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

CRIMINAL APPEAL NO: AAU 155 OF 2015
(High Court Criminal Case No: HAC 30/ 2015 [Lautoka])
(Magistrate's Court at Nadi Criminal Case No: 37/2015)

BETWEEN	:	**MANASA TALALA**	***1st Appellant***
		SERUVI CAQUSAU	***2nd Appellant***
		KELEVI SEWATU	***3rd Appellant***
		PENAIA DRAUNA	***4th Appellant***
		FILISE VERE	***5th Appellant***
		VILIAME VEREIVALU	***6th Appellant***
		JONA DAVONU	***7th Appellant***
		PITA MATAIRAVULA	***8th Appellant***
		SENITIKI NAKATASAVU	***9th Appellant***

AND	:	**THE STATE**	***Respondent***

Coram	:	**Prematilaka JA** **Fernando JA** **Nawana JA**
Counsel	:	**Mr. I. Khan for the Appellants** **Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**14 February 2019**
Date of Judgment	:	**7 March 2019**

JUDGMENT

Prematilaka JA

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

Fernando JA

[2] The 1st to the 9th Appellants have appealed against their conviction for the two counts of rape and the two counts of sexual assault levelled against them and the sentences imposed on the basis of the said convictions. The 1st and the 6th Appellants have in addition appealed against their conviction against the respective charges of defeating the course of justice levelled against them and the sentences imposed on the basis of the said convictions. The assessors had unanimously found the 4th, 5th, 6th, 7th, 8th, and 9th accused guilty on the 1st count of rape and 2nd count of sexual assault and found all the accused not guilty on the other counts. The learned Trial Judge found all nine accused guilty of the respective charges preferred against them.

[3] The Appellants had been charged as follows:

Count 1

Statement of Offence

Rape: Contrary to section 207 (1) and (2) (b) read with sections 45 and 46 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Manasa Talala, Seruvi Caqusau, Kelevi Sewatu, Penaia Drauna, Filise Vere, Viliame Vereivalu, Jona Davonu, Pita Matairavula and Sentiki Nakatasavu on the 15th day of August 2014 at Malevu, in the Western Division, penetrated the anus of (AA - name withheld) with a stick without his consent.

Count 2

Statement of Offence

Sexual Assault: Contrary to section 210 (1) (a) read with sections 45 and 46 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Manasa Talala, Seruvi Caqusau, Kelevi Sewatu, Penaia Drauna, Filise Vere, Viliame Vereivalu, Jona Davonu, Pita Matairavula and Sentiki Nakatasavu on the 15th day of August 2014 at Malevu, in the Western Division, unlawfully and indecently assaulted (name withheld) by rubbing chillies to the anus of the said (AA - name withheld).

Count 3

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (b) read with sections 45 and 46 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Manasa Talala, Seruvi Caqusau, Kelevi Sewatu, Penaia Drauna, Filise Vere, Viliame Vereivalu, Jona Davonu, Pita Matairavula and Sentiki Nakatasavu on the 15th day of August 2014 at Malevu, in the Western Division, penetrated the anus of (BB - name withheld) with a stick without his consent.

Count 4

Statement of Offence

Sexual Assault: Contrary to section 210 (1) (a) read with sections 45 and 46 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Manasa Talala, Seruvi Caqusau, Kelevi Sewatu, Penaia Drauna, Filise Vere, Viliame Vereivalu, Jona Davonu, Pita Matairavula and Sentiki Nakatasavu on the 15th day of August 2014 at Malevu, in the Western Division, unlawfully and indecently assaulted (name withheld) by rubbing chillies to the anus of the said (BB - name withheld).

Count 5

Statement of Offence

Defeating the Course of Justice: Contrary to section 190 (e) of the Crimes Decree No. 44 of 2009

Particulars of Offence

Manasa Talala, on or about the 21st day of August 2014 at Sigatoka, in the Western Division attempted to obstruct, prevent, pervert or defeat the course of justice by

instructing SC Semi Ravuiwasa, SC Maciu Temo, and PC Usaia Natakuru to make false statements in connection with a Police Internal Affairs Investigation into alleged misconduct on 15th day of August 2014.

Count 6

Statement of Offence

Defeating the Course of Justice: Contrary to section 190 (e) of the Crimes Decree No. 44 of 2009

Particulars of Offence

Viliame Vereivalu, on or about the 26th day of August 2014 at Suva, in the Central Division attempted to obstruct, prevent, pervert or defeat the course of justice by instructing SC Keponi Paul and SC Apete Naikolo, to make false statements in connection with a Police Internal Affairs Investigation into alleged misconduct on 15th day of August 2014.

[4] The Appellants had been sentenced as follows:

1st Appellant – seven years and six months imprisonment in respect of counts 1 to 4 and 6 months for the 6th (sic- should be 5th) count, totalling to a sentence of 8 years imprisonment, with a non-parole period fixed at 5 years.

2nd Appellant – eight years imprisonment in respect of counts 1 to 4, with a non-parole period of 5 years.

3rd Appellant - seven years imprisonment in respect of counts 1 to 4, with a non-parole period of 4 years.

4th Appellant - seven years imprisonment in respect of counts 1 to 4, with a non-parole period of 4 years.

5th Appellant – nine years imprisonment in respect of counts 1 to 4, with a non-parole period of 6 years.

6th Appellant – eight years and six months imprisonment in respect of counts 1 to 4 and 6 months for the 6th count, totalling to a sentence of 9 years imprisonment, with a non-parole period of 6 years,.

7th Appellant - nine years imprisonment in respect of counts 1 to 4, with a non-parole period of 6 years.

8th Appellant - nine years imprisonment in respect of counts 1 to 4, with a non-parole period of 6 years.

9th Appellant - seven years imprisonment in respect of counts 1 to 4, with a non-parole period of 4 years.

[5] It is necessary to set out herein the '*relevant'* provisions of the offences, namely rape, sexual assault and conspiracy to defeat justice and interference with witnesses; as set out in the Crimes Act 2009 under which the Appellants were charged.

The offence of rape

207. — **(1)** Any person who rapes another person commits an indictable offence.

Penalty — Imprisonment for life.

(2) A person rapes another person if —

(a)………. ; or

(b) the person penetrates the…anus of the other person to any extent with a thing…or…without the other person's consent; or

(c)……….

(3)……….

Sexual assaults

210. — **(1)** An person commits an indictable offence (which is triable summarily) if he or she—

(a) unlawfully and indecently assaults another person; or

(b)……….

(i)………. ; or

(ii)……….

Penalty — Imprisonment for 10 years.

(2)……….

(3) further, the offender is liable to a maximum penalty of life imprisonment if—

(a) immediately before, during, or immediately after, the offence, the offender is,…, or is in company with any other person; or

(b)……….; or

(c)……….

Conspiracy to defeat justice and interference with witnesses

190. A person commits a summary offence if he or she —

(a)……… ; or

(b)……… ; or

(c)……… ; or

(d)……… ; or

(e) in any way obstructs, prevents, perverts or defeats, or attempts to obstruct, prevent, pervert or defeat, the course of justice.

Penalty — Imprisonment for 5 years.

[6] Counsel for the Appellants in his Submissions filed on 8 January 2019 had set out a "***Summary of Issues***"; encapsulating the 40 grounds of appeal filed on 24 November 2016 against conviction and sentence, as set out below. Leave had been granted by a single Judge of this Court in respect of all 40 grounds of appeal. At the commencement of the hearing, Counsel informed Court that he was relying on his Submissions of 8 January 2019 and elaborated briefly on some of them.

Issue 1: **Voir Dire**:- Under this issue Counsel argued grounds 1, 2, 36 and 37 of the grounds of appeal, alleging that the learned trial Judge erred in law and in fact:

Ground 1: In holding that the caution interviews of the 1st, 2nd, 3rd, 4th, 5th, 7th and 9th Appellants were voluntary and thus admissible.

Ground 2: In not reversing his ruling on admissibility of the caution interview of the 9th accused (9th appellant), since at the trial it was proved that the prosecution witnesses had lied.

Ground 36: In not directing himself and the assessors that the allegations and charges were never put to the accused while they were caution interviewed.

Ground 37: In not directing himself and the assessors that the statements were made on the promise of being made State witnesses and therefore not voluntary.

Issue 2: No Case to Answer:- Under this issue Counsel for the Appellants argued grounds 3, 5, and 13 of the grounds of appeal alleging that the learned trial Judge erred in law and in fact:

Grounds 3, 5 & 13: In not taking into adequate consideration the Appellants submission on No Case to answer based on the evidence of Boila, that none of the Appellants assaulted him and Soko and that there was no evidence that each of the accused had agreed with each other expressly or tacitly to sexually assault suspects for the purpose of interrogation. Grounds 5 & 13 were a repetition of ground 3 in relation to the evidence of Boila.

Issue 3: Recusal:- Ground 4 on which this issue was raised, was abandoned at the hearing.

Issue 4: Serious Doubts in the Prosecution Case:- Under this issue Counsel for the Appellants argued grounds 6, 8 and 32 of the grounds of appeal alleging that the learned trial Judge erred in law and in fact:-

Ground 6: In not taking into consideration that 2 versions were presented in Court in respect of count 5 and in rejecting the evidence of Inspector Samisoni.

Ground 8: In not directing the Assessors that there were serious doubts in the prosecution case. Counsel elaborating on ground 8 in his submissions have referred to:

(i) Inconsistencies in the evidence of the prosecution witnesses
(ii) Inconsistencies in the evidence of witnesses with their witness statements
(iii) That no identification parade was held
(iv) The learned trial Judge only chose to believe evidence favourable to the prosecution

Counsel for the Appellants had, repeating himself again made reference to the rejection of Boila's evidence.

Ground 32: In accepting the evidence of Viliame, Filise and Pita about the assault on the two victims and rejecting the evidence of a witness whose evidence was favourable to the defence.

Issue 5: Summing Up (3 hours to sum up):- Under this issue Counsel for the Appellants argued ground 7 of the grounds of appeal.

Ground 7: Under this ground Counsel for the Appellants argued that the learned trial Judge erred in law and in fact by making a Summing up that was lengthy, unfair, imbalanced, confusing and one sided.

Issue 6: Burden of Proof:- Under this issue Counsel for the Appellants argued grounds 9, 16, 25, 26, 27, 29 and 33 of the grounds of appeal alleging that the learned trial Judge erred in law and in fact:-

Ground 9:- In wrongly directing himself on the question of burden of proof

Ground 16:- When he shifted the burden of proof to the Appellants when he stated "Defence failed to create any doubt in the Prosecution case".

Grounds 25 & 29 :- By not believing prosecution witnesses whose evidence were favourable to defence. This was a repetition of ground 32 under issue 6

Grounds 26 & 33:- By misdirecting himself that none of the accused gave evidence to confirm the truth in his caution interview

Ground 27:- By misdirecting himself that failure to ask questions to prosecution witnesses proved the guilt of the accused

Issue 7: Not properly analysing all the facts:- Under this issue Counsel for the Appellants argued ground 10 of the grounds of appeal.

Ground 10: Under this ground Counsel for the Appellants argued that the learned trial Judge erred in law and in fact in not properly/and adequately analysing all the facts before him before convicting the accused, namely the evidence of the complainant Boila, the prosecution witnesses especially the police witnesses.

Issue 8: Possible Defence on Evidence:- Under this issue Counsel for the Appellants argued ground 11 of the grounds of appeal.

Ground 11: Under this ground Counsel for the Appellants argued that the learned trial Judge erred in law and in fact in not directing himself to the possible defence on evidence. In making submissions under this ground he had merely repeated what he had already urged under grounds 5, 10, 13 and 25.

Issue 9: Unfair rejection of evidence favourable to Defence:- Under this issue Counsel for the Appellants argued ground 12 of the grounds of appeal.

Ground 12:- This was a repetition of grounds 25 & 29 referred to under Issue 6. Appellants Counsel had argued against the rejection of evidence of PW 18 Epeli Rokobrabora.

Issue 10: Circumstantial evidence based on defence not questioning the prosecution witnesses:- Under this issue Counsel for the Appellants argued grounds 14 of the grounds of appeal.

Ground 14:- Under this ground Counsel for the Appellants argued that the learned trial Judge erred in law and in fact in convicting the appellants on circumstantial evidence and on inference drawn from the defence counsel not questioning the prosecution witnesses. The second limb of this ground is a repetition of ground 27 referred to in issue 6.

Issue 11: Contradictions by the learned Trial Judge:- Under this issue Counsel for the Appellants argued grounds 15 and 20 of the grounds of appeal.

Grounds 15 & 20:- The learned Trial Judge misdirected & contradicted himself having earlier said that the credibility and reliability of the witnesses evidence was for the assessors, but when the assessors found the appellants not guilty on certain counts the learned Trial Judge found them guilty by usurping their functions.

Issue 12: Overruling Assessors/Not giving cogent reasons:- Under this issue Counsel for the Appellants argued ground 17 of the grounds of appeal.

Ground 17:- The learned trial Judge erred in law and fact by overruling the unanimous verdict of the Assessors of not guilty and did not give cogent reasons.

Issue 13: Learned Trial Judge raising a new theory:- Under this issue Counsel for the Appellants argued grounds 18 & 31 of the grounds of appeal alleging that the learned trial Judge erred in law and in fact:-

Ground 18:- In commenting on the evidence raising a new theory on the facts, uncanvassed during the course of the trial whereby the defence has had no opportunity of commenting upon it. The theory claimed to be raised by the learned Trial Judge as referred to in the submissions of the appellant is "*giving the impression that 'siliboro' is a common practice of torture known to police officers".*

Ground 31:- When he created a theory that the police officer took the accused person to hilltop in order to torture them when there was no credible evidence to support that.

Issue 14: Joint Enterprise, Common Knowledge and Aiding and Abetting:- Under this issue Counsel for the Appellants argued ground 21 of the grounds of appeal.

Ground 21:-That the learned trial Judge erred in law and in fact when he misdirected himself on the laws regarding joint enterprise, common knowledge and aiding and abetting.

Issue 15: Previous Inconsistent Statement:- Under this issue Counsel for the Appellants argued ground 22 of the grounds of appeal. Ground 22 is a repetition of ground 8(ii) under issue 4.

Issue 16: Acting on Inadmissible Evidence:- This was in relation to grounds 23 and 24. Counsel for the appellants informed Court at the hearing he was abandoning these two grounds.

Issue 17: Hostile Witness:- Under this issue Counsel for the Appellants argued ground 28 of the grounds of appeal.

<u>Ground 28:</u>- The learned Trial Judge erred in law and in fact when he completely misdirected himself on the law as to hostile witness.

Issue 18: Learned Trial Judge acting on Inference not supported by evidence:- Under this issue Counsel for the Appellants argued ground 30 of the grounds of appeal.

<u>Ground 30</u>:- The learned trial Judge erred in law and in fact when he misdirected himself that there was no evidence of a black taxi that they were chasing because there were evidence from prosecution witnesses that there was a black taxi whom they suspected and on that basis they drove towards the feeder road on the hill side.

Issue 19: Admissibility of Caution Interview, Question of Fact for Assessors:- Under this issue Counsel for the Appellants argued grounds 33 and 34 of the grounds of appeal.

<u>Ground 33</u>: Ground 33 was a repetition of ground 26 referred to in issue 6.

<u>Ground 34</u>: The learned trial Judge erred in law and fact by stating that all the accused told the truth in their statements, when that was a matter for the assessors. Ground 34 was a repetition of grounds 15 & 20 referred to in issue 11.

Issue 20: Cost against 1st Appellant and Appellant's Counsel:- Under this issue Counsel for the Appellants argued ground 35 of the grounds of appeal.

Ground 35: The learned trial Judge erred in law and fact in not exercising judicial discretion in awarding costs against the Appellants.

Issue 21: Allegations not put to the Appellants regarding the charges before the Court:- Under this issue Counsel for the Appellants argued ground 36 of the grounds of appeal.

Ground 36:- This was a ground already referred to by Counsel for the Appellant under Issue 1.

Issue 22: Sentence:- Under this issue Counsel for the Appellants had referred to his grounds 39 & 40 of the grounds of appeal. At the hearing before us, Counsel for the Appellants did not offer any arguments on sentence.

Ground 39:- The learned trial Judge erred in law and fact in taking irrelevant matters into consideration.

Ground 40:- The learned trial Judge erred in law and fact in not taking into consideration the provisions of the Sentencing and Penalties Act 2009.

[7] I intend to deal with the 22 issues raised in relation to the 40 grounds of appeal in the Appellants Counsel's submissions of 8 January 2019 repetitively, haphazardly and confusingly by categorizing and dealing with them under the following headings:

- Challenge to the admissibility of the caution statements (Issues 1, 19 and 21)
- Rejection of the No-Case Submission (Issue 2)
- Misdirection on law by the learned trial Judge (Issues 6, 10, 11, 12, 14, 17 and 20)
- Misdirection on Facts by the learned trial Judge (Issues 4, 7, 8, 9, 13, 15 and 18)
- Lengthy Summing Up (Issue 5)
- Sentence (Issue 22)

Counsel for the Appellant informed Court at the hearing that he was abandoning Issues 3 and 16.

In order to deal with the 20 issues it is necessary to examine the evidence led in this case.

Evidence of witnesses for the Prosecution in Brief:

[8] Prosecution witness SC Semi Ravasa, was on the 15th of August 2014 at around 11 am informed of a robbery while he was at Sigatoka Police station and had gone in a police truck with police officers SC Temo and driver PC Usaia and PC Apakuki to look for the suspects. At Sigatoka Total Service station they had got information that two suspects had gone in a mini bus heading for Suva. They pursued the mini bus and at Tagaqe village caught up with the mini bus. Suspect Soko was arrested inside the van while suspect Boila who was in the mini bus had punched Semi Rasa on his face and taken to his heels. They had given chase to him and arrested him. Boila had suffered some injuries upon his arrest. Both Soko and Boila were handcuffed. Boila had a bag containing money with him. Two other police officers had also arrived in another vehicle. Having put the two arrested persons in the truck, the police party had headed towards Sigatoka. Subsequently the truck had deviated and proceeded in the direction of a hill before Tagaqe village. This was a place in Malevu. They had stopped at the top of the hill. When they arrived there the 1st Appellant had already come there in another vehicle with his driver and the 1st Appellant was standing beside his vehicle. The truck carrying the two suspects was parked 12 to 15 meters away from the 1st Appellant's vehicle. Thereafter three other police vehicles had arrived. The 2nd, 3rd, 4th and 5th Appellants had come in one of those vehicles. Thereafter suspects Soko and Boila who were handcuffed were removed from the truck and the 2nd, 3rd and 5th Appellants had taken custody of two suspects Soko and Boila. Semi Ravasa had left the scene thereafter. Four statements had been recorded from Semi Ravasa about the incident some of which under threat that he would be sacked from the police force and locked up.

[9] Constable M. Temo corroborates what Semi Rasa had said upto the time they went to Malevu. He had testified that at Malevu the suspects had been handed over to the 2nd and 9th Appellants. He had made two statements to the police regarding the incident.

[10] Constable Apakuki Tuitavua having corroborated the evidence of Ravasa and Temo about the arrest of the suspects Soko and Temo had come up with the reason why the police truck without going to Sigatoka, deviated and proceeded in the direction of Malevu and that according to Apakuki it was on the instructions of SP Manasa Talala, the 1st Appellant and who was the Divisional Crime Officer. On the instructions of the 1st Appellant the truck carrying Soko and Boila were driven to the top of the hill for about 5 minutes inside the Feeder Road at Malevu and parked right behind the vehicle in which the **1st** Appellant was seen. 1st Appellant had been briefed about the arrest of Soko and Boila and the money recovered from Boila had been handed over to the 1st Appellant by Inspector Bari. Thereafter the 2nd, 6th and the 7th Appellants had also arrived at Malevu in another vehicle. Thereafter Apakuki had left the scene. He made two statements, one of which was recorded by Inspector Samisoini. That statement was not true and he signed it out of respect to his senior.

[11] Constable Usaia, the police driver of the vehicle in which Semi Ravasa and Apakuki travelled, corroborates both Semi Ravasa and Apakuki about the arrest of the suspects Soko and Boila and taking them up a gravel road to Malevu. He confirms seeing the **1st** Appellant in a vehicle on their arrival at the hill in Malevu and money seized from Boila being handed over to the 1st Appellant by IP Bari. He had also seen the 2nd, 4th, 7th, 8th, and 9th, Appellants, who had arrived in two vehicles, at the scene. Usaia had seen Soko and Boila lying naked on the road side and the 7th and 8th Appellants standing beside them. He had left the scene thereafter. Usaia had also, implicated the 1st Appellant in the charge set out in count 5 by stating that he was briefed by the 1st Appellant, in relation to the second statement he made on the 21st of August 2014, which he said was an inaccurate account as to what happened on the 15th of August 2014. He signed the statement out of respect for his superior officers. According to Usaia it was his third statement which was the correct one, the first statement was also not accurate as it was recorded by the 2nd Appellant. In that statement the 2nd Appellant had recorded that people from Tagaqe were involved in this case and not

anyone of the Appellants. He had in his last statement complained about having had to lie in his earlier statements.

[12] Detective Sergent Bari had corroborated Apakuki about Soko and Boila being taken to Malevu on the instructions of the 1st Appellant and meeting the 1st Appellant there and handing over the money recovered from Boila to him. He had left the scene thereafter. Sgt Bari had also implicated the 1st Appellant in the charge set out in count 5. He had been asked by the 1st Appellant to say that Soko and Boila were handed over not on the top of the hill, but at Sigatoka.

[13] Army Officer Auka Natuinivalu has stated that he brought the 8th Appellant to the place where Soko and Boila were been detained. He had seen them lying down with blood all over their bodies. He had fallen asleep.

[14] Police Driver Timoci Nasilasila had brought the 2nd, 3rd and 9th Appellants to the place where Soko and Boila were being detained. Soko and Boila had been bruised and had to be helped to get into the vehicles.

[15] Police officer Apete Nakolo had said that he was instructed by his boss in the Strikeback Unit, namely the 6th Appellant to drive him, and the 7th and 8th Appellants to Malevu where Soko and Boila were being detained. The 6th, 7th, and the 8th Appellants having got off the police truck had kicked and punched Soko, in the stomach while asking questions from him and while he was inside a police truck. Soko was crying in pain. He had also seen two police officers pounding chillies outside in a coke bottle. Thereafter Soko and Boila had been brought out of the police truck, stripped naked and about five police officers, whom he had failed to name, had rubbed chillies on their whole body, their faces, private parts, anus, legs, hands, stomach and mouth. Nakolo had also, implicated the 6th Appellant in the charge set out in count 6 by stating that he was briefed by the 6th Appellant, in relation to the statement he made on the 26th of August 2014, which he said was an inaccurate account as to what happened on the 15th of August 2014. He had been asked to lie in that statement and the 6th Appellant was present when he made that statement. He had made three statements and it was his third statement that was the true statement.

[16] Detective Constable Jone Sauqaqa was the driver of the vehicle of the 1st Appellant. He had said that he drove the 1st, 4th and 5th Appellants to the place where Soko and Boila were being detained on top of the hill at Malevu. He saw that both Soko and Boila were covered with blood with injuries on their faces. According to him Soko and Boila had been injured prior to their arrival at the scene and he did not see them being assaulted by officers at Malevu. The 1st, 4th and 5th Appellants had not got out of the vehicle at Malevu.

[17] It is clear from the evidence of all the police witnesses who testified on behalf of the prosecution that they had named the police officers whom they saw at Malevu and those involved in assaulting Soko and Boila, as they knew them. There was no need therefore for any identification parade to be held, the matter that had been argued in the Submissions of the Appellant under ground 8 in relation to Issue 4. It is also evident that pressure had been brought to bear on the police witnesses when they made their statements to the police by their seniors until the officers from the Internal Affairs Unit recorded their statements. This in my view is a valid explanation to the matter raised by the Defence under ground 8 in relation to Issue 4, that the evidence given on oath by prosecution witnesses was inconsistent with the statements they had given to the police. The inconsistency in the evidence between Jone Sauqaqa, who was the driver of the 1st Appellant and other police witnesses can be understood on a similar basis.

[18] Constable Semi Rasa had placed the 1st, 2nd, 3rd, 4th and 5th Appellants at the scene of offence at the time the offences were committed. The 1st Appellant was already at the scene of offence standing outside his vehicle when Semi Rasa arrived at Malevu. He had also testified that he had handed over the custody of Soko and Boila to the 2nd, 3rd, and 5th Appellants. Constable Temo had placed the 2nd and 9th Appellants at the scene of crime. Constable Apakuki Tuitavua had placed the 1st, 2nd, 6th, and 7th at the scene of crime. According to Apakuki it was on the instructions of the 1st Appellant, who was the Divisional Crime Officer that Soko and Boila who would otherwise have been taken to Sigatoka police station was taken to Malevu. When they arrived at Malevu the 1st Appellant had already arrived there and was seen in his vehicle. There is no apparent reason why Soko and Boila who had been arrested were taken to Malevu. Constable Usaia also places the 1st, 2nd, 4th, 7th 8th and 9th Appellants at the

scene of offence. Usaia had seen Soko and Boila lying naked on the roadside and the 7th and 8th Appellants standing beside them. Usaia had also, implicated the 1st Appellant in the charge set out in count 5. Detective Sergeant Bari had confirmed that Soko and Boila were taken to Malevu on the instructions of the 1st Appellant and that he met him there and handed over the money recovered from Boila to him. Sgt Bari had also implicated the 1st Appellant in the charge set out in count 5. Army Officer Auka Natuinaivalu had placed the 8th Appellant at the scene of offence at the time the offences were committed. Police Driver Timoci Nasiasila had placed the 2nd, 3rd and 9th Appellants at the scene of offence at the time the offences were committed. Police officer Apete Nakolo had placed the 6th, 7th, and the 8th Appellants at the scene of offence and said that it was his boss in the Strike back Unit, namely the 6th Appellant who instructed him to drive the 6th, 7th, and 8th Appellants to Malevu. The 6th, 7th, and the 8th Appellants had beaten Soko while questioning him. He had also seen two police officers pounding chillies outside in a coke bottle. Thereafter Soko and Boila had been brought out of the police truck, stripped naked and about five police officers, whom he had failed to name, had rubbed chillies on their whole body, their faces, private parts, anus, legs, hands, stomach and mouth. Nakolo had also, implicated the 6th Appellant in the charge set out in count 6.

[19] Senijeli Boila, the victim referred to in counts 3 and 4 had been called by the prosecution as one of its witnesses. Since he gave evidence contrary to his previous statements made to the police the prosecution had made an application to treat him as a hostile witness, which application was allowed. In Court Boila had stated that the mini bus in which he and Soko were travelling had been stopped at Tagaqe by police constables. Finding a bag with Soko the police had inquired from Soko as to who was with him. When Soko pointed him out, the police officers had sprayed something on his eyes and assaulted him. He had not run away but stood behind the van. Both Soko and Boila had been handcuffed and thrown at the back of the police truck. The police officers had asked them to lay face down and started assaulting and kicking them. They were fully naked. The truck had been driven somewhere for 1-2 minutes and stopped. They had then been thrown away from the truck and beaten again by the officers who arrested them. He was questioned as to the others involved with him in the robbery. Chillies had been rubbed on their bodies, private parts and put into his anus using fingers and a stick while he was resisting. A stick had been

put inside his anus. He had said that it was police officers Semi, Maciu, Apakuki and Usaia who did this to them. He had said that there were other officers, but the Appellants "were not the guys who were at the hillside".

[20] It is clear that Senijeli Boila's evidence goes against the caution statements of the 1st, 2nd 4th, 5th and 9th Appellants who had all said that they were all at the hill side when Soko and Boila had been brought there. When Semi, Maciu, Apakuki and Usaia gave evidence before the Court it had not been put to them that they were the ones who had committed the offences.

Caution Statements of 1st, 2nd, 4th, 5th, and 9th Appellants.

[21] The caution statements of the 1st, 2nd, 4th, 5th, and 9th Appellants had been admitted by the learned Trial Judge after a voir dire.

[22] The 1st Appellant in his caution statement had stated that on receiving a report of a robbery at Nadi he had proceeded with his driver Jone Sauqaqa first to Nadi and then to Sigatoka. At Sigatoka he had been informed by constable Apakuki that two suspects had been arrested at Tagaqe village. He had directed another fleet from Lautoka to follow up with the robbery. The two police parties had met him at Malevu. Constable Apakuki had informed him that a black taxi had gone up the Malevu hill. They had gone about 2-3 km up the Malevu hill. Apakuki's truck in which suspects Soko and Boila had been detained, followed the 1st Appellant's vehicle. When the vehicles came to a halt he had directed two officers to ask from Soko and Boila about the other accomplices and where they had gone. At that time Soko and Boila had been inside the truck that was parked about 5-10 meters away. One of the officers had come back with the names of accomplices revealed by the suspects. Moneys seized from the suspects had been handed over to him at Malevu by IP Bari. He had seen both suspects in the truck handcuffed and with blood on their faces. Apakuki had been questioned in this regard and Apakuki had told him that they had received their injuries at the hands of the police officers and villagers when they resisted arrest.

[23] The confession of the 1st Appellant had been corroborated by Apakuki's evidence that he was in contact with the 1st Appellant prior to going up the hill in Malevu. The fact

that Soko and Boila were interrogated at Malevu also corroborates the 1st Appellant's caution statement wherein he had asked the police officers to question the suspects. Again the 1st Appellant's evidence that the money recovered from the suspects was handed over to him at Malevu is corroborated by the evidence of Apakuki and Bari. Had the police party proceeded to follow a black taxi that went up the hill in Malevu as the 1st Appellant states the question arises as to why after proceeding 2-3 km they gave up the chase, decided to stop their vehicles and started to question the two suspects, who according to the 1st Appellant were injured and already in their custody. The 1st Appellant's caution statement clearly shows that he was not only in charge of the police party but capable of exercising control over the state of affairs existing at that time.

[24] The 2nd Appellant had said that he with two other police officers went in search of the suspects in connection with a robbery that had taken place at Nadi in a twin cab driven by Jim. When he was at Sigatoka he had been told that two of the suspects had been arrested at Tagaqe village and instructed to come to the top of the hill past Malevu village. On arrival at Malevu he had seen a truck, two other police vehicles and the two suspects arrested, handcuffed and lying down inside the truck. Thereafter another twin cab had arrived and four officers had got off and climbed on to the back of the truck and started to kick and punch Soko and Boila questioning them about the robbery. Both Soko and Boila had been thrown out of the truck. He had seen two officers pounding chillies in a plastic container. They had then put on hand gloves and rubbed chillies on the face, ears, nose and anus of Soko and Boila. He had also seen an officer pulling Soko's leg and hitting him with a stick. When Soko turned upside down in pain, a stick was poked inside Soko's anus. Both suspects had been naked at this time. Thereafter Soko and Boila had been loaded into the twin cab driven by Jim and brought to Sigatoka police station.

[25] The 4th Appellant in his statement had stated that he was informed of a robbery at Nadi and proceeded to Nadi with some other police officers. From there they had gone in search of the suspects to Sigatoka. While at Sigatoka he had been instructed to come to Malevu. Later they were instructed to go up a road at Malevu. Upon reaching the top of the hill the police truck with the suspects Soko and Boila also arrived there. Soko and Boila were lying on the floor of the truck. Thereafter some other police

officers arrived and brought the suspects out of the truck and three of the police officers started kicking and questioning them. The suspects were handcuffed and lying on the floor when they were beaten. One of the officers had hit Soko with a stick. 4th Appellant stated that he did not assault the suspects and had told the officers to stop kicking Soko.

[26] The 5th Appellant had in his caution statement stated that he was asked to join a police party who were heading to apprehend suspects in a robbery at Nadi and proceeded to Nadi with some other police officers. Before reaching Sigatoka they had been informed that two suspects had been arrested at Malevu. They had then gone in search of a black taxi which is supposed to have gone up a gravel road at Malevu. Upon reaching the top of the hill along that road they had seen other vehicles following them including the police truck carrying suspects Soko and Boila. Soko and Boila were dragged out of the truck and questioned by police officers. Seeing a plastic container with small chillies he had picked some and squashed it on injuries on Soko's face. He had picked four pairs of hand gloves from the vehicle and wore them before rubbing chillies on Soko's anus when he turned upside down. Soko was yelling in pain and gave out the names of others involved in the robbery. He had seen a police officer beating Soko with a stick about 12 inches long.

[27] The 9th Appellant in his caution statement had stated that he was also in the twin cab with the 2nd Appellant that went in search of the suspects in a robbery case. On their way to Sigatoka they had been informed that the suspects had been arrested at Tagage. Someone had brought chillies from the Sigatoka market. They had gone up a hill at Sigatoka on receipt of information that the suspects had been taken there. On reaching the hillside he had seen three police vehicles and the two suspects. Soko was sitting at the back of the truck and Boila was lying on the ground. Someone started to *'siliboro'* or rub the chillies 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 suspects behind. It was after they left that two other police teams had come there. He had brought the suspects thereafter to Sigatoka police station.

[28] The caution statements of both 2nd 4th, 5th, and 9th Appellants find corroboration in the evidence of other police witnesses who testified for the prosecution in relation to the

suspects Soko and Boila being taken to Malevu, the assault on them by police officers at Malevu, the fact that chillies had been applied in their anus. The fact that a stick had been poked into the anus of Soko, finds corroboration in the Admitted Facts, i.e. the doctors evidence. Further the caution statement of the 9th Appellant that the arresting officers left leaving behind the suspects is corroborated by SC Semi Ravasa., Constable Apakuki and Constable Usaia.

Issues to be dealt with in this Appeal

[29] **I shall now deal with the challenge to the admissibility of the caution statements (Issues 1, 19 and 21):-**

At the outset I wish to say that I have carefully examined the Ruling on voir dire dated 7 October 2016 and find that the learned trial Judge had comprehensively dealt with the grounds the Appellants tried to argue in this appeal against the voir dire. I shall therefore in brief refer to the paragraphs of the Ruling under which the salient features pertaining to the admissibility of caution statements have been considered.

- Paragraphs 2 & 3 – Test of admissibility. Reference has been made to voluntariness, constitutional rights and fairness.
- Paragraph 4 – Burden of proving - voluntariness, compliance with constitutional rights, fairness and where there has been non-compliance lack of prejudice to the accused.
- Paragraph 5 – Grounds under which defence objected to admissibility.
- Having set out the test of admissibility, burden of proof pertaining to admissibility and the defence objections, the learned trial Judge had separately dealt with the evidence at the voir dire of the Interviewing officers, witnesses to the statements and that of the 1st, 2nd, 3rd, 4th, 5th and 9th Appellants at paragraphs 6 to 131 of his Ruling.
- Thereafter from paragraphs 132 to 144 the learned Trial Judge had made some general observations about the testimonies of those who testified at the voir dire, having analysed the evidence and examined the voir dire grounds filed by the defence on 3rd July 2015. According to the Judge the contention put forward at the voir dire that some of the accused persons were induced to

make statements by way of a promise that they will be made State witnesses had not been reflected in the grounds of objections to the voir dire and thus affected the credibility of the defence version. Also the stance taken by some Appellants that their interview records had been fabricated by police, was not consistent with the grounds of voir dire. It had not been the contention of the defence that their signatures had been forged. According to the learned trial Judge the Appellants are experienced police officers with experience in criminal investigations and thus possessed knowledge of constitutional rights of suspects and the Judges Rules could not be ignored.

- Thereafter the learned trial Judge had exhaustively dealt with the caution statements of each of the Appellants from paragraphs 145 to 191 by taking into consideration the evidence at the voir dire of both the prosecution and the defence before deciding on their admissibility.

[30] Issue 1: Voir Dire:- Under this issue Counsel argued grounds 1, 2, 36 and 37 of the grounds of appeal, alleging that the learned trial Judge erred in law and in fact:

[31] Ground 1: In holding that the caution interviews of the 1st, 2nd, 3rd, 4th, 5th, 7th and 9th Appellants were voluntary and thus admissible:- It must be stated that the prosecution had relied only on the caution statements of the 1st, 2nd, 4th, 5th and 9th Appellants. Further, at the trial the defence had conceded that the caution statement of the 1st Appellant had been given voluntarily. (See paragraph 43 of the judgment) In support of this ground Counsel for the Appellants in his Submissions citing several English and Canadian authorities had argued that the truth and weight of evidence comes within the province of '*Jury'*. Counsel had submitted that the "trial Judge usurped the function of the Assessors when he stated that he was satisfied beyond reasonable doubt that the confession was true and as such he erred in law". But the ground of appeal is on the voluntariness of the confession and its admissibility. Voluntariness and the truth and weight to be attached to a confession are two separate issues. Voluntariness is determined by the trial Judge in a voir dire. If a Judge determines that the caution statement has not been made voluntarily it is not admitted as evidence and will not be considered by the assessors. The Assessors are however entitled to look into the issue of the voluntariness of a confession once a confession has been admitted, in their deliberations. The position in Fiji is different to that of England and

Canada, in cases where the Judge sits with a jury. It is clear from section 237(2) of the Criminal Procedure Act that a Judge shall not be bound to conform to the opinions of the Assessors in giving judgment.

[32] Ground 2: In not reversing his ruling on admissibility of the caution interview of the 9th accused (9th appellant), since at the trial it was proved that the prosecution witnesses had lied:- Appellants' counsel's argument on this matter both in his submissions and at the hearing was that it came out that the 9th accused had signed his caution interview at a drinking party subsequent to his making it, whereas at the voir dire the evidence was to the effect he signed it at the conclusion of his interview. This is indicative of the fact that no compulsion was brought upon the 9th Appellant to sign his caution statement. In my view this is a frivolous ground and has no merit.

[33] Ground 36: In not directing himself and the assessors that the allegations and charges were never put to the accused while they were caution interviewed.

[34] The interviewing officers and the witnesses to the caution interview had denied that the allegations and charges were never put to the accused while they were caution interviewed. I am also of the view that being police officers they were aware of the incident pertaining to which their caution statements were sought to be recorded.

[35] Ground 37: In not directing himself and the assessors that the statements were made on the promise of being made State witnesses and therefore not voluntary.

[36] The interviewing officers and the witnesses to the caution interview had denied that the statements were made on the promise of being made State witnesses and therefore not voluntary.

[37] <u>Issue 19: Admissibility of Caution Interview, Question of Fact for Assessors:-</u> Under this issue Counsel for the Appellants argued grounds 33 and 34 of the grounds of appeal.

[38] Ground 33: Ground 33 was a repetition of ground 26 referred to in issue 6.

[39] Grounds 26 & 33:- By misdirecting himself that none of the accused gave evidence to confirm the truth in his caution interview.

[40] Ground 34: The learned trial Judge erred in law and fact by stating that all the accused told the truth in their statements, when that was a matter for the assessors. This ground is misleading as it contradicts the challenge by the Appellants to their caution statements of the Appellants. Ground 34 was a repetition of grounds 15 & 20 referred to in issue 11.

[41] Issue 21: Allegations not put to the Appellants regarding the charges before the Court:- Under this issue Counsel for the Appellants argued ground 36 of the grounds of appeal.

[42] Ground 36:- This was a ground already referred to by Counsel for the Appellant under Issue 1.

[43] On the issue of the alleged breach of Constitutional rights which was sought to be argued in the Submissions, although not raised as a specific ground in the grounds of appeal for which leave had been granted, I am of the view that a court should exclude such evidence, in the event there has in fact been a breach, only where the prejudicial effect of such evidence is not outweighed by its probative value as stated in a Ruling of the High Court in **State v Lingam [2001] FJHC 33, 13 June 2001**. I take note of the fact that this was a case where the caution statements had been made by police officers and those called upon to perform police duties and thus would have been well aware of their constitutional and common law rights. A Court would have to be careful in setting a precedent of excluding a caution statement of a police officer on the mere ground of an alleged breach of his constitutional rights, as this may give an idea to police officers of deliberately not recording in the caution statement of police officers, that the rights had been read out to them, in order to help out their fellow police officers.

[44] For the reasons set out above I dismiss the grounds of appeal encapsulated in issues 1, 19 and 21 pertaining to the challenge to the admissibility of the caution statements of the 1st, 2nd, 3rd, 4th , 5th, and 9th Appellants.

[45] **I shall now deal with the Rejection of the No-Case Submission (Issue 2)**

Issue 2: No Case to Answer:- Under this issue Counsel argued grounds 3, 5 and 13 of the grounds of appeal, alleging that the learned trial Judge erred in law and in fact:
Grounds 3, 5 & 13: In not taking into adequate consideration the Appellants submission on No Case to answer based on the evidence of Boila that none of the Appellants assaulted him and Soko and that there was no evidence that each of the accused had agreed with each other expressly or tacitly to sexually assault suspects for the purpose of interrogation. Grounds 5 & 13 were a repetition of ground 3 in relation to the evidence of Boila.

[46] **Section 231 of the Criminal Procedure Act 2009** deals with the procedure to be followed when a submission of No Case to answer is made.

"*Close of case for the prosecution*
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 —*
(a) to address the court, either personally or by his or her lawyer (if any); and
(b) to give evidence on his or her own behalf; or
(c) to make an unsworn statement; and
(d) to call witnesses in his or her defence.
(3) In all cases the court shall require the accused person, or his or her lawyer (if any), to state whether it is intended to call any witnesses as to fact other than the accused person, and upon being informed of this the judge shall record the response to the question.
(4) If an accused person says that he or she does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the prosecutor may sum up the case against the accused person.
(5) If an accused person states that he or she intends to give evidence or make an unsworn statement or to adduce evidence, the court shall call upon the accused person to commence his or her defence."

[47] It is well settled that, the test at this stage of the trial is whether there is some relevant and admissible evidence, direct or circumstantial, touching on all elements of the

charge and not an assessment of the weight and credibility of such evidence, unless the evidence is inherently vague or improbable. The learned Trial Judge at paragraph 4 of his Ruling on No Case to Answer Submission had stated: "In this case having heard evidence of 23 witnesses called by the Prosecution, and bearing in mind section 231(2) and (3) 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 defence." He had thereafter set out the issues in dispute, summarised the evidence led before him, examined the concepts of joint criminal responsibility set out in sections 45 and 46 and analysed the evidence led in the prosecution case in respect of each Appellant in respect of each of the charges preferred against them separately.

[48] The learned trial Judge being the ultimate trier of fact was perfectly entitled to reject the evidence of Boila. The Assessors by finding the 4th, 5th, 6th, 7th, 8th and 9th Appellants guilty of counts 1 and 2, had also rejected the evidence of Boila. There was no necessity to look for evidence that each of the accused had 'agreed with each' other expressly or tacitly to sexually assault suspects for the purpose of interrogation, in view of the manner the Appellants were charged, namely under the provisions of section 45 and 46 of the Crimes Act 2009.

[49] In view of the summary of evidence and what I have stated in paragraphs 8-28 above, I have no hesitation in agreeing with the learned Trial Judge's decision to reject the Submission of No Case. For the reasons set out above I dismiss Issue 2 which encapsulates grounds 3, 5, and 13 of the grounds of appeal which was the challenge to the rejection of the No Case Submission.

[50] **I shall now deal with the alleged Misdirection on law by the learned trial Judge (Issues 6, 10, 11, 12, 14, 17 and 20)**

[51] Issue 6: Burden of Proof:- Under this issue Counsel for the Appellants argued grounds 9, 16, 25, 26, 27, 29 and 33 of the grounds of appeal alleging that the learned trial Judge erred in law and in fact:-

[52] Ground 9:- In wrongly directing himself on the question of burden of proof. The Counsel for the Appellants has in his Submissions has referred us to the learned trial Judge's Summing Up at pages 67-87 of the Court Record in this regard, without specifying what his complaint is. Further pages 67-87 of the Court Record does not contain a Summing Up. This in our view is very inappropriate. I have examined the Summing Up and find that at paragraph 7 of the Summing Up, the learned trial Judge had correctly stated: "*On the matter of proof, I must direct you as a matter of law that the accused persons are innocent until they are proved guilty. The burden of proving their guilt rests on the Prosecution and never shifts. There is no obligation upon the accused to prove their innocence."*

[53] Ground 16:- When he shifted the burden of proof to the Appellants when he stated *"Defence failed to create any doubt in the Prosecution case".*

[54] At paragraph 10 the judgment learned trial Judge had stated: "I direct myself in accordance with my own summing up and analyse all the evidence led in the trial. <u>I am satisfied that the version of the Prosecution is truthful and reliable</u> and <u>no reasonable doubt has been created by the Defence for me to reject it</u>". (emphasis added) This in my view does not amount to a shifting of the burden of proof but stating the correct position in law.

[55] Grounds 25 & 29 :- By not believing prosecution witnesses whose evidence were favourable to defence. This was an elaboration of ground 32 under issue 4. The complaint being made is in regard to Samisoni's evidence. His evidence was in relation to count 5 and that about a meeting that took place in his house where he testified that the 1st Appellant was not present. Constable Usaia in his evidence had contradicted him and the learned trial Judge at paragraph 72 of his judgment had given his reasons as to why he disbelieved him.

[56] Grounds 26 & 33:- By misdirecting himself that none of the accused gave evidence to confirm the '*truth'* in his caution interview. This ground is misleading as it contradicts the challenge by the Appellants to their caution statements of the Appellants.

[57] Ground 27:- By misdirecting himself that failure to ask questions from prosecution witnesses proved the guilt of the accused. Counsel at the hearing did not elaborate further on this ground. It is trite law that a trial Judge is perfectly entitled under the law to convict an accused basing himself purely on circumstantial evidence where the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion. In **Blackstone's Criminal Practice 2016 F7.8** it is stated: "*A party who fails to cross-examine a witness upon a particular matter in which it is proposed to contradict him or impeach his credit by calling other witnesses, tacitly accepts the truth of the witness's evidence in chief on that matter, and will not thereafter be entitled to invite the jury to disbelieve him in that regard*". In **Bircham [1972] Crim. LR 430**, counsel for the accused was not permitted to suggest to the jury in his closing speech that the co-accused and a prosecution witness had committed the offence charged, where the allegation had not been put to either in cross-examination.

[58] Issue 10: Circumstantial evidence based on defence not questioning the Prosecution witnesses.

[59] Under this Issue based on ground 14 of appeal, Counsel for the Appellants had argued in his submissions that the learned trial Judge erred in law and in fact in convicting the appellants on circumstantial evidence and on inference drawn from the defence counsel not questioning the prosecution witnesses. The second limb of this ground is a repetition of ground 27 referred to in issue 6, which I have dealt with at paragraph 57 above.

[60] Issue 11: Contradictions by the learned Trial Judge:- Under this issue Counsel for the Appellants argued grounds 15 and 20 of the grounds of appeal.

Grounds 15 & 20:- The learned Trial Judge misdirected & contradicted himself having earlier said that the credibility and reliability of the witnesses evidence was for the assessors, but when the assessors found the appellants not guilty on certain counts the learned Trial Judge found them guilty by usurping their functions. This is a misunderstanding on the part of Counsel for the Appellants as to the general direction given to the assessors and correctly, at paragraphs 3 and 4 of the Summing Up at page

170 that they are the judges of fact, which certainly cannot override the provisions of section 237(2) of the Criminal Procedure Act 2009.

[61] Grounds 15 and 20 are misconceived, as **section 237(2) of the Criminal Procedure Act 2009** specifically states that the judge shall not be bound to conform to the opinions of the assessors. In **Sakiusa Rokonabete –v- The State [2006] FJCA 85; AAU0048.2005S, 22 March 2006** , this Court said: "*In Fiji, the assessors are not the sole judges of fact. The Judge is the sole judge of fact in respect of guilt and the assessors are there only to offer their opinions based on their views of the facts*." Again in **Maya v State [2015] FJSC 30, CAV009.2015 (23 October 2015)** it was held "*In Fiji the decision on guilt or innocence is entrusted to the presiding judge. The role of the assessors is to tender opinions to assist the judge. But they are not deciders of fact or ultimately of the verdict*."

[62] Issue 12: Overruling Assessors/Not giving cogent reasons:- Under this issue Counsel for the Appellants argued ground 17 of the grounds of appeal. Ground 17:- The assessors had unanimously found the 4th, 5th, 6th, 7th, 8th, and 9th accused guilty on the 1st count of rape and 2nd count of sexual assault and found all the accused not guilty on the other counts. The learned Trial Judge while accepting the opinions of the Assessors in respect of 4th, 5th, 6th, 7th, 8th, and 9th in relation to counts 1 and 2 rejected their opinions in respect of the 1st, 2nd, and 3rd accused in relation to counts 1 and 2 and the rest of the counts and found all nine accused guilty of the respective charges preferred against them.

[63] Section 237 of the Criminal Procedure Act 2009 states as follows:

> *"Delivery of opinions by assessors*
> *237. — (1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.*
>
> *(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.*
>
> *(3)…… Notwithstanding the provisions of section 142(1) and subject to sub-section (2), where the judge's summing up of the evidence under the provisions of subsection(1)is on record, it shall not be necessary for any*

judgment(other than the decision of the court which shall be written down) to be given, or for any such judgment (if given) —

(4) 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.
(5)……
(6)……
(7)……"

[64] As regards giving cogent reasons for disagreeing with the opinion of the assessors, it is clear that such reasons must be clearly stated and founded on the weight of the evidence led at the trial and capable of withstanding critical examination in the light of the whole of the evidence presented in the trial. The reasons must explain why the trial judge has rejected the evidence of any witness on critical factual issues, record his findings on them by analysing the evidence supporting the findings and disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence while justifying rejection of the defence account of the relevant facts. **<u>Prasad v Reginam</u> [1972] 18 FLR 68: 23 June 1972 [1972] FJLawRp 14 and <u>Setvano v State</u> AAU0014 27 May 1991[1991] FJCA 3**.

[65] The learned trial Judge had found the opinion of the Assessors perverse and set out his reasons in detail in his judgment.

- That both Soko and Boila were anally penetrated had been an admitted fact.
- That he accepts the prosecution version that all 9 Appellants in respect of counts 1-4 are liable under sections 45 and 46 of the Crimes Act 2009 having analysed all the evidence led at the trial and in accordance with his summing up. He had stated that the prosecution version was truthful and reliable and no doubt had been created by the defence, to reject it. According to the trial Judge the Appellants were engaged in a joint enterprise to torture the victims and rape and sexual assault were probable consequences of their plan which they could have foreseen.
- He rejects the defence version that the Appellants were not involved in the alleged offences, that Soko and Boila were already injured by the time the Appellants came

to Malevu having been assaulted by the arresting officers or villagers, that there is no evidence of a joint enterprise and that the Appellants had gone to Malevu in pursuit of a taxi, that the Appellants were handpicked from 25-30 officers and the indictment was nothing but a blame game of the Police Internal Affairs Unit to save others, that the caution statements by the 2nd, 4th, 5th, and 9th Appellants had been made involuntarily and therefore not truthful statements to be acted upon.

- Criminal liability to the 1st and 2nd Appellants has been attributed on the basis that they had the power to control the offenders and was present when the offences were committed with the knowledge of facts which constitute the offence. The 1st Appellant was the Divisional Crime Officer and the 2nd Appellant the leader of the Lautoka Strikeback Unit.
- The 1st Appellant had directed his officers to question the suspects about the other accomplices and get information from them, which was the main purpose of their enterprise. It had been the learned trial Judge's view that the 1st Appellant's denial of knowledge of what happened to the suspects was unacceptable since he was only 5-10 meters away from where the suspects were crying out in pain.
- The 2nd Appellant had seen pounding chillies in a plastic container, rubbing chillies on Soko's and Boila's anus, had seen somebody poking a stick in Soko's anus and done nothing to prevent the commission of these offences.
- The 3rd Appellant was a member of the fleet that was driven to Malevu hillside. The suspects were handed over to him and the 2nd and 5th Appellants by the arresting officers at Malevu.
- Sine all the accused were law enforcement officers they were duty bound to prevent the commission of crimes. Their inaction or passivity with knowledge of the crimes that were being committed constituted aiding and abetting.
- He has given sufficient reasons to show why he did not place reliance on the inconsistencies between the evidence of prosecution witnesses and their police statements and the inconsistencies in the evidence of some of the prosecution evidence led before the Court. (paragraphs 12 &13)
- He has given reasons for not placing reliance on the evidence of Jone, the driver of the vehicle of the 1st Appellant.
- He has rejected the version of the pursuit of the black taxi on the basis that prosecution witness Apakuki was never questioned about it and that it was highly

unlikely that a flotilla of five vehicles had wanted to follow it, including the truck with the two suspects in it.

- There was no evidence that any of the Appellants had gone there without their own free will nor any evidence that anyone of them had withdrawn from the common plan.
- The fact that chillies had been obtained from the Sigatoka market, that there were rubber gloves readily available at the hillside in Malevu with the police party, and that suspects Soko and Boila were stripped naked was indicative of an agreed plan of sexual assault of rubbing chillies on the anuses of Soko and Boila and each of the Appellants could have foreseen that someone in the group would insert an object into the anuses of the suspects.
- The prosecution evidence proved that there were only 21 police and military officers inclusive of the 9 Appellants present at the scene of offence and out of which 11 of them including the arresting officers had given evidence. It had not been put to any of the prosecution witnesses that they were the ones responsible for the assault on Soko and Boila, nor was there any suggestion that officers who did not give evidence were responsible for the assaults.
- Boila's (who was made a hostile witness) evidence that none of the Appellants were involved in the assaults and that it was the arresting officers who were responsible was not supported by any other evidence. Boila's evidence was totally contradictory to his previous statements to the police. He had never mentioned that it was the arresting officers who caused him the injuries. It was never put to the arresting officers by the defence, while they were giving evidence that they were the ones who caused the injuries to Soko and Boila.
- That PC Usaia's and D/Sgt Bari's evidence implicates the 1st Appellant in count 5. The learned trial Judge had given his reasons for rejecting Samisoni's evidence.
- That SC Apete's evidence implicates the 6th Appellant.

[66] Issue 14: Joint Enterprise, Common Knowledge and Aiding and Abetting:- Under this issue Counsel for the Appellants argued ground 21 of the grounds of appeal.

Ground 21:-That the learned trial Judge erred in law and in fact when he misdirected himself on the laws regarding joint enterprise, common knowledge and aiding and abetting. I am of the view that this was the ground on which the learned Counsel for

the Appellants should have concentrated most, but informed at the hearing that he would in relation to this ground rely on his submissions filed, when asked by Court whether he wished to elaborate further on this ground. In my view the learned trial Judge had in relation to this ground stated the law correctly but had erred in its application in examining the liability of the 3rd and 4th Appellants.

[67] This necessitates an examination of the principles of extensions of criminal liability set out in sections 45 and 46 of the Crimes Act 2009, namely complicity and common purpose and offences committed by joint offenders in prosecution of common purpose; and the provisions relevant to this case pertaining to the offences of rape and sexual assault in the Crimes Act 2009, under which the Appellants were charged and convicted.

"Complicity and common purpose

Section 45. — *(1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.*

(2) for the person to be guilty —
(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
(b) the offence must have been committed by the other person.

(3) Subject to sub-section (6), for the person to be guilty, the person must have intended that —
(a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
(b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

(4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person —
(a) terminated his or her involvement; and
(b) took all reasonable steps to prevent the commission of the offence.

(5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.

(6) Any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

(7) If the trier of fact is satisfied beyond reasonable doubt that a person either—
(a) is guilty of a particular offence otherwise than because of the operation of sub-section (1); or
(b) is guilty of that offence because of the operation of sub-section (1)—
But is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence."

"Offences committed by joint offenders in prosecution of common purpose

Section 46. *When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.***"**

"The offence of rape

Section 207. — ***(1)*** *Any person who rapes another person commits an indictable offence.*
Penalty — Imprisonment for life.

(2) *A person rapes another person if —*
(a)………. ; or
(b) *the person penetrates the…anus of the other person to any extent with a thing…or…without the other person's consent; or*
(c)……….

*(3)……….***"**

"Sexual assaults

Section 210. — ***(1)*** *An person commits an indictable offence (which is triable summarily) if he or she—*
(a) *unlawfully and indecently assaults another person; or*
(b)……….
(i)………. ; or
(ii)……….
Penalty — Imprisonment for 10 years.

(2)……….

(3) further, the offender is liable to a maximum penalty of life imprisonment if—
(a) immediately before, during, or immediately after, the offence, the offender is,…, or is in company with any other person; or
(b)……….; or
*(c)……….***"**

[68] In my view for one to be **liable under section 45**:

a) An offence should have been committed by two or more persons

b) The '*conduct'* of one (secondary party) must have in fact aided, abetted, counselled or procured the commission of the offence by the other person (principal) and the offence must have been committed. In the absence of a commission of an offence there cannot be any secondary party liability. The liability of a secondary party is properly described as derivative: it derives from and is dependent upon the liability of the principal.

c) '*Conduct'* according to section 15(2) of the Crimes Act 2009 means an act, or an omission to perform an act or a state of affairs. It must be noted that conduct can only be a physical element; which is a pre-requisite to establish guilt in respect of an offence; if it is voluntary. An omission to perform an act according to section 16 (4) of the Crimes Act is only voluntary, if the act omitted is one which the person is capable of performing. If the conduct constituting an offence consists only of a state of affairs, the state of affairs is only voluntary according to section 14(5) of the Crimes Act, if it is one over which the person is capable of exercising control.

d) An omission to perform an act can only be a physical element according to section 17 of the Crimes Act 2009, if—(a) the law creating the offence makes it so; or (b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform. This implied provision is found in section 45(4) of the Crimes Act 2009, referred to above. According to section 45 (4) if a person can show that he or she before the commission of the crime terminated his or her involvement or took all reasonable steps to prevent the commission of the offence, he/she could avoid liability.

e) Thus the physical element needs to be proved before one is made liable.

f) The fault or mental element, the other pre-requisite for establishing guilt, should be that the person should have intended or meant to engage in the conduct that

would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed or have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

One cannot intend without knowledge and this requires knowledge of the essential facts. He may also be held to know a fact where he deliberately shuts his eyes to the obvious and refrains from enquiry. In a case of wilful blindness, he is treated as having actual knowledge because he has intentionally chosen not to inquire on the basis that it is folly to be wise.

g) It is not necessary to prove that he intended that his/her conduct would aid, abet, counsel the 'exact offence' the other person committed. This is made clear by the words 'any offence of the type', in section 45 (3) of the Crimes Act as stated above.

h) A person could be said to have been reckless according to section 21(1) of the Crimes Act 2009, if he or she was aware of a substantial risk that the circumstances exist or will exist, namely the commission of the offence and it was unjustifiable to take the risk having regard to the circumstances known to him or her.

Voluntary presence at the scene of a crime may be capable of constituting encouragement but in such a case the secondary party must intend that his presence should encourage the principal, and the principal must in fact be encouraged by his presence: Coney (1882) 8 Q,B.D. 534.

Once the above elements are satisfied the secondary party is taken to have committed that offence individually and is punishable in the same way as the principal according to section 45(1).

[69] In my view for one to be liable under **section 46**:

a) There should be the involvement of 2 or more persons.
b) They should have formed a common intention to prosecute an unlawful purpose in conjunction with one another, and

c) In the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose.
d) Section 46 thus envisages a situation where an offence is committed which is distinct from the unlawful purpose the offenders had formed a common intention to prosecute in conjunction with one another. The sine qua non of liability under section 46 is that the offence committed should be of such a nature that its commission should have been a probable consequence of the prosecution of such purpose in the mind of offender sought to be made liable. In this context the word 'probable' means something more likely to happen than the use of the word '*possible'*.
e) The rationale for joint enterprise liability rule is that one party, by intending to prosecute an unlawful purpose in conjunction with another, consciously accepts the risk that the other person might commit another offence.

[70] According to the 'Admitted Facts' between the Prosecution and the Defence under the provisions of section 135 of the Criminal Procedure Act 2009, both Vilikesa Soko and Seinijeli Boila were anally penetrated on the 15th of August 2014. It had been admitted that Soko had a *"2 × 1 cm laceration at the 12' o clock position (on top) on the anus" and that the "peri-anal laceration and blood stains suggest acute injury (less than 24 hours) and possibly caused by forcefully inserting a blunt object into the patient's anus"*. Smashed chillies were noted on both his ears and after removing chillies blood was noted in both canals. Stool had been noted on gloves produced to the doctor for examination. It had been admitted that Boila had a 2 cm laceration (superficial) with bleeding on his anus. The fact that Boila had told the doctor who examined him that "*a stick was thrust up his anus on the 15th of August 2014*" had been admitted. Thus section 207(2)(b), namely penetration of the anus, which is the physical element of rape that had to be proved by the Prosecution against the Appellants in relation to counts 1 and 3, had been an admitted fact. What then remained to be proved was the identity of the perpetrator or perpetrators of the offences, and the fault element on the part of all nine Appellants under section 45 and 46 of the Crimes Act 2009 to commit the offences on the basis of joint liability. Consent of the victims to the penetrations could never be an issue in this case in view

of the circumstances of this case and the nature of the injuries suffered by Soko and Boila

[71] In my view rubbing chillies in the anus of a person forcibly, is an assault that is both unlawful and indecent that would satisfy all the elements of section 210(1)(a) of the Crimes Act 2009 and needs no further elaboration.

[72] Issue 17: Hostile Witness:- Under this issue Counsel for the Appellants argued ground 28 of the grounds of appeal.

Ground 28:- The learned Trial Judge erred in law and in fact when he completely misdirected himself on the law as to hostile witness.

[73] A reading of paragraph 186 of the Summing Up shows that there has been no misdirection on the law as to hostile witness. The learned Trial Judge had stated therein: "The evidence of a hostile witness would not be totally rejected, but it should be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the Prosecution may be accepted. You decide what weight you give to Boila's evidence, what parts of his evidence you accept and what parts you reject. Please remember that a statement made to the police is not evidence unless it is adopted and accepted by the witness under oath as being true."

[74] Issue 20: Cost against 1st Appellant and Appellant's Counsel:- Under this issue Counsel for the Appellants argued ground 35 of the grounds of appeal.

Ground 35: The learned trial Judge erred in law and fact in not exercising judicial discretion in awarding costs against the Appellants. This is an appeal against conviction and sentence and thus I do not intend to deal with this ground of appeal as it has no bearing on the conviction of the Appellants or their sentences.

[75] I therefore dismiss issues 6 (encapsulating grounds 9, 16, 25, 26, 27, 29, and 33 of the grounds of appeal); 10 (encapsulating ground 14 of the grounds of appeal); 11 (encapsulating grounds 15 and 20 of the grounds of appeal); 12 (encapsulating ground 17 of the grounds of appeal); 14 (encapsulating ground 21 of the grounds of appeal);

17 (encapsulating ground 28 of the grounds of appeal); and 20 (encapsulating ground 35 of the grounds of appeal).

[76] **I shall now deal with the Misdirections on Facts by the learned trial Judge (Issues 4, 7, 8, 9, 13, 15 and 18)**

[77] Issue 4: Serious doubts in the Prosecution case:- Under this issue Counsel for the Appellants argued grounds 6, 8 and 32 of the grounds of appeal alleging that the learned trial Judge erred in law and in fact:-

[78] Ground 6: In not taking into consideration that two versions were presented in Court in respect of count 5 and in rejecting the evidence of Inspector Samisoni. I have dealt with it already at paragraph 52 above.

[79] Grounds 8 and 32: In not directing the Assessors that there were serious doubts in the prosecution case. Counsel elaborating on ground 8 in his submissions have referred to:

(i) Inconsistencies in the evidence of the prosecution witnesses

(ii) Inconsistencies in the evidence of witnesses with their witness statements

(iii) That no identification parade was held

(iv) The learned trial Judge only chose to believe evidence favourable to the prosecution

Counsel for the Appellants, repeating himself had again made reference to the rejection of Boila's evidence. I have dealt with Boila's evidence at paragraphs 19, 20 and 48 above.

[80] The learned trial Judge had adequately directed the Assessors at paragraphs 13 – 15 of the Summing Up as to how they should analyse the evidence; making specific reference to dealing with inconsistencies in the evidence of the prosecution witnesses, inconsistencies in the evidence of witnesses with their witness statements and the rule pertaining to divisibility of credibility of a witnesses testimony. The learned trial Judge had directed them to consider how material are the inconsistencies and whether there is a reasonable explanation for them. He had at paragraph 15, directed them that

"When there are two contradictory versions between the evidence of two witnesses, you have to take a holistic approach and consider all the evidence led in the trial and come to a decision as to who is telling the truth." There was no need for an ID parade in this case as the prosecution witnesses who testified for the prosecution in this case knew the Appellants, who were also police officers.

[81] Issue 7: Not properly analysing all the facts:- Under this issue Counsel for the Appellants argued ground 10 of the grounds of appeal.

[82] Ground 10: Under this ground Counsel for the Appellants argued that the learned trial Judge erred in law and in fact in not properly/and adequately analysing all the facts before him before convicting the accused, namely the evidence of the complainant Boila, the prosecution witnesses especially the police witnesses. This ground was a repetition of ground 8, which has been dealt with at paragraph 81 above.

[83] Issue 8: Possible Defence on Evidence:- Under this issue Counsel for the Appellants argued ground 11 of the grounds of appeal.

[84] Ground 11: Under this ground Counsel for the Appellants argued that the learned trial Judge erred in law and in fact in not directing himself to the possible defence on evidence. In making submissions under this ground he had merely repeated what he had already urged under grounds 5, 10, 13 and 25.

[85] Issue 9: Unfair rejection of evidence favourable to Defence:- Under this issue Counsel for the Appellants argued ground 12 of the grounds of appeal.

[86] Ground 12:- This was a repetition of grounds 25 & 29 referred to under Issue 6.

[87] Issue 13: Learned Trial Judge raising a new theory:- Under this issue Counsel for the Appellants argued grounds 18 & 31 of the grounds of appeal alleging that the learned trial Judge erred in law and in fact:-

[88] Ground 18:- In commenting on the evidence raising a new theory on the facts, uncanvassed during the course of the trial whereby the defence has had no

opportunity of commenting upon it. The theory claimed to be raised by the learned Trial Judge as referred to in the submissions of the appellant is "*giving the impression that 'siliboro' is a common practice of torture known to police officers"*. It was the 9th Appellant who had in his caution statement made reference to '*siliboro*', which is a name given to rubbing chillies on the eyes, ears and anus. Thus the defence had every opportunity to comment upon it if they so wished at the trial stage or asked for a re-direction on it at the close of the Summing Up.

[89] Ground 31:- When he created a theory that the police officer took the accused person to hilltop in order to torture them when there was no credible evidence to support that. This was an inference the learned trial Judge had drawn on the basis of the evidence before him.

[90] Issue 15: Previous Inconsistent Statement:- Under this issue Counsel for the Appellants argued ground 22 of the grounds of appeal. Ground 22 is a repetition of ground 8(ii) under issue 4.

[91] Issue 18: Learned Trial Judge acting on Inference not supported by evidence:- Under this issue Counsel for the Appellants argued ground 30 of the grounds of appeal.

[92] Ground 30:- The learned trial Judge erred in law and in fact when he misdirected himself that there was no evidence of a black taxi that they were chasing because there was evidence from prosecution witnesses that there was a black taxi whom they suspected and on that basis they drove towards the feeder road on the hill side:-

The learned trial Judge's statement in this regard, which is found at paragraph 22 of his judgment cannot be faulted. At paragraph 22 he had said: *"There is no evidence whatsoever that a suspicious black taxi had turned towards Malevu hill. Apakuki was never questioned if he gave such information. Even if the accused had received such information it is highly unlikely that flotilla of five vehicles wanted to follow a suspicious taxi including the police truck with the two suspects and a dog."* Further if the plan was to follow a black taxi there is no explanation why all the vehicles stopped at the top of the hill to interrogate the suspects Soko and Boila.

[93] I therefore dismiss issues 4 (encapsulating grounds 6, 8, 32 of the grounds of appeal); 7 (encapsulating ground 10 of the grounds of appeal); 8 (encapsulating ground 11 of the grounds of appeal); 9 (encapsulating ground 12 of the grounds of appeal); 13 (encapsulating grounds 18 and 31 of the grounds of appeal); 15 (encapsulating ground 22 of the grounds of appeal); and 18 (encapsulating ground 30 of the grounds of appeal).

[94] **I shall now deal with Lengthy Summing Up:-** which was Issue 5 in the Appellant's submission and ground 7 of the grounds of appeal.

[95] <u>Ground 7:-</u> Under this ground the Appellant had argued that the learned trial Judge erred in law and in fact in taking almost 3 hours to outline all the evidence in his summing up which was unfair, imbalanced, confusing, and one sided and hence a substantial miscarriage of justice had occurred.

[96] At the hearing the Court was informed that the trial in this case had lasted 2 weeks and 23 witnesses had testified. This was a case where the learned trial Judge had to explain to the Assessors the elements of the offences of rape, sexual assault, and defeating the course of justice and sections 45 and 46 of the Crimes Act 2009 involving extensions of criminal responsibility. He had also to explain to the Assessors the principles pertaining to analysing evidence in addition to summarising all the evidence led before the Court. He had to deal with the Prosecution and Defence submissions at the conclusion of the hearing. The 39 grounds of appeal, although repetitive and haphazardly drafted and the 30 pages filed at the leave stage and the 50 pages of submissions filed before this Court for the hearing shows the variety and complexity of the issues involved in this case. Had the learned trial Judge made a short Summing Up the complaint would have been that he had not adequately dealt with the issues in this case. There is absolutely no merit in this issue raised and I therefore dismiss as being frivolous.

[97] **I shall now deal with the appeals of each of the 9 Appellants against their respective convictions separately**.

[98] **1st Appellant** had been convicted of the offence of rape under counts 1 and 3, sexual assault under counts 2 and 4, and defeating the course of justice under count 5.

[99] The 1st Appellant, a Superintendent of Police, had overall command of the Western Police Crime Division. According to the evidence of Constable Semi Rasa, Constable Apakuki Tuitavua, Constable Usaia, the police driver of the truck in which the Soko and Boila were brought to Malevu, and Detective Sergeant Bari; the 1st Appellant was at the scene of offence when the offences were committed. According to Semi Rasa, the 1st appellant was already at the scene of offence standing outside his vehicle when he arrived at Malevu with Soko and Boila. The 1st Appellant had come there in another vehicle with his driver and the 1st Appellant was standing beside his vehicle. The truck carrying the two suspects was parked 12 to 15 meters away from the 1st Appellant's vehicle. According to Apakuki it was on the instructions of the 1st Appellant, who was the Divisional Crime Officer that Soko and Boila who would otherwise have been taken to Sigatoka police station was taken to Malevu. There is no other plausible reason why Soko and Boila who had been arrested were taken to Malevu, instead to Sigatoka police station. 1st Appellant had been briefed about the arrest of Soko and Boila and the money recovered from Boila had been handed over to the 1st Appellant by Inspector Bari.

[100] The 1st Appellant in his caution statement admits the presence of Apakuki's truck in which suspects Soko and Boila had been detained, was at the scene of offence. Moneys seized from the suspects had been handed over to him at Malevu by IP Bari. He had directed two officers to ask from Soko and Boila about the other accomplices and where they had gone. At that time Soko and Boila had been inside the truck that was parked about 5-10 meters away. One of the officers had come back with the names of accomplices revealed by the suspects. Soko and Boila had been crying out in pain according to Police Officer Apete Nakolo. He had seen both suspects in the truck handcuffed and with blood on their faces.

[101] On an examination of the entirety of the evidence the main purpose of taking Soko and Boila to Malevu and causing injuries to them was to extract information about the other robbers and that was on the instructions of the 1st Appellant. The 1st Appellant either instigated the ones who assaulted Soko and Boila or being an officer

who had control of the situation did nothing to prevent the crimes being committed 5-10 meters away from him. The other officers who rubbed chillies inside the anus of Soko and Boila and poked a stick into their anus would not have done it without his approval. In my view the evidence available against the 1st Appellant satisfies all the elements set out in sections 45 and 46 particularized in paragraphs 69 and 70 above. The 1st Appellant intended or meant to engage in the assaults on Soko and Boila that the others committed. According to section 45(4) of the Crimes Act referred to at paragraph 69 above it was not necessary for the prosecution to prove that he knew exactly about the methods used to unlawfully extract the information. It is also clear that he had a common intention to prosecute an unlawful purpose in conjunction with those who actually committed the unlawful acts on Soko and Boila, with knowledge of the probable consequences of such acts and thus satisfies all the elements of section 46 of the Crimes Act 2009.

[102] Constable Usaia had also, implicated the 1st Appellant in the charge set out in count 5 by stating that he was briefed by the 1st Appellant, in relation to the second statement he made on the 21st of August 2014, which he said was an inaccurate account as to what happened on the 15th of August 2014. He signed the statement out of respect for his superior officers. Sgt Bari had also implicated the 1st Appellant in the charge set out in count 5. He had been asked by the 1st Appellant to say that Soko and Boila were handed over not on the top of the hill, but at Sigatoka. This evidence satisfies all the elements of section 190(e) of the Crimes Act 2009 referred to at paragraph 5 above.

[103] In view of what I have stated above I have no hesitation in dismissing the appeal by the 1st Appellant against his convictions under counts 1, 2, 3, 4 and 5.

[104] **2nd Appellant** had been convicted of the offence of rape under counts 1 and 3, and sexual assault under counts 2 and 4.

[105] 2nd Appellant was the team leader of the Lautoka Strikeback Unit. According to SC Semi Rasa the 2nd Appellant had arrived at the scene of offence in Malevu with some of the other Appellants in a vehicle after he had gone there with Soko and Boila. Thereafter suspects Soko and Boila who were handcuffed were removed from the

truck and the 2nd Appellant with other Appellants had taken custody of two suspects Soko and Boila. Constables Temo, Apakuki, Usaia and T. Nasiasila have all spoken of the presence of the 2nd Appellant at the scene of offence. Constable Usaia had complained that the 2nd Appellant had recorded his statement and falsely noted therein that it was the people from Tagaqe who were involved in this case and not anyone of the Appellants. This in my view was an attempt by the 2nd Appellant to cover-up his involvement in the offences.

[106] The 2nd Appellant, who was the team leader of the Lautoka Strikeback Unit, in his caution statement had said that on arrival at Malevu he had seen a truck, two other police vehicles and the two suspects arrested, handcuffed and lying down inside the truck. Thereafter another twin cab had arrived and four officers had got off and climbed on to the back of the truck and started to kick and punch Soko and Boila questioning them about the robbery. Both Soko and Boila had been thrown out of the truck. He had seen two officers pounding chillies in a plastic container. They had then put on hand gloves and rubbed chillies on the face, ears, nose and anus of Soko and Boila. He had also seen an officer pulling Soko's leg and hitting him with a stick. When Soko turned upside down in pain, a stick was poked inside Soko's anus. Both suspects had been naked at this time. Thereafter Soko and Boila had been loaded into the twin cab driven by Jim and brought to Sigatoka police station.

[107] In my view 2nd Appellant's liability for the offences of rape and sexual assault set out in counts 1-4 will also be on the same basis as I have set out at paragraph 101 above in respect of the 1st Appellant in view of the fact that he too was an officer who had control of the situation and had done nothing to prevent the crimes being committed. The officers who rubbed chillies inside the anus of Soko and Boila and poked a stick into their anus would not have done it without his approval.

[108] In view of what I have stated above I have no hesitation in dismissing the appeal by the 2nd Appellant against his convictions under counts 1, 2, 3 and 4.

[109] In this case the question centers on the issue of whether subordinate police officers like the 3rd and 4th Appellants can be held responsible as a result of their mere presence at the scene of offence by following their superiors' orders. Evidence in this

case shows that it was the 1st Appellant who directed that Soko and Boila be taken to the hillside in Malevu instead to Sigatoka Police station. The 3rd and 4th Appellants including other police officers who assembled at Malevu went there on orders received from their superiors'. It was the 1st Appellant who directed some police officers that Soko and Boila be questioned to find out as to the others involved in the robbery. In the context of this case however it can be inferred that this would have not meant an ordinary chit chat with Soko and Boila. In my view the omission by the 3rd and 4th Appellant to prevent the commission of the offences was not voluntary. It would be difficult to state with certainty that they were capable of doing so. Please see paragraph 68(c) above.

[110] **3rd Appellant** had been convicted of the offence of rape under counts 1 and 3 and sexual assault under counts 2 and 4.

[111] 3rd Appellant was a Detective Corporal. According to SC Semi Rasa the 3rd Appellant had arrived at the scene of offence in Malevu with some of the other Appellants in a vehicle after he had gone there with Soko and Boila. Thereafter suspects Soko and Boila who were handcuffed were removed from the truck and the 3rd Appellant with other Appellants had taken custody of two suspects Soko and Boila. Constable Semi Rasa had testified to the effect that the 3rd Appellant with other Appellants had taken custody of two suspects Soko and Boila.

[112] The only evidence against the 3rd Appellant who was a Detective Corporal was his presence at the scene of offence amidst officers senior to him. I therefore allow his appeal, quash the conviction and sentence entered against him and acquit him forthwith.

[113] **4th Appellant** had been convicted of the offence of rape under counts 1 and 3 and sexual assault under counts 2 and 4.

[114] 4th Appellant was also a police constable. According to SC Semi Rasa the 4th Appellant had arrived at the scene of offence in Malevu with some of the other Appellants in a vehicle after he had gone there with Soko and Boila. Constable Usaia had also seen the 4th Respondent at the scene of offence.

[115] The 4th Appellant in his caution statement had admitted his presence at Malevu. When they reached the top of the hill the police truck with the suspects Soko and Boila had also arrived there. Soko and Boila were lying on the floor of the truck. Thereafter some other police officers arrived and brought the suspects out of the truck and three of the police officers started kicking and questioning them. The suspects were handcuffed and lying on the floor when they were beaten. One of the officers had hit Soko with a stick. 4th Appellant stated that he did not assault the suspects and had told the officers to stop kicking Soko.

[116] The only evidence against the 4th Appellant who was a police constable was his presence at the scene of offence amidst officers senior to him. He had in fact told the officers to stop kicking Soko. I therefore allow his appeal, quash the conviction and sentence entered against him and acquit him forthwith.

[117] As regards the 5th, 6th, 7th, 8th and 9th Appellants, I wish to note that the United Nations had agreed to a series of "*Nuremberg Principles*" before the tribunals began. Nuremberg Principle IV said: "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him." The 5th to the 9th Appellants have not raised the "*Superior Orders Defence*" and thus it need not be considered in light of article 33 of the Rome Statute. However crimes that are manifestly illegal and clearly immoral cannot receive a '*Superior Orders Defence'*. Rape and sexual assault of suspects in custody and in the manner it had been done in this case *"pierces the eye and revolts the heart, if the eye is not blind and the heart is not impenetrable or corrupt."*

[118] **5th Appellant** had been convicted of the offence of rape under counts 1 and 3 and sexual assault under counts 2 and 4.

[119] According to SC Semi Rasa the 5th Appellant had arrived at the scene of offence in Malevu with some of the other Appellants in a vehicle after he had gone there with Soko and Boila. Thereafter suspects Soko and Boila who were handcuffed were

removed from the truck and the 5th Appellant with other Appellants had taken custody of two suspects Soko and Boila.

[120] The 5th Appellant had in his caution statement stated upon reaching the top of the hill at Malevu they had seen other vehicles following them including the police truck carrying suspects Soko and Boila. Soko and Boila were dragged out of the truck and questioned by police officers. Seeing a plastic container with small chillies he had picked some and squashed it on injuries on Soko's face. He had picked four pairs of hand gloves from the vehicle and wore them before rubbing chillies on Soko's anus when he turned upside down. Soko was yelling in pain and gave out the names of others involved in the robbery. He had seen a police officer beating Soko with a stick about 12 inches long.

[121] The 5th Appellant thus according to his own confession had played an active role in the assault on Soko. It is to be noted that the assault on Boila took place during this same transaction. He certainly is liable in accordance with sections 45 and 46 of the Crimes Act 2009 as he satisfies all the elements set out in sections 45 and 46 particularized in paragraphs 68 and 69 above.

[122] In view of what I have stated above, I have no hesitation in dismissing the appeal by the 5th Appellant against his conviction under counts 1, 2, 3 and 4.

[123] **6th Appellant** had been convicted of the offence of rape under counts 1 and 3, sexual assault under counts 2 and 4, and defeating the course of justice under count 6.

[124] The 6th Appellant is a police officer. According to constable Apakuki 6th Appellant had also arrived at the hillside at Malevu with other police officers in a vehicle. Police officer Apete Nakolo had said that he was instructed by his boss in the Strike-back Unit, namely the 6th Appellant to drive him, and the 7th and 8th Appellants to Malevu where Soko and Boila were being detained. The 6th, 7th, and the 8th Appellants having got off the police truck had kicked and punched Soko, in the stomach while asking questions from him and while he was inside a police truck. Soko was crying in pain. Constable Apakuki had also confirmed the presence of the 6th Appellant at the scene of crime. Nakolo had also, implicated the 6th Appellant in the charge set out in count 6

by stating that he was briefed by the 6th Appellant, in relation to the statement he made on the 26th of August 2014, which he said was an inaccurate account as to what happened on the 15th of August 2014. He had been asked to lie in that statement and the 6th Appellant was present when he made that statement.

[125] The 6th Appellant thus had played an active role in the assault on Soko . It is to be noted that the assault on Boila took place during this same transaction. The 6th Appellant is therefore certainly is liable in accordance with sections 45 and 46 of the Crimes Act 2009 as he satisfies all the elements set out in sections 45 and 46 particularized in paragraphs 68 and 69 above.

[126] In view of what I have stated above, I have no hesitation in dismissing the appeal by the 6th Appellant against his conviction under counts 1, 2, 3, 4 and 6.

[127] **The 7th Appellant** had been convicted of the offence of rape under counts 1 and 3, sexual assault under counts 2 and 4.

[128] The evidence of Police officer Apete Nakolo referred to at paragraph 124 above implicates the 7th Appellant. Constables Apakuki had also confirmed the presence of the 7th Appellant at the scene of crime. Police constable Usaia had seen Soko and Boila lying naked on the road side and the 7th and 8th Appellants standing beside them.

[129] The 7th Appellant thus had played an active role in the assault on Soko . It is to be noted that the assault on Boila took place during this same transaction. The 7th Appellant is therefore certainly liable in accordance with sections 45 and 46 of the Crimes Act 2009 as he satisfies all the elements set out in sections 45 and 46 particularized in paragraphs 68 and 69 above.

[130] In view of what I have stated above, I have no hesitation in dismissing the appeal by the 7th Appellant against his conviction under counts 1, 2, 3, 4.

[131] **The 8th Appellant** had been convicted of the offence of rape under counts 1 and 3, sexual assault under counts 2 and 4.

[132] The evidence of Police officer Apete Nakolo referred to at paragraph 124 above implicates the 8th Appellant. Police constable Usaia had seen the 2nd, 4th, 7th, 8th, and 9th, Appellants, who had arrived in two vehicles, at the scene. Police constable Usaia had seen Soko and Boila lying naked on the road side and the 7th and 8th Appellants standing beside them.

[133] In view of what I have stated above, I have no hesitation in dismissing the appeal by the 8th Appellant against his conviction under counts 1, 2, 3, 4.

[134] **The 9th Appellant** had been convicted of the offence of rape under counts 1 and 3, sexual assault under counts 2 and 4.

[135] Constables Temo and Usaia had seen the 9th Appellant at the scene of offence.

[136] The 9th Appellant in his caution statement had admitted his presence at the scene of crime. He knew that someone had brought chillies from the Sigatoka market. They had gone up a hill at Sigatoka on receipt of information that the suspects had been taken there. On reaching the hillside he had seen three police vehicles and the two suspects. The 9th Appellant had stated in his caution statement that Soko was sitting at the back of the truck and Boila was lying on the ground. Someone started to '*siliboro*' or rub the chillies on the eyes, ears and anus of Boila and Soko whilst they were being interrogated. He had brought the suspects thereafter to Sigatoka police station.

[137] The 9th Appellant obviously knew about the practice known as '*siliboro'*, namely rubbing chillies on a person's body especially on the eyes and anus. He could not be said to have been ignorant as to the purpose why chillies were bought from Sigatoka market, especially because the police party were going to Malevu where Soko and Boila were being detained. He was one who had the opportunity to terminate his involvement or take reasonable steps to prevent the commission of the offences. There is no evidence that he had chosen not to do so.

[138] In view of what I have stated above, I have no hesitation in dismissing the appeal by the 9th Appellant against his conviction under counts 1, 2, 3, 4.

[139] **I shall now deal with the challenge to the sentences passed against the 1st, 2nd, 5th, 6th, 7th, 8th, and 9th Appellants.**

[140] Issue 22: Sentence:- Under this issue Counsel for the Appellants had made reference to grounds 39 and 40 of the grounds of appeal:- At the hearing before us, Counsel for the Appellants did not offer any arguments on sentence, but stated he was relying on his Submissions filed on 8 January 2019.

[141] Ground 39:- The learned trial Judge erred in law and in fact in taking irrelevant matters into consideration.

Ground 40:- The learned trial Judge erred in law and fact in not taking into consideration the provisions of the Sentencing Penalties Act 2009.

[142] The Appellants' Counsel in his submissions filed before this Court have correctly relied on the often quoted judgment of **Kim Nam Bae v The State, Criminal Appeal No. AAU 0015 of [1988] (26 February 1999) that followed House v The King (1936) 55 CLR 499** and other case law in regard to the guidelines given when an appellate court should interfere with the sentence passed by the trial court. I have nothing but to agree with the authorities cited. Thereafter Counsel had stated that the trial Judge had not exercised his judicial discretion in sentencing by taking into consideration the mitigating circumstances and the circumstances of the offence. He had also stated that the trial Judge had not adequately considered the provisions of the Sentencing and Penalties Act when sentencing the Appellant. Counsel for the Appellant had not referred us to any ' *irrelevant matters'* taken into consideration by the trial Judge which was the basis of ground 39. Counsel has failed to show us both in his submissions of 8 January 2019 or the ones filed when leave to appeal was sought from a single Judge; the mitigating factors in relation to the 1st, 2nd, 5th to 9th Appellants and the provisions of the Sentencing and Penalties Act the trial Judge had failed to take into consideration. An examination of the Order on Sentence shows that the learned trial Judge had considered the mitigating circumstances peculiar to each of the Appellants. As regards the 1st Appellant this is borne out in paragraphs 28 and 29 of the Ruling, the 2nd Appellant in paragraph 33, 5th Appellant in paragraph 39, 6th Appellant in paragraph 42, 7th Appellant in paragraph 45, 8th Appellant in paragraph

48, and the 9th Appellant in paragraph 50. In my view the circumstances of this case warranted sentences much heavier than what was imposed and the learned trial Judge had been lenient in that regard. The Order on Sentence also shows that the learned trial Judge had adequately taken into consideration the provisions of the Sentencing and Penalties Act and made reference to it at paragraphs 3, 23, 53, 54, 55, 59 and 62 of the Order on Sentence.

[143] I therefore dismiss issue 22 in relation to grounds 39 and 40 of appeal and dismiss the appeals of the 1st, 2nd, 5th, 6th, 7th, 8th and 9th Appellants against sentence.

Nawana JA

[144] I agree with the reasoning, conclusions and proposed orders of Fernando JA.

Orders of the Court:

1) *(i)* *Appeal by the 1st Appellant against his convictions in respect of counts 1, 2, 3, 4 and 5 is dismissed.*
(ii) *1st Appellant's convictions and sentences are affirmed.*

2) *(i)* *Appeal by the 2nd Appellant against his convictions in respect of counts 1, 2, 3, and 4 is dismissed.*
(ii) *2nd Appellant's convictions and sentences are affirmed.*

3) *(i)* *Appeal by the 3rd Appellant against his convictions in respect of counts 1, 2, 3, and 4 is allowed.*
(ii) *3rd Appellant's convictions and sentences are quashed.*
(iii) *3rd Appellant is acquitted.*

4) *(i)* *Appeal by the 4th Appellant against his convictions in respect of counts 1, 2, 3, and 4 is allowed.*
(ii) *4th Appellant's convictions and sentences are quashed.*
(iii) *4th Appellant is acquitted.*

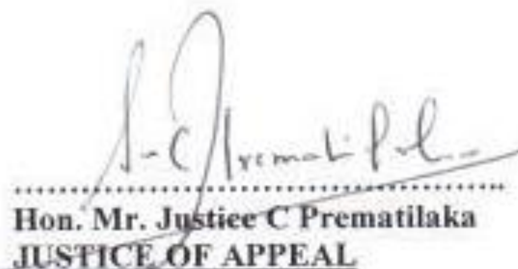
5) *(i)* *Appeal by the 5th Appellant against his convictions in respect of counts 1, 2, 3, and 4 is dismissed.*
(ii) *5th Appellant's convictions and sentences are affirmed.*

6) (i) *Appeal by the 6th Appellant against his convictions in respect of counts 1, 2, 3, 4 and 6 is dismissed.*
   (ii) *6th Appellant's convictions and sentences are affirmed.*

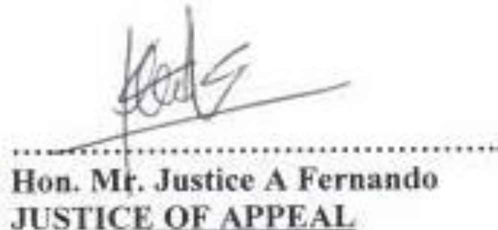
7) (i) *Appeal by the 7th Appellant against his convictions in respect of counts 1, 2, 3, and 4 is dismissed.*
   (ii) *7th Appellant's convictions and sentences are affirmed.*

8) (i) *Appeal by the 8th Appellant against his convictions in respect of counts 1, 2, 3, and 4 is dismissed.*
   (ii) *8th Appellant's convictions and sentences are affirmed.*

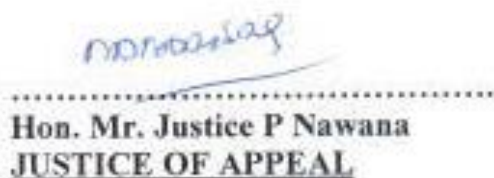
9) (i) *Appeal by the 9th Appellant against his convictions in respect of counts 1, 2, 3, and 4 is dismissed.*
   (ii) *9th Appellant's convictions and sentences are affirmed.*



Hon. Mr. Justice C Prematilaka
JUSTICE OF APPEAL



Hon. Mr. Justice A Fernando
JUSTICE OF APPEAL



Hon. Mr. Justice P Nawana
JUSTICE OF APPEAL