IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO: AAU 0048 & AAU 0054 OF 2015
(High Court Criminal Case No: HAC 109/ 2012 [Lautoka])
(Magistrate's Court at Nadi Criminal Case No: 783/12)

BETWEEN:		**RAVINESH SINGH**	*1st Appellant*
		RONIL KUMAR	*2nd Appellant*
AND	:	**THE STATE**	*Respondent*

Coram	:	**Prematilaka JA** **Fernando JA** **Nawana JA**
Counsel	:	**Mr. R. Vananalagi for the 1st Appellant** **2nd Appellant in person** **Mr. M. Korovou for the Respondent**
Date of Hearing	:	**13 February 2019**
Date of Judgment	:	**7 March 2019**

JUDGMENT

Prematilaka JA

[1] I have read in draft the judgment of Fernando JA and agree with the reasons and conclusions therein.

Fernando JA

[2] The 1st Appellant had appealed against his conviction by the High Court for aggravated robbery while the 2nd Appellant had appealed both against his conviction and sentence in respect of the same charge.

[3] The 1st Appellant had been sentenced to a period of 9 years and 10 months imprisonment with a non-parole period of 8 years, while the 2nd Appellant had been sentenced to a period of 12 years and 01 month imprisonment with a non-parole period of 10 years.

[4] The Appellants along with Steven Prasad were charged on the basis that the 1st (*Steven Prasad*), 2nd (1st Appellant) and 3rd accused (*2nd Appellant*) had on the 11th of July 2012, at Nadi, robbed Kushal Kumar, of items including an I-phone, a mobile phone, two I-pods, a pair of shoes and cash $5,500.00 all to the total value of $8,890.00.

[5] The only evidence against the two Appellants and Steven Prasad who was convicted and sentenced along with the Appellants by the learned trial Judge, were their respective confessions, which had been admitted after a *voir dire* inquiry.

[6] The Assessors had after the summing up by the learned Trial Judge unanimously expressed the opinion that all three accused were not guilty of the charge.

[7] The learned Trial Judge by his judgment rejected the not guilty opinion of the Assessors and convicted all three accused of the charge. Steven Prasad has not appealed.

[8] The application of both Appellants to appeal against their convictions and sentences had been refused by a single Judge of this Court on the basis that the grounds urged by them are unarguable.

[9] The Appellants have renewed their application for leave to appeal to this Court. While the 1st Appellant has put forward two grounds that were not raised when leave was sought from the single Judge; the 2nd Appellant has advanced 8 new grounds and has requested this Court for a consideration of all his grounds taken up before the single Judge.

Appeal of the 1st Appellant

[10] At the commencement of the hearing before us, Counsel for the 1st Appellant informed this Court that having perused the Respondent's submission he does not intend to put forward any submissions. Although this in our view amounted to a withdrawal of the appeal of the 1st Appellant, I have dealt with below, with his grounds of appeal.

[11] The 1st Appellants renewed grounds of appeal were as follows:

i. *"That the learned trial Judge erred in law and in fact while directing the assessors on the disputed confession, he left the issue of voluntariness for the assessors to decide, resulting in a miscarriage of justice in the circumstances of the case, and to me.*

ii. *That the learned trial judge erred in law and in fact when he misdirected the assessors on the evidence contained in the caution interview of the appellant in respect of its truth and/or credibility and weight to be given to the confession." (emphasis added)*

[12] Counsel for the 1st Appellant in his submissions filed before this Court had referred to paragraph 46 of the Summing Up wherein the learned Trial Judge had stated that it is up to the Assessors to decide whether the 1st Appellant (then 2nd accused) made a statement under caution, voluntarily, and if so the facts in that statement and their truthfulness could be considered. It had been the submission of the 1st Appellant's Counsel that there should have been a further direction to the Assessors that although the caution interview was ruled admissible at the conclusion of the voir dire hearing, the Defence was not prevented from raising the question again in trial proper.

[13] Both grounds are misconceived as the Assessors in this case had opined a not guilty verdict and it is obvious the issue of voluntariness of the confession and the truthfulness of its contents had been decided in the judgment by the learned Trial Judge himself, as was his right to do. Therefore the 1st Appellant's complaint of a misdirection or non-direction by the learned Trial Judge resulting in a miscarriage of justice was misconceived. As regards the submission of the 1st Appellant's Counsel regarding a further direction to the Assessors, it is clear that at the conclusion of the Summing Up which is at paragraph 100 the learned Trial Judge had informed Counsel whether "*Any re-directions?*" were necessary. There had been no request for any further directions. Further, there was no obstacle for Counsel to raise the question of voluntariness at the trial.

[14] In **Maya –v- State** [2015] FJSC 30; CAV 009.2015 (23 October 2015) it was said:

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

[15] In view of what has been stated in the preceding paragraphs I dismiss the appeal of the 1st Appellant.

Appeal of the 2nd Appellant

[16] The 2nd Appellant's grounds of appeal can be summarised as follows:

i. *That a Trial Judge cannot overturn the unanimous verdict of the assessors,*

ii. *That the learned Trial Judge failed to give cogent reasons for rejecting the opinion of the assessors,*

iii. *That both the learned Trial Judge and the single Judge of this Court had failed to make a proper assessment of the evidence as to the innocence of the Appellant in not agreeing with the opinion of the Assessors,*

iv. *"That the learned trial Judge erred in law in not stating in his judgment, that the decision does not rely on the earlier evidence (confession) heard on voir dire but is based on the evidence called before the assessors. Failure to do so prejudiced and violated right to a fair trial." (verbatim).*

v. *Failure to direct the Assessors in the Summing Up and himself in the judgment, the extent to which the issue of voluntariness of caution statements should be left in the hands of the Assessors for their determination,*

vi. *That the learned single judge by stating that the Appellant had the onus to raise with the trial Judge the issue of the State failing to call the complainant at the trial, shifted the onus on the Appellant and thereby causing a miscarriage of justice,*

vii. *That the learned single judge failed to consider two of the grounds filed for leave to appeal was conceded by the State,*

viii. *That the learned trial judge had not afforded him his right to Counsel,*

ix. *That the learned trial judge proceeded with the trial after the Appellant had notified his intention to appeal the decision of the voir dire,*

x. *That the learned trial judge should not have acted on the 2nd Appellant's confession in his Caution Statement VD6, as this was the only evidence against him and since no signature of the witnessing officer was found on the carbon copy that was produced at the trial, despite the witnessing officer saying he signed on the Caution Statement.*

xi. *That the learned trial judge failed to observe section 18(2) of the Sentencing and Penalties Act that gives a discretion not to impose a non-parole period and by imposing a non-parole term in the absence of the parole Board.*

[17] It was ground x that came to be argued strenuously by the 2nd Appellant at the appeal before us. It is not in dispute and Counsel for the Respondent did concede that there are only two signatures to be found in the caution statement VD6. A caution statement, whether it is the original or carbon copy, necessarily has to bear the signatures of the accused, the Interviewing Officer and the witnessing Officer, before it could be admitted and relied upon as evidence against an accused by a court, unless there is a reasonable explanation put forward for the absence of any of the signatures. The question before the Court is, is VD6 produced at the trial and on which the conviction of the 2nd Appellant was based, the confession of the 2nd Appellant

obtained at the caution interview, in view of the absence of the signature of the witnessing officer on it?

[18] The question is not as mistakenly understood and argued in the further submissions by the State dated 15th February 2019, whether the 2nd Appellant's signature is not on VD6, but the absence of the signature of the witnessing officer.

[19] It is therefore necessary to examine the evidence of the Interviewing Officer, the witnessing Officer and that of the accused in this regard both at the voir dire and the trial.

[20] DC 4199 Jolame, the Interviewing Officer's evidence at the **voir dire** is to the effect:

> *"12. Yourself and accused signed the interview notes?*
> *Yes*
> *13. Was there a carbon copy made?...*
> *Yes" (verbatim from the record)*

[21] The carbon copy with leave of court had been shown to DC Jolame and identified by him.

> *"16. Do you know what happened to original?*
> *No*
> *17 Is that the same carbon copy made that day?*
> *Yes*
> *18 Your signature and accused signature is present?"... (verbatim from the record)"*

[22] The carbon copy had been tendered as evidence and marked as VD 6, although the accused had objected and requested that that the original should be produced. The 2nd Appellant had admitted that VD 6 is a carbon copy, but has not gone on to say that it is a carbon copy of the original of VD6. In cross –examination by the 2nd Appellant, DC Jolame's evidence had been:

> *"2. Who was the witnessing Officer*
> *Sgt. Amol...*
> *5. Did he sign?*
> *He did not sign."... (verbatim from the record but emphasis added)*

[23] Sgt Amol Prasad, the Witnessing Officer's evidence at the **voir dire** under cross examination by the 2nd Appellant is to the effect:

> *"5. Did you sign the document as witnessing officer?*
> *Yes*
> *6. Can you please confirm your signature in VD 6?*
> *It is not present in carbon copy...*
> *9. How is it possible that your signature does not appear in carbon copy?*
> *I have to sign* (sic – see) *the original*
> *10. Do you agree VD 6 is not the carbon copy of the original?*
> *It is a carbon copy of the original.*
> *11. Do you agree that the signature has vanished?*
> *No."* (emphasis added)

[24] The 2nd appellant had not, up to the time of the hearing of this appeal, made an issue as regards the absence of the witnessing officer's signature in VD6. However, he has certainly raised it in cross-examination of the police witnesses as seen in paragraphs 22 and 23 above. He had said that he signed a statement through fear and compulsion because the police officers had threatened to disrupt his sister's wedding ceremony then taking place. There has been no denial by the police that the 2nd Appellant's testimony of a family wedding was untrue.

[25] The learned Trial Judge has not dealt with the issue of whether VD6 was in fact the confession of the 2nd Appellant in his Ruling on the voir dire, in view of the inexplicable absence of the Witnessing Officer's signature in VD6 and despite him saying he signed it. It goes without saying that a carbon copy contains everything that is recorded in the original, unless there is an explanation as to how something has gone missing.

[26] At the **trial** DC 4199 Jolame, under cross examination by the 2nd Appellant, contradicting the evidence of Sgt Amol had said that Sgt Amol did not sign the caution statement of the 2nd Appellant. It had been his evidence:

> *"9. Who was present with you when this interview was taken?*
> *Sgt. Amol...*
> *12. Did he sign those documents?*
> *He did not sign."...*

[27] At the **trial** Sgt. Amol Prasad, under cross examination by the 2nd Appellant, had stated as follows:

> *"1. How sure you are that this is the document taken on 10/08/2012?*
> *Through the name of the accused, interviewing officer and the name of the witnessing officer...*
>
> *3. Did you sign the caution interview as witnessing officer?*
> *I signed in the carbon interview notes. I cannot confirm that.*
>
> *4. What do you mean by signing on carbon copy?*
> *I can only confirm if it was on the original...*
>
> *6. Do you agree you did not sign in any page?*
> *Yes, on this carbon copy.*
>
> *7. Do you agree this is a carbon copy of original?*
> *Yes.*
>
> *8. Do you agree you signed the original?*
> *I cannot confirm unless I sight the original...*
>
> *10. But you can't recall signing the caution interview as witnessing officer?*
> *Unless I sight the original I can tell..."*

[28] The 2nd Appellant giving evidence at his trial, had denied any knowledge of the robbery. After his arrest he had been informed by the police that his name had come up in a robbery somewhere at Malolo and that two persons had mentioned his name. He had on two occasions told the police officers to bring them to him so that he could confront them. But the police had not acceded to his request. The State in cross-examining the 2nd Appellant had not challenged him on that matter.

[29] The learned Trial Judge in his Summing Up to the Assessors had only addressed the Assessors to consider whether VD6 had been made voluntarily, whether the facts therein can be considered as evidence to substantiate the elements of the offence and whether the said facts can be relied upon as truthful. He had also restated the evidence of Sgt. Amol Prasad who said that he cannot confirm whether he signed in the original unless he has sight of the original. He had not addressed the issue of the authenticity of VD6, and that, whether it was in fact the caution statement of the

2nd Appellant. He had also not addressed the issue of the contradiction between the interviewing officer and the witnessing officer as regards the witnessing officer signing VD6 and the contradictory and evasive answers of Sgt. Amol Prasad as set out in paragraph 27 above.

[30] The learned Trial Judge in his Judgment, rejecting the opinion of the Assessors had also not addressed the issue of the authenticity of VD6, as to whether it was in fact the caution statement of the 2nd Appellant, having stated that the prosecution case against the 2nd Appellant was based on his caution interview statement.

[31] The learned Trial Judge's failure to address the issue of the authenticity of VD6, is in my view a fatal error that cannot be cured in view of the fact that VD6 is the only evidence that implicates the 2nd Appellant.

[32] As regards giving cogent reasons for disagreeing with the opinion of the assessors, raised in ground (ii) of appeal; and failing to make a proper assessment of the evidence, raised in ground (iii); it is clear that reasons must be clearly stated and founded on the weight of the evidence led at the trial and capable of withstanding critical examination in the light of the whole of the evidence presented in the trial.

[33] In **Lautabui v State** [2009] FJSC 7; CAV0024.2008 96 February 2009, the Supreme Court said: "*In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the trial judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting the findings and justifying rejection of the accused's account of the relevant events... As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence.*"

[34] The reasons adduced by the learned Trial Judge in his Judgement for rejecting the not guilty opinion of the Assessors are as follows: *"After careful perusal of each statement, I find that each of these statements is truthful. If these statements are fabricated as alleged by each accused, there could be similar questions and answers. However, there is no evidence as such... The third accused (2nd Appellant) was asked 85 questions and answered those. The 3rd accused's version that he confessed due to fear that his sister's wedding will be ruined by the police officers is also highly improbable. None of the accused had made any complaint regarding the assaults to the police. I have considered both parties' evidence and witnesses, in order to discover the truth. I find the state witnesses credible, and I accept their versions."*

[35] I am of the view that the test laid down in **Lautabui** has not been met in the Judgment. As stated earlier the learned Trial Judge had completely failed to make a pronouncement on the authenticity of VD6, which was a crucial matter in this case. His reasons given for fabrications of the Appellants caution statements cannot be justified. He had failed to analyse the 2nd Appellant's unchallenged testimony that the police had failed to accede to his request to confront those who had implicated him in this crime and the failure by the police to challenge the 2nd Appellant's testimony of a family wedding as untrue.

[36] In view of my findings in respect of grounds (x), (ii), and (iii), I find there is no necessity to look into the rest of the grounds. I uphold grounds (x), (ii), and (iii) raised by the 2nd Appellant and allow his appeal. I therefore quash his conviction and sentence and acquit him forthwith.

Nawana JA

[37] I agree with the reasons and conclusions of Fernando JA.

Orders of Court:

(a) Appeal of the 1st Appellant against conviction dismissed.

(b) 1st Appellant's conviction and sentence affirmed.

(c) Appeal of the 2nd Appellant against his conviction and sentence allowed.

(d) 2nd Appellant's conviction and sentence quashed.

(e) 2nd Appellant acquitted forthwith.

Hon. Mr. Justice C Prematilaka
JUSTICE OF APPEAL

Hon. Mr. Justice A Fernando
JUSTICE OF APPEAL

Hon. Mr. Justice P Nawana
JUSTICE OF APPEAL