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

CRIMINAL APPEAL AAU 74 OF 2014
CRIMINAL APPEAL AAU 84 OF 2014
[High Court Suva HAC 284 of 2012]

BETWEEN	:	**ISIKELI NAKATO**
		ATONIO MATAIRATU
		Appellants
AND	:	**THE STATE**
		Respondent

Coram	:	**Calanchini P**
	:	**Chandra JA**
	:	**Perera JA**
Counsel	:	**Mr. N. Sharma for the Appellants**
		Mr. L. Burney with Mr. E. Samisoni for the Respondent
Date of Hearing	:	**04 July 2018**
Date of Judgment	:	**24 August 2018**

JUDGMENT

Calanchini, P

1. I agree with Perera JA that the appeals against conviction should be dismissed and that the appeals against sentence should be allowed. The appellant Nakato should serve 6 years 2 months imprisonment with a non-parole term of 4 years and 2 months with effect from 14 June 2014. The appellant Matairatu should serve 5 years 2 months imprisonment with a non-parole period of 3 years 2 months effective from 14 June 2014.

Chandra JA

2. I agree with Perera JA that the appeals against conviction should be dismissed, that the appeals against sentence should be allowed and I agree with the proposed orders.

Perera, JA

3. These two appeals arise from the conviction and the sentence of the appellants who were jointly charged of one count of arson under section 362(a) of the Crimes Decree 2009 (now the Crimes Act 2009). After trial in the High Court, the assessors unanimously opined that both accused were guilty of the offence. The Learned High Court Judge in his judgment delivered on 14 March 2014 concurred with the opinion of the assessors and convicted each appellant accordingly. Both appellants were sentenced to terms of 8 years imprisonment with non-parole periods of 7 years on 11 June 2014.

4. The appellants filed separate applications before the court of appeal seeking leave to appeal their convictions and sentences. The two applications were consolidated at the leave stage and the single judge of appeal on 30 September 2015 granted the appellants leave to appeal the convictions and the sentences.

5. It is difficult to identify the particular grounds of appeal for which leave to appeal was granted. Nevertheless, on 08 April 2016, a document titled 'AMENDED GROUNDS OF APPEAL' had been filed on behalf of both appellants in the court of appeal registry which contains the following grounds;

Appeal against conviction

" I. That the learned trial judge erred in law in failing to give cogent reasons in writing on his decision to admit the caution interview statements as evidence during voir dire trial.

II. That the learned trial judge erred in law when he failed to direct the assessors in his summing up that if they were not satisfied that the confession were given voluntarily, in the sense that it was obtained without oppression, ill treatment or inducements, or conclude that it may not have been given voluntarily, they should disregard it altogether in line with the directions in Mushtaq [2005] UKHC 25.

III. That the learned trial judge erred in law and in fact when he accepted the guilty verdict of the assessors based on the erroneous presumption that the assessors had found that the appellants had confessed voluntarily to the police when the learned judge did not put any direction to the assessors in his summing up to disregard the confessions if the assessors were not satisfied that the confession were given voluntarily. In the sense that it was obtained without oppression, ill-treatment or inducements, or conclude that it may not have been given voluntarily.

IV. *That the learned judge erred in law and in fact when he ruled on the admissibility of the caution interview statements in light of the following:*
   i) *Failing to consider that the appellants had complained about being assaulted, forced and threatened to admit to the offence before the learned magistrate at the first call of the matter on the 20th August 2012.*
   ii) *Failing to consider that the 1st appellant had consistently informed the learned magistrate of the first call date that whilst being assaulted with a mop on the head and stomach, he had not suffered from injuries but was suffering from pain.*
   iii) *Failing to consider that the 2nd appellant being a first offender who confessed after being threatened did not necessitate a medical examination nor would a medical examination prove the same.*
   iv) *Failing to consider voluntariness of the confessions given the long hours of interview of the appellants by the police over the course of 3 days.*
   v) *Failing to consider voluntariness of the confessions given that had the appellants confessed voluntarily and/or without oppression, ill treatment or inducements as alleged by the police officers then the caution interviews would not have taken 3 days to complete.*
   vi) *Failing to consider voluntariness of the confessions given that the appellants had not confessed at the beginning of the caution interview but only after a certain number of questions were asked.*
   vii) *Failing to consider voluntariness of the confessions given that an irregular and inconsistent number of questions were asked and answered over the 3 days of interview.*
   viii) *Failing to consider voluntariness of the confessions on the basis of inducements given that appellants were released after the interviews and only charged 5 days thereafter.*

V. *That the learned trial judge erred in law and in fact in admitted the alleged confession of the appellants in the voir dire.*

VI. *That the learned trial judge erred in law and in fact when he directed the assessors to consider the voluntariness of the confession and not the truth or weight of the confession thereby causing a grave miscarriage of justice.*

VII. *That the learned trial judge erred in law and in fact when he directed the assessors that the appellants being free for 5 days never complained to anyone of improper police behavior and did not see a doctor for medical examination thereby shifting the burden of proof to the appellants to prove involuntariness.*

VIII. *That the learned trial judge erred in law and in fact when his Lordship's direction to the assessors failed to effectively canvass the defence case theory thereby encumbering the appellants right to a fair trial.*

IX. *That the learned trial judge erred in law and in fact by failing to sum up in a fair and neutral manner by over emphasizing on the prosecution case.*

X. That the learned trial judge erred in law and in fact by failing to give a complete and/or full direction to the assessors on the defence of Alibi specifically:

i) That the prosecution bore the burden of disproving the defence of alibi raised by the appellants.

ii) That should the assessors conclude that the alibi is false then they should not for that reason alone convict the appellants."

Appeal Against Sentence:

"I. That the Sentencing Judge erred in law in picking a higher starting point of 6years as the higher end of tariff thereby making the overall sentence of 8 years as harsh and excessive.

II. That the learned Sentencing Judge erred in law and in fact by taking irrelevant matters into account in aggravating factors and enhancing the sentence by 4 years for that effect is harsh and excessive.

III. That the learned Sentencing Judge erred in law and in fact by failing to consider and/or give appropriate discount for the 1 year 9 months and 21 days spent by the appellants in remand.

IV. That the learned Sentencing Judge erred in law and in fact by failing to consider the clean background of the 2nd appellant when sentencing him.

V. That the sentence of 8 years imprisonment with a non parole period of 7 years is harsh and excessive."

6. The Learned Counsel for the Respondent in his submissions had not dealt with the grounds of appeal separately but in essence had conceded all grounds of appeal against conviction and sentence at both leave stage and the hearing of this appeal.

7. At the outset, I am compelled to make one observation with regard to the manner in which the grounds of appeal in this case have been drafted. The grounds of appeal in this case run into about 3 pages. It is noted that certain issues raised against the conviction are repeated in more than one ground. This court does not have the benefit of having clear and concise grounds to deal with in this appeal. I consider it appropriate to quote from **Archbold** [2010 Edition, 7-164] with regard to the need for the careful preparation of concise grounds of appeal as highlighted by Lord Chief Justice of England and Wales in the guide that was published by the Registrar of Criminal Appeals in October 2008 titled, '*Guide to Commencing Proceedings in the Court of Appeal (Criminal Division)*' where it is stated as follows;

"As Lord Judge C.J. points out in his forward, the guide provides "invaluable advice as to the initial steps for commencing proceedings" in the criminal division. His Lordship then underlines the importance of well drafted grounds of appeal, ehich "assist the single judge when considering leave and serve to shorten any hearing before the full court", whereas "ill-prepared and prolix documents necessarily lead to wasted time spent on preparation and unnecessarily protracted hearings."

8. Having framed the 10 grounds of appeal alluded to above against the conviction, counsel for the appellants made submissions on the said grounds under the following four headings;

   I. *Failure to give reasons to admit caution interview statement [Ground 1]*
   II. *Directions on confession [Grounds 2, 3 & 6]*
   III. *Error in admitting caution interview [Grounds 4, 5 & 7]*
   IV. *Judge did not fairly canvas defence case in the summing up [Grounds 8 & 9]*
   V. *Directions on alibi [Ground 10]*

9. I propose to deal with the grounds of appeal against the conviction under the same headings stated above.

Appeal against conviction

Failure to give reasons to admit cautioned interview statement [Ground 1]

10. The convictions were essentially based on the cautioned interview statements of each appellant. The admissibility of the records of interview was challenged by each appellant and the Learned Trial Judge ("Learned Judge") had accordingly conducted a *voir dire* on the question of admissibility of the said interviews.

11. At the conclusion of the said *voir dire* on 07 March 2014, the Learned Judge had ruled that both cautioned interviews were admissible and according to the relevant court record, he had stated thus;

" 1. I have heard the parties evidence.
2. I rule Accused No. 1 and 2's police caution interview statements as admissible evidence.
3. As acceptance or otherwise will be a matter for the assessors.
4. Written reason will be given next week on notice.
5. Adjourned 10/03/14 for trial proper at 10am."

12. It is quite obvious that the Learned Judge had not given any reasons, either written or otherwise when he ruled that the two cautioned interview statements are admissible in evidence. However, in his judgment delivered on 14 March 2014, the Learned Judge had stated thus;

> *"5. I accept the 3 assessors' verdict. I, like them, accept that both accuseds gave their police caution interview statements voluntarily and out of their own free will. In my view, the accuseds were not assaulted or threatened by the police when they were caution interviewed. There was no medical report to prove evidence of police assaults etc. They were also free for 5 days and they never complained to anyone.*
>
> *6. I don't accept the accused's version that they were threatened and assaulted by police, when caution interviewed."*

13. Counsel for the appellant and counsel for the respondent were unanimous in their submission that no written reasons were given by the Learned Judge on the admissibility of the cautioned interview statements. In view of the above paragraphs of the judgment, that contention cannot be regarded as correct. Reasons have been given in the impugned judgment. But I agree that the said reasons provided by the Learned Judge are brief and indeed the Learned Judge has been 'economical with his reasons'.

14. As Goundar J sitting as a single justice of appeal said in the case of **Hussein v State** [2017] FJCA 36; AAU0034.2015 (17 March 2017), a trial judge does not make an error of law by being economical with his reasons in relation to the decision on the admissibility of confessions. I concur with the following dictum of Goundar J in **Hussein** (supra):

> *"[9] The trial judge's written reasons were brief. After referring to the relevant principles, the trial judge came to the following conclusion:*
>
> *I have heard all the evidence. I accept the prosecution's witnesses evidence as credible, I accept what they said. I rule that the accused's caution interview statements and charge statements are admissible evidence, and their acceptance or otherwise will be a matter for the assessors.*
>
> *[10] The appellant's contention is that the trial judge had not analyzed the evidence in the voir dire ruling. Central to the issue of admissibility was the credibility of the appellant and the police officers. The police officers denied using force or unfair tactics to extract the confession from the appellant. The appellant's evidence was that they did. The trial judge believed the police officers and ruled the appellant's confession admissible. The trial judge was indeed economical with his reasons. I*

do not think he made an error by being economical with his reasons. Such a course was approved by the Court of Appeal in Ganga Ram v R (46 of 1983) where it said:

> *Accordingly we wish to say that it has always been thought desirable that findings adverse to an accused person, if they must be pronounced during the course of a trial, should be as economically worded as possible.*

[11] Further, in Deo v Reginam [1984] Fiji Law Rp 4; [1984] 30 FLR 31 (24 November 1984) it was held that the learned trial Judge was correct in his ruling on the admissibility of the confessions, of doing so briefly without going into the details of the evidence. Similar pronouncement was made by the Privy Council in Wallace and Others v The Queen (Jamaica) [1996] UKPC 47 (3rd December, 1996).

15. However, it should be noted that the practice sanctioned in the decisions cited above is applicable when reasons are given at the conclusion of the *voir dire* where the objective is to avoid causing prejudice to the accused and therefore there is no basis for the said practice to be adopted when a judge decides to give reasons in the final judgment following the opinions of the assessors.

16. In fact it is desirable for a trial judge to succinctly explain in the judgment following the opinions of the assessors the basis for the decision made on the question of admissibility, in the event the trial judge was unable to give reasons at the conclusion of the *voir dire* due to any justifiable circumstance. His Lordship Gates CJ remarked in the case of **Maya v State** [2015] FJSC 30; CAV009.2015 (23 October 2015) as follows;

> *"Where such litigation issues continue and remain alive into the trial proper, the judge's opinion on this important matter should be referred to in the judge's judgment following the tendering of the opinions of the assessors, irrespective of whether the judge conforms with those opinions or not [section 237(2) Criminal Procedure Decree]. In this way the decision of the trial judge on a crucial litigation issue can be known and understood by the appellate courts. This is another example of why it is highly desirable for a judge to write a short judgment explaining the basis for his concurrence or disagreement with the opinions of the assessors."*

17. However, if I am to answer the particular issue raised on ground one as it is framed, that is, whether the Learned Judge erred in law in failing to give cogent reasons in writing on his decision to admit the cautioned interview statements as evidence, my answer would be in the negative. Therefore, ground one fails.

Directions on confession [Grounds 2, 3 & 6]

18. On grounds 2, 3 and 6 the appellants assail the directions the Learned Judge gave in his summing up to explain the assessors on how to deal with the cautioned interview statements.

19. The issues raised in ground 2 and that in ground 3 are in fact indistinguishable. In essence, on both grounds the appellants submit that the Learned Judge failed to direct the assessors to disregard the confessions if they are not satisfied that the confessions were made voluntarily. The appellants rely on the case of **Regina v Mushtaq** [2005] UKHC 25 in canvassing the said grounds.

20. However, I note that in his summing up the Learned Judge had stated at paragraph 32 thus;

> *". . . The prosecution must satisfy you beyond reasonable doubt that the accused gave his statement voluntarily, that is, he gave his statements out of his own free will. Evidence that the accused had been assaulted, threatened or unfairly induced into giving those statements, will negate free will, and as judges of fact, you are entitled to disregard them. . . ."*

21. Further, at paragraph 36 of the summing up it is stated that;

> *". . . Your decision on whether or not to accept the police or accuseds' version of events on the voluntariness of the statements will depend on your assessment of their credibilities. . . . If you accept the accuseds' version, then you will reject the confession . . ."*

22. In view of the directions given in paragraph 32 and 36 of the summing up alluded to above, it is clear that the Learned Judge had in fact directed the assessors to disregard the cautioned interviews if they find that the prosecution has not proved beyond reasonable doubt that those statements were made voluntarily. During the hearing of this appeal, the counsel for the appellants eventually conceded the said fact.

23. Turning to the case **Mushtaq** (supra) cited by the appellants, the certified question that was discussed in the said case was as follows;

> *"Whether, in view of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, a Judge, who has ruled pursuant to Section*

76(2) of the Police and Criminal Evidence Act 1984 that evidence of an alleged confession has not been obtained by oppression, nor has it been obtained in consequence of anything said or done which is likely to render unreliable any confession, is required to direct the jury, if they conclude that the alleged confession may have been so obtained, they must disregard it."

24. Lord Carswell while affirming the above question had further stated in His Lordship's judgment that;

> *"I therefore consider that the judge should direct the jury in more prescriptive terms than the* ***Bass direction****, to the effect that* ***unless that they are satisfied*** *beyond reasonable doubt that the confession was* ***not obtained as a result of oppression****, they must disregard it."* [Emphasis added]

25. The '*Bass Direction'* referred to in the above dictum is the following direction which was pronounced in the case of **R v Bass** [1953] 1 QB 680;

> *"****if*** *they are* ***not satisfied that it was made voluntarily****, they should give it no weight at all and should disregard it."* [Emphasis added]

26. Therefore, **Mushtaq** (supra) has pronounced in very clear terms that the jurors should be directed that they should disregard a confession unless they are satisfied beyond reasonable doubt that the confession was not made voluntarily. Accordingly, voluntariness is not to be taken into account by jurors to decide what weight to be given to a confession but to decide whether to give any weight at all.

27. Having considered the development the decision in **Mushtaq** (supra) brought to the English Law, in **Maya** (supra) Keith J held that the courts in Fiji should adopt the position that a confession should be treated as valueless if it may have been made involuntarily. However, in view of the fact that **Mushtaq** (supra) was decided in the context of trials by jury where the decision of the jury on the facts is final and taking into account the fact that in Fiji the opinions of the assessors are not binding on the trial judge who makes the final decision on the facts, Keith J gave the following guidance when it comes to directing the assessors;

> *"Judges should for the time being, therefore, tell the assessors that even if they 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. I am not unmindful of the irony here. The judge will have to*

direct himself on these lines if he changes his mind about the voluntariness of the confession in the course of the trial. . . .”

28. If the trial judge makes the finding that a particular cautioned interview statement is admissible in evidence after the *voir dire* held in that regard, the judge will not consider the question of admissibility of the cautioned interview during the final deliberations but only the questions whether the accused made the admissions and whether those admissions are true. However, if any evidence that is capable of calling into question the admissibility of the said cautioned interview surfaces during the trial, the trial judge is entitled to change his mind and in such a situation the judge would revisit his previous decision on the admissibility of the cautioned interview. If that is the case, then the assessors should be asked to consider three questions in view of **Maya** (supra). First, whether the accused made the admissions recorded in the cautioned interview. Secondly, whether those admissions were made voluntarily and they have to be directed to disregard the cautioned interview statement if they are not satisfied beyond reasonable doubt that it was made voluntarily. Thirdly, whether the admissions are true and they should be informed that they can only rely on the admissions that they consider to be true.

29. It is pertinent to note that the Learned Judge, at the time he pronounced his decision on the admissibility of the cautioned interviews had also decided to place the issue of acceptance of the said statements before the assessors and he had in fact directed the assessors during his summing up to disregard the cautioned interviews if they are not satisfied beyond reasonable doubt that those statements were made voluntarily. Therefore, it appears that the Learned Judge decided to direct the assessors to disregard the cautioned interview statements on the basis of voluntariness at the same time he decided that the two statements are admissible and not because he changed his mind during the trial. Even though I am unable to comprehend any justification for that approach taken by the Learned Judge, I do not find that he had erred in law by doing that.

30. But the complaint made under grounds 2 and 3 is that the Learned Judge did not direct the assessors to disregard the cautioned interview statements if they are not satisfied that those statements are made voluntarily. These two grounds are ill-founded.

31. The complaint made on ground 6 is that the Learned Judge failed to direct the assessors to consider truth of the confessions.

32. According to the summing up it is clear that the Learned Judge had not informed the assessors that they can only rely on the admissions in the cautioned interview of an accused as proof of guilt only if they are satisfied that the admissions are true. It is well settled that it is the duty of the trial judge to give a clear direction to the assessors in that regard.

33. There is merit in ground 6.

Error in admitting cautioned interview [Grounds 4, 5 & 7]

34. On grounds 4 and 5, the appellants assert that the Learned Judge erred in law and in fact when he ruled that the two cautioned interview statements are admissible in evidence.

35. According to the relevant court record, initially, both appellants had submitted the following as the grounds on which they challenge the admissibility of their respective confessions;

> *"1) Both applicants complained and claimed to be threatened and assaulted by police officers during their arrest and in custody.*
> *2) Both applicants claimed to have been forced to admit allegations and assaulted in the interview.*
> *3) Both applicants sustained injuries on their bodies as a result of the brutal assault by police officers and interviewing officers.*
> *4) Both applicants claimed that police assaulted and harassed them and told them that if they do not admit to the offence they will be taken to the Army camp and they will not see their family again.*
> *5) 1st applicant claimed that he was assaulted in front of the 2nd accused person and told the 2nd accused if he does not admit they will be assaulted and taken to the Army camp and he will not see his family again.*
> *6) The 1st and 2nd accused was told and given a story to admit to and say that there was another third party who is a driver of a van.*
>
> ***Medical Examination***
>
> *7) Applicants claimed that they asked to be medically examined but were refused."*

36. Subsequently, the first appellant had filed the following amended grounds;

> *"1) The accused objects to the admissibility of his caution interview as the answers given in the caution interview were given involuntarily.*
> *2) The accused at the time of his arrest was not cautioned in accordance to the judge's rules.*
> *3) The accused was assaulted and threatened to admit the allegation prior to be interviewed.*

4) *The accused during the time he was interviewed was further assaulted, forced and threatened to confess to the allegation.*
5) *The accused only cooperated during the entire interview under fear and duress as a result of the assault and threats made against him. He only signed the interview to avoid further assaults.*
6) *The accused was interviewed for the duration of two days. The interview was suspended two times, whereby the interview recommenced 16 hours later after the first break and recommenced 15 hours later after the second break. During the long hours of the interview the accused was subjected to threats and assault.*
7) *The accused was not given the opportunity to read his caution interview or have it read to him in accordance to the Judges Rules.*
8) *The accused had requested for medical examination as a result of the assault but was refused.*
9) *There was a breach of his rights under the Judges Rules and Articles ((2), 10(1) and 14(3)(g) of the International Covenant on Civil and Political Rights during his interview."*

37. I find that the main ground based on which the two appellants had challenged the admissibility of their cautioned interviews was the claim that they were assaulted and threatened by the police officers who dealt with them. It is pertinent to note that among the set of grounds submitted initially, both appellants have claimed that they were given a story to admit, suggesting fabrication by the police. But this ground is not found in the amended grounds filed subsequently by the first appellant. In the amended grounds, the first appellant had also claimed that the interview was suspended for long hours where he was subjected to threats and assaults and that he was not given the opportunity to read his interview notes.

38. According to the reasons given by the Learned Judge in his judgment for his decision to rule that the two cautioned interview statements are admissible, the Learned Judge had accepted the evidence of the police officers and he had rejected the version of the appellants.

39. The factors considered by the Learned Judge on the issue of voluntariness of the cautioned interview statements can be further discerned from paragraph 33 of the summing up where it is stated thus;

> *"They said both accused were released from police custody on 13 August 2012. They were free for 5 days before they were taken by police on 18 August 2012 to be formally charged. [see Prosecution Exhibits No. 6 and 8]. During those 5 days, both accuseds made no complain of any improper police behaviour when caution interviewed. Furthermore, they did not see any doctor, for a medical examination, to verify any injuries by police, during the*

caution interview. The police said, both accused gave their statements voluntarily and out of their own free will."

40. Five witnesses have given evidence on behalf of the prosecution during the *voir dire*. The first prosecution witness was the interviewing officer of the first appellant. The second prosecution was the witnessing officer who was present during the cautioned interview of the first appellant. The third prosecution witness was the interviewing officer of the second appellant. The fourth prosecution witness was the investigating officer. He was also involved in arresting the second appellant and also the witnessing officer who was present during the cautioned interview of the second appellant. The fifth prosecution witness was a Superintendent of Police who was the Manager Major Crimes when the appellants were brought in for their cautioned interviews to be recorded. All the prosecution witnesses have testified that no threat or assault was made to the two appellants. The two appellants have been released on 13/08/12 after their cautioned interviews were recorded. According to the relevant prosecution witnesses, the two cautioned interview statements were recorded following the proper procedures and the two appellants had made the statements in their respective cautioned interviews voluntarily.

41. If the appellants were assaulted by the police officers the way they have claimed in their *voir dire* grounds, it would be reasonably expected of them to seek medical treatment and to make a complaint to a relevant authority regarding that assault soon after they were released after recording their statements. On the contrary, the first appellant had stated in his re-examination that there were no injuries on his body. The first appellant had also said in his evidence that "*I complained to the Magistrate that I don't know anything about this offence and I was forced to admit the offence*". This version is not consistent with the first appellant's objections filed for the purpose of *voir dire* which suggests that he did confess, but due to oppression. The second appellant had said in his cross-examination that '*no police officer assaulted me*' and the position taken during his evidence was that he confessed due to verbal threats.

42. All in all, I note that, on one hand the evidence given by the two accused does not raise or cover all the issues submitted in their respective *voir dire* grounds and on the other hand certain issues raised are not consistent with the evidence given by the two appellants. After going through the evidence available in the relevant court record, it is

my view that it was open for the Learned Judge to conclude after the *voir dire* that each appellant had made the statements in their respective cautioned interview statements voluntarily and those statements were not obtained in an unfair manner.

43. Giving evidence during the trial proper the first appellant had stated in his examination in chief that "*I did not give my answers in my own free will. The answers were not true*". He had further stated in his cross-examination that "*The answers I gave, that is all were not true*". My first observation is that the first appellant had admitted that he had given the answers recorded in his cautioned interview. However, in my judgment these two versions cannot be reconciled. If the first appellant's position is that he gave answers that are not true when he was questioned by the police, he cannot at the same time take up the position that he did not give those answers on his own free will. The second appellant in his evidence had initially said that "*I admitted everything because I was frightened of being killed*". Then later he had said "*I did not know I was admitting the allegations against me*". It is clear that the position taken up by each appellant in relation to their respective cautioned interview statements were not consistent. On the other hand, the evidence of the relevant police officers who were involved in the investigation and in interviewing the appellants is consistent in that there were no oppression and the statements were made by the appellants voluntarily.

44. In the circumstances, I am not convinced that the Learned Judge erred when he ruled that the two cautioned interview statements are admissible in evidence either at the conclusion of the *voir dire* held on the question of admissibility of the said statements or after the trial proper when he gave his judgment following the opinions of the assessors.

45. Grounds 4 and 5 fails.

46. The complaint made on ground 7 is that the Learned Judge shifted the burden of proof to the appellants when he said in his summing up that the appellants did not complain to anyone and did not see a doctor during the 5 days they were not in police custody after the conclusion of their cautioned interviews and before they were rearrested.

47. This allegation is raised based on what the Learned Judge had stated in paragraph 33 of the summing up which is reproduced above.

48. This ground is misconceived. In the said paragraph what the Learned Judge had done is to remind the assessors about the relevant evidence that would assist them to deal with the allegation that the two accused were assaulted and to guide them on drawing reasonable inferences based on those facts. The contents of paragraph 33 cannot in anyway construed as shifting the burden of proof to the appellants.

49. Further, the Learned Judge had stated at the beginning of his summing up at paragraph 1 as follows;

> *So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.*

50. Ground 7 fails.

Judge did not fairly canvas defence case in the summing up [Grounds 8 & 9]

51. The appellants claim that the Learned Judge in his summing up had failed to effectively canvass the defence case. However, in the relevant written submission, what is highlighted is that the Learned Judge failed to properly direct the assessors on the evidence of the appellants and their witnesses. I note that there is a separate ground raised on lack of directions on alibi evidence. The counsel for the appellants does not indicate the evidence which he claims that the Learned Judge failed to put before the assessors and what were the directions apart from directions on alibi evidence that the Learned Judge should have given to the assessors.

52. On ground 9 the appellant asserts that the Learned Judge failed to sum up in a fair and a neutral manner and that the Learned Judge over emphasised the prosecution case. But counsel for the appellant had failed to demonstrate this in the written submissions filed.

53. The Learned Judge sums up the accused's evidence from paragraphs 19 to 25 of the summing up. Then he correctly explains the position taken up by the first appellant regarding the voluntariness of the cautioned interview in paragraph 34 and the position of the second appellant regarding his cautioned interview in paragraph 35. Then again from paragraphs 37 to 39 the Learned Judge explains how to deal with the alibi raised by each accused.

54. Considering the entirety of the summing up, I am not convinced that the Learned Judge had failed in his duty to put to the assessors for their consideration the respective contentions which had been presented during the trial by the prosecution and the defence in a fair and balanced manner.

55. Grounds 8 and 9 should fail.

Directions on alibi [Ground 10]

56. On ground 10 the appellants allege that the Learned Judge failed to give a proper direction on alibi evidence.

57. In the case of **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) the court of appeal said thus;

> *"[29] When an accused relies on alibi as his defence, in addition to the general direction of the burden of proof, the jury (in Fiji the assessors) should be directed that the prosecution must disprove the alibi and that even if they conclude that the alibi was false, that does not by itself entitle them to convict the accused (**R v Anderson** [1991] Crim. LR 361, CA; **R v Baillie** [1995] 2 Cr App R 31; **R v Lesley** [1996] 1 Cr App R 39; **R v Harron** [1996] 2 Cr App R 457). In the present case, the appellant had admitted that initially he had given a false alibi to protect his mother but the summing up contains no directions on alibi at all."*

58. The direction given by the Learned Judge in the instant case was as follows;

> *"[39] You have heard the witnesses on the alibi issue. How did the witnesses appear to you? Were they forthright or evasive as witnesses? Were they telling the truth from your point of view? If you find them to be credible, and you accept their evidence, then you must find the accused not guilty as charged. If you find them not to be credible witnesses, then you will reject their alibi evidence and work on the other evidence to decide this case. What you make of the alibi evidence is entirely a matter for you."*

59. It is manifestly clear that the above direction given by the Learned Judge does not include all essential points a proper direction on the defence of *alibi* should contain according to **Ram** (supra). The Learned Judge does not explain the burden of proof in relation to the *alibi* raised, and does not make it plain to the assessors that they should not draw an

adverse inference against the accused on his guilt merely because they reject the *alibi* evidence.

60. Ground 10 has merit.

61. As noted above, in this case, two errors are identified in the directions given by the Learned Judge in his summing up. That is, the Learned Judge had not directed the assessors that they should rely on the admissions in the cautioned interview of the accused as proof of guilt only if they are satisfied that the admissions are true and had not given a proper direction on how to deal with the alibi evidence. However, I do note that when the Learned Judge had given the opportunity to the parties to suggest points for redirection after the summing up, the above deficiencies were not highlighted on behalf of the appellants.

62. In the case of **Tikoniyaroi v State** [2011] FJCA 47; AAU0043.2005 (29 September 2011), this court observed thus;

> *"As a general principle it is Counsel's duty at trial to draw the attention of the Trial Judge to deficiencies in the summing up and that a failure to do so may debar the Accused from taking the point on appeal:* ***Singleton v. French*** *(1986) 5 NSWLR 425,440, per McHugh J;* ***Evans v. R*** *[2007] HCA 59; (2007) 241 ALR 400,459-460 [236], per Heydon J. However, where an Appellate Court is satisfied that, despite Counsel's failure to object to the summing up, an injustice may have occurred at the trial, it may quash the convictions:* ***R v. Glover*** *(1928) 28 SR (NSW) 482,487, per Street CJ (with whom Ferguson and Campbell JJ concurred)."*

63. Section 23(1)(a) of the Court of Appeal Act reads thus;

> "[O]n any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal;"

64. Therefore, in order to come to the conclusion whether or not to allow the appeal against the conviction, it should be considered whether;

    a) the verdict (the finding of guilt by the trial judge) should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or

b) the impugned judgment should be set aside on the ground of a wrong decision of any question of law or on the basis that there was a miscarriage of justice.

65. I would now turn to examine the evidence. As I have already concluded, it was open for the assessors and the Learned Judge to conclude that the two cautioned interview statements are admissible in evidence. In his cautioned interview statement, the first appellant had stated *inter alia*;

a) He was working for Matrix Risk Company as a security officer and was posted at a site in Solander Jetty No.11 at Walu Bay on 25/06/12. That day his shift was from 7.00am to 7.00pm.

b) He was picked up by one Ben Padar (later referred to as "Ben Padarath") during lunch time and while they were having lunch, this person asked him whether he could accept a 'job' to burn down the government building and the court house and he was offered $5000.

c) In answer to Q83, he had stated "*Ben Padar continue to insist and begging me for this job to be carried out and in addition to that he reason thing by saying that the court house that will be burn down contains some court file of me (Ben Pardar) and also because of the case of former PM Laisenia Qarase is also a reason why this job to be done*".

d) He told his friend the second appellant about burning down the government building and the court house when the second appellant called him around 7.00pm to inform him that he (the second appellant) will be coming late. The second appellant accepted the request. The second appellant was working with him in the same company and the same site. The second appellant then arrived around 7.30pm and they then left to carry out the job around 8.00pm.

e) He took a 'white gallon' (white plastic container) of about 4.5 litres with diesel from a boat at Solander No.11 and put it inside a white sack. Then he went with the second appellant towards the government building. He walked to the drive way to the Government building and the prosecution office and waited there.

f) The second appellant and one Eroni made their way to the target place to be burned down as briefed by him. After 30 minutes, he saw the second appellant coming out of the corner of the court house and walk towards QEB drive. He also walked towards QEB drive and then he saw the second appellant talking to

a security officer between Suvavou house and the Holiday Inn. He saw fire coming out underneath the wooden court house at the back of the bus stop.

g) [It is pertinent to note that Q.108 is "*Isikeli Nakato, before we continue our interview, do you have any complaint or wish to comment anything in regards to our overall interview from 08/08/12, 09/08/12 and today?*" and the answer is "*I wish to say that today the breakfast was late*".]

66. The second appellant had stated in his cautioned interview *inter alia*;

a) He is a security officer for Matrix Risk Management Company and on 25/06/12 he was based at Solander Shed in Walu Bay. His shift that day was from 6.00pm to 7.00am the following morning.

b) He called the first appellant that day to inform him that he will be coming late for work and when he reached the workplace, the first appellant informed him about the job at the government building. He had also stated that when he reached the workplace, the first appellant informed him again about the job.

c) He with the first appellant and one Eroni, walked towards the government building. The first appellant was carrying the plastic containing the diesel which was inside the sack. After the first appellant gave him the sack containing the white 'plastic gallon', he went straight to the wooden building where the Suva Magistrate Court No.6 was situated. He poured some diesel to the corner of the Suva Magistrate Court No.6 and threw a lit match to that diesel he poured.

d) Thereafter, he walked away from there. In answer to Q.64, he had said, "*I was informed by Sikeli Nakato when he was telling us the job that the reason to burn the wooden building because it contains some court documents against one Indian man by the name of Ben Padarath but I do not know the said Indian Man.*"

67. The first prosecution witness had testified that he was a security officer and on 25/06/12 he was on his night shift at the government building guardroom. Around 10.30pm and 11.00pm he saw two men crossing Gladstone Road and walking towards the bus stop at the corner of the Magistrate Court No.6. One stood at the bus stop and the other disappeared at the corner of Magistrate Court No.6. He went towards the Magistrate Court No.6 and he saw the guard at the Holiday Inn who was "*calling of a fire*" and when he approached the scene, he saw a burning bottle and smoke at the space between the Magistrate's Court No.6 and the government building.

68. The sixth prosecution witness had stated that she was at the bus stop opposite the FBC Building after 10.00pm on 25/06/12. She saw two iTaukei males approaching them and one went to the back of the Magistrate Court No.6 and the other person stopped at the bus stop. Later the person who went to the back ran towards suvavou house and the person who was at the bus stop also followed him down Victoria Parade. She saw the security from Holiday Inn running across and also saw fumes coming under the wooden building.

69. The 8th prosecution witness who was an employee for Solander for 8 years had identified the plastic container recovered from the scene as the same type of container used at his work place.

70. The first appellant had said in his evidence that, he was working at Mua-i-Walu Jetty from 7.00am to 7.00pm on 25/06/12 and after work he went home in a bus where he reached home at 8.00pm. He had dinner and he went to sleep around 10.00pm. Second defence witness was the wife of the first appellant. She had said in evidence that the first appellant returned home after work on 25/06/12 at 8.00pm and he went to bed after 9.00pm. During cross-examination she had admitted that she did not mention about the first appellant coming home at that time on 25/06/12 when she gave a statement to police on 11/08/12. The third defence witness who was a brother-in-law of the first appellant had also said that the accused came home at 8.00pm on 25/06/12 and went to bed after 9.00pm.

71. The second appellant had said in his evidence that he was employed at Matrix and he was at work at Mua-i-Walu on 25/06/12 from 4.00pm to 7.00am the following morning. The fifth defence witness had said that he worked for Matrix Security and his job was to check the security guards at their posts. The second appellant was to work from 4.00pm on 25/06/12 to 8.00am the following morning. He visited the second appellant between 6.30pm to 7.00pm, then after 8.00pm and the third time was between 12.00am to 1.00am. During cross-examination he had said that he does not know where the second appellant was between 10.00pm and 11.00pm that day. The sixth defence witness has said that he was the operation supervisor at Matrix. According to the supervisors report, the second appellant was working at Solander at Walu Bay from 7.00pm on 25/06/12 to 7.00am. During cross-examination he had said that he did not see the second appellant at work that day with his own eyes.

72. Given the evidence adduced in this case including the nature and the scope of the details provided in the answers in the two cautioned interviews, it was open for the assessors and the Learned Judge to find that first, the two cautioned interview statements were made by the respective appellants; secondly, the two cautioned interviews were made voluntarily; and thirdly, the relevant admissions in those statements are true. In my judgment, it was also open for the assessors and the Learned Judge to reject the *alibi* evidence of both appellants on the strength of the evidence led by the prosecution. Given the evidence presented by the prosecution the *alibi* evidence presented by the appellants does not sufficiently raise the proposition that each appellant could not have committed the offence. Further, based on the admissions of each appellant it was open to the assessors and the Learned Judge to conclude that the elements of the offence of arson against each appellant are established beyond reasonable doubt.

73. Accordingly, the finding of guilt in this case is not unreasonable and is supported by the evidence. In relation to the issues that relate to misdirections, I am prepared to accept that there has been a miscarriage of justice. However, in my judgment if the assessors and the Learned Judge had been properly directed on how to approach the cautioned interview and the *alibi* evidence, they would have reached the same conclusion. Therefore, I have concluded that there has been no substantial miscarriage of justice. In the circumstances, I would dismiss the appeal against convictions in terms of the proviso to section 23 of the Court of Appeal Act.

Appeal against sentence

74. Grounds I, II and V against the sentence raises the same issue and that is, the sentence imposed by the Learned Judge against each appellant is harsh and excessive. On ground III the counsel for the appellants submits that the Learned Judge failed to properly give effect to the time spent in custody. On ground IV it is alleged that Learned Judge failed to consider the previous good behaviour of the second appellant.

75. In terms of section 362 of the Crimes Act read with section 3(4) of the Sentencing and Penalties Act 2009 ("Sentencing and Penalties Act"), the maximum punishment for the offence of arson is imprisonment for life.

76. Each appellant was sentenced to an imprisonment term of 8 years with a non-parole period of 7 years. The Learned Judge in his sentence had stated thus;

> *"4. The Legislature viewed the offence of "arson" very seriously, and had prescribed it a maximum sentence of life imprisonment (section 362 of Crimes Decree 2009). Her Ladyship Madam Justice Shameem had set the tariff for the offence a sentence between 2 to 4 years imprisonment: see* ***Kelemedi Lagi and Others v State****, Criminal Appeal No. HAA 004 of 2004S, High Court, Suva (12 March 2004) and* ***Aporosa Tuitokova v State****, Criminal Appeal No. HAA 67, 70 and 73 0f 2005S, High Court, Suva (25 October 2005). In* ***State v Kitione Bagasau Malugu****, Criminal Case No. HAC 048 of 2009S (5 March 2010), I followed the above tariff when sentencing a government employee to 2 years imprisonment for burning to the ground a PWD work shed. In* ***State v Raicebe and Others****, Criminal Case No. HAC 208 of 2011, High Court, Lautoka (17 November, 2011), His Lordship Justice Madigan sentenced the accused to 4 ½ years imprisonment for burning Police bures.*
>
> *5. In* ***State v Ravinesh Deo and A. Kamal****, Criminal Case No. HAC 005 of 2013, High Court, Labasa (13 March 2014), His Lordship Justice Bandara sentenced Accused No. 1 to 4 years 10 months and Accused No. 2 to 5 years imprisonment for setting fire to the Westpac Bank in Labasa. In* ***Public Prosecutor v Keneth Atuary and Awen George****, Criminal Case No. 59 of 2007, Supreme Court of the Republic of Vanuatu (10 December 2008), the Supreme Court sentenced Accused No. 1 to 6 ½ years imprisonment, and Accused No. 2 to 7 years imprisonment for burning down to the ground the Vanuatu Supreme Court Building."*

77. Upon perusal of the court record, I find that the State Counsel who conducted the trial had made extensive submissions pertaining to sentencing, drawing the court's attention to several cases including one 'Australian Case' where the accused was sentenced for an imprisonment term of 8 years and 2 months. I was able to obtain a copy of the aforementioned judgment referred to by the said Prosecutor. It was the decision in **R v Davies** [2006] SASC 232 a decision by the Supreme Court of South Australia. In the said case, by majority decision the court upheld the imprisonment term of 8 years and 2 months imposed on the accused who pleaded guilty for one count of arson. It was a case where a building occupied by a public body was completely destroyed by the fire and where the accused was found to be suffering from certain psychological conditions. The case decided by the Supreme Court of Vanuatu which was cited by the said State Counsel and referred to by the Learned Judge in his sentence is the case of **Public Prosecutor v Atuary and another** [2008] VUSC 88; Criminal Case 59 of 2007 (10 December 2008) and it was also a case where the accused had entered an early guilty plea and more importantly where the maximum penalty for arson is an imprisonment term of 10 years.

78. I wish to add that the using of the words "ridiculously high" by Counsel for the Respondent (State) during his submissions to describe the sentence imposed in this case was unfortunate and not consistent with the submissions made before the Learned Judge by the State Counsel and accordingly the position appear to have been taken by the State then.

79. In the case of **Naidu** (supra) two accused were charged for arson where four private properties were destroyed from the fire including the property belongs to the company where both accused were working. The second accused was the managing director of the company. According to the relevant judgment the second accused had committed the offence for the purpose of making an insurance claim. The first accused had hoped for a reward and a better position. The second accused was sentenced to 10 years imprisonment and the first accused was sentenced to 7 years imprisonment. The Court of Appeal upheld both sentences.

80. In **State v Seru** [2016] FJHC 841; HAC32.2015 (21 September 2016) Madigan J when deliberating on the appropriate sentence to be passed for the offence of attempted arson, stated thus;

> *"[15] There is no predetermined tariff for the crime of attempted arson but the accepted sentences for arson itself range from 2 years to 10 years. Two years has been held to be appropriate where there is no danger to human life and 4 years where there is such a danger. These are sentences passed for a crime with the maximum penalty of life imprisonment, and there is no reason why a tariff for attempted arson should be more.*
>
> *[16] If then there is an attempt to burn down a building then an appropriate sentence would start from a term of two years. If the attempt is to harm persons inside the building or is reckless as to whether there would be harm to inhabitants then the sentence should be one of at least 4 years.* ***If the attempt is an attempt to effect large scale arson, for example on a large scale shopping area or a sensitive Government building then the sentence could be in the range to 7 to 10 years****. (See Damodar Naidu & Anor v R. C.A. (1978) FLR93)."* [Emphasis is mine]

81. At this point I would consider it appropriate to express my view on the tariff for the offence of arson. As the Learned Judge has demonstrated in his sentencing decision, though the range of sentence noted in the case of **Lagi & Others v. State** [2004] FJHC 69; HAA0004J.2004S (12 March 2004) is often cited as the tariff for the offence of arson,

in several cases the High Court had not followed the said tariff and had expressed different views regarding the appropriate tariff for arson. It should be noted that though **Lagi** (supra) may be regarded as having the force of a guideline judgment in terms of section 6(3) of the Sentencing and Penalties Act for the magistrate court, the said decision does not bind the High Court.

82. **Lagi** (supra) was a case where the High Court exercised its appellate jurisdiction in respect of an appeal against the conviction and sentence of the magistrate court. This is what the Learned Judge said in arriving at the aforementioned range of 02 to 04 years;

> *"In this case the respondent appears to have ensured that the house was empty when he lit the fire. However the fact that he accompanied a group of men who threatened the occupants, the fact that the arson was motivated by revenge and the serious consequences of the arson on the victims who were forced to leave the village they called home, called for a sentence within the 2 to 4 year range."*

83. It is pertinent to note that the offence in the aforementioned case was committed on 19th January 1999. The judgment in the Magistrate Court was delivered on 19th August 2003. As at that date, in terms of section 7(a) of the Criminal Procedure Code (Cap. 21) a Magistrate did not have the jurisdiction to pass a sentence exceeding 05 years imprisonment. The aforementioned section 7(a) was amended by Criminal Procedure Code (Amendment) Act No. 13 of 2003 which came into force with effect from 18th September 2003 where the term of imprisonment that could be passed by a Magistrate was increased to 10 years.

84. In view of the above, the dictum in **Lagi** (supra) in relation to the 02 to 04 year range should be understood as a tariff established for the magistrate court for the offence of arson and more importantly, given that the maximum sentence the magistrate court could pass at the material time was 5 years imprisonment.

85. I note that this court in the case of **Lesu v State** [2014] FJCA 214; AAU58.2011 (5 December 2014) had made the following observation with regard to the tariff for the offence of arson;

> *"[38] It is now established that the tariff for arson as decided in the case of Lagi v. The State (supra) and thereafter in several other cases is presently established to be 2 to 4 years imprisonment."*

86. Then at paragraph 43 of the said judgment the court said;

> *"[43] Arson is an extremely serious offence and the maximum penalty is life imprisonment. Despite the serious penalty, as mentioned earlier, the Courts in Fiji for considered reasons have placed the tariff for arson between 2 years and 4 years imprisonment."*

87. It is my considered view that this court did not endorse the range of 2 to 4 years imprisonment as the tariff for arson in **Lesu** (supra) but as stated above, merely made an observation that it was the established tariff for the offence of arson. It appears that this court was not properly assisted by counsel for the appellant and for the respondent who appeared in that case by bring the following cases where the tariff of 2 to 4 years was not applied to the attention of court;

a) the judgment of the Court of Appeal in the case of **Damodar Naidu & another** 1978 FLR 93 where sentences of 07 years and 10 years were imposed for the offence of arson;

b) the judgment of the Court of Appeal in **Koya v State** [1997] FJCA 15; AAU0011u.96s (affirmed by the Supreme Court) where a tariff of 03 to 05 years considered by the High Court for the offence of arson was not disturbed; and

c) The judgments of the High Court in **State v Solanki** [2000] FJHC 202; HAC5.1999 (11 May 2000); **State v Ravinesh Deo and A. Kamal**, High Court, Labasa Criminal Case No. HAC 005 of 2013 (13 March 2014); and **State v Nakato** [2014] FJHC 418; HAC284.2012S which was the instant case decided on 11 June 2014.

88. The decisions cited above predate **Lesu** (supra). This court would therefore not have arrived at the conclusion in **Lesu** (supra) that the established tariff for the offence of arson in the High Court is an imprisonment term of 2 to 4 years if the decisions cited above were brought to its attention. It is also clear that this court did not consider the appropriateness of the tariff for the offence of arson in the said case.

89. In the case of **The State v Peter Mc Donald** [2004] TTHC 26 (29 July 2004), the High Court of Trinidad and Tobago while sentencing the accused for an imprisonment term of 17 years where the accused had set fire to a store in downtown Port of Spain, highlighted

the implications of the offence of arson and why this offence should be taken seriously in the following terms at pages 2-3;

> *"It cannot be gainsaid that arson is a crime of odiousness so penetrating and seriousness so extreme that it must be placed in a category of it[s] own. It is a crime that encompasses and carries in its wake, injury, death and destruction. It is a crime that excites the apprehensions of society to the utmost degree.*
>
> *The Court considers the sentencing principles of retribution and deterrence to be most appropriate to the question of sentence.*
>
> *Over and above that general description of arson, it must be said that there is something peculiarly pernicious about the setting of fire to a store in downtown Port of Spain.*
>
> *It is a notorious fact that the various buildings that house the stores in downtown Port of Spain are closely joined together; a fire therefore, started in one store could easily spread to other stores and could eventually envelope an entire block of buildings. This could occasion disaster on an unparallel scale. Further, with buildings on fire there would always be the potential for injury and loss of life. Fortunately, the fire in the instant case was contained to the one building that was destroyed, and there were no casualties.*
>
> . . .
>
> *Be it admitted that arson is not as prevalent as certain other offences. But it is a crime that can cause such devastation and calamity that whenever it raises its head the courts must be astute to ensure that the sentence imposed on the arsonist is an exemplary and a significant one.*
>
> *Displaying perverse ingenuity, the prisoner set fire to the store in order to create a diversion and to rifle the cash register in the ensuing panic and confusion. In this country there are copycats with the deplorable penchant for exclusively copying things negative and unproductive. This Court by its sentence therefore must send a clear and firm message to would-be imitators that they must not go down that road."*

90. The legislation in Fiji clearly indicates the intention to treat arson as a very serious offence by making arson an indictable offence and fixing the punishment for arson as life imprisonment. Even the penalty for the offence of attempt to commit arson under section 363 of the Crimes Act is an imprisonment term of 14 years. In my judgment, the range of 02 to 04 years imprisonment does not reflect the seriousness the legislation intended to attribute to the offence of arson and in fact it defeats the obvious intent of the legislature.

91. It is pertinent to note that;

a) The established sentencing tariff for the offence of rape which carries a **maximum penalty of life imprisonment** when committed against an adult is an imprisonment term between **7 and 15 years** (**State v Naicker** [2015] FJHC 537; HAC279.2013); and an imprisonment term between **10 to 16 years** when rape is committed on a child victim. (**Anand Abhay Raj v State** [2014] FJSC 12).

b) For the offence of manslaughter which carries a **maximum penalty of 25 years**, the tariff is an imprisonment term between **5 and 12 years**. (**Vakaruru v State** [2018] FJCA 124; AAU94.2014 (17 August 2018))

c) For the offence of aggravated robbery which carries a **maximum penalty of 20 years**, the lower tariff for a single act is settled as an imprisonment term between **8 and 16 years**. (**Wise v State** [2015] FJSC 7)

92. The aforementioned tariffs for the offences of rape, manslaughter and aggravated robbery which carry maximum sentences of life, 25 years and 20 years respectively also suggests that a range of 2 to 4 years imprisonment is not an appropriate tariff for the offence of arson given the maximum penalty of life imprisonment it carries.

93. Having considered the views expressed by the courts in the decisions cited above and the aforementioned tariffs, it is my considered view that the tariff for the offence of arson under section 362(a) of the Crimes Decree should be an imprisonment term between 5 to 12 years. In selecting the lower end of 5 years imprisonment, I have taken into account *inter alia* the nature of the offence under section 362(a) which is unlawfully setting fire to a building or a structure, the natural implications of that offence and the maximum penalty which is life imprisonment. Further, this tariff should be regarded as the range of the sentence on conviction after trial. A sentencer may inevitably arrive at a final sentence which is below 5 years imprisonment in applying the two-tier approach unless the aggravating circumstances are quite substantial. If the final sentence reached is one that is below 3 years imprisonment, then it would be at the discretion of the sentencer to opt for any sentencing option as provided under the Sentencing and Penalties Act.

94. In the instant case, the Learned Judge had selected an imprisonment term of 6 years as the starting point of the sentence for each appellant. He had then added 4 years in view of the aggravating factors that are identified in paragraph 6 of the sentence and had deducted 2 years in view of the mitigating factors that are outlined in paragraph 7.

95. In essence, the Learned Judge had considered the fact that the appellant attacked the judicial system and the fact that the targeted building was a public property as aggravating circumstances of this case. I am unable to agree with the counsel for the appellants that the Learned Judge had taken into account irrelevant matters as aggravating factors.

96. The mitigating factors the Learned Judge had considered at paragraph 7 of the sentence are as follows;

> *"(i) Accused No. 1, you are 38 years old, married with 2 young children, aged 5 and 1 year old, and you were the sole bread winner;*
>
> *(ii) Accused No. 2, you are 48 years old, married with 5 children aged between 23 and 17 years old, and you were the sole bread winner;*
>
> *(iii) Both of you had been remanded in custody since 20 August 2012, that is, approximately 1 year 9 months 21 days ago;*
>
> *(iv) The Magistrate Court No. 6 was not burnt down to the ground, although this was not due to your actions, but the actions of the government building security guards, who saw the fire and quickly put the same out, by pouring water on the same."*

97. The personal circumstances of the appellants and the time the appellants spent in custody do not amount to mitigating factors.

98. I note that the Learned Judge had considered the fact that the property was not destroyed as a mitigating factor. For the reason that the Learned Judge erroneously took into account the period in custody as a mitigating factor, the effective concession each appellant received due to the minimal damage caused was only 2 months and 9 days and that is not sufficient.

99. I must say, that I am not convinced that it is correct in principle to regard the fact that the property was not completely destroyed as a mitigating factor. I would rather consider that factor in arriving at the appropriate imprisonment term to be added in view of the

aggravating circumstances. Nevertheless, I do agree that the said fact should be taken into account in deciding the appropriate punishment, in that, an accused in a case where there was significant damage to the property should receive a sentence higher than an accused in a case where there was minimal damage or harm as a result of committing the offence of arson.

100. Section 24 of the Sentencing and Penalties Act reads thus;

> *"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."*

101. The language in section 24 of the Sentencing and Penalties Act is very clear in that the period an accused spent in custody in relation to the relevant case is to be regarded as a period of imprisonment already served by that accused unless the sentencer decides otherwise. In my reading, the accused should first be 'sentenced', before making an order that the period in custody should be regarded as a period already served out of that 'sentence' in terms of section 24 of the Sentencing and Penalties Act. Even though the final effect of applying the said section 24 is that the period the relevant accused was in custody is reduced or deducted from the sentence or the period of imprisonment the accused should serve after the date of sentence, that in actual fact is not a reduction of the accused's sentence. That is because the accused had already been incarcerated for that period of time though that period was not regarded as part of his sentence at that time. The objective of section 24 therefore is to give a formal recognition that the period an accused was incarcerated or in custody in view of a particular case before the trial is regarded as part of the final sentence imposed on the accused after the trial.

102. This error of considering of the period in custody as a mitigating factor and allowing the said period to be subsumed in the deduction made for other proper mitigating factors would not have a significant impact on the sentence or an accused when the said period in custody is relatively short where it is few days or weeks. However, when the relevant period spent in custody is quite substantial as in this case, that error would have a substantial impact on the final sentence which in most cases is adverse to the accused.

103. In the circumstances, I would hold with the counsel for the appellants that the Learned Judge had erred by considering the period in custody as a mitigating factor.

104. I also find merit in the ground of appeal against sentence where it is alleged that the second appellant's previous good character was not taken into account in determining his sentence. The Learned Judge appear to have overlooked this fact because he had dealt with both accused together when he was deliberating on the sentence. In my view, it would be a good practice to consider the circumstances of each accused separately when sentencing multiple accused in the same case.

105. For the reasons stated above, I would allow the appeal against the sentence on the third and fourth grounds of appeal against the sentence.

106. In my judgment an imprisonment term of 8 years was proportionate with the nature and the circumstances of the overall offending in this case where the appellants have wilfully and unlawfully set fire to a court house with the objective of destroying court records, taken together with the fact that the physical damage caused by the fire was minimal. Since the objective of the appellants was to destroy a particular court record and they did not know where that was kept, it is clear that the two appellants had intended to cause maximum damage by setting fire to the government buildings. It should be noted that I have arrived at that term of imprisonment without taking into account any mitigating factors relevant to the two appellants. Therefore, I would adjust the sentence of each appellant in the following manner;

Sentence of the first appellant

a) Having considered all the circumstances, the sentence I would arrive at for the first appellant is an imprisonment term of 8 years as I do not find any mitigating circumstances relevant to the first appellant. I would fix the non-parole period at 6 years;

b) I would order that the period the first appellant spent in custody should be regarded as time already served by him in view of the provisions of section 24 of the Sentencing and Penalties Act and hold that the period to be regarded as served should be 01 year and 10 months;

c) Accordingly, the first appellant is sentenced to a term of 8 years imprisonment with a non-parole period of 6 years. In view of the period spent in custody the time remaining to be served by the first appellant effective from the date of sentence (14 June 2014) should be;

Head sentence – 06 years and 02 months
Non- Parole period – 04 years and 02 months

Sentence of the second appellant

a) Having considered all the circumstances, including the previous good behaviour of the second appellant, the sentence I would pass on the second appellant is an imprisonment term of 7 years. I would fix the non-parole period at 5 years;

b) I would order that the period the second appellant spent in custody should be regarded as time already served by him in view of the provisions of section 24 of the Sentencing and Penalties Act and hold that the period to be regarded as served should be 01 year and 10 months;

c) Accordingly, the second appellant is sentenced to a term of 7 years imprisonment with a non-parole period of 5 years. In view of the period spent in custody the time remaining to be served by the second appellant effective from the date of sentence (14 June 2014) should be;

Head sentence – 05 years and 02 months
Non- Parole period – 03 years and 02 months

107. In the result, I would dismiss the appeals against conviction, and would allow the appeals against sentence. I would accordingly vary the sentences imposed by the Learned Judge as stated in the paragraph above.

Orders of the court;

1. Appeals against the conviction of each appellant are dismissed;
2. Appeals against the sentence of each appellant are allowed;
3. First appellant's sentence is varied where he is sentenced to 08 years imprisonment with a non-parole period of 06 years; In view of the period spent in custody the head sentence

remaining to be served from 14 June 14 is 06 years & 02 months and the non-parole period is 04 years & 02 months; and

4. Second appellant's sentence is varied where he is sentenced to 07 years imprisonment with a non-parole period of 05 years; In view of the period spent in custody the head sentence remaining to be served from 14 June 14 is 05 years & 02 months and the non-parole period is 03 years & 02 months

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Hon. Mr. Justice W.D. Calanchini
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

.....

Hon. Mr. Justice S. Chandra
JUSTICE OF APPEAL

.....

Hon. Mr. Justice V. Perera
JUSTICE OF APPEAL