IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION: CAV 0025 OF 2023
[Court of Appeal No: AAU 170/2016]
High Court No: HAC 202/2015]

CRIMINAL PETITION: CAV 0030 OF 2023
[Court of Appeal No: AAU 160/2016]
High Court No: HAC 202/2015]

CRIMINAL PETITION: CAV 0031 OF 2023
[Court of Appeal No: AAU 168/2016]
High Court No: HAC 202/2015]

CRIMINAL PETITION: CAV 0032 OF 2023
[Court of Appeal No: AAU 165/2016]
High Court No: HAC 202/2015]

BETWEEN : **SEREMAIA MUDURA**
MOSESE TARAU
UATE BALEIONO
TEVITA QAQANIVALU

Petitioners

AND : **THE STATE**

Respondent

Coram : The Hon. Mr Justice William Calanchini, Judge of the Supreme Court
The Hon. Mr Justice William Young, Judge of the Supreme Court
The Hon. Mr Justice Alipate Qetaki, Judge of the Supreme Court

Counsel: Petitioners in Person
Mr T Tuenuku for the Respondent

Date of Hearing: 8 October, 2024

Date of Judgment: 29 October, 2024

JUDGMENT

Calanchini, J

Introduction

[1] The Petitioners seek leave to appeal the decision of the Court of Appeal delivered on 24 February 2023 dismissing each of their appeals against conviction and the appeal against sentence brought by Tevita Qaqanivalu. To avoid confusion the Petitioners will each be referred to by name throughout the judgment.

[2] Mosese Tarau (Tarau), Seremaia Mudura (Mudura) and Tevita Qaqanivalu (Qaqanivalu) together with Jeke Vakararawa were charged on one count of aggravated robbery, the particulars of which were that on the 21 May 2015 in company with others stole property belonging to Sher Dil and Rajneel Chand and immediately before committing the theft used force on the said Sher Dil.

[3] Tarau, Mudura, Qaqanivalu and Uate Baleiono (Baleiono) together with Jeke Vakararawa were charged on one count of aggravated robbery the particulars of which were that on 21 May 2015 in company with others stole property belonging to Distill (Lawhill Companies Ltd) and immediately before committing the theft threatened Jodi Bacchiochi Chang and Elisha Lavulo with a cane knife, steel rod and bottles.

[4] The same four petitioners together with Jeke Vakararawa were charged on one count of acting with the intention to cause grievous harm under section 255(a) of the Crimes Act. The particulars stated that on 21 May 2015 they, with intent to harm, disfigure or disable or do some grievous harm unlawfully wounded Bernadus Groenewald on the forehead.

[5] The fifth person involved in the offences was Jeke Vakararawa (Vakararawa) who did not file a petition for leave to appeal in the Supreme Court. His involvement in the proceedings did not go beyond the Court of Appeal.

The Facts

[6] The following summary of the facts is based on the detailed description of events that is set out in the judgment of the Court of Appeal. On 21 May 2015 Vakararawa and another had gone to the Suva Market at about 7.30pm. They stopped a taxi driven by Sher Dil and asked the driver to take them to Bryce Street and then on to Avon Place. This was the first part of a plan to rob a Chinese Supermarket in Bau Street Flagstaff that had been formulated the day before.

[7] At Avon Place Vakararawa and his passenger attacked and robbed the taxi driver. They took his mobile phone and $250.00 in cash. The driver was then blindfolded and placed in the back of the taxi. Vakararawa then collected Tarau, Qaqanivalu, Baleiono and Mudura and then drove to the Chinese Supermarket in Flagstaff. It would appear that by this time there were cane knives, pinch bars, iron rods, empty bottles and lovo stones in the vehicle.

[8] When they arrived at the Chinese Supermarket, the taxi door jammed. The Petitioners could not get out and as there were people around and it was busy they dropped the idea of robbing the Chinese Supermarket and turned their attention to the nearby "*Distill Wine Shop*" in Rewa Street. At the time there were about 40 people in the shop participating in a wine and food pairing function. At about 8.00pm witnesses saw three men wearing balaclavas and dark clothing enter the premises. One of the men grabbed the money till while another robbed the guests of handbags, purses, wallets and mobile phones. The former Police Commissioner was amongst the guests. He approached the robbers, identified himself and asked them to leave. He was struck on the forehead by wine bottle thrown by one of the robbers.

[9] As the Petitioners were leaving the guests threw objects at them. They left the scene in the taxi driven by Vakararawa who had remained in the vehicle as the get-away driver. Tarau, Qaqanivalu, Mudura and Vakararawa were arrested at Nadonumai the next morning. Baleiono was arrested fours day later in Tailevu. They were each interviewed under caution and made admissions. They were subsequently charged and presented before the Magistrates Court on 29 May 2015.

High Court Proceedings

Voir dire

[10] A *voir dire* hearing commenced on 11 October and continued on various dates through to 26 October 2016. The Petitioners challenged the admissibility of both their caution interviews and charge statements. The Petitioners apart from Vakararawa chose to give evidence to oppose the admission into evidence of the confessions in their respective written out of court statements on the bases that they had been assaulted and the admissions had not been made voluntarily. Tarau, Mudura and Baleiono were each represented by separate Counsel throughout the proceedings. Vakararawa was represented by Counsel for the period 11 – 13 October 2016 and thereafter represented himself. Qaqanivalu represented himself throughout the proceedings.

[11] The caution interviews and charge statement were tendered in evidence by Police witnesses and were subsequently marked as Prosecution Exhibits 1 – 12. The Petitioners gave evidence and also called medical evidence. The trial Judge ruled that the caution interviews and charge statements were admissible on the basis that the admissions contained therein had been made voluntarily.

The Trial

[12] The trial commenced on 27 October before a Judge sitting with four assessors and continued intermittently through to 9 November 2016 on a total of 8 days. The Prosecution case was based solely on the admissions in their caution interviews and charge statements. There was no identification evidence as none of the guests could

identify the petitioners who were wearing balaclavas to conceal their identity. The interviews and statements were again tendered at the trial by the police witnesses and admitted into evidence. The police witnesses gave evidence to the same effect as they had done in the *voir dire* proceedings.

[13] The Petitioners case was that it was not them who robbed and assaulted the people present at the Distill Wine-Shop on 21 May 2015. However, they did not dispute that the incidents had occurred as alleged by the prosecution. Each petitioner, apart from Vakararawa, gave evidence in his defence. The doctors who had examined the Petitioners gave evidence similar to that which had been given in the *voir dire* proceedings.

<u>Verdicts and Sentences</u>

[14] Following the trial, the assessors returned mixed opinions. Vakararawa, Tarau, Mudura and Qaqanivalu were found guilty of the offence under count 1 by two assessors and not guilty by the other two assessors. They together with Baleiono were found guilty of the offences under counts 2 and 3 by two of the assessors and not guilty by the other two assessors. The learned Judge agreed with the guilty opinions and disagreed with the not guilty opinions. Consequently the petitioners were convicted of the offences as charged.

[15] For his involvement Vakararawa was sentenced to 9 years imprisonment with a non-parole term of 8 years. Tarau was sentenced to 15 years imprisonment with a non-parole term of 14 years. Mudura was sentenced to 13 years imprisonment with a non-parole term of 12 years. Qaqanivalu was sentenced to 15 years imprisonment with a non-parole term of 14 years. Baleiono was sentenced to 11 years imprisonment with a non-parole term of 10 years.

<u>Court of Appeal Proceedings</u>

[16] Each petitioner filed a timely notice of appeal against conviction and sentence. Tarau, Baleiono, Mudura and Vakararawa were granted leave to appeal against conviction on the following grounds:

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

[17] On the basis that the sentences imposed did not reflect any arguable errors in the exercise of the sentencing discretion, leave to appeal against sentence was refused in respect of these four petitioners by the single Judge of the Court of Appeal.

[18] While these four petitioners were represented before the single Judge, Qaqanivalu appeared in person and relied on 8 grounds of appeal against conviction. He was given leave to appeal against conviction on grounds 1 – 4 and ground 8. These grounds were concerned with the circumstances leading up to and the conduct of the caution interview. His application for leave to appeal against sentence was also refused.

[19] The appeal on behalf of Tarau, Baleiono, Mudura and Vakararawa proceeded on the three grounds for which they had been granted leave. The Court considered the relevant passages of the summing up and concluded that the three grounds lacked merit. At the hearing Vakararawa raised what appears to be 2 additional grounds that were considered by the Court of Appeal:

> *"a. That the reason why the 5th Appellant had to contain himself to remain silent in the proceeding of this matter was not given fair and reasonable consideration by the learned Judge. The 5th Appellant conflict with Ms Lal (Defence Counsel) and the failure to fairly deal with the conflict in favour of the Appellant has negatively impacted the Constitutional requirement to have the Appellant receive a fair trial on this matter causing serious prejudice.*

b. *That the learned Judge erred in law and in fact when he failed to provide an adequate time and failures to prepare a defence causing serious prejudice."*

[20] The circumstances surrounding the withdrawal of Counsel for Vakararawa are set out in some detail in a Ruling by the trial Judge on 13 October 2016. The Ruling can be found on pages 958 – 960 of Volume 3 of the Record of the High Court. The issue was dealt with by the trial Judge in a fair and appropriate manner. There is no other material to suggest that Vakararawa had been deprived of his right to a fair trial.

[21] Qaqanivalu's appeal against conviction proceeded before the Court of Appeal on the same grounds of appeal for which he had been granted leave. They were:

"1. THAT the denial of my constitutional right to have a legal aid Counsel to be present and or to consult with before the conduct of my caution interview led to the forceful obtained alleged confession not give on my own free will.

2. THAT the high possibility of protection and proper safeguard against forcefully obtained alleged confession before the conduct of my caution interview would have been avoided, if I was afforded the opportunity by the police to consult with or to have a legal aid Counsel present before the proceeding of my alleged caution interview. Thus, the failure has prejudiced me accordingly.

3. THAT the learned Judge erred in Ruling the confessional statement as admissible evidence when (i) there was sufficient suggestion in the medical report that injuries were sustained whilst in police custody thereby negating voluntariness. (Annex. Marked T.Q.02 medical report).

4. THAT the prosecution failed to establish beyond reasonable doubt the nature of the injury on the appellants right eye was not caused by police assault whilst being interviewed under duress resulting a confessional statement made.

8. THAT the learned trial Judge erred in law and in fact when he failed to take into fair and proper consideration the unfairness and fundamental breach of my Constitution rights that existed when the police took my

caution interview at the police station thus causing a preserve voir dire Ruling made."

[22] As noted earlier these grounds are concerned with the *voir dire* hearing and the decision by the trial Judge to allow Qaqanivalu's caution interview and charge statement into evidence.

[23] The Petitioner raised a further five grounds of appeal before the Court of Appeal. Four of the grounds of appeal were against conviction and were new grounds. They do not appear to have been considered by the Court of Appeal and it is not apparent whether the Respondent had been in a position to file submissions for the assistance of the Court. The ground of appeal against sentence was before the Court as a renewed application for leave to appeal against sentence pursuant to section 35(3) of the Court of Appeal Act 1949. The Court of Appeal refused the application for leave.

Supreme Court Proceedings

[24] Pursuant to section 98(4) of the Constitution an appeal from a final judgment of the Court of Appeal may not be brought to the Supreme Court unless the Supreme Court has granted leave to appeal under section 7(2) of the Supreme Court Act 1998. Leave to appeal must not be granted unless (a) a question of general legal importance is involved; (b) a substantial question of principle affecting the administration of criminal justice is involved; or (c) a substantial and gave injustice may otherwise occur if leave is not granted. It is for the Petitioners to establish that the Petitions satisfy one of the requirements specified before the appeal can be considered. In accordance with the Supreme Court's usual practice the hearing of the petitions for leave to appeal against conviction (and if necessary, sentence) will be treated, if necessary, as the hearing of the appeal.

Assessors' not Guilty Opinions/Judge's convictions

[25] Two of the four assessors returned not guilty opinions on all three counts for the five petitioners. However in his judgment the trial Judge indicated that he disagreed with

those opinions and proceeded to record findings of guilt. As a result all five petitioners were convicted on all counts for which they had been charged. In taking that course of action the learned Judge did give written reasons for differing with the opinions of the two assessors (section 237(4)) of the Criminal Procedure Act 2009. The two remaining assessors returned opinions of guilty for each petitioner on each count.

Tarau's Petition

[26] Tarau filed a timely application for leave to appeal against conviction and sentence on 16 March 2023. In that notice the petitioner put forward three amended grounds of appeal against conviction. In a notice filed on 20 September 2024 the petitioner sets out his grounds of appeal against sentence. In a third notice filed on 24 September 2024, this petitioner appeared to revert to his three original grounds of appeal against conviction upon which he relied in the Court of Appeal. In this third notice the petitioner has provided typed submissions on those grounds. The first ground is concerned with the directions that should be given to assessors and when self-directing on the caution interview and the weight to be attached to that evidence. The second issue is concerned with the requirement to put and consider the Petitioner's case in a balanced and fair manner. The third issue related to the directions to be given when considering alibi evidence.

[27] Tarau was arrested in the early hours of 22 May 2015. He was interviewed under caution over a period of time with breaks from 2.15pm on 22 May 2015 to 7.50pm on 23 May 2015. He was medically examined at about 4.00pm on 25 May 2015. On the same day but prior to the medical examination Tarau together with Qaqanivalu, Mudura and Vakararawa appeared before the Magistrates Court in Suva. The Magistrate's notes include the following:

> *"The Defence is alleging that the accused are assaulted therefore the accused to be taken to CWM for medical check-up."*

[28] On 27 May 2015 the same Magistrate ordered *"the medical reports to be tendered to Court."* On 29 May 2015 the Magistrate ordered that *"all the accused are to be taken to*

CWM Hospital for medical check-up. The 1st accused is to be checked for x-ray based on the recommendation. After the medical check-up all the accused are to be taken to the Correction Centre _ _ _ The medical reports are to be submitted to the High Court." For some reason that is not readily apparent the date on the Police Medical Examination form and the dates on which the Magistrate is recorded as having ordered a medical examination do not reconcile.

[29] In his evidence at the *voir dire* hearing, Tarau claimed that he was assaulted when he was handcuffed. His head was "*repeatedly*" punched. The Police kicked his back. At Rifle Range, the Police punch him "*repeatedly*." He was hit with a police baton on his left knee. These assaults caused an injury to his mouth and his head became swollen. He claimed he was punched in the ribs during the interview. He said he signed the interview notes because the Police assaulted and threatened him. At one stage they threatened to kill him.

[30] Under cross-examination Tarau was more detailed when describing the assaults by the Police. When he was arrested two policemen "*landed*" three heavy punches each. He received four kicks to his back when escorted to the roundabout. They were heavy kicks while he was standing. At Rifle Range he was punched on the top of his head with eight hard punches. He was hit hard on his left knee bone twice by a police baton. His mouth was injured when punched during the interview. At the interview he received 2 punches to the left rib – they were not hard.

[31] In his evidence during the trial Tarau, narrated a similar version of the assaults. When he was outside his house one hard punch hit his forehead. A second punch hit his ear. A third punch hit his forehead. Then three punches landed on his forehead and three landed on his hands. He said he was not injured when he was punched. Although kicked in the back on the way to the roundabout, nothing happened to him at the roundabout. In the vehicle he was threatened. He was punched four times at Rifle Range and hit on his left knees twice with a baton. During the interview he was slapped on the ear and punched

repeatedly on the chest. He alleged that the answers in the interview were fabricated by the Police.

[32] Tarau's caution interview was completed by 7.50pm on 23 May 2015. Less than two days later at 4.00pm on 25 May 2015 he was medically examined at the Samabula Health Centre. Dr Padarath conducted the examination and completed the Medical Examination form. At section D(12) the doctor stated his specific medical findings. The State's submissions in the Court of Appeal reproduced those findings in a legible form at page 53 of Tarau's Supreme Court record:

> *"tender left knee region above palella, tender temporal region on palpatron, both ears are normal with healing (old) laceration on the inner check-right side."*

[33] In his evidence at the trial Dr Padarath stated that his findings noted in D12 were consistent with the history that Tarau had given. At D10 Tarau had told the doctor that (1) he had been punched 5 – 6 times on the face by fists on the right jaw and ear (appears as "*@ear"* on record) and temporal region (2) twice striked on left knee by baton. However, there is no indication in the report as to when these assaults took place.

[34] However, under cross-examination the doctor acknowledged that there were no bruises or lacerations on the knee or above the knee cap. There were no signs to support the claim by Tarau that when touched he experienced pain. Furthermore, there were no bruises, lacerations or swelling on the left temporal region to support the pain that Tarau claimed to experience when that area was touched. Although Tarau referred to the right jaw when he made his complaint to the doctor, there is no reference to the right jaw in the doctor's findings. Finally, the doctor also stated that Tarau's ears were normal. There was no bleeding or swelling in the ears. There were no lacerations, bruises or swelling close to the ears. The doctor stated that there were no signs to support the other assaults close to the ears. The doctor stated that there were no signs to support the other assaults that Tarau claimed to have been inflicted on him, none of which he had mentioned to the doctor. The laceration inside the mouth on the inside of the right cheek was described by the doctor as an old injury.

[35] The fact is that, while the version of events given by Tarau was consistent with the pain that Tarau claimed to be experiencing, when examined by the doctor, there were no signs of any description on his body to support the symptom of alleged pain around the left temporal region or the knee.

[36] On that basis and in view of the evidence given by the police officers it was open to the trial judge to find that the prosecution had established beyond reasonable doubt that the admissions made by Tarau had been made voluntarily.

[37] Apart from the claim by Tarau (and the other petitioners made the same claim) that he was not involved in the offences and hence that he did not make his admissions voluntarily, Tarau also challenged the directions given by the trial Judge to the assessors on how they (and he for that matter) should assess the evidence in the form of the admissions in the caution interview. This ground is concerned with the directions that the trial Judge should give to the assessors when voluntariness is in issue at the trial.

[38] The directions given to the assessors are contained in paragraph 44 of the summing up as follows:

> *"We now discuss how, as assessors and judges of fact, you should approach the above alleged confessions by the accuseds. A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements contained in his police caution interview and charge statements? If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confession true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the circumstances surrounding the taking of the statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If*

> *its otherwise, you may give it less weight and value. It is a matter entirely for you."*

[39] Prior to 2015 the approach that a trial Judge should adopt in crafting directions to the assessors was considered briefly by this Court in **Kean –v- The State** [2011] FJSC 11; CAV 15 of 2010 (12 August 2011) at paragraph 25 where the Court noted:

> *"In his summing up the learned trial Judge quite correctly left the truth of the confession to the assessors after determining admissibility. The truth and weight of the confession were matters for the assessors to consider after taking into account all the evidence."*

[40] These directions could be said to be similar to the directions that would be given by a trial Judge to a jury. However, as Keith J observed in **Maya –v- The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015) in Fiji the opinion of the equivalent of the jurors, the assessors, is not decisive. At paragraph 21 he observed:

> *"In Fiji, although the judge will obviously want to take into account the considered view of the assessors, it is the judge who ultimately decides whether the defendant is guilty or not. By then, of course, the judge will have ruled the confession to have been admissible. He will therefore have already found beyond reasonable doubt that it had been made voluntarily. If he remains of that view by the end of the case, the terms of the direction, he gave to the assessors, if they thought that the confession may have been made voluntarily, is irrelevant. The problem will only arise if, in the course of the trial, the judge himself changes his original view about the voluntariness of the confession."*

[41] In the present case the trial Judge has directed the assessors that (a) they must consider whether the petitioner made the statements; (b) if the answer is "*no*" then the admissions are to be disregarded; (c) if the answer is yes then the assessors must consider whether the admissions are true, (d) if the assessors are satisfied that the police did not assault, threaten or make promises to the petitioner while in custody and that the statements were given voluntarily then the admissions should be given more weight and value and (e) if it is otherwise then the admissions should be given less weight and value. Those directions were consistent with directions that this Court had previously endorsed.

[42] However, in keeping with the development that had occurred in jury trials, Keith J in **Maya** (supra) stated that "Judges should for the time being, tell the assessors that even if they are sure that the defendants said what the police attributed to them, they should nevertheless disregard the confession if they think that it may have been made involuntarily.

[43] Although the trial Judge's directions in paragraph 44 may have fallen short of the directions recommended by Keith J in **Maya** (supra), they were nevertheless consistent with what had hitherto been the accepted form of guidance to the assessors. I consider any shortcoming in the directions to be of no consequence since the trial Judge has agreed with the opinions of two of the assessors. Furthermore, he has confirmed his conclusion that he was satisfied beyond reasonable doubt that the admissions were made voluntarily and in doing so he has provided his reasons for disagreeing with the opinion of the other two assessors who had concluded that the petitioners were not guilty.

[44] The Petitioner Tarau has raised the same two additional grounds in his petition as he had raised in the Court of Appeal. The first of these grounds is a complaint that the trial Judge did not put the Petitioner's case to the assessors in a fair and balanced manner. The Petitioner's case was that he was not involved in the offences. He was not there. In the *voir dire* Tarau stated that his admissions had been made as a result of police assaults and threats. In his evidence at the trial he stated that the police fabricated his answers and that the reconstruction was a fabrication. He only signed because of the assaults and the threats. The essence of the defence was that the caution interview was accompanied by police assaults and threats. This defence was adequately explained to the assessors. The Judge was well aware of the defence when he drafted his judgment. The alibi defence was discussed in paragraphs 46 and 47 of the summing up. Although the Judge did not discuss in detail the nature of each alibi raised by each petitioner, he did point out that the effect of the alibi is a claim by the petitioner that he was not present or involved in the offences because he was somewhere else. The Judge reminded the assessors that it

remains for the prosecution to prove guilt beyond reasonable doubt when considering the alibi defence evidence.

Seremaia Mudura's Petition

[45] On 25 July 2023 Mudura filed a petition for leave to appeal against sentence. The Petition was out of time by about three and a half months. Apart from the delay, Mudura's petition cannot be considered by the Supreme Court. There is a jurisdictional issue that is discussed at the end of this judgment.

[46] On 8 October 2024 when the hearing of the Petitioner's application for leave to appeal against sentence came on for hearing, Mudura purported to raise an application for leave to appeal against conviction. Putting to one side the procedural issues that flow from the extremely late filing of this document, it would appear that Mudura's grounds of appeal and submissions upon which he relies in his petition are copied directly from the material filed in the Court of Appeal on behalf of the Petitioners.

[47] Furthermore, Mudura has relied on the same grounds in his petition as Tarau has put forward in his petition. Those grounds have been considered fully earlier in this judgment. It is unnecessary to repeat what the Court has already said and their is nothing to add.

Uate Baleiono's Petition

Conviction

[48] Uate Baleiono (Baleiono) filed a timely petition for leave to appeal against conviction on 24 March 2023. The one ground of appeal relied upon in his petition was a ground that was the same as one of the grounds upon which the other petitioners also relied. This Petitioner claimed that:

> *"The learned trial Judge erred in law and in fact when he failed to direct himself and guide the assessors on how to approach the evidence contained*

> *in the caution interview and the weight to be attached to the disputed confession."*

[49] In his *voir dire* Ruling the trial Judge summarised the evidence given by Baleiono concerning the allegations of assault at paragraph 16 on page 194 of Volume 1 of the Record as:

> *"As for Accused No.5, he said he was arrested by police on 26 May 2015. He said, the police kicked him in the stomach and slapped him on the face when they arrested him. Later, they hit his back with a "dogo" firewood. Later, he was punched in the mid-section, and chillies rubbed up his anus. When he was taken to Nabua Police Station, he was slapped many times. When formally charged, he was repeatedly punched on the jaw. On 27 May 2015, Accused No.5 first appeared in the Suva Magistrate Court. He made no complaint against the police to the Magistrate, nor did he ask for a medical examination. On 29 May 2015, he appeared before the Magistrate. He complained of assaults and asked for medical examination. On 3 June 2015, Doctor S Nabati (DW8) medically examined Accused No.5. The doctor found no injuries on Accused No.5, but only tenderness on his back.."*

[50] The medical evidence at the *voir dire* was given by Dr Saimone Nabati and is found at page 1021 – 1022 of Volume 3 of the Record. The doctor tendered the original medical report on DE5 TWT. Unfortunately, the exhibit was not in the Record. The doctor stated in his evidence:

> *"I look at the patient. I ask the patient the complaints. I examine the patient. In this case the main examination was feeling the patient for the complaints."*

[51] His finding was:

> *"tenderness on palpation of both sides of the back means some sensation of pain – either by touch or pressure and it is felt by the patient. I touch the area complained of and the patient says its painful."*

[52] This means that it is the petitioner who identifies the area of the body that he wants the doctor to touch. There is no sign on that region of any injury. It is then the petitioner who indicates that there is pain as a result of the doctor's examination. The whole process is in the hands of the petitioner, in the absence of any sign of injury.

[53] The doctor concluded that there were no injuries except the tenderness in the area identified by the petitioner. The conclusion as to tenderness was based on the alleged pain experienced by the patient when the doctor touched or pressed the identified area of the petitioner's body. The doctor went on to say that whether he had examined Uate Baleiono on the day of his arrest or even seven days later he would have expected to see lacerations on his back as a result of the alleged assaults. The doctor categorically stated that he saw no lacerations on Baleiono's back. His evidence at the trial (P1102 of the Record) is virtually the same.

[54] The directions to the assessors on how they should approach the admissions in the caution interviews of each of the petitioners and the weight to be attached to those admissions are set in paragraph 44 of the summing up. Those directions are equally applicable to the trial Judge as the ultimate judges of both questions of fact and law. Those directions have been reproduced in paragraph 39 in this judgment.

[55] In **Niubasaga –v- The State** [2024] FJSC 29; CAV 0008 of 2023 (29 August 2024), this Court cited with approval the dicta of the Court of Appeal in **Tuilagi –v- The State** [2017] FJCA 116; AAU0090 of 2013 (14 September 2017) on the correct approach to be adopted by trial judges regarding admissions/confessions. The Court said:

> *"The correct law and appropriate direction on how the assessors should evaluate a confession could be summarised as follows.*
>
> *(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness (vide **Volau v State** Criminal Appeal No. AAU0011 of 2013: 26 May 2017 [2017] FJCA 51).*
>
> *(ii) Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial but such evidence goes to the weight and value that the (the assessors and the trial Judge) would attach to the confession (vide **Volau**).*

> (iii) *Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the (assessors) should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them. (emphasis added) (vide* ***Volau*****).**
>
> (iv) *Even if the assessors are sure that the defendant said what the police attributed to him, they should nevertheless disregard the confession if they think that it may have been made involuntarily (vide* ***Noa Maya v. State*** *Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30])*
>
> (v) *However,* ***Noa Maya*** *direction is required only in a situation where the trial Judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the confession is voluntary, Noa Maya direction is irrelevant and not required (vide* ***Volau*** *and* ***Lulu v. State*** *Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19."*

[56] The trial Judge has relied strongly on the medical evidence given by Dr Nabati at both the *voir dire* and at trial. He has rejected Baleiono's account of his injuries and as a result no support for the claim of serious assaults. The Judge has accepted the evidence of the Police that Baleiono had not been assaulted.

Tevita Qaqanivalu's Petition

[57] Tevita Qaqanivalu (Qaqanivalu) filed a timely petition for leave to appeal against conviction and sentence on 4 April 2023. He indicated that he relied on the same grounds that were dismissed in the Court of Appeal. He reserved the right to add, amend or renew grounds upon receipt of the court record.

[58] However by notice filed on 23 September, 2024 the petitioner indicated that the grounds of appeal against conviction *"on which I will rely in the hearing of this petition are as follows:"*

> *"[1] The learned High Court Judge and the Court of Appeal Justice fell into serious error when they conceded to make wrong and erroneous assumption that the nature of the injuries stated in the petitioner's medical report seems to have been inflicted as a result of the violent robbery. This wrong assumption on the fact leading up to the question bearing the voluntariness of the allege confession resulted to the miscarry and wrong assessment of its admissibility.*
>
> *[2] The learned High Court Judge and the Court of Appeal Justice fell into error when they considered the facts that the evidence of the witnesses led by the prosecution is credible and consistent. The witnesses evidence on the account of the injury mentioned in the medical report varied in such a degree that even the respondent onus to prove voluntariness of her confession and the finding of admissibility was in serious doubt.*
>
> *[3] The learned High Court Judge and the Court of Appeal Justice failed to properly analyse the importance of the undisclosed voir dire material e.g: The Nabua Police Station Diary, Nabua Police Station Cell Entry Diary that was vital material to assist the trial Judge to fully and appropriately analyse the question of voluntariness of the disputed confession thus the petitioner's voir dire proceeding was not conducted fairly by the lack of disclosure materials.*
>
> *[4] The learned High Court Judge and the Court of Appeal Justice has been misled by the Respondents Counsel by stating that the requested Nabua Police Station Diary and Cell Diary has been disclosed to the petitioners before the voir dire proceedings. In fact, the record is not clear that only the petition's co-petitioners voir dire materials were disclosed and provided to their Counsel and not the petitioner who was unrepresented throughout the proceedings.*
>
> *[5] The Court of Appeal Justice had failed to provide proper analyses and reasons to the petitioner's grounds of appeal thus the failure raises question of law.*
>
> *[6] The learned High Court Judge erred in law and fact when he failed to take into consideration or take into account the general ground of unfairness in which the police behaved."*

The evidence as to injuries

[59] Doctor Padarath was called as a defence witness during the *voir dire* hearing. In his evidence at page 1008 of the Record, he stated that he could not recall Qaqanivalu limping upon entering the examination room. The doctor only examined those parts of the body where the Petitioner said he was injured. Consequently the doctor only concentrated on the face because that was where he said he was injured. The doctor said that he could not recall the Petitioner complaining of any other injuries. Qaqanivalu made no complaint about chillies being rubbed on his anus. There was no complaint of any injuries to his right leg, stomach, ribs or to the back of his head.

[60] The doctor examined Qaqanivalu's face. There was no tenderness on the right eye nor was there any swelling on the right eye. There was a small bruising on the corner of his right eye. Although he found tenderness on the nasal ridge (by palpation), there was no swelling, or bruising or laceration. The only sign was a small bruising in the corner of the right eye. Again, the doctor confirmed that there was no swelling on the petitioner's face. The small bruising on the corner of the right eye was much less severe that would be expected from hard punches.

[61] The doctor's evidence at the trial (p1095 – 1097 Record) was in the same terms at in the *voir dire*. He added that the bruise to the right eye "*could be caused by a blunt trauma. It is not consistent with a punch. It could be consistent with objects thrown at him.*" Under re-examination the doctor appeared to say the opposite when asked:

> *"The bruise in the eye was in the corner of the eye socket. It can't be consistent with an object been thrown at it. If a wine bottle is thrown at the eye, there would be more injuries.*
> *When I asked you what happened you said what I recorded in D(10) (in the medical report). The bruise was in the eye. Tenderness to the nasal bridge. It could be consistent with a punch."*

[62] Qaqanivalu's medical report was exhibited as DE3 at the trial. In paragraph D10 of the report the petitioner related the history of his injuries as "*punched few times in the face.*

Did not loose consciousness." At paragraph D12 the examining doctor (Dr Padarath) stated his specific medical findings as:

> *"bruise on the medial canthus of the right eye, both ears normal, tenderness of nasal ridge and both noses are clear."*

[63] Ultimately the question of voluntariness was a matter for the trial Judge in the *voir dire* hearing and at the trial. The consequences that may arise as a result of any misdirection to the assessors concerning the weight to be attached to the admissions have already been discussed at length in the judgment. Following the evidence at the trial two of the four assessors accepted Qaqanivalu's admissions as having been made voluntarily. The trial Judge had not changed his mind from his findings that the admissions by Qaqanivalu had been made voluntarily. The Judge has certainly placed great weight on the medical evidence. The various assaults alleged to have been inflicted on Qaqanivalu found no confirmation from the doctor's evidence. The trial Judge has concluded that there was no support for the petitioner's detailed account of serious assaults. The Judge accepted the evidence of the police officers that they had not assaulted Qaqanivalu and he also accepted the evidence of Dr. Padarath. The exact cause of the minor injury to the right eye remained unresolved and unaccounted for. The cause of that injury was a factual issue and as such involved an assessment of each of the witnesses which was ultimately a task for the trial Judge hearing the case. For obvious reasons he had a better opportunity of assessing their testimony that this Court. Under those circumstances it cannot be said that in this case the Judge has made a wrong assessment that would require this Court to disturb the findings.

Missing *voir dire* disclosures

[64] Qaqanivalu raised two grounds of appeal concerning an alleged failure on the part of the prosecution to provide complete *voir dire* disclosures before the *voir dire* proceedings commenced. The Petitioner refers specifically to the Nabua Police Station Diary and Cell Entry Diary. He claimed they were essential to establish the unfairness of his alleged admissions. He also claimed that State Counsel had misled the trial Judge on this issue.

It must be noted that these issues was not raised in his initial application for leave to appeal before the single Judge in the Court of Appeal. However, a similar issue was raised together with four others during the appeal hearing before the Court of Appeal. The Court noted the further grounds and summarily rejected them.

[65] The Court Record indicates that Qaqanivalu, who was unrepresented during the *voir dire* and at the trial, had received, along with the other petitioners, disclosures between 2 July 2015 and 26 August 2016. The position thereafter is set out on page 938 of the Record where at the Pre-Trial Conference on 9 September 2016 the following was said:

> *"Prosecution : A4 (Qaqanivalu) had been given the disclosures (volume 2) on 2/9/16. A4 was given volume 1 of his disclosures on 26/08/16. An initial voir dire disclosures was served on A4 on 15/07/16.*
>
> *A4 : I want CPC cell book from 22/05/15 to 29/05/15.*
>
> *Prosecution : We have the copies of the documents mentioned above by A4. We will provide it within 2 weeks.*
>
> *Court :*
> *1. Prosecution to supply copies of the documents requested by A4 within 14 days.*
> *2. _ _ _*
> *3. Defence Counsel and prosecution to work together to ensure all the discloses, documents and other pre-trial matters to be sorted before 11/10/16.*
> *4. _ _ _*
> *5. _ _ _"*

[66] On 11 October 2016 the trial opened with one preliminary matter to be determined before the *voir dire* commenced. That issue related to the taking of skype evidence from the former Police Commission who had left the jurisdiction. There is no reference to any outstanding disclosure material and certainly no application by the Petitioner that he had not received that which he had requested on 9 September 2016.

[67] The *voir dire* commenced later on 11 October 2016. Qaqanivalu gave evidence at the *voir dire* 21 October 2016. At no stage during the *voir dire* proceedings did the Petitioner

complain to the trial Judge that he had not received the disclosures that he had specifically requested at his various pre-trial court appearances. During the course of his evidence at the trial proper there was complaint about having been denied access to the specific disclosures to which he had referred on various occasions during the pre-trial interlocutory proceedings. As the petitioner did not pursue any shortfall in the disclosures at the time of the trial and as there is no material on the record to indicate that the disclosures had not been served on the Petitioner, it is too late at the Court of Appeal hearing to raise such a complaint.

Proper analysis

[68] The Petitioner has complained in ground four that the Court of Appeal failed to provide a proper analysis and reasons for its decision. The view taken by the Court of Appeal was that the Petitioner's conviction was based on an assessment by the trial Judge of the evidence given at the trial. The only issue was whether the Petitioner was a party to the offences. That the offences occurred in the manner alleged by the prosecution was not in dispute. The issue was whether the Petitioner and his co-accused were the perpetrators. The Prosecution relied on the admissions made by the Petitioners in their respective caution interviews and charge statements. The trial Judge concluded as a matter of law that those out of court statements were admissible as evidence. At the trial two of the four assessors with whom the trial Judge agreed concluded that those caution interview and charge statements had been made voluntarily. The Court of Appeal obviously found it unnecessary to repeat the analysis of the evidence in any detail. No doubt, if the Court of Appeal had taken a different view of the evidence then there would have been a more considered analysis of the material.

Unfair behaviour of the Police

[69] This ground can only be of assistance to the Petitioner if the Judge had accepted the evidence given by the Petitioner during the *voir dire* and the trial. The trial Judge has rejected the Petitioner's evidence. He has accepted the evidence given by the Police

Officers and the medical evidence. Under those circumstances this ground cannot succeed.

[70] For all of the above reasons I would refuse leave to appeal. The petitioner raises issues of fact and as such does not satisfy any of the threshold requirements for granting leave.

Sentence Appeals

[71] When the Petitioners appeared before the single Judge of the Court of Appeal, each had applied for leave to appeal against conviction and sentence. Leave to appeal against conviction was granted to each petitioner. However, leave to appeal against sentence was refused in each case. To pursue their sentence appeals any further each petitioner was required to renew the application for leave to appeal sentence before the Court of Appeal (consisting of three Judges of Appeal) pursuant to section 35(3) of the Court of Appeal Act 1949. Apart from Qaqanivalu the petitioners have not yet applied to renew their applications for leave to appeal sentence before the Court of Appeal.

[72] Although there is in existence a Practice Direction (No.4 of 2019) prescribing a 30 day time limit for renewing the application for leave before the Court of Appeal, the only course of action open to the Petitioner is to apply for an enlargement of time in order to file in the Court of Appeal a renewed application for leave to appeal sentence. This Court has no jurisdiction to hear a petition for leave to appeal from a decision of the single judge of the Court of Appeal refusing leave to appeal against sentence.

Qaqanivalu's Petition for Leave to appeal Sentence

[73] Qaqanivalu's renewed application before the Court of Appeal was refused. In his Petition filed on 23 September 2024 the amended grounds of appeal against sentence are amalgamated as follows:

> "• *The learned sentencing court erred in law and in fact when (it) applied the sentencing guideline tariff in the case of **Wallace Wise –v- The State** [2015] FJSC 7; CAV 7 of 2015 to sentence the Petitioner.*

- *The current sentencing guideline tariff on the case of* ***<u>Eparama Tawake – v- The State</u>****."*

[74] Qaqanivalu was convicted and sentenced on two counts of aggravated robbery under section 311(1)(a) of the Crimes Act and on one count of acts intended to cause grievous harm under section 255(a) of the Crimes Act. Section 311(1)(a) provides that an offence is committed if a robbery is committed in company with one or more other persons for which a maximum penalty of 20 years imprisonment may be imposed. Section 255(a) provides that an offence is committed if, with the necessary intent, unlawfully wounds or does any grievous harm to any person by any means for which a maximum penalty of life imprisonment may be imposed.

[75] On the first count of aggravated robbery the petitioner was sentenced to 12 years imprisonment. The starting point was 9 years and three years were added on account of aggravated factors. This offence involved two victims. First the taxi driver from whom the Petitioners, including Qaqanivalu, robbed a billabong wallet containing $250.00 and an alcatel mobile phone valued at $150.00. Qaqanivalu's culpability for the theft of the taxi is based on his being involved in the planning of the offences. The vehicle was damaged at some time during the commission of the offences. Although the aggravating factor of blindfolding the taxi driver occurred before Qaqanivalu had got into the taxi, it was a probable consequence of the robbery and he had acquiesced in the detention of the driver during the commission of the offences. It would appear that the driver was released unharmed but the vehicle was damaged as a result of a wine bottle thrown at the offenders by one of the guests from the restaurant.

[76] On the second count of aggravated robbery the petitioner was sentenced to 15 years imprisonment. The starting point was 12 years and three years were added on account of aggravating factors. The aggravating factors attached to this offence included the threatening manner in which the offence was implemented. While enjoying an evening social function in a restaurant, a large group of people were suddenly confronted by three

men wearing balaclavas and dark clothes behaving in a threatening manner. While stealing from the dinner guest the perpetrators threatened violence via the weapons they were carrying. The premises were damaged as a result of the offence under count 2. The fact that the offenders were masked while committing the offence was also an aggravating factor.

[77] On the third count of unlawfully wounding the former Police Commissioner, the Petitioner was sentenced to 11 years imprisonment. The starting point was 5 years imprisonment to which was added 6 years imprisonment by way of aggravating factors. The aggravating factors to which the Judge referred were that the victim was the former Police Commissioner and that he was severely injured. The former Police Commissioner, although not in uniform and appeared as a member of the public, identified himself as such and demonstrated courage in standing up to the petitioners. His injury was examined two days later by Dr. Prasad at the Nasese Medical Centre. The doctor prepared a report. The treatment on that day involved cleaning the wound and putting 12 stitches to the laceration.

[78] The third offence for which the petitioners were convicted involves the following elements:

(1) a) an intent to main, disfigure or disable or
b) to do some grievous harm
c) to resist or prevent lawful arrest

<u>and</u>

(2) a) unlawfully wounds or
b) does any grievous harm
c) to any person
d) by any means

[79] In this case the victim was most fortunate that he did not suffer any fracture as a result of the incident. The material in the record does not indicate that the victim was *"severely injured."* The injury was therefore encompassed within the description of being "*wounded*" that forms an element of the offence.

[80] Qaqanivalu submitted that the tariff for aggravated robbery that was developed by the decision of this Court in **Wise –v- The State** [2015] FJSC 7 was not applicable in this case. **Wise** was a night time home invasion by masked intruders disturbing and terrifying a family all of whom had been asleep in their beds. Violence was inflicted and a knife used to threaten. The present case is similar to **Wise**. **Tawake** was essentially a street mugging fact situation. However there is some guidance offered in the dicta of Keith J in that decision.

[81] In the present case Qaqanivalu was convicted under section 311(1)(a) of the Crimes Act. This form of aggravated robbery relates to there being more than one offender engaged in the robbery. Although Qaqanivalu and his co-offenders were not charged under section 311(1)(b), their being armed with a bar, a cane knife and stones cannot be ignored as an aggravating factor for the robbery itself. In all the circumstances I consider the level of harm to be of a medium nature. As Qaqanivalu has been convicted under section 255(a) of the Crimes Act on account of the injury inflicted on one of the guests it cannot be added as an aggravating factor for the offence of aggravated robbery. In accepting the guidance in the decision Keith J in **Tawake –v- The State**, I acknowledge that the facts in this case are similar to a **Wise** situation than to a street mugging situation. For that reason, the sentence that I propose still falls within the sentences range contemplated in **Wise**. Without itemising a sentence in respect of each conviction I consider a total sentence of 12 years with a non-parole term of 11 years as appropriate in this case.

Conclusion

[82] I would reject the Petitioners' application for leave to appeal against conviction. I would grant leave to Qaqanivalu to appeal against sentence and allow the appeal. I would substitute his sentence for a total sentence of 12 years with a non-parole term of 11 years. The Court has no jurisdiction to consider the remaining petitions for leave to appeal sentence. Their initial applications for leave to appeal against sentence in the Court of Appeal must be renewed before the Court of Appeal.

Young, J

[83] I have read the judgment of Calanchini J and agree with his conclusions and proposed orders.

Qetaki, J

[84] I have read in draft the judgment of Calanchini J and I agree with it, and the proposed orders.

Orders:

1. ***Seremaia Mudura***

a) Leave to appeal against conviction is refused.

b) Petition for leave to appeal against sentence is struck out for want of jurisdiction.

2. ***Mosese Tarau***

a) Leave to appeal against conviction is refused.

b) Petition for leave to appeal against sentence is struck out for want of jurisdiction.

3. ***Uate Baleiono***

a) Leave to appeal against conviction is refused.

b) Petition for leave to appeal against sentence is struck out for want of jurisdiction.

4. ***Tevita Qaqanivalu***

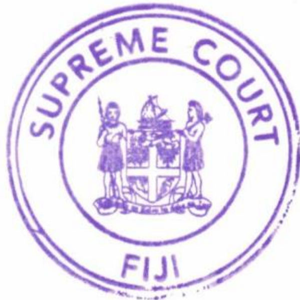
a) Leave to appeal against conviction is refused.

b) Leave to appeal against sentence is granted.

c) *Appeal against sentence is allowed.*

d) *Sentence imposed by the High Court is quashed.*

e) *Petitioner is sentenced to a term of 12 years imprisonment with a non-parole term of 11 years.*



The Hon Justice William Calanchini
JUDGE OF THE SUPREME COURT

The Hon Justice William Young
JUDGE OF THE SUPREME COURT

The Hon Justice Alipate Qetaki
JUDGE OF THE SUPREME COURT