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

CRIMINAL APPEAL NO. AAU 58 OF 2015
(High Court No. HAC 181 of 2013)

BETWEEN : **1) JOELI BALEILEVUKA**
2) WATISONI SAQAILAGILAGI
3) ISAIA BOBO
4) ISIMELI NARESIA
5) SAKIUSA TUKANA

Appellants

AND : **THE STATE**

Respondent

Coram : **Prematilaka JA**
A Fernando JA
Nawana JA

Counsel : **1st Appellant in Person**
Mr. M. Fesaitu for the 2nd Appellant
Ms. S. Nasedra for the 3rd and 5th Appellants
Mr. S. Waqainabete for the 4th Appellant
Ms. J. Prasad with Ms. W. Elo for the State

Date of Hearing : **19 September 2019**

Date of Judgment : **3 October 2019**

JUDGMENT

Prematilaka JA

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

Fernando JA

The appeal:

[2] The Appellants had appealed against their convictions by the High Court for two counts of aggravated robbery, two counts of assault causing actual bodily harm, and one count of theft of motor vehicle. There is no appeal against the sentences imposed on them by the High Court in respect of such convictions.

Charges that were levelled against the Appellants:

[3] The five Appellants had been charged as follows:

> ***"Count 1***
>
> ***Statement of Offence***
>
> *Aggravated Robbery: Contrary to section 311 (1) (b) of the Crimes Decree 44 of 2009.*
>
> ***Particulars of Offence***
>
> *Joeli Baleilelvuka, Watisoni Saqalagilagi, Isimeli Naresia, and Isaia Bobo and Sakiusa Tukana, in company of each other on the 20th of August 2013 at Rakiraki in the Western Division, while being armed with an offensive weapon stole cash amounting $127,180.00 and 70 whales tooth valued at $ 35,000.00 all to the value of $ 162,180.00 the property of George Shiu Raj.*

Count 2

Statement of Offence

Aggravated Robbery: Contrary to section 311 (1) (b) of the Crimes Decree 44 of 2009.

Particulars of Offence

Joeli Baleilelvuka, Watisoni Saqalagilagi, Isimeli Naresia, and Isaia Bobo and Sakiusa Tukana, in company of each other on the 20th of August 2013 at Rakiraki in the Western Division, while being armed with an offensive weapon stole 20 big gold coins (mohar) valued at $ 12,000.00, 4 bangles (kangans) valued at $1.200.00, 1 gold chain and mohar valued at & $1,400.00, 1 gold patta worth $4,000,00, other assorted jewelleries valued at $ 2,000.00 all to the total value of $ 20,600,00 the property of Praveen Raj.

Count 3

Statement of Offence

Assault causing actual bodily harm: Contrary to section 275 of the Crimes Decree 44 of 2009.

Particulars of Offence

Joeli Baleilelvuka, Watisoni Saqalagilagi, Isimeli Naresia, and Isaia Bobo and Sakiusa Tukana, in company of each other on the 20th of August 2013 at Rakiraki in the Western Division, assaulted George Shiu Raj, thereby causing actual bodily harm.

Count 4

Statement of Offence

Assault causing actual bodily harm: Contrary to section 275 of the Crimes Decree 44 of 2009.

Particulars of Offence

Joeli Baleilelvuka, Watisoni Saqalagilagi, Isimeli Naresia, and Isaia Bobo and Sakiusa Tukana, in company of each other on the 20th of August 2013 at Rakiraki in the Western Division, assaulted Praveen Raj, thereby causing actual bodily harm.

Count 5

Statement of Offence

Assault causing actual bodily harm: Contrary to section 275 of the Crimes Decree 44 of 2009.

Particulars of Offence

Joeli Baleilelvuka, Watisoni Saqalagilagi, Isimeli Naresia, and Isaia Bobo and Sakiusa Tukana, in company of each other on the 20th of August 2013 at Rakiraki in the Western Division, assaulted Prabha Prasad, thereby causing actual bodily harm.

Count 6

Statement of Offence

Theft of motor vehicle: Contrary to section 291 (1) of the Crimes Decree 44 of 2009.

Particulars of Offence

Joeli Baleilelvuka, Watisoni Saqalagilagi, Isimeli Naresia, and Isaia Bobo and Sakiusa Tukana, in company of each other on the 20th of August 2013 at Rakiraki in the Western Division, stole a twin cab number: George, valued at $ 94,000.00, the property of George Shiu Raj."

Trial before the High Court:

[4] At the conclusion of the trial as stated in the Judgment: "The three Assessors gave a mixed verdict. All three Assessors had unanimously found 1st and the 4th accused (now Appellants) guilty of the two aggravated robbery charges. The 2nd Assessor had found all five accused (now Appellants) guilty of the two aggravated robbery charges. The 3rd Assessor had found the 5th accused (now Appellant) guilty of the two aggravated robbery charges. All Assessors found all accused not guilty of the other charges." Thus as regards the 5th Appellant two of the Assessors had found him guilty and as regards the 2nd, and 3rd Appellants only one of the Assessors had found them guilty and that of aggravated robbery only.

[5] The learned Trial Judge had convicted all 5 Appellants in respect of all 6 counts preferred against them.

The incident in Brief:

[6] The charges referred to at paragraph 3 above sets out the incident pertaining to this case briefly. The case of the prosecution is that the five Appellants had at the place and in the early hours of the date set out in the charges, namely around 1 am, while being armed with an offensive weapon entered the house of George S. Raj at Namuaimada and committed theft of cash and articles (whales teeth) more fully described in the charges belonging to George Raj and articles (gold coins, bangles, a gold chain, a gold patta)

more fully described in the charges, belonging to his wife Praveen Raj; assaulted George Raj, Praveen Raj and Praba Prasad Chand, sister of George Raj causing them bodily harm; and stole a vehicle belonging to George Raj. According to the evidence of G. S. Raj, P. Raj, P Chand and Sashi Chand, the husband of Praba, who were all inmates of the house; the 5 persons who entered the house were all masked and they could not identify any one of them. One of them had a pinch bar or steel rod with which S. Chand was attacked. Another had a cane knife. They had put the money and items stolen into cartons and a pillow case and loaded them into the new vehicle of G. S. Raj having forcefully taken the key from him and driven off. The police had returned part of the cash stolen, namely $ 93,113.00 and 19 tabua out of the 70 that was stolen. G.S. Raj had claimed that he identified the cash that the police returned from the way he had bundled them, but there were no markings on them. The tabua also had no markings. They did not have his or his father's initials engraved therein. P. Raj, the wife of G.S. Raj had narrated the incident very much in the lines of her husband and claims that in addition to what has been mentioned in count 2, wristwatches and rings were stolen. At the trial she had identified two watches that were recovered, but there were no identifying marks on them. She had not been asked to describe the watches before they were shown to her. In fact she had said the wristwatches returned to her were similar to those sold in Fiji. I am of the view that since there is no mention in the charges of wristwatches having been stolen, that evidence pertaining to the theft of wristwatches could not have been led at the trial nor any recoveries of wristwatches from any Appellants could have been relied upon in convicting any one of the Appellants.

[7] A tabua is a polished tooth of a sperm whale that is an important cultural item in Fijian society. They were traditionally given as gifts for atonement or esteem (called sevusevu), and were important in negotiations between rival chiefs. Today the tabua remains an important item in Fijian life. They are not sold but traded regularly as gifts in weddings, birthdays, and at funerals. They are highly priced.

[8] A single Judge of this court in his Ruling on the application by the five Appellants for leave to appeal against their convictions has stated: "Although the appellants have filed

separate grounds of appeal, they raise common complaints. The common complaints relate to the direction on the evidence of an accomplice, immunity for the accomplice and chain of custody of the stolen properties that were allegedly recovered from the appellants. The 3rd appellant further contends that the learned trial judge gave no direction on the exercise of his right to remain silent, misdirected on alibi, failed to give cogent reasons for not agreeing with the majority not guilty opinions of the assessors and failed to give Turnbull direction on identification evidence of the accomplice."

Evidence available against the Appellants:

[9] The learned Trial Judge had stated in the judgment: *"The complainants have failed to identify the accused. The prosecution case was based on the caution interview statements of the 1st and 2nd accused, the recoveries from the 1st, 2nd, 4th, & 5th accused and the evidence of the accomplice, Sailasa Momo."* The only evidence against the 3rd Appellant was that of the accomplice, Sailasa Momo.

[10] A single Judge of this court in his Ruling on the application by the five Appellants for leave to appeal against their convictions has correctly identified evidence that was available against each of the Appellants as follows:

1st Appellant – confession, recent possession and accomplice evidence
2nd Appellant – confession, recent possession and accomplice evidence
3rd Appellant – accomplice evidence
4th Appellant – recent possession
5th Appellant – recent possession and accomplice evidence

The issue of recent Possession as against the 1st, 2nd, 4th and 5th Appellants:

[11] ASP S. Naqica had arrested the 1st and 4th Appellants on the 20th of August 2013 around 11 pm, i.e. about 22 hours after the incident. According to the testimony of ASP S. Naqica before the trial court, on information received from villagers that two strangers

had been seen in the area, he along with a police party had proceeded to that area. They had then seen two persons approaching them. The 4th Appellant had told ASP Naqica *"Grandpa I am going down to Burelevu*". He had a cane knife with him. On flashing the torch light he had also seen the 1st Appellant with the 4th Appellant. The 1st Appellant was holding a bolt cutter wrapped in a cloth and an orange bag on his back. He had told the rest of the police party *"those are the people we are looking for*". He had then called them up to stop. Instead of stopping they had started to walk faster. He had asked the 1st Appellant to surrender. The 4th Appellant had then gone towards the cliff. He had a pillow case with tabua on his shoulder and a green bag on his back. ASP Naqica had tried to follow them. The 1st and 4th Appellants had fallen down the cliff. The 1st Appellant had thereafter been arrested by him. The 4th Appellant having fallen from the cliff which was about 15-20 m in height was lying on top of the rock motionless. The pillow case with tabua and the knife were near him. Thereafter the 1st and 4th Appellants had been brought to the Rakiraki police station and the 4th Appellant was taken to the hospital. A black wallet, the cane knife, the bolt cutter, the green bag containing cash, the orange bag containing cash and the pillow case containing 19 tabua that was seized from the 1st and 4th Appellants were handed over at the police station. Although ASP Naqica took part in counting the money he could not recall the amount. He had said that it was about $80,000 and that money had been in the orange and green bags. No contemporaneous notes had been made as regards the recoveries. There had been no search list produced at the trial in regard to the items seized from the 4th Appellant.

[12] According to Inspector Anoop after the arrest of the 1st and 4th Appellants the exhibits were brought to the police station. According to Anoop, when the 1st Appellant was arrested they had seized $ 93,433 in cash, 19 tabua, a bolt cutter and a cane knife. A search list of the goods seized from the Appellants had been prepared by him but it had got misplaced. What had been produced before the court were photo copies. Under cross examination he had admitted that in his statement there was no mention that he prepared the search list and made copies. The search list had been made on the 26th of August 2013, 6 days after the Appellants had been arrested. He had said that the cash and 19 tabua were returned to the complainant. No court order or photographs of the items

seized before their release to the complainant were produced. He had also said that the 3rd Appellant had been arrested after the statement of Sailasa Momo.

[13] According to the testimony of Cpl. 2724 Seruvi, he had arrested the 2nd and 5th Appellants on 21/8/2013 at the house of the 2nd Appellant. When he searched the 5th Appellant he had found a ladies gold wristwatch in his pocket. On searching the house of the 2nd Appellant he had found a green bag containing 9 whales' teeth. He had prepared a search list of the items recovered from the 5th Appellant and produced a photocopy of it.

[14] Both DC 3920 Sailosi Bawaqa and DC Petro testifying before the trial court had admitted that it was their mistake not to check on the alibi of the 3rd Appellant. He had admitted that the 3rd Appellant had told them that he was with his wife and mother-in -law at Suva, at the time of the robbery. Inspector Anoop had also admitted that he had not cross-checked as regards this information, namely the alibi of the 3rd Appellant.

[15] The Prosecution has relied on the evidence of the said police officers to prove the guilt of the 1st, 2nd, 4th and 5th Appellants on the basis that they were in recent possession of articles stolen from the house of the complainant.

[16] The time gap between the seizure from the 1st and 4th Appellants and the robbery is 22 hours. Unfortunately there is no evidence as to the distance between the place where the robbery took place and the place where the seizure was made from the 1st and 4th Appellants. One of the fundamental principles that applies before drawing an inference of guilt from recent possession, as correctly stated by the Trial Judge at paragraph 65 of his summing up, is that there must be clear evidence that the articles recovered from the Appellants were in fact those stolen from the house of the complainant. It is clear that the cash and the tabua had no special identifying marks on them. The tabua according to the complainant had no initials engraved on them. It is not possible to make an identification of cash on the basis of the complainant's evidence that the cash that the police handed back to the complainant were bundled in the way he normally bundles them. No one leaves a large amount of currency notes in loose leaves and always keeps them in

bundles. Although there is room for suspicion that the said cash and tabua alleged to have been seized from the 1st and 4th Appellants, belong to the complainant, suspicion alone does not suffice to come to a finding against the 1st and 4th Appellants on the basis of recent possession. One may argue as to how come the 1st and 4th Appellants were in possession of such a large amount of cash and tabua at the place and time they were found. Proof that the said cash and articles seized are in fact stolen property from somewhere does not suffice. A link needs to be established between the cash and the tabua recovered from the Appellants and those stolen from the complainant. The cane knife found with the 4th Appellant has not been identified by the complainants as the one which one of the Assailants had, and rightly so, as argued by Counsel for the 4th Appellant many a villagers do carry cane knives with them.

[17] For the reasons set out above I am of the view, there had been insufficient evidence to come to a finding against the 4th Appellant, whose case rested only on the items allegedly seized from him.

[18] The same principle pertaining to recent possession referred to earlier applies to the 9 tabua or whales' teeth seized from the house of the 2nd Appellant by Cpl. 2724 Seruvi on 21/8/2013.

[19] As regards the 5th Appellant what was found on him was a ladies gold plated wristwatch in his pocket. As stated earlier at paragraph 6 above, there is no mention in the charges of wristwatches having been stolen. Therefore the evidence pertaining to the recovery of a ladies gold wristwatch from the 5th Appellant could not have been relied upon to convict the 5th Appellant. Cpl Seruvi had prepared a search list of the item allegedly seized from the 5th Appellant and produced a photocopy of it. The search list bears the name '*Sakiusa Turaga'* as the person from whom the ladies gold watch was seized. The name of the 5th Appellant is, '*Sakiusa Tukana'*.

[20] The only way evidence of recent possession can have a bearing on the guilt of the 1st, and 2nd Appellants is, if reliance can be placed on the evidence of the accomplice Sailasa

Momo and their respective confessions. As regards the 3rd Appellant there is only the evidence of the accomplice. As regards the 4th Appellant an irresistible inference of guilt cannot be drawn merely on the basis of recent possession due to the inability to link any of the tabua seized from him as that of property stolen from the complainant's house, as stated earlier. As regards the 5th Appellant recent possession can have a bearing on his guilt if reliance can be placed on the evidence of the accomplice Sailasa Momo. This necessitates me to look closely at the evidence Sailasa Momo and how the learned Trial Judge treated his evidence in his summing up to the Assessors and in his judgment.

Evidence of Sailasa Momo which implicates the 1st, 2nd, 3rd, and 5th Appellants as recorded in the proceedings:

[21] Sailasa Momo, who claims to be a taxi driver, testifying before the Court, on 08/04/2015, almost one year and 8 months after the incident, had stated that on 19/08/2013, the 2nd Appellant had called him around 2.00 pm and requested him to come and pick him up at 9.00 pm. This was subsequent to the 2nd Appellant calling him on the previous day and asking him whether he could transport them from Rakiraki. As requested he had picked up the 2nd Appellant at "*Acro town bowser pass the airport close to runaway*". Soon thereafter Momo changes his evidence and says that he went down to a place called Nakavu and when asked how he went there he had said that a van driven by one 'Tukera' had come and picked him up. As to what happened to Momo's vehicle there is no mention. It is then that he had gone to the house of the 2nd Appellant in Tukera's van. There is no mention of the 2nd Appellant going along with him. When he went to the house of the 2nd Appellant, he claims to have seen the 1st, 2nd, 3rd and 5th Appellants. On being questioned as to whether he knows them, Momo had said "I don't know them very well. They know me because I normally drive every day". Momo has not been questioned about how he knows and the extent of his knowledge about 1s, 3rd, and 5th Appellants. Thereafter the 1st, 2nd, 3rd and 5th Appellants and himself had gone to Rakiraki. The 5th Appellant had told him that they were going to rob a shop. They had then picked up "one iTaukei" man. They had then come and got off the vehicle near the shop. The iTaukei man had told them that there were two families living in the house and two watchmen.

The 1st Appellant had cut the fence and they had entered the house. Momo was the last one to enter. They had woken up two couples living in the house and the 2nd and the 5th Appellants had punched them. The 1st and the 3rd Appellants had been moving around the house. Momo had gone looking for the car keys. There had been two vehicles parked at the garage. One vehicle had low fuel and therefore he had started the other vehicle, which was a red coloured twin cab, with the keys that the 1st Appellant had given him. He had asked the 1st Appellant to load the stuff into the boot of the twin cab. Sacs had been loaded into the boot. Then they had headed back to Nadi. At a certain stage they had abandoned the twin cab and the 1st, 2nd, 3rd and 5th Appellants, the iTaukei man and himself had climbed up the hill near Fiji Water. They had rested till early morning and when they saw some people coming towards them they had gone in different directions. He along with the 2nd, 3rd and 5th Appellants had gone in one direction while the 1st Appellant and the iTaukei man had gone in another direction. Momo and the 2nd, 3rd and 5th Appellants had hidden in a cave till night. There is no mention as to whether they slept from the morning of the 20th to the night of the 21st. Thereafter a vehicle arranged by the 3rd Appellant had come to pick them up. They had then gone to Nadi and he had got down at his home in Acro town. The others with him had proceeded further. In Court he had pointed to the 1st, 2nd, 3rd and 5th Appellants. There is no mention on the record of his pointing to the 4th Appellant.

[22] Under cross-examination by the 3rd and 5th Appellants, Momo had admitted that he was arrested on the 10th of November 2013, i.e. two months after the alleged offence. Momo had stated that he was caution interviewed. Momo had said *"I told them I will remain silent".* He had admitted that he gave a statement only after his arrest and that a police officer had bargained with him to give a statement. He had admitted that he did not know the 3rd and 5th Appellants closely. He had admitted that he was not taken to an identification parade. Momo had admitted that he has previous convictions.

[23] I make the following observations as to Momo's evidence, as it raises the issue of the probability of his story and his credibility, which the learned Trial Judge has not addressed his mind to in his summing up and in his judgment:

- Momo is a person with previous convictions
- Momo had been arrested and his statement recorded about 2 1/2 months after the robbery. He was taken in as a suspect.
- Momo had first stated in his caution interview: *"I told them I will remain silent*". He had admitted that he gave a statement only after his arrest and that a police officer had bargained with him to give a statement. Thus he had been a witness who had been coerced to make a statement. The fact that he has not been charged adds doubt to his testimony as a whole.
- At his caution interview he had said that he could not recall what happened on 19/8/2013.
- Having first said that he picked up the 2nd Appellant as requested around 9 pm on the 19th of August 2013 in his taxi at a place close to the airport, he contradicts himself by saying that he went to the house of the 2nd Appellant in a van driven by one '*Tukera*'. There is no evidence as to who this Tukera is.
- He had not known the 1st, 3rd and 5th Appellants very well and appeared to have made a dock identification of them in Court almost one year and eight months after the incident. The learned Trial Judge in the summing up had misdirected himself when he told the Assessors *"He knows them earlier as driver"* when Momo's evidence had been to the contrary, namely: *"I don't know them very well. They know me because I normally drive every day"*. The court record does not bear out that he had identified the 4th Appellant. There had been no identification parade.
- Momo does not speak one word about what was stolen from the house, leave aside bundles of money, tabua, gold coins, jewellery (bangles and a gold chain and a patta). He does not speak about sharing the loot or discussing about it, having been a party to the robbery, save the fact of loading some sacs of stuff into the twin cab at the house of the complainant.
- Momo does not speak of seeing with the 1st Appellant an orange bag or a bolt cutter and with the 4th Appellant a pillow case with tabua, a green bag and a cane

knife when they parted company. These were the items allegedly seized from the 1st and 4th Appellants at the time of their arrest.

- It is not clear why the 2nd, 3rd, 5th, Appellants and Momo were hiding inside a cave from the morning to the night of the 20th, especially because there is no mention of them being identified by anyone or having any stolen goods in their possession.
- Momo's testimony is to me like missing pieces of a jigsaw puzzle that cannot be fitted together and the learned Trial Judge had erred in failing to draw the attention of the Assessors to these matters in his summing up and deal with them in his judgment. In my view the credibility of his evidence and the reliability to be placed on his evidence is very much in doubt. The main issue therefore is not whether an accomplice warning was given or not, but his credibility as a witness.

[24] In view of what I have stated above the appeal of the 3rd, 4th, and 5th Appellants have to succeed.

[25] What is left to be decided are the caution statements of the 1st and 2nd Appellants.

The Caution Statements of the 1st and 2nd Appellants:

[26] The caution statements of the 1st and 2nd Appellants have to be considered along with their evidence and that of the other Appellants who testified at the trial.

1st Appellant's (1A) caution interview as recorded by DC 3920 Sailosi Bawaqa on 21/08/2013:

[27] A had expressed his wish to be interviewed in English. He had said that he has no injuries on his body. He had been informed of his right to be legally represented. He had been informed that he was not obliged to say anything and whatever he says may be given as evidence against him. On 20/08/2013 around 8 pm he had been asked to come to Rakiraki by some person and that transport was waiting for him. The purpose was to go

and steal from S. Raju. When he visited the house of the person who called him 4 persons were waiting for him. Thereafter he boarded a van and went in the direction of Suva. On the way they had picked up another person. On reaching the house of the complainant he had cut the barbed wire fence using a bolt cutter and entered the compound. Thereafter all of them had entered the house removing some louvre blades. Having entered the house they had assaulted the inmates and removed cash and a carton of tabua. Cash had been bundled in rubber bands. 1A had put the cash and the tabua inside a pillow case. He had also taken a gold coin, 2 gold rings and 2 gold earings and placed them in his jeans. He then had asked for the keys of a vehicle from a lady who had given it to him and proceeded towards Rakiraki. He had said he is unable to state as to who had assaulted the inmates of the house. When he boarded the van the cash and tabua that were placed in a pillow case and a shopping bag was with him. Reaching Fiji Water they abandoned the vehicle as there was no fuel and had run towards the hills. They had walked until it was dark and rested. They had waited till it was dark the following day and had started to move. At a certain stage they were accosted by a police officer who asked him to stop when he started to run. He had stopped but the other person who was with him had jumped over the cliff. The two of them were arrested and brought to the police station. He had not known what had happened to the other 4 persons that were with them. He had admitted that the police seized the cash and tabua that were with him. He was not aware of the amount of cash that was with him. He had identified the bolt cutter with which he had cut the barbed wired fence and the cane knife, one of them was carrying. He had said that he gave the statement voluntarily and that no threat or inducement was exerted on him to make the statement.

1st Appellant's evidence at the trial:

[28] The 1st Appellant having elected to give evidence had said, that at the time of the robbery on 20/08/2013 at 1.00 am he was sleeping at Beisevu. On 20/08/2013 at around 7.30 pm had gone to Rakiraki where he met Peni Samuta. The two of them had then gone interior to Raviravi to buy something. When Peni Samuta had gone beside the river to relieve himself he had met another person and got into a conversation with him. While talking to

him a police party of 9 had approached them and questioned them. On searching him and finding that he had $1,875.00 with him, the police party alleged that he had taken part in a robbery and assaulted him. They had taken him down to the river and dipped him several times in the river and said they would drown him unless he admitted to taking part in the robbery. Thereafter they had arrested him. The police party had taken the man who was with him down to the river and assaulted him. He was unconscious. They were both forced to admit that they took part in the robbery. Then they were taken to Naseyani and assaulted again. Thereafter both of them had been taken to Rakiraki police station and placed in the cell. He was made to sleep in the cell with his underwear as his clothes were wet. In the morning he had been told that he would not be given his breakfast by Officer Bawaqa unless he admits to the robbery at Namuaimada. He had said he was elsewhere but they had not believed him. The police had assaulted him again and in the afternoon his caution statement was taken. The 1st Appellant had said that the police had written down what they wanted and not what he had told the police. He had been forced to sign the statement. The 1st Appellant had claimed, that he had not been given an opportunity to consult a lawyer or a relative, which was his right. He had not been taken to the doctor although he had made a request. He had not been permitted to speak to his wife although she was present at the police station. He was forced to sign a search list on the 27th. He had not been taken to a doctor although a request had been made. The 1st Appellant had said that he did not know the 4th Appellant before and on that date he and the 4th Appellant did not have anything with them when the police party approached them. Under cross-examination he had admitted that he did not complain to the Magistrate about the assault on him.

[29] 1st Appellant had called two witnesses at the trial on his behalf. H. Penjueli had stated that he was in the company of the 1st Appellant between 5 and 7.30 pm on 20/08/2013. Peni Samuta was the person referred to by the 1st Appellant in his evidence as having accompanied him when he went interior after reaching Rakiraki to buy something. He had corroborated the 1st Appellant's evidence about him going to relieve himself and then hearing cries of help from the 1st Appellant who was being beaten. 1st Appellant had been

thrown into the water. Peni Samuta had hid himself while this was happening. Thereafter 1st appellant had been put into a vehicle and taken away.

Summing up by the learned Trial Judge on the 1st Appellant's evidence:

[30] As stated earlier the 1st Appellant in his evidence had said on 20/08/2013 at 1.00 am he was sleeping at Beisevu. In the summing up the learned Trial makes no reference to this whatsoever, save the fact that 1st Appellant takes an alibi. The learned Trial Judge also does not make any reference to the 1st Appellant being beaten at the time of his arrest, namely that the police officers had taken him down to the river and dipped him several times in the river and said they would drown him unless he admitted to taking part in the robbery. In my view this was an essential part of the evidence for both the Assessors and the learned Trial Judge to consider in relation to the voluntariness and truthfulness of the 1st Appellant's caution statement. Further the learned Trial Judge had erred in making reference to H. Penjueli and Peni Samuta by stating: "The above witnesses were called by the 1st accused to establish that he was elsewhere at the time of the incident. The 1st accused in his defence takes an alibi" H. Penjueli and Peni Samuta are certainly not witnesses called into support the alibi of the 1st Appellant. They speak to incidents that took place long after the robbery. By referring to them as witnesses called into support the alibi of the 1st Appellant, the learned Trial Judge had not only misdirected himself but also the Assessors on this matter, which would have led both the Assessors and the learned Trial Judge not to give due regard to the 1st Appellant's albi.

2nd Appellant's (2A) caution interview as recorded by DC 4166 on 23/08/2013:

[31] The caution interview of 2A had been recorded by DC Petro on 23/08/2013, just 15 days before the promulgation of the 2013 Constitution of Fiji. According to Petro there was no witnessing officer. Petro had admitted that he had not informed 2A of his right to remain silent and the consequences of not remaining silent. Petro had admitted that 2A at the interview had stated that he would answer his questions in Court and he had then asked 2A to answer. There has been an issue as to how Petro had asked 2A to answer, i.e.

whether Petro '*warned'* 2A to answer or '*advised'* 2A to answer on a perusal of the court record. Petro had however admitted that he was not permitted to warn 2A when he said that he wanted to answer in court.

[32] 2A had stated in his confessional statement that he works as a cleaner at the Denarau Golf Course. On 19/08/2013 on reaching home around 8 pm, 4 persons had come to his house in a white mini bus. He had then spoken to one 'Joe Raj' who persuaded him to go to Rakiraki. With reluctance he had got in and sat with a "man from Nadole, Sabeto", whose name is not mentioned. When asked who else and how many were travelling in the van 2A had said that he will answer that in court. Two others had been picked up on the way. Then they had gone to the complainant's store. 2A had claimed that he came to know that they had come there to break into the store only on arriving there. He had remained in the compound with another while 4 others went in. He had not wanted to go in. He had heard screams coming from the house. Later he too had gone into the house. When he saw what was happening he had gone back to the compound. He says he did not do anything or take anything. They had been at the house for about ½ an hour. 2A had said he had seen 9 tabua in a yellow plastic when the others came out of the house. They had thereafter travelled in a red coloured twin cab to Rakiraki. Leaving the vehicle at Naseyani he had walked up to the hill top. Reaching the hilltop they had gone separate ways. Three others had travelled with them. He does not know where the other two went. They had then gone and sat in a cave. He was holding on to the plastic containing the tabua. They had slept in the cave that night and in the morning travelled in a minibus and he had got himself dropped off at Nakavu village with another person. He had said that he was not forced, threatened or induced to give a statement and gave it of his own free will. 2A makes no mention of Sailasa Momo. As to who, '*Joe Raj'* or the 'man from Nadole, Sabeto' was has not been clarified.

2nd Appellant's evidence at the trial:

[33] The 2nd Appellant testifying at the trial had denied the allegation. He had stated that around 7 pm after work on the 19/08/2013 he "went straight home". He had been

drinking grog with four of his friends from 8.00pm to 2.00 am and then went to sleep. On the 20th and 21st he was at home. Around 4.00 pm on the 21st police had come to his house and searched his house and he had cooperated with the police to search the house. The police had taken 9 whales teeth, 4 gold plated ladies wrist watches, 4 silver wrist watches, 3 black wrist watches, 8 earrings, 2 decorated pins, 2 marble stones and two vehicle keys, all belonging to his family. He had said that none of these items were produced in court for this case. He had been asked to come to the police station. The 2nd Appellant had thereafter been taken to Nadi police station and questioned about the case. He had told the police that he does not know anything about the case. He had been kept there for 22 hours, assaulted and threatened. On the 22nd around 5.00 pm he had been taken to Lautoka police station, where he was assaulted again. He had said that he does not know Sailasa Momo nor called him on the 19th or 20th of August 2013. He had said he also does not know any person by the name of Tukera. On the 23rd morning he had been taken to Rakiraki police station. He had been told that if he doesn't admit they will do what they did to another suspect who is paralysed and in hospital. (It is a fact borne out in the evidence that the 4th Appellant had in fact been admitted to the Lautoka hospital by that time with serious injuries and had to remain in hospital for two months. This fact is corroborated by the evidence of the 4th Appellant at the trial.) He had got frightened when the iron rod was shown to him several times. It is then that his caution statement was recorded. The 2nd Appellant had stated that the police had fabricated the admissions in his interview. He had not been explained the right of silence or consequences. He had said that he will give his answers in court several times. Under cross-examination he had said that he did not meet the 1st Appellant on 19/08/2013 or 20/08/2013. He had seen the 1st Appellant in the cell at Rakiraki police station. His face was swollen, eyes red and looked weak, what corroborates the evidence of the 1st Appellant. He had admitted that he did not complain to the Magistrate or the High Court Judge about him being assaulted.

Evidence on behalf of the 3rd Appellant at the trial:

[34] The 3rd Appellant had not testified before the Court. His defence was one of an alibi. He had called his wife and a friend of him to testify on his behalf. According to both of them at the time of the robbery, namely on 20/08/2013 around 1.00 am the 3rd Appellant was at home watching a DVD. The 3rd Appellant's wife had said that although she went to Rakiraki police station to see her husband and stayed there the whole day, she was not allowed to see him nor did they question her as to whether the 3rd Appellant was at home at the time of the incident. Both Sailosi Bawaqa and DC Petro had admitted that it was a mistake not to check on the alibi of the 3rd Appellant. Inspector Anoop, DC 3920 Sailosi Bawaqa and DC Petro had admitted that it was their mistake not to check on the alibi of the 3rd Appellant, namely that whether the 3rd Appellant was with his wife and mother-in -law at Suva, at the time of the robbery.

4th Appellants evidence at the trial:

[35] The 4th Appellant's defence was also an alibi. Testifying before the Court he had stated that on 19/08/2013 he was at his home and it was only on 20/08/2013 at around 6.30 pm he left home to go to Burelevu to visit his grandfather. Around 11.00 pm while he was on his way he had met a stranger with whom he started to talk. It is then the police had approached them. He then corroborates the evidence of the 1st Appellant about their meeting each other and about them being assaulted by the police. He had fallen down unconscious and regained consciousness only at the Lautoka hospital. He had been in the ward for two months. He had injuries on his head, back bone and knees. He could not hold anything with his fingers, has double vision in his left eyes and memory loss. On the 23rd of October 2013 the Resident Magistrate of Rakiraki on a complaint made by the 4th Appellant that he had suffered serious injuries as a result of being assaulted by the police had made order granting him bail in his own recognition of $ 1800.00 "In view of the apparent difficulty faced by the accused due to his injuries". The 4th Appellant had said that he did not rob any house on 20th morning, did not steal any motor vehicle, nor was he

carrying any pillow case with tabua. The cane knife alleged by the police to have been recovered from him was not his. He had stated that he doesn't know Sailasa Momo. Under cross-examination he had stated that the 1st Appellant whom he met on 20/08/2013 was a stranger to him and that the 1st Appellant was not carrying anything with him.

[36] The **5th Appellant** had not given evidence at the trial.

A major flaw with the summing up in this case:

[37] A major flaw and a fatal irregularity in the summing up of this case and in the judgment is the failure of the learned Trial Judge to consider the evidence of each of the Appellants where it corroborates the evidence of another Appellant or where such evidence is in any way favourable to any of the other Appellants. It is trite law that a reference made in a caution statement by one accused cannot be made use of against another accused. It is also trite law that if an accused while testifying on oath at the trial implicates another accused that will be evidence against the other accused. It may be in the form of an admission that he committed the crime along with the other accused or it may be in the form of a 'cut-throat defence' (**R V Turner & Others** [1979]70 Cr App R 256; **R V Varley** [1982] Cr App R 242; **Bannon V Queen** [1995] 185 CLR 1) where he implicates the other accused in the crime exonerating himself. It is my view that where an accused corroborates the evidence of another accused or gives evidence favourable to any of the other accused; that is also evidence that must be considered by the Assessors and the trial Judge in coming to a finding against the accused. I have examined both the summing up and the judgment in this case and find that this matter has not been specifically addressed at all. The learned Trial Judge's statement at the end of his summing up in regard to what I have stated above is misleading, namely: "If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of each accused's guilt of each charge you must find him guilty for that charge. You have to consider evidence against each accused and each charge separately". There is no mention of the defence version of events and a direction to consider whether the evidence of one Appellant is favourable to another.

[38] The 1st Appellant's evidence had been corroborated by the 4th Appellant as to how they met around 11.00 pm on the night of 20/08/2003 and vice-a-versa and that anyone of them had not been carrying anything with them at the time of their arrest. The 4th Appellant's evidence that he was beaten severely and admitted to Lautoka hospital had been corroborated by the 2nd Appellant. That injuries were seen on the face 1st Appellant indicative of him being assaulted, is corroborated by the 2nd Appellant.

[39] A perusal of the court record in this case casts an element of doubt on the entirety of the prosecution case. It bears the Complaint filed before the Magistrate's Court at Raki Raki dated 21st October 2013. That is almost two months after the incident. According to the police evidence in this case all five Appellants had been arrested by the 23rd of August 2013. The Complaint filed before the Magistrate's Court at Raki Raki only bears the name of the 4th Appellant of having committed the offences with five others. Sailasa Momo had been arrested on the 11th of November 2013. It is only in the 'Consolidated Information by the Director of Public Prosecutions', filed on the 31st of March 2014 that the names of the 1st, 2nd, 3rd, and 5th Appellants are seen.

Failure to give cogent reasons for not agreeing with the majority not guilty opinions of the Assessors

[40] One of the grounds of appeal filed in this case is that the learned Trial Judge failed to give cogent reasons for not agreeing with the majority not guilty opinions of the Assessors in respect of the 2nd, 3rd, and 5th Appellants in respect of the two charges of aggravated robbery and their majority not guilty opinions in respect of all the other charges.

[41] The learned Trial Judge had convicted all 5 Appellants in respect of all 6 counts preferred against them having stated in his judgment: *"Obviously, the three assessors have not accepted the prosecution's version of events. It appeared that they have found that the prosecution had not proven its case beyond a reasonable doubt in respect of some of the*

charges. I do not accept the opinion of not guilty given by the assessors in respect of counts of Assault causing actual bodily harm and Theft of Motor Vehicle. In my view, the assessors' opinion was perverse." (emphasis placed by me) In making this statement, the learned Trial Judge had not specified how the majority opinion of the Assessors was perverse, especially in relation to their opinion expressed in respect of the 2nd, 3rd and 5th Appellants not guilty verdict, in respect of the two counts of aggravated robbery.

[42] The learned Trial Judge in his judgment had correctly cited the cases of **Joseph v The King** [1948] AC 215, **Ram Dulare & others v R** [1955] 5 FLR and **Sakiusa Rokonabete v The State,** Criminal appeal No. AAU 0048/05 and stated, in Fiji the responsibility for arriving at a decision and of giving judgment in a trial by the High Court sitting with Assessors is that of the trial Judge, who is the sole Judge of facts and that the Assessors duty is to offer opinions which might help the trial Judge and does carry great weight, but he is not bound to follow their opinion. Section 237 of the Criminal Procedure Act states that the Judge in giving judgment "shall not be bound to conform to the opinion of the assessors".

[43] The learned Trial Judge had again correctly made reference to the provisions of section 237(4) of the Criminal Procedure Act which states: "When the Judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be - (a) written down; and (b) pronounced in open court." He has cited the cases of **Ram Bali v Regina** (1960) 7 FLR 80 at 83, **Ram Bali v The Queen Privy Council** Appeal No 18 of 1961, **Shiu Prasad v Regina** (1972) 18 FLR 70 at 73, and **Setevano v State** [1991] FJA 3 at 5 and stated the reasons for differing with the opinion of the assessors must be cogent and clearly stated, founded on the weight of the evidence, reflect the trial judge's view as to the credibility of witnesses and be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial.

[44] The question is has he correctly followed the guidance given in the cases referred to in the paragraph above. I am of the view he has not. In regard to the truthfulness of caution

interview statements of the 1st and 2nd Appellants the learned Trial Judge had stated he finds that they are truthful because: "If these statements are fabricated… there could be similar questions and answers…The first accused was asked 146 questions and he had given answers to those questions. The 2nd accused was asked 140 questions and he had answered those." In my view this not a cogent reason founded on the weight of the evidence capable of withstanding critical examination in the light of the whole of the evidence presented in the trial, to have placed reliance on the caution statements of the 1st and 2nd Appellants. I had stated earlier how the learned Trial Judge erred in not considering the evidence of some of the Appellants who testified at the trial which corroborated or was favourable to other Appellants.

[45] The learned Trial Judge's reasons for accepting the evidence of Sailasa Momo, having said that there are some contradictions in his statement and police version, are, that *"he was prompt in answering the questions put to him by prosecution and the defence",* that *"he was not evasive in his answers"* and after having observed his demeanour. The learned Trial Judge had said despite there being no independent evidence to corroborate Momo's evidence as against the 3rd Appellant he is of the opinion that it is safe to act on his evidence to convict the 3rd Appellant. I am of the view that these statements do not satisfy the cogency test especially in view of what I have stated at paragraph 23 above. Also a bare statement: *"I find the state witnesses credible and I accept their evidence. I find 1st, 2nd, 4th, accused were not credible witnesses"* and *"I reject the evidence of the witnesses called by the 1st and 3rd accused as untrue*" do not satisfy the cogency test.

[46] For the reasons enumerated above I have no hesitation in allowing the appeals of the 1st, 2nd, 3rd, 4th and 5th Appellants and quashing their convictions.

Nawana JA

[47] I agree that the convictions against 1st, 2nd, 3rd, 4th and 5th appellants should be quashed and appeals allowed as proposed by Fernando JA.

Orders of the Court:

i. *Appeals of the 1st, 2nd, 3rd, 4th, and 5th Appellants allowed.*

ii. *The convictions and sentences of the 1st, 2nd, 3rd, 4th, and 5th Appellants quashed.*

iii. *The 1st, 2nd, 3rd, 4th and 5th Appellants are acquitted of all six counts.*

Hon. Justice C Prematilaka
JUSTICE OF APPEAL

COURT OF APPEAL
FIJI

Hon. Justice A Fernando
JUSTICE OF APPEAL

Hon. Justice P Nawana
JUSTICE OF APPEAL