

[21] One of them proceeded to grab the shop's money till whilst another went to the guests and robbed their hand bags, purses, wallets and mobile phones. One of the robbers was giving orders to the others.

[22] The former Police Commissioner (PW5) had been among the guests. The latter identified himself as the Police Commissioner and demanded the robbers to leave. The robbers then started attacking the Police Commissioner by throwing a wine bottle at him, which struck his forehead causing severe injuries.

[23] The guests and the staff then had retaliated by pelting various objects at the robbers. After committing the robbery they fled the scene in the taxi that was robbed earlier.

[24] The incident was reported to the police and investigations commenced.

[25] It was the stance of the prosecution that, all the Appellant were the ones who robbed the 'Distill Shop' and its customers at the time of the incident.

[26] The Appellants 1, 2, 4 and 5 were raided and arrested at Nadonumai early morning on the 22nd May 2015. The 3rd Appellant was arrested on the 26th May 2015 at Namena, Tailevu. Consequent to their arrests they were all caution interviewed by the police. According to the prosecution all the Appellants had admitted their guilt.

[27] They were produced before the magistrate and formally charged with, robbery (committed in relation to Sher Dil, and the Distill Wine Shop) and for causing injuring to the former Police Commissioner.

[28] In the instant case the evidence shows that all the accused persons were present at the crime scene and that they were acting in concert. It is common ground that under the concept of joint enterprise when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons liable for the act in the same manner as if it were done by him alone.

[29] Section 46 of the Crimes Act 2009 is to the effect that;

> *"46. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence".*

[30] In **SEAN PATRICK McAULIFFE v. THE QUEEN** (1995) 69 ALJR 621 it was held that:

> *"12. The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design. Such a venture may be described as a joint criminal enterprise. Those terms - common purpose, common design, concert, joint criminal enterprise - are used more or less interchangeably to invoke the doctrine which provides a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime…"*

Consideration of the Appellants' case

[31] On the 26th October 2016, on the first day of the trial proper (wherein the 3rd and the 5th Appellants had represented themselves), the Appellants had pleaded not guilty to the charges against them.

[32] At the conclusion of the prosecution case when a defence was called from the Appellants, the 5th Appellant opted to remain silent whereas the other Appellants opted to give sworn evidence on their behalf.

[33] The 1st, and 3rd Appellants called two witnesses each. The 2nd and 4th Appellants called three witnesses each.

Version of the 1st Appellant

[34] The 1st Appellant testifying under oath had stated, that on the 21st May 2015, he had been at Nadonumai from the morning till midnight. Around 6.30 p.m. he had been at home and had had a bath. After having dinner at 7 p.m. he had gone to the 2nd Appellant's home to visit him at 9 p.m.

[35] He said that he slept at the 2nd Appellant's home until the next day. According to his testimony he had not been at the crime scene. The 1st Appellant was caution interviewed by the police on the 22nd and the 23rd May 2015, the record of which had been marked as the Prosecution Exhibit No. 8 (B).

[36] The 1st Appellant was formally charged by the police on the 23rd May 2015 (record of which had been led in evidence as Prosecution Exhibit No. 139 (B)).

[37] In the above-mentioned statements, the 1st Appellant had admitted having committed the offences with which he had been charged. However, it had been the stance of the 1st Appellant that the said statements were taken by the police under coercion, when he was under their custody from 22nd to 25th May 2015.

Version of The 2nd Appellant

[38] The 2nd Appellant had stated that on the 21st May 2015, he had been at home at Nadonumai. At the time his mother, brother and sister too had been with him. Thereafter, he had gone to Tuberi's house and met his sister there. All of them had had dinner and a grog party at Tuberi's house. Around 8.30 p.m. the 1st and the 4th Appellants (along with whom he grew up) had arrived to visit him. Thereafter, they had been looking at Facebook until midnight.

[39] He had stated that he along with the 1st and 4th Appellants slept at Tuberi's house until early morning of 22nd May 2015. Accordingly it was the position of the 2nd Appellant that he (along with the 1st and 4th Appellants) had not been at the crime scene, at the material time. In his interview and charge statements he had admitted having committed the alleged crime. He claimed that they had been forcibly obtained by the police whilst being in their custody. He strenuously denied having made the inculpatory statements in question on his own free will.

Version of 3rd Appellant

[40] The 3rd Appellant on oath stated that on the 21st May 2015, from 6 p.m. to 10 p.m. he had been drinking grog with some others at Vasenai's (DW10) house at Lovonilase, Tamavu-i-wai. He stated that he never left DW10's house during that period.

[41] It was his firm position that he had not been at the crime scene at the time in question. On the 26th May 2015, he had been caution interviewed by the police, record of which had been marked by the prosecution as Exhibit No. 14 (B). He was formally charged by the police on the same day.

[42] In both his caution interview and charge statement the 3rd Appellant had admitted having committed the crime, though in his defence he stated that they were forcibly obtain by the police.

Version of the 4th Appellant

[43] The 4th Appellant, on oath stated that, on the 21st May 2015, at 5 p.m. he was at home, at Nadonumai watching movies, and had dinner at 7 p.m.

[44] After dinner he had been at home along with the 1st Appellant. At about 8 p.m he along with the 1st Appellant had visited the 2nd Appellant at the latter's the residence. He further stated that they slept at the 2nd Appellant's home until 4a.m. on the 22nd May 2015.

[45] Accordingly his claim was that he had not been at the crime scene at the time in question.

[46] On the 22nd and 23rd May 2015, the 4th Appellant was caution interviewed by the police, the record of which had been led in evidence, marked Exhibit No. 10 (c) and 10 (e). On the 23rd May 2015 he was formally charged by the police, the record of which had been led in evidence, marked Exhibit No. 12 (c) and 12 (d).

[47] In the said statements the 4th Appellant had admitted guilt. However, at the trial his stance had been that the admissions were obtained by coercion by the police and not made with his own free will.

The Appellate procedure

[48] The Appellants being aggrieved by the judgment of the High Court forwarded their leave to appeal applications before this court, against both the conviction and the sentence, pursuant to section 21 (1) of the Court of Appeal Act.

[49] The leave hearing had proceeded on the 16th October 2019, and the Single Judge of Appeal pronounced his leave ruling (pursuant to section 35 (1) of the Court of Appeal Act), on the 27th of November 2019, granting leave to appeal against convictions and refusing leave to appeal against the sentences, in respect of all the Appellants.

Consideration of the grounds of appeal against the conviction advanced before the full court by 1st, 3rd, 4th and 5th Appellants

[50] The three grounds of appeal against conviction relied upon by the 1st, 3rd, 4th and 5th Appellants were the same and as follows:

> *'1. That the learned trial Judge erred in law and in fact when he failed to direct and guide the assessors on how to approach the evidence contained in the caution interview and the weight to be attached to the disputed confession.*
>
> *2. That the learned trial Judge erred in law and in fact when he did not put the case of the appellants to the assessors in a fair and balanced and objective manner.*
>
> 3. *That the learned trial Judge erred in law and in fact when he failed to give proper directions on alibi evidence of appellants 1,2,3 and 4.'*

[51] None of the witnesses of the prosecution actually identified any of the Appellants at the crime scene, at the time of the commission of the offence.

[52] The prosecution's case against the five Appellants is entirely based on the acceptance of their respective inculpatory admissions, in cautioned interview answers and charge statements.

[53] The Appellants throughout the course of the voir dire inquiries and the trial proper, had robustly challenged the admissibility of their inculpatory admissions, made in the cautioned interviews and charge statements. Whilst testifying under oath 1st, 2nd, 3rd and 4th Appellants had also raised their respective *alibi* defences. The 5th Appellant opted to remain silent at the trial.

[54] In paragraphs 44 - 45 of the summing up the Learned High Court Judge had given clear guidance to the assessors, on how to deal with the inculpatory admissions in the caution interviews and charge statements.

[55] He had highlighted the facts that they needed to consider; whether the Appellants made the statements, whether they were true and how the inculpatory admissions in the cautioned interviews and charge statements should be considered at the trial.

> *"44. We now discuss how, as assessors and judges of fact, you should approach the above alleged confessions by the accuseds. A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements contained in his police caution interview and charge statements? If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the circumstances surrounding the taking of the statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If it's otherwise, you may give it less weight and value. It is a matter entirely for you.*
>
> *45. You have heard so much about how Accused No. 1, 2, 3 and 4 were arrested by police from their homes in Nadonumai, Lami at about 4 am on 22 May*

> *2015 – approximately 8 hours after the alleged offences on 21 May 2015. Four police officers gave evidence on what they did when they arrested the four accuseds at Nadonumai on 22 May 2015 at about 4am. DC 4791 Jone Tupua (PW7) arrested Accused No. 1, D/Corporal 3695 Isireli Waqairalia (PW18) arrested Accused No. 2. D/Corporal 4654 S. Tabalailai (PW12) arrested Accused No. 3 and 4. As for Accused No. 5, he was arrested by DC 2985 Gaunavou Vakalevei (PW17) on 26 May 2015, when the police raided Accused No. 5's house at 4am. I will not outline to you the details of the above raids and arrest, but suffice to say that the parties' versions on the circumstances surrounding the arrests varied greatly. The details are still fresh in your minds. The police said, they did not assault, threaten or made false promises to the accuseds when they arrested them. They said, all were accorded their legal rights and given rights to counsels. The police said, they were treated well and not abused while they were in their custody. As for the accuseds, they said exactly the opposite. However, we will consider their versions when we discuss their cases."*

[56] Section 237 of the Criminal Procedure Act 2009 makes it obvious, that the ultimate judge of facts and law is the trial judge.

[57] The opinions of the assessors as to the guilt or innocence are there for the guidance of the trial judge, and the latter is not bound by those opinions.

[58] The omissions or even errors that could be there in the summing up, can be remedied in a well-reasoned judgement, where the trial judge either agrees or disagrees with the opinions of the assessors.

[59] In **Maya v The State** [2015] FJSC30; CAV 9 of 2015 (23 October 2015) it has been held that:

> *"….in Fiji ..the opinion of the equivalent of the jurors - the assessors - is not decisive. In Fiji, although the judge will obviously want to take into account the considered view of the assessors, it is the judge who ultimately decides whether the defendant is guilty or not…"*

[60] The Learned High Court Judge had carefully analysed the evidence led by the prosecution at paragraphs 11 to 14. Furthermore, he had amply highlighted the issue

whether or not the Appellants did give their caution interviews and charge statements to the police, and whether or not they were true and voluntary.

[61] In **Maya v The State** [2015] FJSC 30; CAV 009. 2015 (23 October. 2015], it was held that:

> *"In Fiji the judge may admit the confession into evidence after the void dire, and yet subsequently at the conclusion of the trial proper he or she may arrive at different opinion. The defence may pursue in cross- examination in the trial proper the same issues of involuntariness in order to persuade the judge as well as the assessors of the rightfulness of such an allegation…"*

[62] The correct test that was observed by the Supreme Court in **Maya v The State** (*supra)* was subsequently applied by the Court of Appeal in **Singh v The State** [2018] FJCA 206; AAU 114.2014 (29 November 2018).

[63] Both those decisions unambiguously lead to the proposition, that the judge should direct the assessors and himself, how to approach the issue of voluntariness of the admissions. If either the assessors or the judge concludes that they are not satisfied beyond reasonable doubt that the confessions or admissions were made voluntarily, then they should, without attaching any weight whatsoever, disregard them.

[64] The 2nd ground of appeal above, raises an issue similar to ground one. It claims that the trial judge had not considered the totality of the evidence, in relation to Appellants' contention that their confessions were not made voluntarily, and hence should be considered in conjunction with ground one.

[65] There is no failure on the part of the trial judge to put fairly the case of the Appellants before the assessors. In paragraphs 46-48 of the summing up he directed the assessors on how they should consider both the Appellants' claims against voluntariness of the inculpatory admissions, and the raised alibi defences. Contents of paragraph 46-48 are important to note here.

"46. All the accuseds gave sworn evidence in their defence. Accused No. 1 choose to remain silent. As for him, take on board the direction I gave you in paragraph 27 hereof. As for Accused No. 2, 3, 4 and 5, they relied on an alibi defence. This simply meant they were not at the crime scene at the material time, because they were somewhere else. Accused No. 2's position was that as outlined in paragraph 28 hereof. He said, he was at Nadonumai from the morning of 21 May 2015 to midnight. Accused No. 3's position is also as that explained in paragraph 29 hereof. He said he was in Nadonumai from 5 pm to midnight on 21 May 2015. Accused No. 4's position was also as that explained in paragraph 30 hereof. He said, he was at Nadonumai on 21 May 2015 from the afternoon to midnight. Accused No. 5's position was that as explained in paragraph 31 hereof. He said, he was drinking grog with others at Tamavua-i-wai from 6pm to 10pm on 21 May 2015. Some of the accuseds called witnesses to verify their version. Whether or not you accept the accuseds version of events is entirely a matter for you.

47. If you accept the accuseds' alibi defences, then you will have to find Accused No. 2, 3, 4 and 5 not guilty as charged on all counts. However, if you reject the accuseds' alibi defence, you will still have to consider the whole of the prosecution's case, and determine whether or not they had proven the accuseds' guilt beyond a reasonable doubt. This is because the burden of proof stays with them from the start to the end of the trial.

48. As for the treatment the accuseds allegedly received from the police while they were in their custody, Accused No. 2, 3, 4 and 5 said the same thing. I will spare you the details because the accuseds version of events are still fresh in your minds. They all said they were repeatedly assaulted, threatened and made false promises by the police when arrested, while been cautioned interviewed, while been formally charged and while in their custody. When they first appeared in the Magistrate Court, they complained to the Magistrate of alleged police assaults and asked for a medical examination. Accused No. 2, 3 and 4 were all examined by the same doctor on 25 May 2015 at Samabula Health Centre. The doctor was Mr. Shanjivan Padarath (DW7). He tendered the accuseds medical reports as Defence Exhibit No. 1(A2): 2(A3) and 3(A4). You have heard the doctor give evidence on these reports and you have heard the prosecution cross-examined the doctor. Whether or not you find the doctor's reports verified the accuseds version of events is a matter entirely for you. You have heard the accuseds accuse the police of various assaults on them. Do the medical reports bear them out or don't they? Accused No. 5 was medically examined by Doctor Saimone Nabati (DW9) on 3 June 2015. DW9 tendered Accused No. 5's medical report as Defence Exhibit No. 4. Apply to DW9's evidence and the report the same analysis you did on the others. Does the report verify Accused No. 5's version or not? For Accused No. 2 to 5, please carefully read their medical reports and examine it in the light of DW7's and DW9's evidence, which I'm sure is

still fresh in your mind. Your decision on the above will affect whether or not you accept Accused No. 2 to 5's alleged confessions."

[66] In relation to the defence of alibi, in **Ismail v State** [2021] FJCA 109; AAU0113.2014 (29 April 2021) this court observed that:

> *"[12] The word "Alibi" comes from Latin, bearing the literal meaning in translation **"elsewhere".** It does not constitute a defence in its proper sense: where an accused raises an Alibi he is merely denying that he was in a position to commit the crime with which he is charged. It is well settled jurisprudence that, when raising the defence of Alibi an accused does not bear the burden of proof beyond reasonable doubt, and a mere raising a reasonable doubt about the prosecution case will suffice.*
>
> *[13] If the Alibi is reasonably possibly true, it must be accepted. Where the Alibi evidence does prima facie account for the accused's activities at the relevant time of the commission of the crime, the onus (always) remains with the Prosecution to eliminate any reasonable possibility that the alibi is true. The prosecution must establish beyond reasonable doubt that despite the alibi, the facts alleged are nevertheless true."*

[67] In relation to the issue, whether the Learned High Court Judge had failed to give proper directions on the *alibi* defences of the Appellants, it clearly appears that though perfect directions had not been given to the lay assessors, they have been sufficiently reminded of how to reasonably consider the *alibi* defences, causing no miscarriage of justice.

[68] At paragraphs 46 and paragraph 47 (mentioned above) of the summing up the Learned High Court Judge had specifically directed lay assessors on how to approach the raised defenses of *alibi.*

[69] The 1st Appellant's caution interview (at pages 887-897 of the trial proceedings) indicates that he was interviewed under caution by D/Cpl. 2391 Ulaiasi in the presence of DC 3657 Leone, from 14.15 hours on the 22nd May 2015 to 19.50 hours on the 23rd May 2015.

[70] The 1st Appellant had been given his relevant Constitutional rights, where he had opted to see his counsel at a later time. He had been provided with breaks for meals and rest, and also cigarettes. The latter had also taken part in a scene reconstruction, in the course of his interview.

[71] The medical report indicates (at pages 269-274 of the court proceedings) that the 1st Appellant, had suffered, "*tender left knee region above patella, tender temporal region on palpation, both ears are normal with healing (old) laceration on the inner cheek – right side"*.

[72] In his '*Written Reasons For Judgment And Sentence*,' the Learned High Court Judge had dealt with the said revelations on the medical report, in the following manner:

> *"13. Furthermore, the accuseds' medical reports did not show any major injuries. Had they been assaulted by the police officers, as they alleged, the court would expect more serious injuries in their medical reports, not the usual "tenderness. The police officers they alleged assaulted them, were huge individuals and I expect serious injuries on the accuseds if these officers did in fact assaulted them. Furthermore, the accuseds were attacked by the Distill Wineshop customers at the time of the robbery. They threw all sorts of articles at the accuseds and consequently they fled the crime scene. Could it be possible that the injuries that they are spotting are the result of this episode?"*

[73] The overall approach of the Learned High Court Judge, in relation to the issues raised against voluntariness of the inculpatory admissions, complies with the following rules set by the Supreme Court in **Maya v The State** [2015] FJSC30; CAV 9 of 2015 (23 October 2015):

> *"2. For my part, I reach the view that the assessors should be directed by the judge in his summing up that if they are not satisfied that the confession was given voluntarily, in the sense that it was obtained without oppression, ill-treatment or inducements, or conclude that it may not have been given voluntarily, they should disregard it altogether.*
>
> *3. In Fiji the judge may admit the confession into evidence after the voir dire, and yet subsequently at the conclusion of the trial proper he or she may*

arrive at a different opinion. The defence may pursue in cross-examination in the trial proper the same issues of involuntariness in order to persuade the judge as well as the assessors of the rightfulness of such an allegation. The prosecution however bears the burden in the trial proper, as in the voir dire of proving that the confession was voluntary, and must do so to the standard beyond reasonable doubt, as with all other elements of proof required to prove the charge. The position in Mushtaq [2005] UKHC 25 is to be preferred to that of Chan Wei Keung v The Queen [1966] UKPC 25; [1967] 2 AC 160.

4. Where such litigation issues continue and remain alive into the trial proper, the judge's opinion on this important matter should be referred to in the judge's judgment following the tendering of the opinions of the assessors, irrespective of whether the judge conforms with those opinions or not [section 237(2) Criminal Procedure Decree]. In this way the decision of the trial judge on a crucial litigation issue can be known and understood by the appellate courts. This is another example of why it is highly desirable for a judge to write a short judgment explaining the basis for his concurrence or disagreement with the opinions of the assessors. At the end of the day, in Fiji the decision on guilt or innocence is entrusted to the presiding judge. The role of the assessors is to tender opinions to assist the judge. But they are not deciders of fact or ultimately of the verdict."

[74] As indicated by paragraphs 11-14 of his '*Written Reasons For Judgment And Sentence'*, the Learned High Court Judge had properly directed himself and was properly mindful, that the impugned inculpatory admissions led in evidence by the prosecution, had been obtained voluntarily and were true, leading to no miscarriage of justice.

[75] The 3rd Appellant's cautioned interview (at pages 901-916 of the court proceedings) indicates that he had been interviewed under caution by D/Cpl 3695 Isireli, in the presence of DC 3039 Iosefo from 11.30 – 21.00 hours on the 26th May 2015.

[76] The 3rd Appellant had been given his constitutional rights. He had been provided with milk tea and biscuits and lunch break during his interview, in the course of which he had taken part in a scene reconstruction. He had admitted having taken part in the robbery but denied hitting the Commissioner of Police at the material time.

[77] The 3rd Appellant's medical report (at pages 529-533 of the court proceedings) indicates that he had suffered, *"tenderness on palpation of both sides of back".*

[78] In relation to the issue that has been raised regarding these injuries, the Learned Trial Judge in his '*Written Reasons For Voir Dire Ruling'*, had come to the following finding, indicating that the 3rd Appellant's version of assaults was not compatible with the injuries he had sustained.

> *"He complained of assaults and asked for medical examination. On 3 June 2015, Doctor S. Nabati (DW8) medically examined Accused No. 5. The doctor found no injuries on Accused No. 5 but only tenderness on his back. Looking at the evidence as a whole, I find Accused No. 5 not to be a credible witness. In my view, the fact that no major injuries were found on him on 3 June 2015, showed the police never assaulted him while he was in their custody."*

[79] The Learned High Court Judge had not fallen into error in admitting the 3rd Appellant's admissions into evidence having found them to have been voluntarily made, when the trial proceedings clearly reflect, that the credibility and consistency of the relevant prosecution witnesses could not be shaken by the defence during the trial proper.

[80] The Learned High Court Judge had properly directed himself or was properly mindful at paragraphs 11-14 of his *"Written Reasons For Judgment And Sentence"* (at pages 160-169 of the court proceedings) that the inculpatory admissions the prosecution relied on had been voluntarily made causing no miscarriage of justice.

[81] The 4th Appellant had been cautioned interviewed (at pages 846-861 of the court proceedings) under caution by D/Sgt 2080 Josua in the presence of A/D/Cpl 3689 Suliasi from 16.30 hours on the 22nd May 2015 to 20.10 hours on 23rd May 2015. The 4th Appellant too had been given his relevant constitutional rights. He had been provided with time to rest, refreshments, and also cigarettes. In the course of the caution interview he had taken part in a scene reconstruction. 4th Appellant had admitted his guilt and sought forgiveness.

[82] The 4th Appellant's medical report indicates that he had suffered, "*mild musculoskeletal pain and a boil in his right ear"*.

[83] The Learned High Court Judge has considered the said medical evidence and came to the finding that the 4th Appellant's version of assaults *vis-à-vis* the injuries he sustained were not consistent. Hence the Learned Trial Judge had not fallen into error by admitting the 4th Appellant's inculpatory admissions into evidence, having found and the same to have been made voluntarily and the latter to be an uncredible witness.

[84] The 5th Appellant's caution interview (at pages 746-748 and 813-827 of the court proceedings) indicates that he was interviewed under caution by DC 3090 Akuila in the presence of WDC 3667 Berenadeta from 16.12 hours on the 22nd May 2015 to 23.00 hours on the 23rd May 2015.

[85] The 5th Appellant had been given his relevant constitutional rights. He had been provided with time to rest and meals. He had also taken part in a scene reconstruction during his interview. His inculpatory admissions (Q & A 90-153 pages 819-827 of court proceedings) reflect the fact that, he had shown an evasive attitude until he was confronted with the fact that the barcodes of the bottles of wine recovered from his home, matched with the barcodes of the bottles of wine robbed from the wine shop in question, at the material time. He had admitted having taken part in the robbery after being assigned with task of being the driver of the robbed vehicle.

[86] The medical report (at pages 262-268 of the court proceedings) indicates that the 5th Appellant had suffered *"mild tenderness on the left rib".*

[87] The Learned High Court Judge in his written reasons for voir dire ruling states that the 5th Appellant's version of the police assaults vis-à-vis, the injuries he sustained were not consistent. Hence the Learned High Court Judge had not fallen into error in admitting the 5th Appellant's inculpatory admissions into evidence having found the same to have been voluntarily made.

[88] The Learned High Court Judge had properly directed himself, or was properly mindful at paragraphs 11-14 per his *"Written Reasons for Judgment and Sentence"* (at pages 160-169 of the court proceedings) that the inculpatory admissions the prosecution relied on had been voluntarily made causing no miscarriage of justice.

[89] The 5th Appellant advanced a new ground of appeal before the full court which is as follows:

> *"a. <u>THAT</u> the reason why the 5th Appellant had to constrain himself to remain* silent *in the proceeding of this matter was not given fair and reasonable consideration by the Learned Judge. The 5th Appellant conflict with Ms. Lal (Defence Counsel) and the failure to fairly deal with the conflict in favour of the Appellant has negatively impacted the Constitutional requirement to have the Appellant receive a fair trial on this matter causing serious prejudice.*
> *b. <u>THAT</u> the Learned Judge erred in law and in fact when he failed to provide an adequate time and facilities to prepare a defence causing serious prejudice."*

[90] The Learned Trial Judge's notes indicate that he had not fallen into error when he considered the 5th Appellant to have waived his right to counsel whilst the trial was in progress. When his right to counsel had been waived by the Appellant himself he runs the risk of facing the adverse consequences of going ahead with a criminal case without legal representation. Nothing that emanates from this situation amounts to a breach of an accused person's right to a fair trial.

[91] The court proceedings do not indicate a situation that has arisen for the Learned High Court Judge to intervene and come to the assistance of the 5th Appellant.

[92] The above grounds of appeal advanced on behalf of the 1st, 3rd, 4th and 5th Appellants lack merit.

Consideration of the grounds of appeal advanced by the 2nd Appellant

[93] The 2nd Appellant had filed a leave to appeal application advancing eight grounds of appeal against the conviction for which single Judge of Appeal granted leave to proceed, with the exception of 5-7 grounds.

[94] At the oral hearing before the full court, the 2nd Appellant advanced only the grounds of appeal 1-4 and 8. The said grounds of appeal are as follows:

> *"1. THAT the denial of my constitutional right to have a legal aid Counsel to be present and or to consult with before the conduct of my caution interview leds to the forceful obtained alleged confession not give on my own free will.*
>
> *2. THAT the high possibility of protection and proper safeguard against forcefully obtained alleged confession before the conduct of my caution interview would have been avoided, if I was afforded the opportunity by the police to consult with or to have a legal aid Counsel present before the proceeding of my alleged caution interview. Thus the failure has prejudiced me accordingly.*
>
> *3. THAT the learned Judge erred in Ruling the confessional statement as admissible evidence when (i) there was sufficient suggestion in the medical report that injuries were sustained whilst in police custody thereby negating voluntariness. (Annex. marked T.Q 02 medical report).*
>
> *4. THAT the prosecution failed to establish beyond reasonable doubt the nature of the injury on the appellants right eye was not caused by police assault whilst being interviewed under duress resulting a confessional statement made.*
>
> *8. THAT the learned trial Judge erred in law and in fact when he failed to take into fair and proper consideration the unfairness and fundamental breach of my Constitution rights that existed when the police took my caution interview at the police station thus causing a preserve voir dire Ruling made."*

[95] Grounds 1-4 and ground 8 mentioned above pertain to the circumstances that led up to the manner, the caution interview was conducted. The prosecution claimed, both at the voir dire inquiry, and the trial proper, that the impugned inculpatory admissions were made voluntarily by the Appellants, which fall into the category of confessions.

[96] The 2nd Appellant's cautioned interview (at pages 832-835 of the court proceedings) reflects that he was interviewed under caution by D/Cpl 3064B Samuela in the presence of WDC 4157 Kesaia. The interview had commenced at 16.30 hours on the 22nd May 2015 and continued up to 20.00 hours on the 23th May 2015.

[97] The 2nd Appellant had been given his relevant constitutional rights, upon which he had requested to see and consult a lawyer. However, he had not pursued the request, taking into account the time it would take to apply for the assistance of a Legal Aid Lawyer, and had agreed to proceed with his interview.

[98] In the course of the interview the 2nd Appellant had been provided with a rest break, a break for his lunch and shower. He had also taken part in a scene reconstruction during his caution interview.

[99] The 2nd Appellant's inculpatory admissions disclose that it was the 3rd Appellant who set up the plan for the robbery. The 2nd Appellant had put himself as a door guard at the wine shop during the robbery and had not taken part in the attack on the Former Commissioner of Police. Both in his caution interview and charge statement he had admitted guilt, and apologized for his actions.

[100] The medical report of the 2nd Appellant indicates that he had suffered "*bruise on the medial canthus of the right eye, (both ears normal tenderness of nose bridge and both noses are clear)*".

[101] The Learned High Court Judge in his findings of the *"Written Reasons For Voir Dire Ruling"* states that, the 2nd Appellant's version of assaults, *vis-à-vis* the injuries he sustained per his medical report, was not credible.

[102] The Learned High Court Judge had not fallen into error in admitting the 2nd Appellant's inculpatory admissions into evidence, having found the same to have been voluntarily made. As the trial proceedings reflect, the defence could not shake the credibility and the

consistency of the prosecution witnesses (who testified in relation to the recording of the admissions and their voluntariness).

[103] The Learned High Court Judge had properly directed himself, or was properly mindful as reflected in paragraphs 11-14 per his *"Written Reasons For Judgment And Sentence",* that the inculpatory admissions relied on by the prosecution had been obtained voluntarily.

[104] The natural flow of the events in the narratives given in the course of the admissions reflect that the 2nd Appellant had not been giving answers consequent to any alleged police coercion, and his admissions appear to be wholly voluntary.

[105] The 2nd Appellant (having made an overall challenge on the voluntariness of his inculpatory admissions) raises an issue claiming that there had been a lack of voir dire disclosures in the form of failure to provide him with the station diaries and the cell books.

[106] However, the court proceedings disclose the impugned material had been actually disclosed and provided to the Appellants (as per pages 513-623 of the court proceedings). The following submissions made by the State in regard to the issue, are relevant for consideration:

> *"3.1 It however has become apparent that appeal records might not be accurate (contain disclosures but not actual documentary exhibits) as the cautioned interviews of the 2nd – 5th appellants contain elements of bad character while there were no relevant directions in such regard. However surely counsel from both sides, together with His Lordship at trial, had been tuned into this issue as RHCV3 at page 1024 paragraph 9 (at numbering 4) shows that parties and the Honorable Court had engaged in discussions and the deleting of prejudicial questions and answers from the accused's cautioned interviews and charge statements to ensure a fair trial. This is raised to ensure that this Honourable Appellate Court is not misled in any manner (given the confusing compilation of certain records, at least per the respondent's copies) and also ensuring fairness to all the appellants because should this Honourable Appellate Court, in its sage supervisory*

capacity, find that bad character directions had been necessary, it could be in favour of the 2nd to the 5th appellants with references to ***Mohan v State*** *[2015] FJCA 155; AAU 103.2011 (3 December 2015)"*

[107] Moreover, the 2nd Appellant appearing in person urged before the full court the following five new grounds of appeal (four against the conviction and one against the sentence):

"1. THAT the Learned trial Judge erred in law and in fact by proceeding the voir dire in the Appellants case without the Appellant obtaining or receiving the required station diary, Cell diary and meal diary which was requested by the Appellant as part of his voir dire grounds submitted to court before the commencement of the voir dire proceeding thereof violating the requirement of Section 15 (1) of the Constitution.

2. THAT the Learned Trial Judge erred in Law and fact when he did not provide any proper reference to the Appellants defence witnesses in the summing up causing serious prejudice.

3. THAT the Learned Trial Judge erred in law and facts when he failed to direct the assessors to consider whether the Appellants evidence in court corroborates with the version given by the other Appellants or was favourable to other Appellants.

4. THAT the Learned Trial Judge erred in law and fact when he failed to direct the assess that they should determine whether they considered the caution statement to be true and reliable in whole or in part and consider its contents with all the other evidence.

5. THAT the learned sentencing judge erred by applying the sentencing guideline tariff in the case of Wallace Wise v The State Criminal Appeal No. CAV 0004 of 2015 sentence me since this offending is not a home invasion matter."

[108] The Learned High Court Judge as the sole judge of fact and law, had been adequately mindful as to the correct procedure that should be adopted in admitting inculpatory admissions, and what weight should be attached to them in analysis.

[109] As regards the issue raised by the 2nd Appellant in his fresh ground of appeal against the sentence, it should be observed that the term *'home invasion'* as considered in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) as a concept cannot be given a

narrow interpretation as to exclude premises like the premises in which the instant robbery took place.

[110] ***'Wallace Wise'*** concept is wide in application and certainly wide enough to encompass premises like the one in question.

[111] All grounds of appeal advanced on behalf of the 2nd Appellant lack merit.

[112] It appears that the five Appellants have been found guilty as charged and rightly convicted based solely on their inculpatory admissions relying on the credible evidence of the witnesses led by the prosecution whose credibility couldn't be impeached and consistency couldn't be shaken by the defence.

[113] The Learned High Court Judge's rejection of the defence evidence can be substantiated having regard to the embellished accounts of alleged police coercion. Furthermore, the injuries sustained by the Appellants reflected in the respective medical reports, do not appear to be compatible with police assaults or impropriety.

[114] The Learned High Court Judge having given thought to the issue, had seen the possibility that the said injuries could have resulted from their respective involvement in a violent robbery, when the victims retaliated at the time in question by throwing various objects at them.

[115] In this regard, it is relevant to note, the learned trail judge's following finding in his *'Written Reasons for Judgement and Sentence'*:

> *"13. Furthermore, the accuseds' medical reports did not show any major injuries. Had they been assaulted by the police officers, as they alleged, the court would expect more serious injuries in their medical reports, not the usual "tenderness. The police officers they alleged assaulted them, were huge individuals and I expect serious injuries on the accuseds if these officers did in fact assaulted them. Furthermore, the accuseds were attacked by the Distill Wineshop customers at the time of the robbery. They threw all*

sorts of articles at the accuseds and consequently they fled the crime scene. Could it be possible that the injuries that they are spotting are the result of this episode?"

[116] In view of the lines of defence raised by the Appellants throughout the trial, in relation to the admissibility of the inculpatory admissions, the above observation bears a substantial significance.

[117] In **Ganga Ram & Shiu Charan v Reginam** Criminal Appeal No. 46 of 1983, it has been observed that, "….*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 the tyranny of fear" Ibrahim v R (1941) AC 599 DPP v Pin Lin (1976) AC 574. Secondly 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 behaved, perhaps by breach of the Judges Rules falling short of overbearing the will by trickery or by unfair treatment. Regina v Sang (1980) AC 402, 436 @ C –E. This is a matter of overriding discretion and one cannot specifically categorise the matters which might be taken into account…."*

[118] I find no cogent reasons to interfere with the judgment of the High Court. The appeals of all accused lack merit and is accordingly dismissed.

Order of the Court:

1. Appeals of all the Appellants dismissed.

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

.....
Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

Solicitors:

Legal Aid Commission for the 1st Appellant, 2nd & 3rd Appellants
and 4th Appellant
5th Appellant in person
Office for the Director of Public Prosecutions for the Respondent