SENIVALATI RAMUWAI, RUPENI NAISORO v STATE (AAU0081 of 2008)

COURT OF APPEAL — CRIMINAL JURISDICTION

MARSHALL, WIKRAMANAYAKE, GOUNDAR JJA

21 November 2011, 23 March 2012

Criminal law — appeals — powers of Court of Appeal — new evidence on appeal — examination under oath of witnesses who would have been compellable at trial — approach of Court of Appeal for permission to adduce new evidence — approach of Court of Appeal to assessment of witness as hostile — trial judge failing to hold voir dire — Court of Appeal Act ss 23(1)(a), 28, 38(a) — Criminal Appeal Act 1907 (UK) ss 4(1), 9 — Criminal Appeal Act 1966 (UK) — Criminal Appeal Act 1968 (UK) s 2(1) — Criminal Evidence Act — Criminal Procedure Code s 299.

Criminal law — prosecution — duty to prosecute case fairly — prosecutor should not seek declaration of hostile witness where witness fails to satisfy factual and legal criteria for such declaration — duty to conduct legal research and present cases to Court

The appellants were charged with, and convicted of, murder following a trial in the High Court before a Justice and three assessors. At different times, both appellants later filed notices of appeal to the Court of Appeal. Both appellants were later granted bail pending appeal following an affidavit of the Assistant Superintendent of Police that, since the appellants' conviction following trial, an unrelated person had confessed to committing the killings that were the subject of the appellants' murder charge and conviction. The matter came before the Court of Appeal, which indicated that new evidence was required, and such evidence was heard by Marshall JA sitting as a single Justice of Appeal, who heard evidence from the two appellants and the alleged confessor. The matter, including the new evidence, was thereafter heard by the full bench of the Court of Appeal. At issue was the circumstances under which the Court of Appeal would admit new evidence on appeal, the approach of the Court where that new evidence indicated an appeal should be allowed, the circumstances wherein the Court may declare a witness to be hostile, and the duty of the prosecution to put legal authorities before the Court.

Held –

(per Marshall JA, Wikramanayake and Goundar JJA concurring) (1) Section 28 of the Court of Appeal Act empowers the Court of Appeal to receive new evidence on appeal, which includes hearing the examination under oath of witnesses that would have been compellable at the trial, but the Court will only hear new evidence in exceptional circumstances and subject to established exceptional conditions.

(2) The correct approach of the Court of Appeal, when new evidence is considered, is to ask whether, if the tribunal of fact had heard the new evidence at the High Court trial, they would have had a reasonable doubt and acquitted the defendant.

(3) The prosecution had a duty to prosecute the case fairly and, in the circumstances of the present case, the prosecutor should not have applied to make the key witness a hostile one because he did not satisfy the criteria in fact and law to be declared a hostile witness.

(4) Where the trial judge has not held a *voir dire* to assess whether or not a witness to be called may be declared hostile, the Court of Appeal will intervene depending on the strength of the prosecution case, leaving out the "prejudice" to the accused.

(5) The prosecution has the duty to research the law and place before the Court cases that are against the prosecution submission as well as for the prosecution submission.

Appeals allowed, convictions and sentences quashed and annulled, verdicts of not guilty entered

Casea referred to

R v Dat [1998] Crim LR 488; *R v Mann* [1972] 56 Crim App R 750; *R v Vibert* (Unreported) October 21st 1974, cited.

R v Hancox 8 Crim App R 193; *R v Honeyghon* [1999] Crim. L.R. 488; *R v Parks* [1961] 1 WLR 1484; 46 Cr App R 29, applied.

R v Rowland [1947] KB 460; *R v Turnbull* [1977] QB 244, distinguished.

N. Nawasaitoga instructed by *Legal Aid Commission* for first Appellant.

F. Vosarogo instructed by *Mamlaka Lawyers* for second Appellant.

S. Puamau instructed by *Office of the Director of Public Prosecutions* for the Respondent.

[1] Marshall JA. On the evening of Friday 29th April 2005 at about 9.00 pm Navneet Kumar aged 17 years was driving a white passenger hire van in the district around Korovou in Tailevu. Near the village of Matacula and close to the Wainikavula creek, one or more persons stopped him, stole $100 in cash from him and then took him from the van. At an ivi tree above the creek he was punched until he fell down and then hit with a knife in the head and upper body. There were multiple blows with an intent to kill. The knife was bent because it was used with great force. Navneet Kumar was thrown in to the river. When it appeared that he was not dead but trying to get out of the other side of the creek he was held under the water and drowned. The knife was left at the scene of the stabbing.

[2] Senivalati Ramuwai was born on 30th October 1969 and aged 37 on 29th April 2005. He was arrested on 3rd May 2005. He was investigated and interrogated for some days. A case against him depended on the fact that he had signed a confession statement to murdering, assisted by others, Navneet Kumar. He also signed when he was charged with Navneet Kumar's murder and did not seek to exculpate himself from knowing participation. There is also, according to the police, a statement made on 9th June 2005 by a Fijian van driver Moape Kadavu that Senivalati wanted his van for use in a contract to beat up Navneet Kumar a Hindu school boy who was allegedly *"chatting up"* a Muslim girl fellow student to the distaste of her strict family. Moape Kadavu's statement also claimed that he had told Senivalati to use Rupeni (Niudamu) Naisoro, who Senivalati did not know in the assault on Navneet because Rupeni did not like Navneet. Finally Moape in the statement of 9th June 2005 claims that while on the road about 11:00 pm on 29th April 2005 he observed walking with wet clothes below waist both Senivalati and Nemani Tuicakau.

[3] Rupeni Naisoro was born on 11th July 1982 and was 23 years old on 29th April 2005. He had no previous convictions before being arrested for the murder of Navneet Kumar on 2nd May 2005. The prosecution case against him was based on a signed confession statement backed up by a signed statement on the charge sheet which was also an admission. There was also the above mentioned statement to the police dated 9th June 2005 of Moape Kadavu who is a friend and relative of his. In that statement Moape told police that at about 11 pm on 29th April 2005 he had seen Rupeni Naisoro, who had told him that he and Senivalati Ramuwai had stabbed Navneet Kumar shortly before. He observed that Rupeni's shoes and lower trousers were wet.

[4] Since Moape had made a quite different statement to police on 2nd May 2005 before police enquiries had reached even speculation let alone firm evidence, the statement of 9th June 2005 is highly controversial. Nearly a year later on 2nd March 2006 the prosecution announced that they were joining one Nemani Tuicakau as a 3rd Defendant. Nemani was found by the learned High Court Judge to have no case to answer at the end of the prosecution case. He was discharged.

[5] The trial commenced before a Justice of the High Court and assessors on 3rd April 2007. After a long *voire dire* there was a trial with much of the same evidence being lead and further examined before the High Court Justice and assessors. Both Senivalati Ramuwai and Rupeni Naisoro gave sworn evidence and called witnesses. Two of the three assessors gave opinions of *"guilty"* in the case of Senivalati Ramuwai and one said *"not guilty"*. All three assessors gave an opinion of *"guilty"* in the case of Rupeni Naisoro. On 16th May 2007 the learned Justice of the High Court convicted both Rupeni and Senivalati in accord with s 299 of the Criminal Procedure Code. Also on 16th May 2007 the learned Justice of the High Court sentenced both men to life imprisonment as required by law but did not fix a minimum sentence to be served before release on parole. At the time if there was no fixing of a minimum sentence those convicted of murder could expect to be released after about 11 years.

[6] On 9th August 2008 Rupeni Naisoro through his solicitors filed a Notice of Appeal. It relied on the following grounds:

> *"I hereby the petition Fiji Court of Appeal to appeal against my conviction on the following grounds:*
>
> *1. That the Trial Judge erred in law and in fact in mentioning to the assessors that the witness Moape Kadavu had been declared hostile as this could have affected the assessor's assessment of Moape Kadavu's evidence.*
>
> *2. That the Trial Judge erred in law and in fact in not addressing and/or directing the assessors that the fact that the Appellant had refused an offer of immunity was a matter the assessors could, if they wished, to take into account in reaching their respective opinions."*

Senivalati had already filed a Notice of Appeal on 20th August 2007.

[7] Then on 12th August 2009 Rupeni swore an affidavit saying that four years after the murder it had come to his attention that a new team of officers was carrying out further investigations, and that a person unconnected with him or Senivalati had confessed to the murder of Navneet Kumar.

[8] On 22nd September 2009 Assistant Superintendent of Police, Rupeni Raga swore an affidavit which included as follows:

> *"3. THAT since the 18th of April 2009, a Timoci Ravurabota had confessed to a Church Group in the name of Waimaro Methodist Church Reconciliation Prayer Team that he himself had murdered the deceased Navneet Kumar at Korovou Tailevu on the 29th of April 2005.*
>
> *4. THAT since the re-investigations into this matter I have recorded the statements of 19 witnesses.*
>
> *5. THAT the said Timoci Ravurabota is currently in police custody and is being interviewed by me.*
>
> *6. THAT after completing our investigations this week, we intend to liaise with the Office of the Director of Public Prosecutions on any appropriate charges that may be put against this Timoci Ravurabota."*

[9] In view of this information Acting President of the Court of Appeal John Byrne sitting as a single judge granted bail pending appeal to Rupeni Naisoro on 7th October 2009 subject to a surety and reporting conditions.

[10] Senivalati Ramuwai representing himself had filed an informal Notice of Appeal on 20th August 2007 in which he said he was the subject of a miscarriage of justice.

> *"That I was sentenced on the 16th of May 2007 to which is a result of wrong decision and also the wrong application for the rule of law as undertaken by the trial judge, upon gathering findings of facts.*
>
> *1. I wished to raise a number of issue arise in relation of finding a verdict of Manslaughter in relation to the Murder charge.*
>
> *a) That the evidence adduced against me does not establish murder beyond reasonable doubt.*
>
> *b) That the evidence tendered in court does not establish manslaughter beyond reasonable doubt.*
>
> *2. That the trial judge erred in law and in facts in not raising the issue of manslaughter with the jury and give them direction in relation to it.*
>
> *3. That the trial judge erred in law and in facts in not directing the jury that my statement taken by police was through force.*
>
> *4. That there was no direct or clear evidence to implicate me to the crime charged."*

[11] Senivalati was granted bail pending appeal on 29th October 2009 with a surety and reporting conditions.

[12] In due course both appellants added as a principal ground of appeal that if Timoci Ravurabota was convicted of the murder and had acted alone, their convictions of the murder of Navneet must be set aside.

[13] The matter came before a Full Court of Appeal on 4th March 2010. Acting President John Byrne sitting with Daniel Goundar JA and Madam Justice Anjala Wati JA were of the view that they required new evidence. On 31st March 2010 some statements were agreed and there was evidence on oath from Timoci Ravurabota himself.

[14] Although Judgment on Notice was promised on 31st March 2010 it was never delivered. After Acting President John Byrne retired in October 2010 it was clear that the Full Court of Appeal would have to be reconstituted and the appeals reheard before a differently constituted Full Bench.

[15] As the senior appeal judge I decided to hear new evidence as a Single Justice of Appeal. That evidence if admissible would then be considered by a full bench over which I would preside, together with the evidence at trial.

[16] I heard the new evidence on 13th October 2011 when I heard evidence on oath from Timoci Ravurabota, Senivalati Ramuwai and Rupeni Naisoro. I then presided at a new appeal hearing on 21st November 2011 together with Daniel Goundar JA and Nimal Wikramanayake JA. At the end of the hearing this Court of Appeal reserved its judgment and intimated that it would deliver written judgment on notice.

The law relating to new evidence on appeal and the criteria for considering an appeal where new evidence is admitted

[17] It must be noted that the legal framework for criminal appeals in Fiji remains that first enacted in England in 1907 in the Criminal Appeal Act 1907. While in England that statute was modified by the Criminal Appeal Act 1966 which became the Criminal Appeal Act 1968 s 2(1) Fiji decided to remain with

the criteria in s 4(1) of the 1907 Act which is identical to s 23(1)(a) of the current Court of Appeal Act in Fiji. The corollary is that many appeals in England and Australia decided since around 1968 provide no guidance to Courts hearing criminal appeals in Fiji.

[18] Section 9 of the 1907 Act provides for the reception of new evidence. It is s 28 of the Court of Appeal Act in Fiji and is in identical terms.

[19] There are a number of related powers in s 9 which in Fiji is s 28. But the one that is most relevant in this case is s 9(b):

> *"9. For the purposes of this Act, the Court of Criminal Appeal may, if they think it necessary or expedient in the interest of justice, -*
>
> *… (b) if they think fit order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any judge of the court or before any officer of the court or justice of the peace or other person appointed by the court for the purpose, and allow the admission of any depositions so taken as evidence before the court."*

It is clear that there must be examination of witnesses under oath. So statements cannot be admitted to prove the important facts sought to be adduced.

[20] The earlier Court of Appeal admitted statements of the Reverend Ananaiasa Soro, Kuliniasi Vunikedra, Epeli Lalakoverata and Inosi Turagalada. While that is not an appropriate or effective primary procedure these statements can fill out details of facts accepted by this Court as a result of the oral hearing before me on 13th October 2011 when Timoci Ravurabota, Senivalati Ramuwai and Rupeni Naisoro gave evidence on oath. This Court has also admitted police statements in the Ravurabota file which are relevant, mostly as supporting evidence, in respect of the accepted oral evidence.

[21] The criteria for deciding that it is necessary and expedient to hear new evidence has always been held to be a difficult one for would be appellants to surmount. The 36th Edition of Archbold at paragraph 899 says:

> *"It is only in exceptional circumstances and subject to exceptional conditions, that the court is willing to listen to additional evidence. The principles on which the court will exercise its discretion to allow further evidence to be called may be summarised as follows: (i) the evidence must be evidence which was not available at the trial; (ii) it must be evidence relevant to the issues; (iii) it must be credible evidence, i.e. well capable of belief; (iv) if the evidence is admitted, the court will, after considering it, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial: R v Parks* [1961] 1 WLR 1484; 46 Cr App Rep 29"

[22] In *R v Rowland* [1947] KB 460 the appeal involved an application to hear the evidence of one David John Ware who claimed in a statement to have committed the murder of which Rowland had been convicted. The head-note summarises the view of a full Court of Criminal Appeal consisting of Lord Goddard CJ, Humphreys J and Lewis J:

> *"On an appeal against a conviction on a charge of murder, an application was made on behalf of the appellant for leave to call as a witness a man who, since the trial of the appellant, had confessed that he himself had committed the murder of which the appellant had been convicted: -*
>
> *Held that permission to call the person making the confession could not be granted. Although his statement called for the most careful investigation, the Court of Criminal Appeal was not the proper tribunal to hold the necessary inquiry, which would involve*

in the light of the new evidence, the recalling of many witnesses, and probably the calling of several fresh ones. Further, the court would be compelled to form some view as to the guilt or innocence of the person making the confession and to express that opinion in open court. In effect, they would be trying not only the appellant but also the man making the confession who might, as a result, have to stand his trial for murder, in which event the finding of the Court of Criminal Appeal could not but be prejudicial to him. In the absence of very special circumstances, which did not exist in the present case, the court would not re-consider the verdict of a jury in the light of fresh evidence."

[23] Humphreys J for the Court said at 462 and 463:

"The attitude of the court towards the question of hearing fresh evidence has often been stated. For instance, in the case of Rex v Mason (1923) 17 Crim App R 160 at 161, where Mason had been convicted of murder and the leave of the court was asked for several fresh witnesses to be called in support of his appeal, Darling J., giving the judgment of the court refusing leave, observed, after dealing with the facts, as follows:

"It is now really asked that there should be a new trial, which this court is not empowered to order, and that we should hear certain witnesses whose names have been mentioned, and then consider the whole of the trial in the light of that new evidence. This court exercises with very great caution the power given to it to hear fresh evidence because to do so is opposed to the old-established, trusted and cherished institution of trial by jury. This court has to be convinced of very exceptional circumstances before it will reconsider the verdict of a jury in the light of fresh evidence".

We find no exceptional circumstances in the present case. Upon the hearing of the appeal we were not referred to, and we are not ourselves aware of, any precedent for granting the present application.

Finally, we are not unmindful to the fact that there exists an authority in the person of the Home Secretary, who has far wider powers than those possessed by this court, who is not bound as we are by the rules of evidence, and who has all the necessary machinery for conducting such an inquiry as is here asked for."

It is noted in the report that the Home Secretary held an enquiry and in the course of it Ware withdrew his pretended confession.

[24] In my view the confession of a 17 year old youth of previous good character in this case had a greater ring of truth than what Ware in *Rowland* had to say. But nonetheless until Timoci Ravurabota was convicted of the murder of Navneet Kumar which did not happen until 12th February 2010 it should have been wrong because of the potential prejudice to Timoci Ravurabota for the Full Court to order that new evidence be heard. So at the time of granting bail pending appeal it would be inappropriate. However by 30th March 2010 when the former Court of Appeal gave leave to adduce new evidence the situation can be distinguished from that in *Rowland*. Timoci Ravurabota sought leave to appeal his conviction although he had pleaded guilty but withdrew it at the outset of the hearing on 4th November 2011. The Court of Appeal allowed his appeal on sentence on 16th November 2011.

[25] In Fiji the equivalent of a statutory reference by the Home Secretary after enquiry is s 38(a) of the Court of Appeal Act. I am unaware of that power ever being used in Fiji.

The New Evidence Heard on 13th October 2011

[26] The whole of the disclosures in the Ravurabota case and in the Ramuwai and Naisoro case disclose quite a lot about life in Korovou and the surrounding villages. For one thing the town of Korovou is the hub for villages such as Nailega (where Timoci Ravurabota and his family and his clan live), Deepwater where Seet Kumar and his son Navneet lived, and Nayawasara where Rupeni, his

family and his mother's clan live. Senivalati lived with his sister who was a school teacher at Fulton College Naibili which is close to Nailega. Korovou is where people travelling further afield such as to Nausori or Suva get on or off the buses. Social transport is provided by passenger van drivers. The evidence refers to Seet Kumar and his son Navneet as local transport providers. It also refers to Moape Kadavu who performed this function. There is also one Dharmend who was not plying for hire on the evening of 29th April 2005. The evidence is that Korovou is quiet on a Friday evening. There is the presence of those interchanging between buses and passenger hire vans. The others are those drinking and later there is a dance and bar at the Tailevu Hotel with a $20 admission charge. At 9.00 pm the Tailevu Club, which is a bar closes. If one wishes to drink after 9.00 pm you have to go to the dance at the Tailevu Hotel. Another Korovou bar is the Top Taste. Because Korovou and neighbouring villages are a relatively small community, everyone knows a high proportion of others but sometimes by face rather than name. People of the same age meet at schools such as Tailevu North College where Navneet and Timoci were in the same form. The evidence is that there had not been a murder in Korovou for many years. It is also the evidence that police in the aftermath of this murder interviewed about 20 persons who they thought might know something or have been involved.

[27] The most important evidence on 13th October 2011 comes from the fact that the full statement under caution of Timoci and his response to being charged was read to him in court. Under oath he then said that every answer was correctly recorded, that he had signed at the time in a number of places and that all the facts in his answers were true. He had not been threatened, hit or improperly pressured by ASP Rupeni Raga in any way. He agreed that he had pleaded guilty before Justice Salesi Temo on 16th February 2010. The facts in the statement of facts agreed with the prosecution and Defendant were read out and Justice Temo asked if he admitted the facts and after Timoci Ravurabota said *"yes"* Justice Temo wrote in the Record *"facts admitted"*.

[28] I now state the facts from the statement under caution:

"I am Timoci Ravurabota of Nailega village. District of Namalata in the province of Tailevu. I am only known by the name Timoci. I live with my parents at Nailega Village. I am not married. I am not employed other than assisting my father with farming. My level of education if Form 6. In 2005 I attended Form 6 at Tailevu North College. It is true that I told Kuliniasi Vunikedra and Inosi Turagalada that I murdered Navneet Kumar in the year 2005 near Matacula Village. I murdered Navneet within the period of time from 8.30 pm on Friday 29th April 2005 to 4.15 pm on Saturday afternoon on 30th April 2005. No one assisted me in murdering Navneet. I murdered him alone. I killed him by stabbing him repeatedly on his neck, face, upper chest and his head with a kitchen knife before I forced him underwater in the Wainikavula River until he was dead. I then put his body under the roots of a tree which was underwater so that the body does not float. The kitchen knife I used to repeatedly stab Navneet belonged to my mother Venaisi Bolaciri which I brought from home that day Friday 29th April 2005 at about 6.00 pm. It is a small knife with a brown handle and it is marked with the letters 'IL'. 'IL' is my younger brother's name Inoke Lavaisiga. My mother put these initials on the knife. I can still very well remember that knife but the blade is bent where I stabbed Navneet's head. I have been handed a knife and I recognise that I used (it) to repeatedly stab Navneet. Her identification marks is still there. After I stabbed Navneet I left the knife near Wainikavula Creek which is the place where I killed Navneet. I still remember the exact place at the Wainikavula Creek where I put Navneet's body after killing him.

I can show that place to the police. I know Navneet Kumar very well since we attended Tailevu North College from Form 3 to Form 6. I was in Class 602 while he was in Class 601."

[29] After the above Timoci Ravurabota was asked by ASP Rupeni Raga about his plan to rob and kill and what happened. Timoci Ravurabota replied:

"First of all, the Coca Cola Games was to be held at the National Stadium on Friday 29/4/2005 and Saturday 30/4/2005. I was still in form 602 at Tailevu North College at that time and I was camping with our village rugby 15 team at our Village Community Hall beginning from Monday 25/4/2005 for the rugby game to be played on Saturday, 30/4/20005 against Dritabua, a team from Naivicula. I asked my mother to give my admission fee to the Coca Cola Games and she gave me only $20.00 which is not enough to pay my fare, food and admission fee to the National Stadium in Suva. On Friday, 29/4/2005, the beginning of the school break, at about 7.00 pm, I walked alone to Korovou town. I was wearing a dark blue long trousers with side pockets with a brown round neck t/shirt. I was bringing with me my mother's kitchen knife which was pocketed inside my trouser's side pocket. I was planning to rob Dharmen by threatening him with the kitchen knife. I remembered meeting Samuela Qiotagane in Korovou town. We played billiard together before we came to the bus stand that goes to Suva where we were just yarning. It was dark and lights were switched on in Korovou town. I was looking for Dharmend, carrier driver but I didn't see him. Whilst I was yarning with Samu, the kitchen knife fell off from my pocket and Samu saw the knife, he then advised me in Fijian 'Qarauna Vinaka, ke raica na ovisa ni o kauta tiko nai sele ena taoni, ena vesuki iko' which when translated means 'Be Careful, if a police officer sees you carrying a kitchen knife in town, you will be arrested'. I picked up the knife again and put it back into my trouser's side pocket. Samu is one of my close friends, we attended form 3 and 4 together at Tailevu North College. During our conversation with Samu, at about 8.00 pm or after 8.00 pm, I saw Navneet Kumar driving their white liteace van to Korovou town through the road that goes to Tailevu North College. I saw Mrs Torika Vateitei sitting in the front seat of the van. The van then driven by Navneet Kumar then went up Nawiwaivusa Road. I crossed to the other side of the road and followed Navneet Kumar's van. I stopped Navneet Kumar's van near Master Peni Saukarawa's house along Nawiwaivusa Road. Navneet stopped and there was no other passenger inside the van. I opened the back passenger door of the van and told Navneet to take me to Burerua and I was seated at the back seat. When we (were) approaching the Korovou town main road, I told Navneet Kumar not to allow anyone to see me because some gang were looking for me. Navneet then advised me to go underneath the seat, which I did. The reason he told me to get down underneath the seats because the van will stop in town. He did stop in town, and I believe he was talking with an Indian guy, I recognised the voice to be of Gyan Prasad because we also attended Tailevu North College. I heard Gyan Prasad talking from the passenger side window and they were talking in Hindustani, and I can only understand that Navneet was telling Gyan that he wanted to buy a CD radio for his lorry. Gyan wanted to go for a ride but Navneet told him that he's going for another pick up job. After a short while, we then drove out again and I remained underneath the seat until I felt that the lights of the town faded and we have passed the Doctor's government quarters. Just after we passed the government quarters, I saw a lorry coming towards Korovou town, but I don't know who was driving it. We drove passed Burerua village and was about to reach RKS, then we return until we reached a drain just passed the junction that goes to Matacula village, I then told Navneet to stop. While stopping there, I saw a white twin cab coming with its light flicking, when it was about to reach us, then slowed down, then drove passed us after Navneet flickered his van light. I don't know the owner of the lorry as well as the registration number. Navneet's van lights was still switched on. I then got off then walked around the back of the van then came to the front at Navneet's side (driver's side). I took out the kitchen knife from my pocket and placed the blade on Navneet Kumar's neck and told him to get off the van. I saw him getting all the money from under

the seat and handed it all to me, even before I asked him for money. I took the money and put it inside my trouser's pocket. He wanted to give me his mobile phone as well but I refused it. I removed the knife from his neck and I held the collar of his t/shirt from the back, then pushed him in front of me as we were following the road up to Matacula. After a while, we went through under a fence near a hill. After going under the fence, I then released the collar of his t/shirt because the place was bushy. A little bit further, he ran down the slope until I caught him again down the slope. I again got hold of his collar and we walked until we reached some Ivi trees, where I punched him until he fell to the ground. At that time, I started to stab him on his neck, upper chest including his head and his hands when he tried to stop the knife. Whilst I was stabbing Navneet Kumar, his mobile phone rang and at the same time someone was calling out to Navneet. I then threw Navneet to the river believing that he is dead. Then I saw him trying to come up again to the other side of the river, I then jumped down to the river and got hold of Navneet and submerged him until he was motionless. I knew that he is really dead, I then put his body under the roots of trees in the water, then I swam out of the water. I knew that when I stabbed his head, the kitchen knife blade bent, I just left the knife there. I did not take his mobile phone, it was still with him. I believed that I killed Navneet Kumar at 9.30 pm to 10.00 pm. Navneet was wearing a white t/shirt with a black long trousers. I think his t/shirt fell off at the place I repeatedly stabbed him. After killing Navneet, I ran towards Matacaucau, the night was so dark I didn't know where I was running. I recalled climbing a tree and when I looked back, I saw Tom's light and I followed the light until I almost reach Tom's house, I came down and crossed the road to Deepwater. I cross the Waibula river and followed along the back of the houses near the Bilo Road. I again crossed the Waibula river, and up the Daya Ram Tyre Repair, I then followed the Nabilo road until I reached the Kings Road, up to the PWD Depot, then went to the village. I reached home at about 5.00 am on Saturday, 30/4/2005. I changed my clothes and put my long trousers and t/shirt at the back of the double wall of our old store. I just laid down inside our kitchen when my mother woke up to cook. I think I laid down for only 5 minutes when I got up again to walk with the rugby 15 team to Korovou town. I well remembered that when I just laid down, the police from Korovou Police Station arrived in their lorry at my uncle Bolalailai's house. I didn't know what they came there for."

[30] At this point in the interview ASP Rupeni Raga asked Timoci if he would assist in a reconstruction:

"*Q: Are you ready to show us, police all the places you have mentioned that you have been to on 29/4/2005, the spot where you were talking with Samuela Qiotagane at the bus stand, where you stopped Navneet Kumar's van to get in, where you told him to go to Burerua, the spot where you turned around and came back before parking at the junction of the Matacula Road, the places you have mentioned that both of you followed, the spot you repeatedly stabbed him, the river at which you drowned him to death, and the place you dumped his body under the tree roots so the body does not float also the road you followed after you murdered Navneet Kumar right up to your house?*

A: Yes, I am ready to show you, police all the places I have mentioned to you."

On 23rd September 2009 between 9.30 am and 6.30 pm a reconstruction of events, movements and places with many photographs being taken, took place. On 24th September 2009 Timoci was asked about the reconstruction. I now put the question and answer in respect of this:

"*Q: Were all the places you have showed us yesterday, 23/9/09, especially the spot you stopped Navneet's van at the junction to Matacula Road, the spot at the ivi tree where you repeatedly stabbed him, the river at which you drowned him to death before dumping his body under the tree roots so the body does not float, were they the correct spots?*

A: Yes, I have shown you all the correct places which coincide to all the places I have mentioned to you during our interview."

Asked about the two appellants in this appeal, the questions and answers were:

"Q: What about Rupeni Naisoro and Senivalati Ramuwai, they have been convicted for life imprisonment because they murdered Navneet Kumar s/o Seet Kumar in 2005. Is it true that they murdered Navneet Kumar.

A: No, I myself murdered Navneet Kumar. Rupeni and Senivalati did not know anything. I believe the police investigation on the murder of Navneet was incompetently done. I believe if the investigation was properly conducted, they would have arrested me, even though it will take time.

Q: Do you know Nemani Tuicakau who (was) charged (with) Rupeni and Senivalati for murdering Kumar?

A: No, I do not know him."

A: "… I wish to say that I, alone murdered Navneet Kumar s/o Seet Kumar. Rupeni Naisoro and Senivalati did not know anything about the murder and they are innocent. I blamed the police officers for not conducting their investigation thoroughly and properly, as a result, Rupeni and Senivalati were arrested and convicted for Navneet Kumar's murder. I also wish to request the High Court judge for the release of Rupeni and Senivalati from prison. I am willingly ready to face the punishment of what I did, but no innocent person to carry the punishment of what I have done."

[32] At the hearing on 13th October 2011 evidence was given by all three witnesses as to the level of their acquaintance with each other. It should be borne in mind that Timoci was 17 years old on 29th April 2005 while Rupeni was 23 years old and Senivalati was 37 years of age on that day. It is also relevant that everyone living, growing up or working in the neighbourhood of Korovou and surrounding villages tends to be aware of a large proportion of the people in the area.

[33] Timoci said that Senivalati was known to him as often seen around Korovou town and in fact he lived with his sister at Fulton College which is close to his clan village at Nailega. He was not a friend or a close friend and he had never socialised with him. He socialised with persons of his own age and his close friends were relatives from the same village such as Inosi Turagalada and Kuliniasi Vunikedra. It seems that the Fulton volleyball court was a place where Nailega villagers and others would come together and play volleyball from time to time and Timoci said in his statement under caution that on one or more occasions Senivalati was one of the participants in such a game. Senivalati in his evidence on 13th October 2011 said that he did not know Timoci at all but did have an acquaintanceship with his father. He could not remember Timoci as a participant in volleyball at Fulton but agreed that plenty of boys come to Fulton and play there.

[34] In his statement under caution Timoci said he knew Rupeni when Timoci was in Primary School in 1996 at Namalata District School. Rupeni's sister Rosalini was a teacher at Namalata. Rupeni had lived with his sister at that time. In evidence on 13th October 2011 he repeated this. He had never played sport, gone drinking with or gone to Suva with Rupeni Naisoro. He merely knew who he was. Rupeni gave evidence unequivocally that *"I did not know (Timoci) at all on 29th April 2009"*.

[35] Senivalati on 13th October 2011 gave sworn evidence *"I just knew Rupeni through this case"*. Prior to the case they were not friends or even acquaintances and Senivalati said: *"Yes I only knew Rupeni just by name"*. In saying this he was not saying that he had ever had a conversation with Rupeni up to 29th April 2005. When Rupeni on 13th October 2011 was asked how well on 29th April 2005 he had known Senivalati he replied *"I did not know him at all"*.

Supporting Facts (1) - The Kitchen Knife To what extent is their supporting evidence for Timoci Ravurabota's version of events?

[36] The item that stands out is the kitchen knife used to stab Navneet by Timoci said to belong to his mother Venaisi Bolaciri. ASP Rupeni Raga interviewed Venaisi Bolaciri on 13th August 2009. This was prior to interviewing Timoci. Venaisi said:

> *"I still recall that an information also received that a kitchen knife was found at the Murder scene with an Identification Mark – Letter 'IV' on the handle and the said kitchen knife belongs to someone of Nayawasara village.*
>
> *I felt suspicious that the said kitchen knife belongs to me when I heard that my son Timoci Ravurabota verbally admitted to the church Minister of Waimaro that he himself murdered the said Indian boy who was found dead in a creek near Matacula village.*
>
> *I recall that a kitchen knife of mine went missing from home way back in 2005 and may be immediately after the murder.*
>
> *My Identification Mark – Letter 'IL' I made it on one side of the handle. I made letter 'IL' by using a different kitchen knife. The letter 'L' is slightly racing upwards and it looks like letter 'V'. My kitchen knife also looks new.*
>
> *I still recall the way I made the letter 'IL' on the handle of my kitchen knife for identification. This is the way I made the initial on the handle of my kitchen knife.*
>
> (At this point in the statement there is a drawing of the knife. The statement taker comments *"kitchen knife drawn by Venaisi Bolaciri and she also made her identification initial on the handle"*).
>
> *The initial identification Letter 'IL' on my kitchen knife represents my youngest son's name 'Inoke Lavaisiga'. The reason why I marked it because things which unmarked goes missing in the village and most kitchen knives in the village are the same.*
>
> *If I am allowed to see the kitchen knife which was found at the scene of Murder near Matacula in 2005, I can tell it's mine by looking at the identification mark on it.*
>
> *Today, 13/8/09 at 5.18pm (1718 hours), a kitchen knife was shown to me by D/ASP Rupeni Raga. He stated that the same kitchen knife was found at the scene of murdered Navneet Kumar Singh s/o Seet Kumar near Matacula village on 30/4/2005. I have identified the same kitchen knife to be mine. I have certified that the initial 'IL' was made by me. The only different that this kitchen knife blade has bended."*
>
> Mrs Venaisi Bolaciri also produced a plastic bucket with the 'IL' mark on it and it appears in the photographs taken in the 2009 investigation.

[37] In the 2007 trial the prosecution case was that the kitchen knife found at the scene marked with two letters the first of which was *"I"* and the second of which was *"L"* or *"V"* had been in the possession of Rupeni. On 27th August 2009 a statement was taken from Rupeni's mother Makelesi Naisoro. This makes it clear that she had not been shown this kitchen knife found at the murder scene in 2005 or indeed before 2009. She was sure it had never been in her ownership and possession. *"IV"* or *"IL"* was not her mark. Her mark is *"NAI"*. Her short statement reads:

> *"I recalled that I gave my statement to Police on the 2nd day of May, 2005 regarding the movement of my son Rupeni during the day of the murder. Now I wish to make an additional statement regarding the kitchen knife that was used in the murder. (1605 hrs) Shown with the knife. I have no kitchen knife marked as such (IV). I marked some of my knives. My marks is 'NAI'. That is if I'm gonna mark any it's gonna be 'NAI'. But this (IV) I have no knowledge at all who's knife is that. That does not belong to me. Lastly I wish to thank you (police) for bringing the knife over for me to identify it. Now my mind is clear of all the doubts about the murder weapon."*

[38] When in the September 2009 interview Timoci was asked to describe the knife he said it belonged to his mother and had the mark *"IL"* on it. He also said the blade was bent. Then he was shown the knife and he confirmed it was the knife he had used to stab Navneet which he had left near Wainikavula Creek. Only the perpetrator of the stabbing would know where he had acquired it, who owned it, what the letters of the identification mark were and the name associated with these initials, and the fact that it was bent.

Supporting Facts (2) Just before Navneet's Van stopped in the junction of the Matacula road, it passed the vehicle driven by Moape Kadavu on the Lodoni road

[39] In the first investigation on Monday 2nd May 2005 which was the third day after the murder of Navneet Corporal 2032 Epeli took the following statement from Moape Kadavu. According to the Record before this Court it was not disclosed to any of the Defendants in the first trial. The statement reads:

"I am a driver by profession. I used to drive a carrier of one Mr Cecil Quai Hoi. The carrier registration is DM 964 and it is white in colour with a white tarpaulin. It is 1.5 ton carrier which is Isuzu in brand. I could still recall that on Friday (29/4/05) at about between 7pm to 8pm, I took a job to Namau village whereby I conveyed a lady whom I know to be one Paula's mother. Paula used to be a bus driver at Dawasamu. I left Korovou towards Namau on the Dawasamu Road and upon reaching the driveway to the village at Wainikavula, I met one Rupeni who was walking along the road on the right hand side of the road. I used to pick (up) Rupeni all the time I see him walking on the road. I then stopped the carrier and Rupeni when seeing me stopping, he crossed over and boarded the carrier at the back. Though I did not inform him verbally to accompany me but it was my intention and that's why I stopped the carrier at the spot he was walking. When Rupeni boarded the carrier, I drove right to Namau. At the said Namau village the lady got off and Rupeni came and sit in front of me.

I drove back and upon reaching a spot named Vunisalusalu, I stopped and he got off to go to his house. After dropping Rupeni at Nayawasara, I proceeded towards Korovou. Whilst driving along the flat and to reach the bend near the Government Quarters, I saw the van of Seet running towards Matacula. The van is well known to me as it belongs to Mr Seet. I also thought to myself and to my surprise that this van is still doing the job of picking passengers at that hour after 8.00pm. I then reached Korovou and ran towards Navunisole and other places before knocking off at 10.00pm. That is all I can say about the issue."

If Rupeni had been dropped off close to his village and had gone there and socialised until he went to bed at about 11.00 pm he could not have been in Seet's white van being driven by Navneet observed by Moape afterwards near Matacula. The facts here attested to rule out Rupeni as the perpetrator or one of the perpetrators of Navneet's murder. It is also important because the perpetrator(s) in Navneet's moving van close to Matacula turn off are likely to have seen Moape's white carrier DM964. While it would be dark they would not wish to be seen. But they would be interested in those who might have seen the movements of Navneet's white van.

[40] During the very long answer when asked to describe all the events without being asked any specific question by ASP Rupeni Raga, Timoci said:

"Then we return (from a point just short of RKS) until we reached a drain just past the junction that goes to Matacula village … While stopping there I saw a white cab coming with its light flicking, when it was about to reach us [it] then slowed down then drove past us after Navneet flickered his van light. I don't know the owner of the lorry. [I also don't know] as well the registration number."

At page 245 of the record in Timoci's case are photos number 37 and 38. This was where Timoci on that day of the reconstruction was asked about the Moape vehicle incident. The legend to 37 and 38 reads:

"Photo number 37 and 38. General view of Lodoni road and Maji junction. In between is where they came across Moape's vehicle."

[41] In my view both Moape's and Timoci's account of this incident were not capable of being invented by them. Neither were they aware that the other would give or had given supporting evidence of this happening when they gave their account of the matter. Each version is fully supported by that of the other. On 2nd May 2005 when Moape gave his evidence to Corporal Epeli any observed movements of Navneet's van before it became stationary were of the utmost importance. At this stage Corporal Epeli would not know that Rupeni was later to become a suspect. Rupeni only went to see police on that Monday. Moape certainly would not know that Rupeni was about to become a suspect or indeed that he was the subject of a rumour whose origin or status seems never to have been enquired into.

Supporting Facts (3) - The Gyan Prasad Incident

[42] During the long account in Timoci's caution statement of what happened during the taking of Navneet – and his van and later events until Timoci arrived back in Nailega there is an incident involving one Gyan Prasad who was a friend of Navneet and also known to Timoci from his attendance at Tailevu North College. The event occurs shortly after Timoci had stopped Navneet's van and requested to be driven to Burerua as a lone passenger. The route lay through Korovou town. This information was not the subject of any particular questions asked by ASP Rupeni Raga. What Timoci said was:

"When we were approaching the Korovou town main road, I told Navneet Kumar not to allow anyone to see me because some gang were looking for me. Navneet then advised me to go underneath the seat, in which I did. The reason he told me to get down underneath the seats because the van will stop in town. He did stop in town, and I believe he was talking with Indian guy, I recognised the voice to be of Gyan Prasad because we also attended Tailevu North College. I heard Gyan Prasad talking from the passenger side window and they were talking in Hindustani, and I can only understand that Navneet was telling Gyan that he wanted to buy a CD radio for his lorry. Gyan wanted to go for a ride but Navneet told him that he's going for another pick up job. After a short while, we then drove out again and I remained underneath the seat until I felt that the lights of the town faded and we have passed the Doctor's government quarters."

[43] In the investigation preceding the 2007 trial there are no disclosures of Gyan Prasad's evidence. If he was the last to converse with Navneet other than Timoci or one or more unrelated perpetrators travelling with Navneet on his white van, it should have been important for the investigators to find him and hear what he had to say. However the Timoci investigation headed by ASP Rupeni Raga interviewed Gyan Prasad on 27th August 2009. He gave useful background evidence. But the following passage is totally credible and gives independent support to Timoci's account of this incident which was during the *actus reus* comprising abduction, robbery and murder. The passage says:

"At about 8.00 pm, I was sweeping outside the corridor of our shop when I noticed Navneet's van AK087 coming towards our shop from Suva side. I waved at him and Navneet stopped his van AK087 in front of our shop. I asked Navneet in Hindi as where he was going as I wanted to have a ride in his van. I was standing outside the front door of the passenger seat while talking to him. I did not see anyone in the front seat likewise the back seat. Navneet told me not to accompany him as he was going to pick (up) a job. He also asked me in Hindi whether I've got any CD Radio as he wanted to fix it in his van. I told him that I had none. He then drove off towards the Korovou bridge.

From the time I talked to Navneet until we closed the shop at about 8.30 pm, I did not see Navneet's van AK 087 returning to town after picking the job he told me."

The time of the Gyan Prasad incident may have been slightly later that he remembered. But Gyan Prasad does not pretend to be precise. He was making a statement over four years later.

Supporting Evidence (4) - The Absence of Timoci from Rugby Camp

[44] According to the September 2009 statement under caution Timoci did not arrive back at Nailega until 5.00 am on 30th April 2005. He then had to hide bloody clothes and attend to other matters. So he rejoined the rugby campers shortly before their walk into Korovou and back. So basically without explanation, he was absent without leave from the rugby camp for the evening of 29th April and the night of 29th/30th April.

[45] Uraia Tuidama now a police officer made a statement to ASP Rupeni Raga's investigating team on 26th August 2009. He said:

"We all camped in the village community hall starting on Monday 25th April 2005. I well remember that in the hall, Timoci was sleeping beside me also camping even though he was not playing at that time.

Come Friday evening sometimes after seven (7.00pm) I didn't see Timoci around, I didn't bother much for he is not playing. I woke up to relieve myself I saw Timoci's bed was spread idle, no one in there. Again when we all woke up for our morning devotion, Timoci was still missing. We had our morning devotion, got geared up for a walk to Korovou. Here, I saw Timoci amongst the team in that morning walk. I didn't bother to ask him for he was not playing."

[46] So again there is independent supporting evidence of an important part of Timoci's account. During all the time in which he said he was engaged in the *actus reus* of abduction, robbery and murder, there is evidence that he was absent from where he should have been but rejoined the party in time for the morning walk to Korovou. It also shows that earlier in the week it was decided that Timoci was not to be in the team for the Saturday's match. Hence his desire to attend the second day of the Coca Cola games in the National Stadium in Suva.

Supporting Evidence 5 Seet Kumar near the scene at the time of the stabbing calling out his name and trying to contact Navneet's mobile phone

[47] It is a poignant fact that Navneet's father was shouting his son's name after he found the white van at the Matacula junction and this was at the time of the punching and stabbing.

[48] Timoci's evidence in his September 2009 statement under caution is graphic:

"Whilst I was stabbing Navneet Kumar his mobile phone rang and at the same time someone was calling out to Navneet."

[49] But this is independently supported by Seet Kumar who is Navneet's father who made a statement on 30th April 2005 at about 10.00 am which is before Navneet's body was located. The statement relating to the evening of 29th April 2005, as relevant reads:

"After that [Navneet] came back to town and was operating from Korovou town. My vehicle was last seen at Korovou town at 8.30 pm by some other drivers Danish and Salesh …

At about 9.30 pm, I drove the medical vehicle towards Nayawasara village to pick the Staff Nurse to do night shift duty. On Lodoni Road at Matacula junction to the Korovou

cemetery I saw my van was parked facing towards Korovou town on the left side of the road, the park light was on and when I went to my vehicle I saw both glass winded down. I looked for my son Navneet, who was not seen in the vehicle nor near the vehicle. I called for my son Navneet, but there was no response."

[50] In relation to Navneet's phone (9206128) being called, Staff Nurse Mrs Vaciseva Tubuitamana made a statement on 3rd May 2005 which as relevant reads:

"I was still awake on that evening of Friday, 29/4/05, the hospital van arrived to pick me that was 9.45 pm When I boarded into the van, the driver, Mr Seet had asked me to contact the mobile phone of his son as he said that the van which was driven by his son was parked near the junction of Matacula Road. When we reached the junction of Matacula Road, I saw the van which belongs to Seet parked with both head lamps on and also the red lights at the back. I dial again to the son's mobile number, but still diverted. We stopped to the place where the van was and Seet checked around. He took out the money from the van till and we headed to Korovou Hospital."

[51] I do not think that anyone could doubt anything in the evidence of Seet Kumar and Nurse Tubuitamana. It does not need supporting. But their evidence independently supports the account of Timoci that he heard Navneet's name being called and the phone ringing while stabbing Navneet. Only the true perpetrator would know of the calling out of Navneet's name and the phone ringing. It is powerful supporting evidence that Timoci's account is true. It should be noted that the evidence of Seet Kumar and Nurse Tubuitamana correspond with the evidence of Timoci as to the time of the murder.

Supporting Evidence 6 – the 2009 Reconstruction

[52] In a similar way the reconstruction of events implemented by ASP Rupeni Raga on 24th September 2009 provides convincing evidence of Timoci being beyond any doubt the sole perpetrator. There is an album of 69 photographs showing every point mentioned by Timoci in his statement. It starts with Nailega village where the blood stained clothes were hidden and the community hall used by the rugby team is shown. It then shows Mrs Vateitei's teacher's house at Tailevu North College and the Nawiwaivusa Road. Mrs Vateitei was Navneet's last legitimate fare paying passenger. In most of these photos and especially at the Ivi tree where the stabbing took place and at the creek Timoci is in the photo pointing at the relevant spot. From the earlier investigation where the stabbing took place and where in the creek the body was hidden was objectively known. Without hesitation Timoci went to the exact same spots. If he had not committed the crime in the way he said he did, Timoci could not have been able to do this. Then there is the route cross country which Timoci later took to Nailega avoiding walking along roads. It is photographed including one of Timoci pointing to the spot where he swam across the Waibula river towards the Nabilo Road. The Matacula headman (Turaga ni Koro) one Jovilisi Naiduki had given for the first time a statement to police on 17th September 2009 that, at the request of Seet Kumar and an Indian policeman, he had found Navneet's body in the creek after 4.00 pm on 30th April 2005.

[53] Jovilisi Naiduki in his statement of 17th September 2009 said:

"I am a married man and staying with my family in our own house at Matacula. I was the Turaga ni Koro of my village from 1996 to 2007. My village is about one and half (1 ½) kilometre from Korovou town. I am well known to my neighbouring villages and the Indian community in Korovou Town.

I could clearly recall on 29/4/05, there was a Murder incident at Wainikavula Creek beside my village. It was on the early morning of Saturday, 30/04/05, after having my breakfast, one Seet Kumar entered our house. He came with a bundle of waka. I could see tears coming down his face. I asked him as what was the problem. He replied, asking me if the villagers could help in searching for his missing son namely Navneet Kumar s/o Seet Kumar in the bush beside my village. Without any delay, I asked my children to accompany me in the search. I returned home at about 1.00 pm to have my lunch. I was still at home when one of my children came running saying that a kitchen knife and a blood stain t/shirt was found beside Wainikavula creek. At about 4.00pm, I left home and went to where the t/shirt was found. Upon my arrival at the scene, I was asked by one bald head Indian Policeman if I could jump into the creek and search for the body. I called my brother's son namely Simione Naiduki to accompany me into the creek facing towards the sea. My brother's son was on the left side of the creek. Also Constable V joined in and he was behind us. While swimming towards a drala tree, I could feel something touching my stomach. It was the victim's feet. He was stuck under the roots of the drala tree. I pulled him out and he was facing downwards. I carried the deceased body to the left side of the creek. Seet Kumar came running, jumped over his only son (deceased) and crying on top of his voice. I could see that (Seet's son) was wearing only one shoe on his right foot. The left shoe was missing. Both socks were still on. I could see injuries on the neck area and on his head. From there the police took over. From that day until the two suspects Rupeni and Senivalati were sentenced for life imprisonment, the police did not take my statement as I was the one who found the (deceased) body. I was shocked to hear that Constable V mentioned that he was the one who found the body. I want to state here that the police officers involved in this murder investigation in 2005 are full of liars. That was why my nephew Rupeni (Niudamu) Naisoro was sentenced to life imprisonment by the High Court of Fiji."

[54] Jovilisi Naiduki on account of what he knew about the murder as set out above was asked to participate in the reconstruction of 23rd September 2009. He made a further statement on the same day. It reads:

"In addition to my statement I gave the police on 17/09/09, I accompanied the reconstruction team for the murder today 23/9/09. The construction team are ASP Rupeni, IP Levi, Sgt Epeli Mata, a police driver, a photographer and the suspect Timoci Ravurabota of Nailega village. At about 11.55 am, we got off at the junction of Matacula. Timoci pointed at the place where the van was parked. He then led us along the road to Matacula village. He went under the fence of Tom Gardwards paddock. He then led us under the Ivi tree towards Wainikavula creek. Timoci pointed at the place where he stabbed Navneet and where he dropped his kitchen knife. He also pointed at the place where he put Navneet's body during the search in 2005. After the reconstruction today, I confirmed that Timoci Ravurabota is the likely person who murdered Navneet Kumar."

In my opinion this supports the points made above. The reconstruction provided persuasive evidence that Timoci Ravurabota was the sole perpetrator.

Supporting Matter – the consistency of Timoci's confessions between 2005 and 2010

[55] On 29th April 2005 and on 30th April 2005 Timoci did everything to avoid detection. He came home cross country, he hid his clothes which were covered with Navneet's blood between the walls of a disused canteen at Nailega. He did not say anything to anyone. He rejoined the training camp of the rugby team. He saw police come and confer with his policeman close relative also living in Nailega who at the time was in charge of the Korovou police station, about the finding of the white van and the fact that Navneet was missing. This now ex-policeman is Serupepeli Bolalailai who made a statement on 10th August 2009. He said that Timoci in 2009 had said that he had heard everything that

Corporal 965 Asi in the early hours of 30th May 2005 had said and his replies concerning the missing person about whom there were fears. Timoci lived only yards away from the place of this meeting.

[56] Timoci was a young man of good character and he decided to kill his robbed victim because he realised that with his inexperience and lack of foresight and planning he had got himself into a position where conviction and imprisonment was almost inevitable. For two years he simply covered his tracks and told no one. But he is not someone without conscience or feelings. The load of guilt increased and was added to by the conviction of Senivalati and Rupeni. As he says in his statement he began having nightmares in which Navneet's face would disturb him. So about two years after the event in 2007 he told the whole story in detail to his closest friends Kuliniasi Vunikedra and Inosi Turagalada. They were told it was his secret and did not tell anyone for nearly two years. Then Timoci departed to Lautoka on account of a girl in the village becoming pregnant. Kuliniasi by this time (it was in early 2009) was in a depressive state over the burden of his knowing without being able to speak about it. He went to see an old school master and then in early 2009 told his village headman and also the Nailega village pastor of the Methodist Church. The lay pastor is Epeli Lalakoverata. Epeli asked the parents Timoci to bring him back to Nailega. He also requested the parents to ask Timoci concerning the allegation.

[57] On 14th March 2009 Epeli was informed that Timoci was back in Nailega. He contacted the Reverend Ananaiasa Soro who is the Methodist Minister for 22 churches in the Waimaro Circuit. In the evening Timoci confessed in detail before the Reverend Soro and Epeli. There followed a prayer. Timoci confessed to his parents and apologised to them and his parents apologised to him. Timoci gave his life to the Lord and the Reverend Soro prayed for them all. A few days later the Reverend Soro informed Inspector Peni Moi of Korovou. Later in 2009 ASP Rupeni Raga was appointed to investigate. At some time in early 2009 Timoci also confessed to his kinsman Serupepeli Bolalailai who had been acting police chief at Korovou in 2005. This is mentioned above.

[58] Two things stand out about all these confessions which were made at different times in 2007 and in 2009. Firstly, the detail and the events never varied. Secondly, the persons receiving the information did not hesitate in believing that Timoci was informing them about facts and events which had truly occurred. Because of the detail in earlier confessions the second investigation in 2009 was able to take statements from witnesses who might be able to give supporting evidence as to the facts confessed. The process culminated with the interview and reconstruction and charging of Timoci on 24th September 2009.

[59] In my view these matters relating to detailed confessions which never varied over a period of time convince me as it did to others that Timoci Ravurabota alone killed Navneet Kumar at Wainikavula Creek near Matacula on the evening of 29th April 2005. The exact time of death would have been shortly after Staff Nurse Mrs Vaciseva Tubuitamana made two attempted calls to 9206128. She said this was about 9.45 pm. This time should have been able to have been checked with records kept by the phone company. It seems that no check was ever made even though Navneet's phone was recovered in his clothing.

[60] Although this was an intentional killing and evil in conception and execution I feel it appropriate to end this evidential review with Timoci's answer to the charge of murder on 24th September 2009.

"I admitted that I have committed the offence and I did it alone. The reason is that I needed money and I admit that I killed Navneet Kumar alone. I now ask for forgiveness from the parents of Navneet for what I have done and also to the families of Rupeni and Senivalati who were wrongly charged, and the hurt that I have caused to them. I also take this opportunity to ask my parents for forgiveness, to forgive me for what I have done and I hope that I will be forgiven for the act that I have committed."

Why the appeals of Senivalati and Rupeni must be allowed

[61] As stated in paragraph 21 above the correct approach of the appeal court when new evidence is considered is to ask whether if the tribunal of fact had heard the new evidence at the High Court trial would they have had a reasonable doubt and acquitted the defendants.

[62] In my view the usual kind of new evidence appeal case does not include evidence that for sure someone unconnected with the appellants is solely responsible for the crime in respect of which the appellants have been convicted.

[63] The usual case is exemplified by the decision in *R v Parks* which is also reported at [1961] 1 WLR 1484. The usual case is where new evidence throws in doubt the conclusions that the jury, or other tribunal of fact have reached so that the appeal court can conclude that if the jury had heard the new evidence then they might have had a reasonable doubt.

[64] Sydney Alfred Parks was a young man in employment, of good character who was engaged to be married. He also had fair hair. On January 17th 1961 after dark in London an indecent assault took place at an alley way through a bomb site in London called Diamond Court. It was a *"lonely and ill lit spot"*. The complainant was described by the Chairman in his summing up to the jury as an *"honest and truthful witness"*.

[65] It then was discovered that the complainant had in fact some eight convictions for dishonesty. There was also evidence that the complainant in conversations before or after the trial had expressed herself as unsure of her identification of Parks. What Lord Parker CJ described as *"the second class of 'new' evidence"* also went to correct identification. At page 1488 he described it:

"The second class of evidence concerned only one young man, whose evidence was not available at the trial, and was clearly relevant. It was to the effect that he was a baker's roundsman, who, one evening in January, had been delivering bread near the scene of the assault, when he heard a woman scream and that almost immediately afterwards a man had run past him whom he said had dark hair, black or brown, and was middle-aged, about 50 years of age. That evidence, as I have said, would clearly be relevant evidence. Having seen the young man give his evidence before us, the court feels unable to say that it is not credible evidence in the sense of being evidence open to a jury to believe. The only question is whether if that evidence had been given together with the other evidence at the trial, and in the light of the character of the complainant, the jury might have had a reasonable doubt in that matter."

[66] The Chief Justice Lord Parker at page 1487 had referred to the relevance of the complainant's eight previous convictions for dishonesty:

"It can, however, be put rather differently, namely, in this way, that this complainant admittedly did not have any great opportunity of identifying her assailant. Her answers were not always quite consistent on the point, and it can be put, and indeed Mr Clay put it in this way, that albeit she may at one time have thought quite honestly that the appellant was her assailant, yet being a dishonest person she was not so prone to be frank with the court and would not retreat from her allegation that the appellant was her assailant even if she were satisfied in her own mind that he was not.

It is emphasised that this was a case of no corroboration, of a young man with a perfect good character on the one side, and the complainant who as it turns out has eight convictions for dishonesty on the other side, and who was referred to by the chairman in the course of his summing-up as an honest and truthful witness. The court has had considerable doubt on this matter, but they have come to the conclusion that in the present case these convictions were just relevant and, if they were just relevant, then they might have had an effect on the minds of any jury properly directing their minds to the matter. Accordingly, the court allowed the complainant to be called, who quite frankly admitted those convictions."

[67] Finally in a passage which is in line with the later landmark case on identification R v Turnbull; R v Whitby; *R v Roberts* [1977] QB 224, Lord Parker CJ concluded:

It is well known that these questions of identification are difficult. They can lead to a miscarriage of justice, and the court, though with great hesitation, has come to the conclusion that it would be unsafe to allow this conviction to stand. If the evidence to which I have referred had been given at the trial it is impossible to say that the jury might not have had a reasonable doubt in the matter.

[68] But the present case is in a different and almost unique category. Since the beginning of the twentieth century in the leading common law jurisdictions there have been a number of cases where investigations have brought charges against those later accepted as wholly innocent. But in these cases the prosecution authority either dropped the case before trial or there was acquittal because the evidence was sparse and speculative in the view of the trial judge or the jury. In Scotland before serial killer Peter Manuel was exposed, charges were made against another person who was later accepted as wholly innocent. In England Timothy Evans was found guilty and hanged when he was probably set up by serial killer Christie, who was his landlord and neighbour in Christie's Notting Hill house. I cannot however, find any other case in countries where the common law prevails, where persons charged were convicted after High Court trial and then it has had to be accepted that they had nothing to do with the killing. So this is far from the typical case where as in *Parks* an appeal court has acquitted because in their view admissible new evidence might have resulted in a reasonable doubt on the part of the jury or other tribunal of fact.

[69] The supporting evidence, discussed at length above, leads to the conclusion, on which I am sure, that Timoci Ravurabota acted alone and that Senivalati Ramuwai and Rupeni Naisoro are completely innocent of the murder of Navneet Kumar who was killed on the evening of Friday 29th April 2005 at about 9.45 pm at the Wainikavula Creek near Matacula Village. In my opinion it is a case where this Court should conclude not on the basis that with the new evidence there might have been a reasonable doubt in the tribunal of fact as to the guilt of Senivalati Ramuwai and Rupeni Naisoro, but that beyond any reasonable doubt these two appellants are innocent and the victims of a miscarriage of justice. I believe this would be the view of the learned High Court Judge and the Assessors who heard the case in 2007 if they had heard the new evidence as well as the evidence then adduced before them.

[70] Finally I consider the position if the correct approach was for the Court of Appeal to apply the factual criteria of s 23(1)(a) of the Court of Appeal Act. The appeal court would have to consider the evidence at trial together with the new evidence and decide whether the *"guilty"* verdicts should be set aside on the ground that they were unreasonable. It was decided in *R v Hancox* (1913) 8 Crim

App Rep 193 that the court will only set aside a verdict on a question of fact alone *"where the verdict was obviously and palpably wrong"*.

[71] Once the new evidence is considered in my opinion the verdicts at the 2007 trial are obviously and palpably wrong. Indeed they are wholly wrong on all the facts now relevant to whether they were unreasonable verdicts. But while that is a logical approach as to how new evidence on appeal cases may be considered, the only approach that has legal precedent in its favour is that explained by Lord Parker CJ in *Parks* (supra). That is whether if the new evidence had been called at trial might the jury have had a reasonable doubt. I conclude that that is the only appropriate rule of law on the matter.

[72] In view of these conclusions and reasons I propose that the appeals of Senivalati Ramuwai and Rupeni Naisoro for murder be allowed, their convictions quashed, and that it be ordered that verdicts of *"not guilty"* by order of the Court of Appeal be entered in the High Court in place of the verdicts of *"guilty"* entered on 16th May 2007.

*What caused this Miscarriage of Justice***?**

[73] Those responsible for the investigation and prosecution of the cases against Senivalati Ramuwai and Rupeni Naisoro in 2005 are in a difficult position. If Timoci had not come forward it could never be proven that someone other than Senivalati and Rupeni was solely responsible for killing Navneet Kumar.

[74] But once it is wholly accepted that Timoci acting alone committed the crime, the actions, motives, the facts put forward as true and the evidence at trial of the investigators are exposed in an illuminating and unhappy light for them. Below, I will deal in some detail with three matters only; I focus on the untrue confessions of Rupeni and Senivalati and the statement of witness Moape Kadavu of 9th June 2005.

[75] The history of the law is replete with convictions where the police acted properly but the confession of the accused was false. In some cases it is attention seeking such as in the case of David John Ware whose untrue confession of murder is mentioned in the case of R v Rowland discussed above at paragraph 22. In other cases police interview a person about the commission of a crime or crimes. The person interviewed has for one reason or another a propensity to confess to acts which he did not do.

[76] I refer to such phenomena because it is clear that Senivalati Ramuwai and Rupeni (Niudamu) Naisoro are not persons who would confess and sign statements in respect of crimes that they did not commit unless under extreme pressure. While Senivalati has committed offences before in the Korovou/Tailevu area and has served sentences of imprisonment, Rupeni is a man of good character. Senivalati has no previous convictions for violence.

[77] At the hearing in this case on 13th October 2011 Senivalati Ramuwai was giving evidence under oath and I asked him why he had signed. I set out the questions and answers:

> *"MARSHALL RJA: There are many ways of forcing. Physical violence, there are threats, there is suggestion that other people will get into trouble if you don't. There are all these kind of things. What kind of force are we talking about here?*
>
> *S. RAMUWAI: When I don't want to sign they punched me to sign.*
>
> *Q. You were hit?*
>
> *A. Yes. …*

Q. … Why, even though you have been hit should one confess to a murder when that is going to mean most of the rest of your life in prison? Many people might say I'd have to be hit a lot before I put my signature to a confession statement of murder.

S. RAMUWAI: Can you repeat the question, please.

MARSHALL RJA: I will ask it again – you were being hit and therefore you signed but they were asking you to sign a confession that you had murdered somebody together with someone else which meant that you will be in prison for anything up to 20 years, yes?

S. RAMUWAI: Yes.

Q. Then even if you were being hit why sign it?

A. I just (signed it) to stop them from hitting me and beating me up [and they] might kill me. So I just signed it."

[78] In the case of Rupeni Naisoro similar questions were asked and answered:

"Q. So clearly here things (were) being said in the murder investigation, (about things) you were supposed to have done. Why at your age (with a record of not being) in trouble with the police in any way, why did you sign?

My Lord, I signed because I was forced to. I was hit, punched, sworn at and threatened.

Q. Even if a person is being hit, punched, sworn at and threatened, if they be accused of a murder they did not do are they going to sign for it that easily?

A. The very reason I signed was for the police to stop assaulting me.

Q. So what you are saying is that the pressure was such that you decided that you wanted to stop the pressure and that meant signing the document?

A. Yes, my Lord."

The content of Rupeni's confession was inserted by investigators A fact that lead to Miscarriages of Justice

[79] Although Rupeni is the 2nd appellant, he was the first to be arrested. It is his signed statement that lead to the arrest of Senivalati. I therefore find it appropriate to deal with Rupeni's signed statement first.

[80] Rupeni's movements in the Korovou area on the evening of 29th April 2005 were straightforward and he gave evidence about them and has been consistent about them since 29th April 2005. They are corroborated by numerous witnesses who gave evidence at trial. They could have been corroborated by investigators on 2nd or 3rd May 2005 as a follow up to Moape Kadavu's statement to police of 2nd May 2005. In a statement of 17th August 2009 Rupeni states:

"I clearly recalled that on the afternoon of April 29th that was a Friday afternoon I came back to Korovou town to buy rubber band. I came about 4-4.30 pm I stayed in town until after 7.00 pm when I left for home. Reaching near the main road to Wainikavula Settlement, Moape came and stopped in front of me. I jumped into the back (of his carrier) and went with him right to Namau settlement. After that I came up again with Moape sitting in front. Reaching Vunisalusalu I got off and went home. Reaching the village I went straight to my grandfather's house (Mr Epeli) and watched a movie. I can remember that I watched two discs. After the movie I then came to Uncle Utona's place. I asked for food, but there was no more food left. My aunty gave me a banana which I ate and left down home. Reaching home I saw mum still cooking ivi. Mum prepared me a cup of tea and bread. After that I went straight to bed. Early the next morning 30th April, I woke up got prepared and came to Suva to watch the coca cola games. I went straight to the stadium and watched the game until it's over."

It should be added that Rupeni's father is from the Yasawas while his mother is from Nayawasara; if Rupeni is seen as something of an outsider that impression seems to have been increased by the fact that he wears his hair in dreadlocks. That is why he was buying rubber bands in Korovou.

[81] Rupeni went to the police station at Korovou at 9.00 am on Monday 2nd May 2005. On 3rd May 2005 he made a signed statement to investigators. In order to explain its contents I here summarise the statement in the form of direct speech. However the statement involves two conflicting narratives. I summarise the first of these narratives as follows:

"I know Navneet Kumar but not very well; I have seen him driving around in his father's white van in the last two months. On the afternoon of Friday 29th April 2005 at about 5.00 pm I was driven to Korovou by one Deo in his van. I bought rubber bands and some cigarette rolls. I saw Senivalati and six other youths outside Tailevu Club. I then took a minibus to Nausori after 6.00 pm I came back in another mini bus from Nausori and arrived at Korovou at about 8.00 pm I then checked who was drinking inside Top Taste. I saw Senivalati with some other boys drinking there. They were not the same persons who I had seen him with earlier. I walked down the road and Senivalati followed me and they crossed the road. At the Tailevu Club he called to me indicating that he wished to talk. I told him I was going home. After a conversation with one Tevita I walked back towards Nayawasara. On the way I saw a carrier driven by one Waisake of Wainikavula. This was at the junction of the road to Matacula. With the driver was Paula's mother. I boarded the carrier. We went to Namau where Paula's mother got off. We returned towards Korovou and after 9.00 pm I got off at the crossing closest to Nayawasara. It is true that I smoked one roll of marijuana. It was an interlude when I was walking back. I met Moape who I know very well and he had marijuana and I smoked one roll. When I was dropped off from the carrier driven by Waisake I walked immediately to Nayawasara where I watched video at my Uncle Eremasi's house. Just before 10.00 pm I went to Uncle Utona's house to look for food. I then went home and my mother gave me tea and bread. I then went and slept."

[82] A second narrative from Rupeni is recorded at a resumed interview at 2.30 pm on Tuesday 3rd May 2005. The venue is Nausori Police Station. This interview commenced with the following exchange:

"Q. We have now confirmed in our investigation that you also took part in the alleged Allegation that you are now being questioned here at the Crime Office at Nausori Police Station. You have admitted to the Police that you took part in the alleged allegation with Senivalati, Tevita and Junior that you met them at Korovou town.

A. All the above statements are true."

[83] What Rupeni is said to have stated in this interview may be narrated as follows:

"On Thursday 28th April 2005 I was at Nayawasara village in the evening at about 10.00 pm when I was told by Moape to take part in a contracted assault in a passenger hire van which would be paid. The victim was to be the driver an Indian man. I was to drive the van when required. As Moape had instructed I came down to Korovou town in the afternoon on Friday 29th April 2005. I went straight to the Tailevu Club and bought one roll of cigarettes. In the Tailevu Club I met Senivalati, Tevita and Junior and two other boys whom I did not know. I told them I am going to Nausori and back to Korovou in Waisake's van. Back at Korovou I got off at Waisake's house stood for a while at the bridge, spoke to my aunt Timaima at Payless supermarket. I saw Senivalati at the Top Taste Restaurant with two boys I did not know. I then saw Senivalati at the Tailevu Club. Senivalati told that we would go in Seet Kumar's van. Senivalati said the paid job we would do was to assault an Indian. We would first visit Nayawasara to buy marijuana. Outside on the road Seet Kumar's van driven by his son came and turned

around where I was standing with Senivalati and two boys I did not know. They boarded the van. I was asked to board it but I was frightened and I refused. I started walking along the road, but the van stopped beside me and I was forced to board it. I sat in the back with Senivalati and one of the other boys. We went towards the Lodoni road. The other boy in the front seat just as we were passing the Maji settlement started punching Seet's son the driver who braked and stopped before slumping unconscious over the steering wheel. The four of us left the vehicle and Senivalati and one of the two boys carried the driver and laid him on the back seat. I, on Senivalati's asking, drove the van towards Lodoni until told by Senivalati to stop at the old Matacula road. After another vehicle had passed I sat in the van while Senivalati and the boys carried the unconscious driver out of the driver's seat. I was asked to move the van to a different position. Then Senivalati and the two boys put the driver in the driver's seat. At the same time another vehicle came by and we all hid beside the van. After that one of the two boys turned the van around and parked it. We then carried the Indian boy following the Wainikavula creek downwards. At some point while we were carrying him he regained consciousness and started to move. Senivalati then took out a kitchen knife and struck the driver once on the heard with it. At the same time one of the two boys choked his throat. At that point the driver died. I dropped the legs that I had been carrying and fled back to the main road where I met Moape and boarded his carrier. After we dropped Paula's mum off at Namau, Moape drove me and dropped me off at the crossing that leads to Nayawasara. It is not true that I assaulted the driver inside the van because of my girlfriend Elena daughter of Mosese. She has never been my girlfriend and I have never had an affair with her."

[84] Towards the end of the interview there was a reconstruction where Rupeni is alleged to have been taken to the places mentioned in the statement. He is alleged to have confirmed each one as the place where each described incident had taken place. This process attracts the same comment of *"farcical"* and invites the same conclusions of investigators bearing false witness at trial as I state in paragraph 94 when dealing with the signed statement of Senivalati.

[85] The reference in this signed statement to the unconscious driver being placed in the driver's seat and the four involved hiding at the side of the van while a vehicle passed by has significance. The day before the second interview the wife of a soldier had given a statement. She is Ana Waqa and she says that she and a party who had attended the Coca Cola Games in Suva on the Friday left Korovou in a mini bus driving towards Lodoni at about 9.30 pm. Her statement concludes:

After doing some shopping at Korovou town, we finally left at about 9.30 pm and as we approached the junction of Matacula village, I saw a white van parked on the other side of the road. This van was parked about 15-20 meters from the junction towards Korovou town. What struck me was the person on the driver's seat was still on the steering wheel with his right hand hanging outside the window. I also saw that the driver was male and I also saw that his mouth was wide open. Two things came into my mind, either the driver is dead drunk or he is dead. I reached home at about 9.50 pm and later I related what I saw to my father namely Maika Vunimoli. This van that I saw is similar to one Deo of Korovou town is driving."

This evidence would seem to have been designed to support the confession that Rupeni was intended to make. It would then be supporting evidence for Rupeni's signed statement. But for reasons already rehearsed it cannot be true. In addition there is Seet Kumar's evidence that after leaving Korovou at 9.30 pm he found the white van empty on his way to pick up Nurse Tubuitamana. See paragraphs 47 through 51 above.

[86] In his statement of 17th August 2009 Rupeni Naisoro told about the taking of the signed statement:

"We reached Korovou Police Station at about 9.00 am (on Monday 2nd May 2005). That was the time when Police got hold of me until I was taken to court and later remanded. Here I want to reveal how my interview statement was taken or recorded by Sgt E. It was in the afternoon on the 2nd day of May he started recording my statement at Korovou Police Station. Together with us was P also a Police Officer. During the record of my interview I told Sgt E the whole truth of my movement that day until I went to Suva and came back. In between the interview a short police officer came and threatened me, telling me to tell the truth and not to hide anything. My interview went on until it was suspended for me to have dinner. Later it commenced and went on until late in the night after 10.00pm.

He, Sgt E locked me in the cell. He then later threatened me when I was in the cell saying 'rogoci au sara mai vakavinaka, kevaka o lasu tiko se vunitaka tiko e dua na ka, o na qai laki vosa i Nausori', meaning 'listen to me properly, if you are telling lies and hiding things to us you will take it to Nausori'. What other story do I have to say here. I have nothing to hide.

The next day 3/5/05 I was released and taken inside the charge room. Later I was escorted to Nausori at about 10.00 am in a grey pajero. Reaching Nausori Police Station I was taken upstairs. There in a room, five policemen started to punch me up. They continued to punch me up all my body, head and kept telling me to own up and not hide anything. I was really put to fear and forced to say 'yes' to something I didn't do. I kept telling them that I didn't know anything about that murder. I knew two of the police officers to be Q and B. After that assault session I was then taken to another room. There Sgt E read out to me in his re-commencement of my recorded interview that the Police have confirmed that I took part in the murder with three others whom I do not know. I told Sgt E that I didn't know but he didn't bother to listen to me and kept asking me questions. From that time on Sgt E kept on asking questions and also answering them. That was what really happened. I was only sitting there listening and waited for my turn to sign the interview. To prove that, how would I know that Navneet was stabbed on his head. He, Sgt E told me that the deceased was stabbed on his head. Later he put the question to me asking me where the deceased was stabbed. The leading process went on like that until the next day (Wednesday) when they took me to the spot where the deceased was found. He, Sgt E took me to the spot where the van was parked and also where the body was found. I just couldn't make out as to whose story the police are working or following to try and connect me to that murder. I went when I was taken to the doctor with another boy for medical check up. As soon as we were taken to the doctor's room still cuffed, the doctor told us the punishment that we received was enough for us. He (doctor) didn't examine us. We were then again brought down to the station. I wish to end my statement here saying that I'm really happy this investigation has come about again so that the right man be brought here. That's all."

[87] I would conclude from this that police arrested Rupeni Naisoro on a rumour based on the fact that he was regarded as an outsider because his father is from the Yasawas. Without any evidence, and with actual and potential evidence clearing him at this early stage, a decision was made to invent a scenario and pressure him to confess to it in a signed statement. The scenario included commission of murder by Rupeni assisting Senivalati and two other *"unknown"* boys. If the scenario were to succeed, it would require manipulation of community witnesses to support it. It would also require much bearing of false witness at trial. The four strands of evidence tending to clear Rupeni, were Moape Kadavu's evidence of picking him up while driving Paula's mum to Namau, and later, after dropping Rupeni near Nayawasara seeing the white van before it became stationary at Matacula junction, Paula's mum's statement which confirmed Rupeni was in the carrier when she got off at Namau, and the evidence of six or more witnesses at Nayawasara who placed Rupeni in the village between 8.30 pm and going to sleep sometime around 11.00 pm There then is the

fifth strand of Timoci Ravurabota confirming that Moape's van had passed the white van containing only himself and Navneet very shortly before the white van became stationary at Matacula junction prior to Timoci robbing and then killing Navneet. The investigators carried through with all the actions that their false scenario and plan would require. This did not in any way serve the proper administration of criminal justice in which the people of Fiji must have confidence. These matters are one reason why there was a complete miscarriage of justice and two persons were convicted and imprisoned for a murder that they had no connection with.

What caused this Miscarriage of Justice? Part II – The signed statement of Senivalati Ramuwai

[88] Senivalati's movements in Korovou on the evening through to 11.00pm on the 29th April 2005 were very simple. He was drinking at the Bula Club with two others when at 5.00 pm a school master friend Master Dan walked in and joined them. When the bell was rung at 9.00 pm and there were three bottles left, Mr Tabaka the barman told them to finish the bottles outside. They sat there in front of the Bula Club (also known as the Tailevu Club) for half an hour until the beer was consumed. Then they walked to the Tailevu Hotel where there is a Friday function which includes a bar and dancing where $20 buys admission until 1.00 am Master Dan gave Senivalati $20 for admission and some beer. Senivalati paid his $20 and at the time the dance hall was empty. He went straight to the bar with Master Dan. Master Dan drank with him at the bar until 11.00 pm when the school teacher decided to go home. Senivalati remained at the bar until the dance ended at 1.00 am Then he walked home with Nemani Tuicakau from Naitutu. When the two of them reached the entrance to Fulton College Senivalati took the road home and Nemani continued walking towards Naitutu. Then Senivalati went to bed.

[89] In contrast to these simple events which were corroborated by Master Dan and others, the signed for account in Senivalati's *"confession"* were complicated to the point that it is unbelievable that Senivalati could have been responsible for inventing such a scenario. Senivalati may have previous convictions but none for violence. He comes over as reasonably hard working shop assistant and jack of all trades who enjoys a lot of social drinking with friends. He does not come over as intelligent enough to invent the facts said to have been confessed by him in his statement.

[90] What Senivalati is reported as having confessed, starts with him drinking in the Bula Club not with Master Dan, Ifereimi and Master David but with Master David, Eve and Charcoco. But then he says that after drinking at the Bula Club (also known as the Tailevu Club) he suddenly with Rupeni, Te, Junior and Dan all boarded Navneet's white van and asked to be taken to Nayawasara where they intended to buy marijuana from one Joji. Then passing the police station at Maji, Rupeni, seated in front with Navneet, started punching Navneet. Then the van stopped at Matacula junction and Senivalati, although he had been travelling in the back, punched Navneet on the left side of his face and then kicked him. Then Rupeni gave Senivalati a kitchen knife and he stabbed Navneet twice in the head. Shown the knife Senivalati is said to have identified it. He then explained that it had bent when he had stabbed Navneet. Senivalati then dropped the knife at the place where the stabbing occurred. The party of aggressors now numbered six and included an unidentified boy from Vanua Levu who was staying with Tui. The other four were now described as Rupeni, Tukai, Dan and Pa. Senivalati said

that after the stabbing he knew Navneet was dead. Then he, Rupeni, Pa and the boy from Vanua Levu had carried Navneet's body and put it in the creek. Then Senivalati changed his account and said that Navneet was attacked and left disabled but alive on the front seat of the back of the van while he and the others travelled in the van and bought marijuana at Nayawasara. Then the aggressor party went to Matacula and Senivalati stabbed him with the knife that Senivalati now said he had brought from his home. Then Rupeni, Pa and the boy from Vanua Levu placed Navneet in the creek. Senivalati now said he had not put the body in the creek. He then said that the motive of the aggressor party was because one Mosese of Nayawasara put out a contract that Navneet be assaulted and beaten because he was *"going around with"* Mosese's Fijian daughter. Moape Kadavu had known about this contract. Senivalati gave no account of how the aggressor party had dispersed after killing Navneet.

[91] The conspiracy to assault and beat Navneet on account of Navneet's *"going around with Mosese's Fijian daughter"*, we know to be lies because we know that it was a robbery by Timoci Ravurabota that developed into a murder by him and him alone. Suppose however that Timoci had not confessed. Was there any supporting evidence for what Senivalati signed for? There are no police statements from Mosese, Te, Junior, Dan, the boy from Vanua Levu (who was staying with Tui), Tui, Tukai and Pa. Nor did any of these give evidence for the prosecution at trial. The only evidence at trial did not support the conspiracy to assault and beat Navneet. It was from one Elena Toroca. She had been residing at Nayawasara and Rupeni Naisoro was a relation. She said she had been in the same form as Navneet at Tailevu North College. She denied going out with Navneet. She was asked whether Navneet joked with her and she replied *"Yes, swear words and jokes"*. She said that she had told Rupeni about this and he *"got angry"* about the swear words. Since the evidence of non police witnesses was untrue in many cases at trial. It is difficult to know whether this was something investigators manipulated Elena to say and whether there was any truth in it. But Rupeni getting angry in the abstract about an Indian boy discussing swear words with a Fijian girl who was a Form mate, is a very long way from Rupeni joining a conspiracy to assault and beat Navneet. For one thing Elena was not going out with Navneet. For another it was supposedly Mosese who put out a contract because he disapproved of Navneet going out with his daughter Elena. In addition police investigators put in Rupeni's signed statement an allegation that Elena was Rupeni's girlfriend which Rupeni denied. So there was and is no supporting evidence for Mosese or anyone putting out a contract for the assault and beating of Navneet on 29th April 2005. The fact is that the investigations and the prosecution never had any evidence of this conspiracy to assault and beat Navneet. However the investigators never seem to have considered the obvious, that the wallet devoid of notes openly lying in the white van indicated a robbery with threat of violence used since there was no evidence of actual struggle at the place in the Matacula Road where the white van was found.

[92] If the investigators believed any of this account in Senivalati's statement you would expect statements of confirmation or denial to have been taken from all those allegedly involved. But the disclosures in the trial record contain statements from no one in the list. If police statements are taken but the prosecution do not use them, they must be disclosed to the defence. But it seems no statements were ever taken and that these persons were not interviewed. Certainly this is so in the case of Junior whose real name is Ilaisa Kauwata Nabunobuno. He made a statement dated 26th August 2009 in the second

investigation. He had been in Suva from about 22nd April 2005 attending his dying uncle and then staying on for the funeral. His mother told him in 2005 about the murder and his alleged involvement as per the *"statement"* of Senivalati at his uncle's funeral. His statement then says:

> *"That was the first time I heard about the murder incident. From that day until today 26/08/09 the police did not make any effort to come and interview me regarding the incident since my name was mentioned by Senivalati. I do believe that Senivalati was assaulted and forced by the police to tell lies. That is all."*

[93] In a statement dated 20th August 2009, Senivalati told Inspector Levi Seduadua about his arrest on Tuesday 3rd May 2005. It was at about 3.00 pm which happens to be just after Rupeni had agreed to signing a false confession implicating Senivalati. He was working in his employment at Rajend's supermarket. He had been asked by police before that time, and had told his movements on 29th April 2005. This on at least two occasions. No witness statement had been taken from him on these occasions. His statement, which is consistent with his sworn evidence at trial (which evidence was corroborated by the sworn evidence of Master David, Master Dan, Miss Eka Nailati a barmaid at the Tailevu hotel – all witnesses of good character) says the following about his arrest and interrogation:

> *"Little after 3.00 pm whilst cleaning inside the billiard shop, two police vehicles parked outside the supermarket, I saw police officers came running out and into the shop. Later, I saw Mr Rajend was pointing to the billiard shop. They (police) again ran across towards the shop I was in, the door was closed. They forced opened the door and straight for me. Not a word again, one of them cuffed my hands at my back and pushed me outside and threw me in the van. I sat at the back while two huge police officers on my side. As soon as we all got in the vehicle, one of them said 'Tou lako' meaning 'we go'. We left Korovou and came towards Suva. I thought we were coming to Nausori, instead they took me straight to Nasinu Police Station. I wish to say here that I was shocked to hear what they (police) were telling me. It was not only telling but threatening. One of them whom I knew by name said 'Dua na gone vakadomobula o iko' 'datou sota tiko ga ena veimataka qai vaka mo sega to ni kila e dua na ka' meaning 'You're a dangerous person'- we met every morning but (you) kind (of) ignore everything'.*
>
> *I just told them that I really didn't know anything. I was locked there after 5.00 pm, I think after half past seven (7.30 pm) I was again released. Well before I walked outside, three police officers led by a police officer whose name I know entered the cell and assaulted me badly. They punched up my chest, stomach and shoulder. I was only taking care of my face. That was the first horrible time I came across during that investigation because of the assault. Later I was again cuffed, put in the vehicle and brought back to Nausori. At Nausori, I was taken upstairs into a room. When I came in that room about ten (10) police officers were there. Their waves of questions came from all angles of which I couldn't understand or hear a complete question. Later one of them asked me if I was the one who murdered the Indian boy. There I told them the story of my movement on Friday, starting from the morning until I came out of the club. That's when they (police) intervened and connected me to a story told to them. One of them continued and told me that as soon as I came out of the club, I got in a white van, two people were calling me from inside. Here again, they asked me who were those two people. I told them that I didn't know them. The assault never stopped. I want to say here that I wanted to continue my story or my movement until I reach home on Friday night when the (Police) who was confronting me that night connected me to a story, as soon as I walked out the club. That's the story that was written in my recorded interview. Starting from there, I said "yes" to everything. They have framed me. They lead me all along and I said yes also all through out, and signed after. Even in the re-visiting of the*

scene of murder. (Three police officers whose names I know) took me and showed me around of where I got in the van. Again where Rupeni got in and drove towards Matacula. We stopped near Matacula junction and they pointed down towards an Ivi tree. That's where they told me the body was dumped. We didn't go straight to that spot. We stood from the main road and a policeman whose name I know pointed out the spot, i.e. 'A ivi tree'."

[94] The references to the supposed visit and reconstruction of where Senivalati was alleged to have killed Navneet in the confession statement describe a farcical event. Normally a reconstruction is a chance for the confessing accused person to show that what he has confessed to is true and that the detail is correct. But here the officers having put facts unsupported by evidence in the signed *"confession"* statement, have to take Senivalati to the road overlooking the scene where the knife and blood were found and point to an ivi tree and say *"See that ivi tree, that is where you killed Navneet"*. Then in Court under oath the officers have to claim that Senivalati showed them the ivi tree. That is bearing false witness at a trial when under oath.

[95] The same matters that lead to Rupeni signing a confession in which investigators scenarios as to what had happened were put into the statement in place of what he had said about his movements on 29th April 2005 happened with Senivalati Ramuwai. The signing was as a result of threats (including intimidation) and assaults and batteries. The pressure was such that there came a time when Senivalati agreed to sign in order to remove the intense pressure on him. That is the second reason these complete miscarriages of justice occurred.

The destruction of Moape Kadavu as a credible defence witness by pressuring him to become a prosecution witness

[96] At paragraph 39 is the statement of Moape Kadavu of 2nd May 2005 taken when the investigation had just commenced. For reasons rehearsed above it exonerates Rupeni Naisoro. It is true. That follows from the fact that, for sure, Timoci, acting alone, killed Navneet. Also that Timoci's evidence corroborates the truth of the statement taken on 2nd May 2005.

[97] After this statement was taken on 2nd May 2005, the investigators decided to place within the false confession they pressured Rupeni Naisoro into signing on 3rd May 2005, the alleged fact that Moape Kadavu was the person who introduced Rupeni to the alleged conspiracy whereby there was a contract for reward for Navneet to be assaulted and beaten on 29th April 2005. There was a further allegation that after the killing Rupeni had got a lift home from Moape who stopped for him on the Lodoni road and had confessed to him.

[98] I should note here that in Moape's statement of 9th June 2005 which is set out below, the allegation as to the person contracting for the assault and beating to be carried out on Navneet is changed from Mosese of Nayawasara to one Khaiyum of Lodoni. There were never either statements or evidence to support a contract being made by either. Now we know it is all lies on account of knowing for sure why and how Navneet was murdered.

[99] But around 8th June 2005 the case was being transferred to the High Court and no doubt the investigators were acutely aware that there was no evidence at all to support what they had put in the statements of Rupeni and Senivalati. There was nothing supporting a contract with Mosese or anyone else. There was no *"smoking gun"* apart from these confessions to link either Rupeni or Senivalati to the *actus reus* of the crime. That is the background to the taking of Moape's second signed statement on 9th June 2005:

[100] The statement of 9th June 2005 says:

"In addition to the statement which I have given to police I would like to state that before Navneet s/o Seet Kumar of Deepwater, Tailevu was killed one Sainivalati Ramuwai had approached me on four (4) occasion this was within three weeks before Navneet was killed. Sainivalati wanted to issue me a 'job'. This job was for me to drive. I refused and Sainivalati approached me again in Korovou Town. He then told me that there is a job for me to drive. I refused again. I then told Palati again that I am still driving for Cecil. Then on the third occasion Palati met me again at the carrier stand in Korovou opposite Courts. Palati then offered me again to drive. I then questioned Palati what job, what I have to drive. Palati then told me that one Khaiyum of Lodoni village has given him a job. Then (I) questioned him what job. Palati then stated to assault one of the van driver who is driving one white coloured van and he is from Deepwater. Palati also stated that the said Indian boy is schooling at Tailevu North College and is son of Seet Kumar who used to drive the ambulance truck at Korovou Hospital. Palati stated that the said Indian boy used to take one Muslim girl related to Khaiyum in his van and used to drop her at Lodoni. I then told Palati that the said Indian boy is not in good terms with Rupeni of Nayawasara Village. Rupeni also wants this boy. Palati then told me if I could check Rupeni. I then told Palati that I will check him. Palati also told me to drive the said van which Seet's son is driving. I refused and left. On the fourth occasion I then met Palati again in town at the bus stand opposite Mobil Service Station. Palati then questioned me again about the said job and to see Rupeni. I then told Palati that I will check Rupeni and in the afternoon I will then bring him. This was on Thursday 28/4/05 at about 1100 hours. I then drove the carrier for job.

I then met Rupeni about 6.00pm along old Lodoni Road. I told Rupeni that Palati wants to see him. He is in Korovou town. Rupeni sat in the front seat of the van. Rupeni then questioned me why Palati wants to see him. I then told Rupeni that Palati wants him to drive a van. I told Rupeni that I cannot drive as I am already driving a van. I did not mention to Rupeni about the job which Palati wants to do. I then dropped Rupeni in town and he went away.

On Friday 29/4/05 at about 11.00 am I saw Palati standing at the Bus Stand. At about 8-9pm I was taking a job to Namau. I then saw Rupeni walking faster along Lodoni Road past Matacula junction. I then slowed the van to give pass to a Covec truck. Then I called Rupeni and he came and sat at the back of the carrier. I reached Namau. Rupeni then came and sat in the front seat when the passenger got off. I then saw Rupeni's both legs dirty with mud up to the knee. The blue ¾ trousers he was wearing was slightly wet above the knee. The brown coloured round neck singlet was not wet. The flip-flop was wet also. I saw Rupeni's face and he was uneasy and unsteady. I had a roll of marijuana with me. I then lit the marijuana and we both smoked. I then questioned Rupeni where was he as his mother had questioned him.

Rupeni then stated the job he had told him yesterday they have done it after meeting Palati. I then questioned him what van they were travelling and Rupeni stated the van which Seet's son was driving. Rupeni then started to tell the story. He stated they boarded from Korovou Town. They then went to buy the marijuana from Tui Mateo's home at Nayawasara. Rupeni then stated that upon reaching Tui Mateo's house they then assaulted the said Indian boy. He became unconscious and they put him at the back seat. Palati then told him to drive the van. At this time the van was parked on the road near to Tui's house. Rupeni stated they drove the van they were coming to Korovou. Rupeni then stated he drove the van and parked inside Matacula junction. Rupeni stated that they then removed the said Indian boy and took the said Indian boy who was still unconscious to throw him inside the fenced paddock. They were still carrying him. Rupeni said he was holding both legs. Rupeni stated they took him inside the fenced boundary. Whilst taking they had tried to leave him and the said Indian boy gained conscious. At the said moment Rupeni stated Palati stabbed him with the kitchen knife. Rupeni stated when Palati stabbed him he then met me along the Lodoni road and boarded the van which I was driving.

Whilst still talking to Rupeni he started to check Palati and them near the culvert. Rupeni then got off near Tui Mateo's house I then drove the van and past Matacula junction. I did not see Navneet's van which he was driving. Just past the culvert of Wainikavula creek I then saw two figures. I saw both of their legs were wet. Both wearing fli-flop whilst I recognised Palati and I stopped. I then also identified another man as Nemani of Naitutu village. I also noticed both of them wearing ¾ trousers which was wet above the knee and sides but not back. Palati and Nemani had more ¾ trousers wet than Rupeni. Both then boarded the carrier and got off in Korovou town. I saw Palati wearing green ¾ trousers and green t-shirt. Nemani wearing long sleeve round neck coloured dark blue and black ¾. At about 2.00 pm I then saw both Palati and Nemani walking towards Fulton. I also like to state that whilst going to Namau I did not see the van of Navneet and also whilst coming. I also did not question about the money which Palati was offered or issued."

[101] Moape Kadavu's statement in the 2009 investigation explains that his statement of 2nd May 2005 is true and also explains how he came to sign the statement of 9th June 2005. The 2009 statement is also consistent with the sworn evidence Moape gave at the trial of Rupeni and Senivalati in 2007. Moape's statement of 12th August 2009 says:

"I'm residing at the above mentioned address since birth and am a driver by profession. First and foremost, I'm so happy that investigation (Navneet's murder) has come up again. Reason why I'm happy because I know the true story would be revealed and nothing else. Here I wish to say that I made two statements in regards to Navneet's murder. The first statement that I made was recorded on the 2nd day of May 2005. That statement stated that on my way down to Namau settlement to drop Paula's mother, I met Rupeni walking towards Nayawasara. I stopped a little bit in front of him and he jumped at the back of the van. I took him right down to Namau where I dropped Paula's mother. He, Rupeni came in the front and I drove back to Korovou. I dropped Rupeni at Vunisalusalu and came straight to Korovou town. I took that job sometimes between 7.00 pm to 8.00pm. Also on my way back just about a chain or two towards the Agricultural Quarters, I then met Navneet's van going towards Matacula before I knocked off at about 10.00 pm That was the statement that I made voluntarily and of my own free will. There was nothing to add or to make up in that statement.

It was a shock of my life when again I was picked from the PWD Depot by [a policeman known to me] and two others and was taken to Korovou Police Station on 8/6/09 and later conveyed to Nausori Police Station. On our way to Nausori, the three police officers whom I didn't know their names started to threaten me. One of them said as why I was denying when the other two (Rupeni and Palati) have already admitted the murder. It went on like that and at times one of them started punching.

At Nausori Police Station, two police officers threatened me at all cost telling me to tell the truth. They went on to say that if I'm not going to tell the truth, they'll punch me up and would never release me. At that point in time, I thought to myself what else or what other story I have to make. There and then they put me into fear. I was afraid I didn't know what else to say. Later they took me to another room and [a policeman known to me]. There I was left alone with [this policeman]. I recalled that this was in June 2005. I well remembered that they took me at about midday on the 8th of June 2005. In that room alone with [a policeman known to me], he told me to mention in my statement that I conveyed Rupeni, Palati and Nemani back to Korovou after the murder. He [a policeman known to me] went on to tell me that once I mention that, then I'll be free. I didn't say a word at that moment. He forced me to say what he has already arranged to suit their investigation. He [a policeman known to me] went on to tell me that I'm a married man and once I agreed to his side of the story, I would be free. So those two Rupeni and Palati would get trapped in that murder since they're still single. I would like to mention here that [a policeman known to me] was really forcing me to say yes to a statement best known to him and may be also to suit their investigation. It went on like that for almost two hours when I finally say yes. That statement was not

taken that same night. It was about 10.00 pm when they dropped me back at home. The next day they then called me back and make that statement they were forcing me to say. Here, [another policeman known to me] told me if I diverted from where they wanted me to go they would take me back to Nausori and assault me. There [this second policeman] wrote my second statement which was under duress and I signed it after. [He] told me that if I'm going to say things the opposite in court they would charge me again for giving false information. I was forced to make that second statement."

[102] The pressure on Moape seems firstly to be being punched on the way to Nausori, and then being threatened by two police officers at Nausori that he would be punched and never be released. Then it is suggested that he as a married man would *"go free"* while *"Rupeni and Palati would get trapped in that murder since they are still single"*. Moape is not a man of previous convictions. His actions at trial show him to be a person who would risk further punishment rather than have his 9th June 2005 statement used to convict anybody. Since the statement of 9th June 2005 is untrue in each and every fact stated it is not something that ever emerged from the conscious mind of Moape. As with Senivalati Ramuwai and Rupeni Naisoro's statements under caution it is more likely than not that Moape Kadavu was not capable of inventing the details in the statement of 9th June 2005.

However it happened it was not in accordance with the proper administration of justice to behave in this way to a person such as Moape, whose evidence on 2nd May 2005 in the immediate aftermath of the crime they had taken in good faith. They knew he had nothing to do with the events leading up to the murder let alone anything to do with the murder itself. Moape was from 2nd May 2005 a defence witness in good faith against the police version of events. Particularly so in respect of the prosecution case against Rupeni to whom he gave a clear alibi. One cannot rule out that the investigators decided to behave in this way towards Moape in order not only to bolster their case but also to deprive Rupeni of an unimpeachable witness who would have ensured his acquittal. Certainly whether this was intended or not, that is what happened at trial because Moape was compromised as a witness of truth before the assessors and the learned judge hearing that he had signed this 9th June 2005 statement and hearing the contents of it which were fully put before them.

[103] One cannot say for sure if the only prosecution case in respect of each accused had been the caution statement if the assessors would have given the opinion that they did and the trial judge would have convicted. But remove the Moape witness statement of 9th June 2005 and assume that the alibi witnesses and both accused gave sworn evidence, the evidence called by the Prosecution does not place either Senivalati or Rupeni at the robbery/murder scene; there is no scintilla of evidence from witnesses proving the motive of a contract for reward to assault and beat Navneet. In this there is no support for the statements under caution which are only evidence against the maker.

[104] In my view the applications to turn Moape hostile was the matter that tilted the balance and produced the convictions of both men. That leaves two questions. The first is whether the prosecution should have called Moape and when he was consistent in respect of his statement of 2nd May 2005 should have applied to make him a hostile witness. The second question is if the correct legal principles were ascertained by the Court could the Court have declared Moape Kadavu hostile?

What are the rules about turning a witness hostile at trial? Should the prosecution have applied to make Moape Kadavu a hostile witness?

[105] According to Blackstone 2011 paragraph D15.3 quoting the Farquharson Report of 1986 explaining the duty of the prosecutor at common law, the duty of the Prosecutor is to:

> *"conduct his case moderately albeit firmly. He must not strive unfairly to obtain a conviction; he must not press his case beyond the limits which the evidence permits which in his own judgment no longer sustains the charge laid in the indictment."*

Earlier in the same passage the emphasis is upon a duty to the Court and to the public to prosecute fairly:

> *"(Prosecuting Counsel) duties are wider both to the Court and the public at large. Furthermore, having regard to his duty to present the case for the prosecution fairly to the jury he has a greater independence of those instructing him than that enjoyed by other counsel."*

In cases such as *Puddick* (1865) 4F and F497 and *Banks* (1916) 2 KB 621 a strong underlying policy reason for these rules is avoiding miscarriages of justices.

[106] What in fact happened at trial? By his 2nd May 2005 statement to Corporal Epeli he was a clear defence witness. Nonetheless prosecuting counsel called him as a prosecution witness. Moape Kadavu, in chief, gave the evidence in the 2nd May 2005 statement. Although there was a ruling it is not in the record. The prosecution was allowed to cross examine. The High Court judge told the assessors that they *"must approach [Moape Kadavu's] evidence with great caution"* and continued that if Moape had made the 9th June 2005 statement voluntarily as the police had testified *"then you may think that you cannot put much weight on his sworn evidence at court"*. The result was that the principal witness giving evidence clearing Rupeni Naisoro was wholly nullified. The detail of the 9th June 2005 statement was put before the assessors.

[107] It is possible that the prosecutor had doubts about the 9th June 2005 statement. It came at a time when the DPP was preparing and advising on whether to bring an information in the High Court.

[108] It seems the prosecutor had doubts after the 9th June 2005 statement. No doubt the prosecutor heard that when police investigated this contract to assault and beat Navneet, Khaiyum of Lodoni wholly denied it. So prior to the 2007 trial, the prosecutor invited Rupeni, his father Seremaia Naisoro, and his mother Mrs Makelesi Naisoro to his office and asked in return for the dropping of the case against Rupeni that he give evidence for the State against Senivalati. According to Seremaia Naisoro's statement of 17th September 2009 the family considered the DPP's offer and his father reported what Rupeni said as follows:

> *"He's not going to be the witness for he didn't know who killed Navneet. He's not gonna lie in court for he might be blamed for the conviction of an innocent man. He (Rupeni) said I'd rather go to court and convicted but I'm not gonna lie"*.

At trial it was accepted by the prosecution that the DPP had made this offer.

[109] The prosecutor, although he would not be aware of the facts that made it so, was inviting Rupeni to commit perjury.

[110] In view of his duty to the court and the public to act fairly, should the prosecutor have applied to make Moape Kadavu a hostile witness? Taking the matter from a different angle, the answer must be in the negative. That is because of the conclusions of law and fact at paragraphs 125, 126 and 127 below. It is likely that the prosecutor was not aware of the cases of *R v Honeyghon* [1999] Crim LR 221 and *R v Dat* [1998] Crim LR 488. But were the same facts to arise

again, and the prosecutor had acted with an immunity offer as set out in paragraph 108 above, it would be appropriate for that prosecutor to consider the duty to act fairly and decide that to apply to make a witness in the position of Moape Kadavu a hostile witness was contrary to that duty. If there is a risk of a decision of the prosecutor causing a miscarriage of justice, in most situations that risk should not be taken.

*Should the Court on the relevant law have ruled Moape Kadavu hostile***?**

[111] Let me commence the legal discussion about the rule that a party must not impeach his own witness and the rule that a party may apply for his witness to be made hostile and to be cross-examined about a previous statement. The present facts are quite exceptional in that of the many cases cited in the leading text books there is none where the prosecution have taken a statement from a witness exculpating an accused on one day and then, one month and one week later taken a second statement in which two of the accused are said to be parties to the planning of a contract to assault and beat a victim and in which three parties are said to have carried out an assault and battery which turned into a killing with *malice aforethought* of the victim. The respective statements are set out above at paragraphs 39 and 100 above.

[112] It is also unprecedented in that the statement of 2nd May 2005 is not acknowledged as false by the witness in the statement of 9th June 2005. There is no acknowledgment of inconsistencies between the facts in the two statements in the statement of 9th June 2005. There is no explanation in the statement of 9th June 2005 as to how the witness Moape came to make a further statement. If Moape had said he had lied in his first statement and had explained how the second statement was the truth it would evidence a situation that was entirely different.

[113] The position is that the prosecution have two statements and when Moape is called into court, his evidence is wholly consistent with one of these two statements taken by the prosecutor namely the statement taken by Corporal Epeli on 2nd May 2005 which is at the outset of the investigation.

[114] The following extract from Phipson 16th Edition (2005) paragraph 12-64 explains the basic ground rules of impeaching one's own witness:

> *"(45) Discrediting own witness*
>
> *12-64 The general rule that a party may not cross-examine his own witness has the consequence that if the witness when called refuses to give evidence, the court or the jury hear no evidence from the witness. If the witness give evidence completely at variance with what was said in a statement, the court or the jury will hear evidence favourable to the other party, in ignorance of the change. The principles relating to adverse or hostile witnesses are designed to deal with this problem of the witness who has 'changed sides'. The principles of common law were supplemented by s.3 of the Criminal Procedure Act 1865."*

[115] The common law on cross examining one's own witness was supplemented by statute as long ago as 1865 in the England:

> *"(47) Criminal Procedure Act 1865, s 3*
>
> *12.66 s 3 provides that:*
>
> *'A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed*

statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement'.

There are, or should be, three stages in relation to previous statements. First, the judge must consider whether the witness has proved adverse. Secondly, if the witness is adverse, the judge must consider whether leave should be given to cross-examine him on the statement. Thirdly, the question may arise of proving the statement."

[116] Paragraph 12:67 of Phipson deals with the concept of the witness having *"changed sides"*. There has to be hostility which may be an important matter in respect of Moape. But also there must be evidence of not giving his evidence fairly and with a desire to tell the truth to the court.

"(48) Whether a witness is adverse

'Adverse' means 'hostile', that is, when in the opinion of the judge, he bears a hostile animus to the party calling him and so does not give his evidence fairly and with a desire to tell the truth to the court. He is not adverse in the statutory sense when his testimony merely contradicts his proof or because it is unfavourable to the party calling him. A witness who retracts evidence supporting of the Crown's case or purports to have no recollection, but does not change sides in the sense of giving evidence that is actually damaging to the Crown's case, may be treated as hostile, and the Crown is entitled to call such a witness to explore the possibility that the witness will return to his original statement.

The making of an application to treat a witness as hostile is not limited to examination-in-chief. Where a witness said in chief that he could not remember, but in cross-examination exculpated the defendant, the prosecution were permitted to treat him as hostile. In another case an application was successful where the witness first exhibited hostility in re-examination."

[117] Very relevant in relation to the Court's decision in Moape's case, is a discretion in the Court in exceptional circumstances to hold an enquiry (or *voire dire*) into whether the witness should be permitted to be called.

"(49) Whether the witness may be cross-examined

12-68 The inconsistent statement may be oral. Where the witness admitted making parts of the statement and signing it, the judge was entitled to find that he had made the statement. There is a discretion to hold a voir dire to establish whether a potentially hostile witness should be permitted to be called and to be cross examined, but the discretion should only be exercised in exceptional circumstances. In some cases the cross-examination must proceed by degrees and must if necessary be stopped to prevent unfairness. Cross-examination may by leave extend beyond the inconsistent statement."

[118] The case *R v Honeyghon* [1999] Crim LR 221 is the source of the concept of *voire dire* before the witness is permitted to be called. It deals also with *"prejudice"* in this context. It is a short report and I set it out in full:

"R v Honeyghon and Sayles

Court of Appeal (Criminal Division): Beldam LJ., Garland and Longmore JJ. July 31, 1998.

Three black youths, one carrying a knife and the others carrying bottles, attacked two white youths, one of whom was fatally stabbed with the knife. The Crown's case was that these two appellants, together with a third youth, had acted together with murderous intent. There were a number of witnesses to the fight and some who were able to give evidence of things said and done after the killing. Three witnesses were reluctant to give evidence. Two had agreed to speak to the police but refused to make written statements. The third had signed a witness statement implicating both appellants but refused to answer questions at the committal proceedings and at the Crown Court maintained that she could not remember anything. Crown counsel applied for leave to treat these witnesses as hostile and was allowed to do so in respect of two of the witnesses. The

appellants were convicted of murder and appealed against conviction on the grounds that the judge ought to have held a voire dire without the jury in order to determine whether each of the three witnesses treated as hostile was likely to persist in their refusal to assist the Court; if such a hearing had been held it would have been apparent that they would continue in their refusal to assist and the judge would then have had to rule that they could not give evidence before the jury who would not then have become aware that there was material evidence being withheld.

Held, that underlying these submissions was a conflict between two important principles of the criminal law: (i) in the interests of justice the Court must encourage a citizen to perform his or her duty to assist in the detection of crime and the prosecution of offenders and must not appear readily to accept a reluctance or refusal to give evidence which it is believed can serve the interests of justice, but (ii) in the interests of the fairness of the proceedings as a whole, the Court had a duty to ensure that evidence should not be led or statements made whose value in proof of the issues the juries had to decide was substantially outweighed by the prejudice they were likely to cause. Whilst there might be cases in which a judge would feel justified in holding a voire dire the decision to do so was plainly within his discretion.

Their Lordships did not read the report of R v Darby [1989] CrimLR 817 as denying the existence of such a discretion in all circumstances. The judge had a discretion to allow a witness to be cross-examined about a previous statement whether the adverse witness professed to have no recollection or departed from his proof or deposition in favour of the other side or the defendant. A witness who simply refused to speak at all presented a different problem which might in an appropriate case be dealt with as contempt of court. In the case of H the evidence fell short of the standard required to prove his guilt and his conviction was therefore unsafe. The evidence against S, however, was more substantial and his appeal would be dismissed.

[Reported by Clare Barsby, Barrister]"

[119] In the commentary that immediately follows the report, the Criminal Law Review cases editor Professor Di Birch, the then Professor of Criminal Justice and Evidence at Nottingham University makes plain what Beldam LJ was talking about when he refers to *"prejudice"*.

"The objection to calling the witness in a case like the present one is that it might be regarded as an underhand way of introducing into evidence before the jury the previous statements of the witness which, though incriminating on their face, are not capable of forming evidence against the accused if put in this fashion. Despite the judicial obligation to make clear to the jury the true status of the earlier statements, the fear is that the jury will be unable to expunge them from their minds and may end up taking them into account notwithstanding the direction. Hence the notion that the evidence is 'prejudicial'. The difficulty arises most acutely where, as here, there is precious little real prospect of the witness returning to proof. In some ways the exhibition of the hostile witness to the jury in such a case has less to do with a genuine expectation that proof will be forthcoming than with a determination to go as far down the road towards seeing justice done as the system permits."

[120] The reason the prejudicial practise is allowed to continue is the fact that witnesses present at the scene but friends of the accused having stated to police that their friends did some or all of what the prosecution claims that they did become reluctant to testify at committal or in court. An even more anti social reality is that witnesses can be intimidated or paid off. Nor is this confined to witnesses that are friends of the accused.

[121] In the present case Moape was never reluctant to tell the Court what was in his 2nd May 2005 statement to police. Nor is there a scrap of evidence to suggest that he was intimidated by Senivalati and/or Rupeni not to tell the whole truth when he gave his statement to police on 2nd May 2005 as to the events of 29th April 2005 as seen by him.

[122] It is clear that in *Honeyghon* the Defendant Honeyghon was acquitted by the Court of Appeal in England where the trial judge had not held a *voire dire* because in the view of the appeal judges there was never any chance of the three witnesses returning to their original statements so that the prosecution exercise was one of getting the original statements before the jury even although the judge had a duty to, and would tell the jury that detailed early accounts by these witnesses against the accused could not be evidence of guilt. So the Court of Appeal where the evidence against Honeyghon was sparse, apart from this prejudice, acquitted Honeyghon without ordering a retrial. In respect of the co-accused Sayles, where the evidence was much stronger with or without the prejudice, the Court of Appeal upheld Sayles conviction. It is authority for the view that where the trial judge has not held a *voire dire* the Court of Appeal will intervene depending on the strength of the prosecution case leaving out the *"prejudice"* against an accused.

[123] In 1998 a year prior to the *Honeyghon* decision the Court of Appeal took a very similar approach in *R v Dat* [1998] Crim LR 488. The Court was presided over by Lord Justice Mantell who sat with Douglas Brown J and Judge Martin Stephens. After considering the cases of *R v Mann* [1972] 56 Crim App R 750 and *R v Vibert* (Unreported) October 21st 1974, Mantell LJ made a statement very similar to what Beldam LJ said in *Honeyghon*. The background was that the prosecution witness a fifteen year old girl in an initial statement to police identified the accused Dat as coming and departing from the scene and then emphatically said that she could not identify Dat as that person. She was made hostile at trial and her statement was admitted although she maintained her retraction of identifying Dat. Said Mantell LJ:

> *"In both [Mann and Vibert] it appears that the Crown were alerted to the possibility that the witness would not come up to proof by reason of a retraction or a second statement made in advance of the trial, a situation similar to that which existed in the present case and in the event were permitted to treat the witness as hostile. But even so, we say, it is incumbent upon prosecutors and the court to view with care the sort of situation which developed here, particularly, so far as counsel prosecuting is concerned, he should enter upon cross-examination of his own witness by degrees so as to limit the damage which might occur as a result of wide ranging cross-examination based on the original statement."*

But the Court upheld Dat's conviction and they did so because of the existence of other strong evidence identifying Dat. This was what happened to the accused Sayles in the *Honeyghon* case. If this other evidence had been other than strong or if it had been non-existent, the Court of Appeal in *Dat* would have acquitted him as happened with Honeyghon in the *Honeyghon* case.

[124] In neither of these English appeals nor in any other case in the texts has there been an initial clear statement by a witness acquitting an accused where the witness makes a second statement where there is a motive for the investigators. Not only a motive but also clear suspicion that the investigators have manipulated the witness into signing a second statement considerably later in time at a time when the evidence is sparse to non-existent with regard to the prosecution account of the alleged motive and alleged actions of the accused person or persons in respect of the crime. With the safeguards of the Police and Criminal Evidence Act 1984, the police in England would not contemplate such a course and if they did the prosecutor's clear duty would be to make no use of the manipulated statement in the trial and at an early time to disclose it to the defence. To recap, there were two motives in the case of the witness Moape for

manipulation. Firstly there was the absence of any evidence of a contract by Khaiyum of Lodoni, and of anyone placing the accused at or near the scene of the crime with wet clothes. Secondly, there was the motive to completely undermine a genuine defence witness who would otherwise clear either one or both of the accused.

[125] It must be pointed out that there was a total failure to put before the Court either *Honeyghon* or *Dat*. It is always the prosecutor's duty to research the law and place before the Court cases that are against the prosecution submission as well as for the prosecution submission.

[126] The law is that a witness is not *"adverse"* or *"hostile"* unless he has *"changed sides"*. Moape was hostile in the sense that he believed he had been manipulated with regard to the events of 8th and 9th June 2005. He was aware that the manipulation seriously undermined the defence of Rupeni where his 2nd May 2005 statement which was true, cleared Rupeni. But hostility to investigators because of evidence manipulation must not be confused with Moape being a hostile witness according to law. For one thing *"the hostile animus"* must relate to departing from or changing his previous statement to the prosecution to favour a defendant or defendants. But Moape had never resiled from the statement to police of 2nd May 2005 in a later statement. His evidence has always been true to his statement on 2nd May 2005 to police which as it turned out exonerates Rupeni and indirectly assists Senivalati as well. So the legal basis for claiming *"hostility"* was never satisfied. The other criteria to be satisfied is *"does not give his evidence fairly and with a desire to tell the truth to the Court"*. Since he was always true in his evidence to the 2nd May 2005 statement to police and stuck fairly to the facts therein, which were not resiled from in the later statement the prosecution could not satisfy these necessary criteria either.

[127] But if we consider *Honeyghon* and the earlier case of *Dat* it is clear that the learned High Court judge at trial failed to consider these cases and apply them. Compared with the facts in these cases, the facts amounting to prejudice are so overwhelming that the only conclusion that could have been made was that Moape should not have been called by the prosecution. The motive of the investigators in their activities on 8th and 9th June 2005 was extremely suspect in the circumstances. There was no *"changing sides"*. The effect of undermining the testimony of a witness which would exonerate one or both accused cannot co-exist with the essential requirement of a fair trial. Nor was there ever any prospect of Moape agreeing *"the truth"* of the statement of 9th June 2005.

[128] What if Timoci Ravurabota had never come forward? In my opinion this Court of Appeal would have set aside the convictions by reason of the turning of Moape hostile. His evidence was the most important in the trial. The Court of Appeal would have considered whether to order a retrial. In my view the evidence against both Senivalati and Rupeni was extremely sparse. It was extremely weak. In addition, Moape would give his evidence as per the 2nd May 2005 statement. Following the acquittal of Honeyghon by the Court of Appeal in England without ordering a retrial, the identical result would have been appropriate in the cases of Senivalati Ramuwai and Rupeni (Niudamu) Naisoro.

Other Matters

[129] Some other matters should be mentioned. In the statements under caution and in Moape's 9th June 2005 statement there is mention of illegal drug use. This may be unfairly prejudicial to Defendants facing trial. Secondly, the prosecution

lead a witness who referred to being acquainted with Senivalati when he was a serving prisoner. Such prejudice cannot be undone by telling the assessors to ignore it. It is even worse when it is not clarified that Senivalati has never been convicted of an offence against the person involving violence.

[130] There are matters disclosed by the record which should be further considered. The first is that all the usual safeguards of the right of interview with a Justice of the Peace and examination by a doctor seem to have failed in this case. The second is that the evidence of the pathologist seemed to be incomplete. At trial in 2007 both prosecution and defence were unhappy about this. A further matter is that, inexplicably, ordinary persons in the community gave evidence for the prosecution that could not possibly be true in view of what is now known to be the true facts. A final matter is that it seems that no record was kept of the fingerprints found upon the murder weapon.

[131] As was canvassed in the hearing of this case, I believe that if the future in Fiji is to be free from egregious and avoidable miscarriages of justice there should be sound recording or video recording of all interviews under caution with suspects. This was proposed and I am told, accepted in 2005. It has been accepted in most common law jurisdictions since around 1984. But although proposed, its use has not been adopted up to the present day in Fiji. Why not? The attitudes of investigators shown in this case may not be common place. But if such attitudes remain prevalent under the surface, changing procedures will not avoid future miscarriages of justice. The recording procedure should also apply where a defence witness is invited to make a new statement incriminating defendants who have been already charged.

[132] **Goundar JA.** I agree with the judgment, the reasons and the proposed orders of William Marshall JA. I also agree that sound or video recordings should be used in interviews with suspects. I agree with what is said about this in paragraph 131.

[133] **Wikramanayake JA.** I agree also agree with the judgment, the reasons and the proposed orders of William Marshall JA.

Marshall JA.

ORDERS OF THE COURT

[134] The orders of the Court are:

(1) That the appeals of Senivalati Ramuwai and Rupeni Naisoro against conviction be allowed.

(2) That the conviction and sentence of Senivalati Ramuwai for the murder of Navneet Kumar be quashed and annulled and a judgment and verdict of *"not guilty"* be entered.

(3) That the conviction and sentence of Rupeni Naisoro for the murder of Navneet Kumar be quashed and annulled and a judgment and verdict of *"not guilty"* be entered.

Appeals allowed.

Justin Carter
Barrister