

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION
CRIMINAL CASE NO.: HAC 30 OF 2015

STATE

v

- 1. MANASA TALALA**
- 2. SERUVI CAQUSAU**
- 3. KELEVI SEWATU**
- 4. PENAIA DRAUNA**
- 5. FILISE VERE**
- 6. VILIAME VEREIVALU**
- 7. JONA DAVONU**
- 8. PITA MATAIRAVULA**
- 9. SENITIKI NAKATASAVU**

Hearing: 28th October, 2016

Ruling: 1st November, 2016

Counsel: Lee Burney with J. Fatiaki for State

Mr. I. Khan for Accused

RULING ON NO CASE TO ANSWER APPLICATION

1. On behalf of all Accused persons, the Counsel for Defence makes an application that the Accused persons have no case to answer. All the Accused persons are jointly charged with Rape and Sexual Assault on first four counts while the 1st and 6th Accused persons are charged with Defeating the Course of Justice on last two counts.
2. The test at this stage of the trial in the High Court is whether there is any evidence (touching on each element of the offence) that each accused committed the offences charged.

Sections 231(1) and (2) read as follows:

"...231.—(1) When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is no evidence that the accused person (or any one of several accused) committed the offence.

(2) When the evidence of the witnesses for the prosecution has been concluded, the court shall, if it considers that there is evidence that the accused person (or any one or more of several accused persons) committed the offence, inform each such accused person of their right—

(i) to address the court, either personally or by his or her lawyer (if any); and

(ii) to give evidence on his or her own behalf; and

(iii) to call witnesses in his or her defence..."

3. It is well settled that, the test at this stage of the trial is whether or not there is some relevant and admissible evidence, direct or circumstantial, touching on all elements of the charge, the weight and credibility of such evidence not being matters for assessment: *The State v George Shiu Raj & Another*, Criminal Appeal No. AAU 0081 of 2005, Fiji Court of Appeal; *The State v Brian Singh*, Criminal Appeal No. AAU 0097 of 2005, Fiji Court of appeal, *Sisa Kalisoqo v Reginam*, Criminal Appeal No. 52 of 1984, Fiji Court of Appeal and *State v Anesh Ram*, Criminal Case No. HAC 124 of 2008S, High Court, Suva.
4. In this case, having heard evidence of 23 witnesses called by the Prosecution, and bearing in mind Sections 231(1) and (2) of the Criminal Procedure Decree 2009, the authorities cited hereof and the parties' submissions, I am of the view that there is a *prima facie* case exists against each accused, requiring them to be called upon to make their defences.
5. The test applied in the High Court is a different one from that in the Magistrates' Court. The test in the latter is whether, taken at its highest, a reasonable court could convict on

the Prosecution case. The test in the High Court is whether there is relevant, admissible and inculpatory evidence implicating the accused in the offence charged. It is not for the Court at this stage to assess credibility or reliability of evidence, although if the evidence is "inherently vague or incredible" that would not satisfy the Section 231. If there is some relevant and admissible evidence, direct or circumstantial touching on all elements of the offence, then there is a prima facie case, and the accused must be put to their defence (State v. Eliko Mototabua [2004] HAC 020/02S. In State v. Saimoni Kaitani & 3 Ors. [2005] HAC044/04S (per Gates J).

Agreed Facts

6. The Counsel have agreed on certain facts in this case and, therefore, those facts are not in dispute. It is agreed by the Defence that Soko, one of the victims in this case, had told the doctor when he was taken to the Nadi hospital that he was assaulted by police and chilies were put in his anus and a stick was inserted into his anus.
7. It is also an admitted fact that both Soko and Boila had been anally penetrated on the 15th of August 2014.

Issues in dispute

8. On first four counts of sexual assaults (Rape and Sexual Assault), all Accused persons are jointly charged. In regards to those counts, this Court has to determine whether any or all of these accused are criminally responsible for those sexual assaults. Prosecution relies on two legal concepts, namely, Complicity in Crime and Common Purpose described in Section 45 of the Crimes Decree 2009 and the legal concept which is broadly known as Joint Enterprise described in section 46 of the Crimes Decree 2009.
9. The Prosecution says that it is not just those who rub the chilies on the detained persons, it's not just those who used the stick to penetrate the detained persons but also any of the Accused who took part by aiding, abetting, counseling or procuring the commission of those assaults is equally guilty as a matter of law.
10. Under the concept of joint enterprise, when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in

the same manner as if it were done by him alone. Prosecution must prove that each accused person agreed (either impliedly or expressly) beforehand or shared a common intention to sexually assault and Rape Soko and Boila or in the prosecution of a common purpose, each accused foresaw that commission of offences in the nature of sexual assault and/or rape would be probable consequences.

11. The Defence, on the other hand, submits that the evidence adduced by the Prosecution is highly unreliable and that there is no evidence that the accused persons were involved in the commission of alleged offences. They also submit that these accused were handpicked and the indictment is nothing but a 'blame game'.
12. Bearing in mind the legal concepts relied on by the Prosecution, it is pertinent at this stage to examine all the evidence adduced by the Prosecution to come to a definite conclusion whether the Prosecution had established a *prima facie* case against each accused.
13. Before proceeding to analyse the evidence in light of legal principles aforementioned, I would like at this stage to summarise evidence relevant to the issues at hand.

Evidence of Semi Ravasa

14. According to evidence of arresting officer PC Semi Ravasa both suspects were arrested, handcuffed and brought to the police truck in order for them to be taken to the Sigatoka Police Station. Instead of going to the Sigatoka Police Station, the truck went up in the hill after PC Apakuki had a talk with two the police officers who had arrived at the scene.
15. At the hill side, he saw the 1st accused Talala standing beside his vehicle that was parked about 12 to 15 meters away from the truck. He recognised 4th accused PC Penaia, 2nd accused PC Seruvi, 3rd accused PC Kelevi and 5th accused PC Filise in one of the three vehicles that arrived shortly afterwards. When the suspects got off from the truck, he had left the hill side with other arresting officers leaving the two suspects in the custody of officers including Seruvi, Filise and Kelevi. When they left the hillside, Talala, Seruvi, Filise, Pena and Kelevi remained there with the suspects.

Evidence of Special Constable Maciu Temo

16. Arresting officer SC Temo said that suspects were handed over to the CID personnel DC Seruvi and Senitiki at the hillside without any paper work being done.

Evidence of Constable Apakuki Tuitavua

17. Arresting officer PC Apakuki said that when he was escorting the suspects to Sigatoka Police Station on the instructions of IP Bari he received a call from SP Manasa wanting them to wait at the Malevu Bridge bridge. SP Manasa then instructed him to follow his vehicle along a feeder road up the hill for about 5-minutes. The truck was eventually parked just behind SP Manasa's vehicle at the hilltop. Another two Police vehicles, carrying operation teams from Suva and Lautoka also arrived at the hill side. He recognized PC Seruvi from Lautoka and Constables Viliame and Jona from Suva.

Evidence of Police Constable Usaia

18. Upon arrest of the suspects, PC Apakuki first instructed him to drive the truck to the Sigatoka Police Station. Then he received a call on the mobile phone and asked him to stop the truck at the Malevu junction. Then Apakuki told him to go on a gravel feeder road towards Yalalovu. After a one and a half k.m. drive, the truck was stopped right behind SP, Manasa's vehicle. IP Bari who came in another vehicle handed the recovered money over to SP Manasa. Another two vehicles arrived, one from the Western Division and the other from Suva. He recognised two of the officers Pita Matairavula and Jona who had come from Suva. In the Lautoka team, he recognised Penaia, Seruvi, Jone Sauqaqa, Senitiki and PC Marika. By that time Boila and Soko were out of the truck. When he turned the truck around he saw the suspects, Boila and Soko lying naked on the road side and Jona and Pita Matairavula were standing beside them. He left the scene with two special constables.

Evidence of Detective Sargent Isira Bari

19. He left the scene at Tagaqe with Apakuki and the driver. He informed the DCO that an arrest had been made and money recovered. Apakuki was in direct contact with the DCO and received instructions to handover the suspects and money to DCO's party that was

coming from Lautoka. They met DCO's vehicle just past Malevu and followed him for 5 to 10 minutes' right up the hill.

20. He saw three vehicles, including DCO's vehicle at the hillside. His vehicle stopped right behind DCO's vehicle and handed over the bag of money to the DCO and left the scene after 5 to 10 minutes with Apakuki and Mario. Apakuki handed over the suspects.

Evidence of Senijeli Boila

21. Boila said that chilleis were rubbed on his anus and that of Soko. He also said that a stick was inserted into his anus and that of Soko. None of the accused persons was involved. However, he admitted under cross examination (by the Prosecuting Counsel), having told the Investigating Officer Tevita that Pita with the assistant of other officers was inserting a piece of stick into Soko's anus. He also admitted that he read the statement dated the 25th of August 2014 and the declaration before signing. In that he had stated that he knew the officers from the Strike Back Unit and one Pita who was a military officer. He identified in Court the 8th accused as Pita.

Evidence of Timoci Nasilasila

22. Nasilasila picked Seruvi, Kelevi and Senitiki and drove the Hilux twin and went past Sigatoka town to Malevu Village and turned left up the gravel feeder road as directed by Cpl. Seruvi, and drove about 10 minutes to the place where suspects were detained. He saw three police officers and a big truck parked on the side.
23. Having dropped his teammates, he went to turn the vehicle and came back about 5 minutes' time. When he got back to the scene, his teammates were there with the two suspects. Suspects were helped to get into the back tray of the vehicle and he headed back to the Sigatoka Police Station with his team.

Evidence of Apete Nokolo

24. He joined Keponi, 7th accused DC Jona, 6th accused Cpl. Vili and 8th accused Pita who was a military officer. They were informed that two suspects had been arrested. Before Malevu, they turned to one gravel feeder road going inside and travelled roughly 15

minutes. When they parked the vehicle at the hill top, he saw two suspects and three vehicles from the Western Division. Suspects were in the police truck. Everybody in his vehicle got off. He and Keponi just stood beside their twin cab while others proceeded to have a conversation with the Western Officers.

25. His teammates jumped inside the Police truck. All of them, Jona, Cpl. Vili and Pita were kicking and punching Soko's stomach while asking questions. He heard Soko shouting in pain. The other suspect was on the ground beside the big truck. He saw injuries on him. When his crew was inside the truck, he saw two Western officers pounding chilies in a coke bottle. Two or three Western officers jumped inside the Police truck and brought Soko out of the Police truck, took off his clothes and rub chilies on his whole body, his face, his private part, his legs, hands, stomach and mouth. About five officers were doing this. Soko was crying in pain. He saw the bag of money inside a Police vehicle that was parked there.
26. After they had finished with Soko they went to the other suspect. Soko was fully naked at that time. What they did to Soko was done to the other suspect also. They were rubbing chilies all over his body including his private part and his anus.

Evidence of Epeli Rokoborabora

27. On the instructions of Colonel Suliano he traveled on the 15th of August 2014 to the West with Matairavula and two other officers. Matairavula was the leader of the crew. On their way towards Sigatoka the vehicle took a right turn before Sigatoka and went up the hill. He saw one big truck and some people and some small vehicles. Two people were lying on the ground.

D/Const. Jone Sauqaqa

28. Jone drove SP Manasa and Drauna. They proceeded down to Sigatoka and took a turn just past Malevu Village. He stopped at some distance from the Queens Road and got off

from the vehicle. Other vehicles arrived at the hillside including the Police truck with suspects. Suspects were covered with blood with injuries on their faces. He did not ask Usaia why he had driven suspects to the hillside against regulations.

DC Mario Daurewa

29. Mario drove IP Bari. At the Outrigger Hotel junction, they met DCO Manasa's vehicle coming down in the opposite direction. Then they followed DCO's vehicle which had turned off the Queens Road towards interior. The police truck with the suspects was ahead of them following DCO'S vehicle up the hill side. They stopped directly behind DCO's vehicle. Inspector Bari briefed DCO Manasa and handed the money over to him.

Caution Interview Statements

1st Accused Manasa Talala

30. Manasa was informed by Constable Apakuki that two suspects had been apprehended at Tagaqe village. He directed another fleet from the Lautoka Crime Intelligence Unit to follow up with the robbery. When they went past Melevu, Constable Apakuki informed him that a black taxi had gone up the hill. They went up interior about 2-3 k.m.s. and Apakuki's team and the truck with two suspects driven by Usaia also followed his vehicle. When the truck stopped at the hill, he directed two of his officers to ask two suspects Soko and Boila about other accomplices and where they had gone. Suspects were inside the truck which was parked about 5-10m. away. He heard loud questioning. One officer came with the names of accomplices revealed by the suspects. IP Bari handed over the recovered money to him. Another two fleets also arrived. He saw both the suspects in the truck handcuffed and also blood on their faces. He questioned Constable Apakuki about the blood seen and was told that suspects resisted arrest at Tagaqe. He directed one of the officers to take the suspects to Sigatoka. Then he left for Koralevu Police Post and then to the Nadi Police Station.

2nd Accused Seruvi

31. 2nd accused Seruvi said that he, with two other officers from the Lautoka Police Station, headed towards Sigatoka in a twin cab driven by Jim in search of suspects of the robbery at Nadi. When they reached Sigatoka, he received a call from another officer and was informed that two of the suspects had been arrested at Tagaqe village and was asked to meet them at the hill past Malevu village. Then he instructed the driver to drive them to the said hill past Malevu village. When they arrived at the hill side, he saw a truck, and two other police vehicles and two Fijian men handcuffed lying down inside the truck with two dog handlers with them inside. Boila had injuries on his face. Another twin cab arrived and four officers got off from the cab climbed on the back of the truck and started kicking and punching Boila asking him about the robbery case in Macbool, Suva. They threw Boila out of the truck. Then they went to Soko and kicked and assaulted him while he was lying down inside the truck. Soko was then told to jump out of the truck with his hands still handcuffed.
32. He saw two officers pounding chilies in a plastic container. They put on hand gloves and rubbed chilies on Boila's face and anus while he was being kicked on his ribs by other officers. When he was interrogating Boila, other officers were interrogating Soko. He could see one officer with hand gloves rubbing chilies on Soko's face, ears, nose and anus while he was being kicked on his stomach by other officers. One officer pulled Soko's leg and hitting it with a stick. When Soko turned upside down in pain, a stick was poked inside Soko's anus. Both suspects were naked at that time. One officer requested them to drop the two suspects at the Sigatoka Police Station. Then they loaded the suspects and came to the Sigatoka Police Station in the twin cab driven by Jim.

4th Accused Drauna

33. 4th Accused said that that before reaching Sigatoka, he received a call from Apakuki and was informed that two suspects had been apprehended at Tagaqe village. Then they proceeded to Tagaqe as was directed by the other officer in the front seat. On their way,

Apakuki called again and told that a suspicious taxi was heading in the opposite direction. Since they didn't meet the taxi, his officer told them to go up a feeder road near the Malevu Bridge. The other vehicle was also informed to follow them. Upon reaching the top of the hill, the police truck driven by Usaia also arrived with two suspects and stopped behind his vehicle. He, with Jone and another officer went to see the suspects. He saw both suspects lying on the floor of the truck only in their three quarter pants. When they were questioning the suspects, the Suva Strike Back team arrived. They got off and three of them jumped into the back tray of the truck and started questioning about Suva cases. Then they brought the suspects out of the truck. Lautoka Crime Intelligence team also arrived before the suspects were taken out of the truck. Suspects were lying on the ground handcuffed with their faces down. He saw three Suva Strike Back officers kicking and taking turns in questioning Soko and Boila. One officer from the same team was hitting Soko with a stick. He did not assault any of the suspects. He turned Soko's face just to identify him. He walked over to where Soko was to tell the officers to stop kicking him. Then he came to his vehicle with Jone.

5th Accused Filise

34. Filise said that he was asked to join the fleet of three other officers that was heading to apprehend the suspects of the robbery case at Nadi. Before reaching Sigatoka, one of the officers received a call and was informed that two suspects had been apprehended at Malevu. On their way, another call received and was told that a suspicious taxi was heading in the opposite direction. They went passed Malevu Village and, on the instructions of his officer, turned left towards a gravel road that went up the hill in search of the black taxi. When they stopped he saw other vehicles following them including the truck with the suspects. Suspects were dragged out of the truck and officers started questioning them.
35. He saw a plastic container with small chilies. He picked chilies and squashed it on injuries on Soko's face. Soko was yelling on top of his voice in pain and started giving the names of others involved in the robbery. He saw one officer beating Soko with a stick

about one 12 inches long. Soko was yelling on top of his voice. As soon as he got the names, the officer who came with him told him to board the vehicle to go to Koralevu Police Post.

36. On the following day, 28th August 2014 he said that he wore hand gloves before rubbing chilies. He picked four pairs of hand gloves from the vehicle. He rubbed chilies on Soko's anus too when he turned upside down. On the 12th November, 2014, Filise said he saw one officer beating Soko as they were leaving the hillside.

9th Accused Senitiki

37. He joined the fleet driven by Jim Nasilasila. On their way towards Sigatoka, they received information that two suspects had been arrested at Tagaqe. The vehicle turned at Malevu to a road going up the hill as one officer received information that the arrested suspects were in the hill. When they reached the hillside he saw the two suspects, the truck driven by Usaia, vehicles driven by Jone and Mario and another Toyota Hilux that had come from Suva. Soko was sitting in the back of the truck and Boila was lying on the ground. One officer started to 'siliboro' or rub the chilies on the eyes, ears and anus of Boila and Soko whilst they were being interrogated. The arresting officers had left in the truck leaving the prisoners behind. After they left only his team and the Suva team were there. He got instructions to put the suspects in the truck. He came with his team and the suspects to the Sigatoka Police Station.

Analysis

38. For the purpose of this ruling, I ask myself whether the evidence adduced during the Prosecution case is capable of providing inculpatory evidence in relation to the charges, and in relation to each accused. Whether such evidence is reliable and in fact proves the guilt of the accused is a matter for the assessors. I also exclude from my consideration any reference to other accused persons contained in the caution interviews. Each interview is only evidence against its maker.

39. Prosecution case was run on the premise (as the Prosecuting Counsel suggested in his opening address), that the accused persons were engaged in a joint enterprise to achieve an unlawful common purpose namely; extracting information from the victims by torturing them and therefore each accused person must be held responsible for alleged offences as he could have foreseen that acts of rape and sexual assault were probable consequences of police torture.
40. Accordingly, in regards to joint enterprise claim, the Prosecution must prove in respect of each accused that;
- a. The accused person was engaged in a joint enterprise or formed a common intention to further the aforementioned unlawful purpose.
 - b. In the prosecution of that common purpose, each accused person foresaw that offence in the nature of rape and sexual assault would be probable consequences of their enterprise.
41. Alternatively, Prosecution says that, pursuant to Section 45 of the Crimes Decree, it is not necessary for the Prosecution to prove in respect of each accused whether he is a principle or secondary offender. All that is required is proof that the respective offences were committed and that the conduct of each accused must have aided or abetted (assisted or encouraged) with the intention of assisting or encouraging the commission of those offences with knowledge of what the principal offender is doing.
42. This is no doubt a case to be decided both on direct and circumstantial evidence. There is ample evidence in this case that the alleged acts of rape and sexual assault took place and those acts were committed at Malevu hillside. There is also *prima facie* evidence that all the accused persons were present at the crime scene where the rapes and sexual assaults were alleged to have been committed.
43. Prosecution relies on following pieces of evidence to prove the circumstances of a joint enterprise.

- After the arrest of Boila and Soko (suspects), instead of them being taken to the nearest police station (Sigatoka), they were taken to remote Malevu hillside, violating accepted police procedures.
 - Some of the accused persons were engaged in telephone conversations with the arresting officers whereby they came to know that two suspects had already been arrested at Tagaqe village.
 - With knowledge that two suspects had been arrested at Tagaqe village, some accused persons proceeded to Malevu hillside where the suspects had been taken.
 - At the hillside, the suspects were handed over to some of the Lautoka police officers by the arresting officers.
 - At the time the alleged offences took place, only the accused persons and the officers who accompanied them in their respective vehicles remained in the hillside with the suspects.
 - One accused from the Lautoka Strike Back team got chilies from the Sigatoka market.
 - Hand gloves that were used to rub chilies on the suspects were readily available at the crime scene. 5th accused took four pairs of hand gloves from his vehicle.
 - Both suspects were interrogated by the officers of Lautoka police team to get information as regards the Nadi robbery and as a result of which some valuable information including names of accomplices was obtained.
 - Both suspects were interrogated by Suva Strikeback team about several robberies that had taken place in Suva and some important information was obtained.
44. In **Case Stated by DPP** (No. 2 of 1993) 70 A Crim. R 323 the trial judge held that there was no case to answer, and reserved questions of law for the High Court. It was held by the High Court of Australia (per King CJ, Mohr and Bollen JJ) that the test for a no case to answer submission in a case of circumstantial evidence is whether there are inferences which are reasonably open on the evidence. The judge should not choose which inference was consistent with the accused's innocence.

At page 327 of the judgment (per King CJ) the test is summarized as follows:

"If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the Judge might consider such evidence to be, if the case depends on circumstantial evidence, and that evidence, if accepted, is capable of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is capable of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence."

45. Having given due consideration to aforementioned pieces of evidence, I am of the view that there is *prima facie* circumstantial evidence of an unlawful joint enterprise aimed at obtaining information from detainees subjecting them to torture.
46. In light of agreed facts, eye witness accounts and caution interview statements adduced during the Prosecution case, it can be said that there is direct evidence that anus of both suspects were rubbed with chilies. There is also direct evidence that a stick was inserted into the anus of Boila and that of Soko. Therefore, there is evidence that, in the Prosecution of the unlawful purpose, two sexual offences alleged in the Information had been committed.

Joint Enterprise

47. The question to be resolved is whether, in the prosecution of the common purpose, all or any of the accused persons was responsible for alleged sexual offences (rape/ sexual assault) that had been committed. As suggested by the Prosecuting Counsel in his submission on 'no case application' (there is a paradigm shift in his stance from his opening address) there is no *prima facie* evidence that each of the accused had agreed

with each other expressly or tacitly to sexually assault suspects for the purpose of interrogation. Therefore, the criminal liability of each accused on the basis of joint enterprise will ultimately depend on whether the accused knew or could have foreseen that the commission of an offence in the nature of sexual assault and /or rape was a probable consequence of the joint enterprise, namely obtaining information from detainees subjecting them to torture. For assessors and Court to come to a definite conclusion on this crucial point it is necessary to put the accused persons in their defences.

Aiding and Abetting

48. Now I proceed to consider whether there is evidence that each accused aided or abetted (assisted or encouraged) in the commission of those offences with knowledge of what the principal offender/s were doing with the intention of assisting or encouraging the principal offender/s in that activity.
49. It is trite law that mere presence at the scene of crime does not constitute aiding and abetting. Prosecution is relying on *Tuck v Robsan* [1970] 1All ER 1171 at 1175 to support its assertion that there are instances where even mere presence could constitute aiding and abetting and that, in the circumstances of this case, the presence of the accused persons at the crime scene at the material time, in itself constitute aiding and abetting the commission of the offences.
50. According to *Robsan* (*supra*) two things must be proved before an accused can be held to be guilty of aiding and abetting the commission of the offence;
 - He must have full knowledge of the facts which constitute the offence.
 - There must be some form of voluntary assistance in the commission of the offence.
51. Sometimes the word used is ‘encouragement’, and the real question here is how far inaction, passive tolerance, can amount to assistance so as to make the accused guilty of aiding and abetting.

In the *National Coal Board v Gamble* [1958] 3 AllER 203 at 210 1QB 11 at 25 Slade J. in his dissenting judgment observed:

“mere passive acquiescence is sufficient only, I think, where the alleged aider and abettor has the power to control the offender and is actually present when the offence is committed. (Though this passage occurs in the dissenting judgment, the principle enunciated was approved in Tuck v. Robsan (supra))

52. Moreover, quite apart from the question of control, it is quite clear that there may be circumstances in which mere presence is *prima facie* evidence of aiding and abetting.
53. In *R v. Forman and Ford* [1988] Crim. L.R. 677 two police officers, F1 and F2 were indicted (inter alia) with assaulting T thereby occasioning him actual bodily harm. After an incident in the street, T had been brought into the police station and placed in a cell. He gave evidence that, with his hands handcuffed behind his back, he was hit a single blow to the rear of his head. He could not name his assailant, but only F1 and F2 were in the cell at the time. At the close of the prosecution case, both counsel for the defence submitted that there was no case to answer, relying upon Abbott (1955) 39 Cr.App.R. 141 and Russell and Russell (1987) 85 Cr.App.R. 388, i.e. if two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty in the case of both.
54. Rejecting the submissions, the judge gave the following judgment and subsequently directed the jury in similar terms:
1. *If one police officer, despite being in the presence of another officer, has the added confidence to assault their joint prisoner because he can and does rely on the second officer neither to intervene to prevent nor afterwards to report that offence, and the second officer in fact refrains from intervening and from reporting the offence, then it does not matter which of them struck their prisoner and which of them in that way encouraged him to do it. Both of them are guilty of the assault.*

2. *If the jury find that T was assaulted while in the cell alone with the two defendants but are not sure which of them assaulted him, both must be acquitted unless the jury are sure in respect of each of them that if he himself did not commit the assault he encouraged the other to do so by failing to intervene or to report the offence in the way described at 1. In that event both would be guilty.*

55. According to this judgment, if the prosecution can prove only that the crime must have been committed either by A or by B, both must obviously be acquitted. If however they can prove that one of them committed the crime and the other aided and abetted him in doing so, so, then both may be convicted. It is immaterial that it is impossible to identify the principal offender for, by the Section 45 of the Crimes Decree 2009, one who aids, abets, counsels or procures the commission of an offence may be indicted, tried and punished as a principal offender.

56. Furthermore, it is possible to aid and abet by inactivity. Where a person has a duty to intervene to prevent the commission of a crime by another, his failure to intervene may be a positive encouragement to the other to commit, or to persist in the commission of, an illegal act. If a person's inactivity is a positive encouragement to another, and he knows it is a positive encouragement to that other, to commit an offence, then the inactivity amounts to aiding and abetting. Every constable obviously has a duty to intervene to prevent the commission of a crime, such as an assault, by whomsoever it may be committed, including his fellow officers. It is his job to keep the peace. If one constable stands by and watches his colleague beat up a suspected person, it may well be that the first officer encourages, and knows that he encourages, the second to commit the offence.

57. The matter depends of course on the circumstances of the case, and the position of the parties, and, therefore, when there is *prima facie* evidence that accused persons were present at the crime scene at the material time, the best option available to Court is to solicit the opinion of the assessors.

58. In light of legal principles enunciated in the judgments I have cited, I proceed to analyse evidence led in the Prosecution case in respect of each accused.

1st Accused Manasa

59. There is evidence that the the 1st accused was in overall command of the Western Police Crime Division and therefore had the power to control other accused persons who were his subordinate officers. He admits seeing the suspects inside the truck which was parked at hillside about 5-10 m. away from him and directing two of his officers to question them about other accomplices. He heard a loud questioning. One officer came with the names of accomplices revealed by the suspects. He saw both the suspects in the truck handcuffed and also blood on their faces. It is open for the assessors to find whether the 1st accused had the full knowledge of the facts which constitute the offences and his presence and his passivity encouraged his subordinates to commit the crimes so as to make him guilty of aiding and abetting.

2nd Accused Seruvi

60. There is evidence that Seruvi was the team leader of the Lautoka Strike Back Unit. He admitted seeing two officers pounding chilies in a plastic container and rubbing chilies on Boila's face and anus. He saw one officer with hand gloves rubbing chilies on Soko's anus. He saw one officer poking a wooden stick inside Soko's anus. He interrogated Boila.
61. It is open for assessors to infer that his presence and his passivity encouraged his subordinates so as to make him guilty of aiding and abetting commission of offences and also to infer that he must have foreseen that sexual assaults as probable consequences of the joint enterprise.

3rd Accused Kelevi

62. There is evidence that the 3rd accused was present at the crime scene at the material time. PC Nasilasial said that Kelevi was a member of the fleet that was driven to the Malevu hillside. He got off from his vehicle at the hillside and later boarded the vehicle with the suspects who were then escorted to the Sigatoka Police Station.
63. SC Semi said that he handed over the suspects to 2nd 3rd and 5th accused at the hillside.

64. It is open for the assessors to infer if his presence at the crime scene is *prima facie* evidence of aiding and abetting and/ or that he must have foreseen that sexual assaults as probable consequences of the joint enterprise.

4th Accused - Penaia

65. 4th accused admitted under caution that he was questioning the two suspects in the back of the truck when another two teams arrived and got in the back of the truck. He was standing nearby and heard them being interrogated. He saw Soko's pants removed. He saw Soko being beaten and he touched Soko by turning his face as he was facing downwards.
66. It is open to the assessors to infer from all the circumstances that 4th accused assisted and encouraged the principals in the sexual assault and rape of Soko and Boila or/and that he must have foreseen that sexual assaults as probable consequences of the joint enterprise.

5th Accused Filise Vera

67. Filise admitted wearing white gloves taken from his vehicle in order to rub chilies on the two suspects. He admits rubbing chilies on Boila's face and Soko's anus.
68. There is *prima facie* evidence that 5th accused was one of the principal offenders in the sexual assaults. It is properly open to the assessors to conclude that he must have foreseen sexual assaults as probable consequences of the joint enterprise.

6th Accused Viliame

69. DC Apakuki said that he recognized the 6th accused as one of the officers arrived at the hillside as part of the Suva Strikeback fleet.

70. SC Apete said that the 6th accused was the team leader of the Suva team. He got off at Malevu hillside and proceeded to have a conversation with the Western Officers. 6th accused jumped inside the Police truck with 7th and 8th accused and were kicking and punching Soko's stomach while asking questions. He heard Soko shouting in pain. When his crew was inside the truck, he saw two Western officers pounding chilies in a coke bottle.

71. It is open for the assessors to infer from all the circumstances that the 6th accused was a principal offender or aided and abetted the principal offender/offenders.

7th Accused Jona

72. PC Usaia recognized 7th accused as one of the members of the Suva Strikeback team. He saw the 7th accused standing beside Soko who was naked and lying on the ground.

73. SC Apete said that the 6th accused was the team leader of the Suva Strikeback team. He got off at Malevu hillside and proceeded to have a conversation with 'Western Officers'.

74. 7th accused jumped inside the Police truck with 6th and 8th accused and were kicking and punching Soko's stomach while asking questions. He heard Soko shouting in pain and saw 6th, 7th and 8th accused standing beside the truck as Soko and Boila were rubbed with chilies. When his crew was inside the truck, he saw two 'Western Officers' pounding chilies in a coke bottle.

75. It is open for the assessors to infer from all the circumstances that the 7th accused was a principal offender or aided and abetted the principal offender/offenders and that he must have foreseen that sexual assaults as a probable consequences of the joint enterprise.

8th Accused Pita

76. SC Apete gave evidence that he saw 6th, 7th and 8th accused speak with officers from the West before getting into the back of the truck. He heard Soko shouting in pain and saw 6th, 7th and 8th accused standing beside the truck as Soko and Boila were rubbed with

chilies. After which 6th 7th and 8th accused resumed the assault on Soko as the ‘Western Officers’ stood around.

77. Boila admitted under cross examination (by the Prosecuting Counsel), having told the Investigating Officer Tevita that 8th accused with the assistant of other officers was inserting a piece of stick into Soko’s anus. He also admitted that he read the statement dated 25th of August 2014 and the declaration before signing. In that he had stated that he knew the officers from the Strikeback Unit and one Pita who was a Military officer. He identified in Court the 8th accused as Pita.
78. It is open to the assessors to infer that 8th accused was the principal offender in the rape of Soko. It is open for them to infer that 8th accused assisted and encouraged the rape of Boila.

9th Accused Senitiki

79. 9th accused admitted under caution that he saw someone wearing gloves just about to ‘siliboro’ Boila. He explained ‘siliboro’ to mean rubbing chilies into the eyes, ears and anus. He admitted to standing in the middle of the road writing down names provided by Soko and Boila as they were being rubbed with chilies. 9th accused admitted slapping Boila’s head to extract the names of accomplices.
80. It is open to the assessors to infer that the 9th accused assisted and encouraged the sexual assaults and that he must have foreseen that sexual assaults as a probable consequences of the joint enterprise.
81. Defence submits that the evidence adduced by the Prosecution is highly unreliable. To support his claim he highlighted number of previous inconsistent statements given by witnesses to the police. It is up to the assessors, after the summing up, to decide in circumstances of this case whether to accept or reject that evidence and what weight should be attached to them.

82. Defence counsel also cross examined the Prosecution witnesses on the basis that the accused persons had been hand- picked from a crowd of officials and that the indictment of only 9 accused is a part of a 'blame game'.
83. According to the evidence led there were five vehicles and a total of 23 persons (including the victims) present at the scene of crime at the material time. After the handing over of suspects took place, arresting officers and the police truck left the alleged crime scene leaving the suspects behind. After the handing over of recovered money to the 1st accused IP Bari and Apakuki left the alleged crime scene with his driver Mario.
84. Save for Soko, Keponi and the accused persons, everyone present have so far given evidence. It was not suggested to any of the police and military witnesses that they had sexually assaulted or raped the victims. Therefore, it is open to the assessors to infer that it is the accused who committed the offences.
85. There is prima facie evidence touching each the elements of the offences in the Information. Suspects were yelling in pain when the stick was inserted into the anus of each accused. It can be inferred that the penetration occurred without the consent of the suspects.

Defeating the Course of Justice (5th and 6th Counts)

86. In order to establish the guilt of the 1st and 6th accused on counts 5 and 6 respectively, the Prosecution must prove that the 1st and 6th accused did an act with an intention to prevent the course of justice. *Sunil Kumar v. Fiji Independent Commission against Corruption* [2010] HAC 181/08 (18 March 2010)
87. Now I look at the evidence adduced in respect of 5th and 6th counts.

1st Accused – Count 5

88. PC Usaia gave evidence that he was collected from his home at 4 a.m. on 21st August 2014 and driven to Sigatoka. He was present at a meeting together with many officers from Western Division including the two dog handlers (SC Semi and SC Temo). 1st

accused briefed them about an Internal Affairs investigation arising from the death of Soko. He provided a statement on 21st August 2014 which was false as a result of what the 1st accused had briefed him to say about the incident on 15th August 2014.

89. SC Temo said that on the 21st of August 2014, he was asked by Sargent Suliano to make a statement in relation to the incident at the Sigatoka Police station. He was taken to Sigatoka Police Station in a police vehicle around 7 in the morning.
90. D/Sgt Bari gave evidence that he was present at the briefing at Samisoni's house at which 1st accused instructed those present to make statements in connection with the Internal Affairs investigation that the handover of the two suspects had taken place at Sigatoka Police Station.

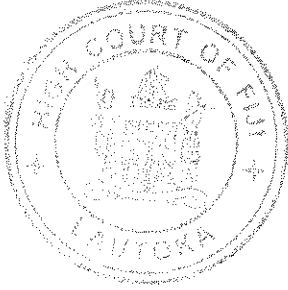
6th Accused – Count 6


91. SC Apete gave evidence that after Soko passed away his team leader, 6th accused, instructed him to provide a witness statement. This statement was recorded by WPC Tima in the presence of the 6th accused. It was not a full account of what actually happened because 6th accused informed him to leave out certain details. A second statement recorded by WDC Taufā was also not the full truth as a result of what he was instructed by the 6th accused.
92. I find that there is *prima facie* evidence against the 1st and 6th accused in respect of counts No. 5 and 6.

Conclusion

93. There is evidence against each of the accused, both circumstantial and direct, that each of them participated in a joint enterprise to obtain information by detained suspects by subjecting them to torture. There is evidence that all the accused were present at the crime scene and by virtue of their presence at the scene which in all the circumstances is *prima facie* evidence of aiding and abetting those sexual assaults and rapes. There is

prima facie evidence against the 1st and 6th accused in respect of counts No. 5 and 6. I find that each accused person has a case to answer. I put each of the accused in their defences.




Aruna Aluthge
Judge

AT LAUTOKA
01st of November 2016

Solicitors:
Solicitors for Accused:

Office of the Director of Public Prosecutions for the State
Iqbal Khan & Associates for the Accused