IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 117 of 2016

[In the Magistrate's Court at Suva Case No.HAC.1709 of 2010]

BETWEEN	:	**1. JOSEFA TEMO**
		2. MANASA TEMO

Appellants

AND	:	**THE STATE**

Respondent

Coram	:	**Gamalath, JA**
		Prematilaka, JA
		Dayaratne, JA

Counsel	:	**Ms. S. Ratu for the Appellants**
	:	**Mr. R. Kumar for the Respondent**

Date of Hearing	:	**10 May 2022**
Date of Ruling	:	**26 May 2022**

JUDGMENT

Gamalath, JA

[1] I have read in draft the reasons and the conclusion of Dayaratne, JA and I agree with his reasons and conclusion.

Prematilaka, JA

[2] I have had the benefit of reading the draft judgment of Dayareatne, JA and agree with the reasons and conclusions therein.

Dayaratne, JA

Charges against the Appellants in the High Court

[3] The trial against the appellants was held at the Magistrate's Court of Suva, exercising extended jurisdiction of the High Court. They were charged on two counts, namely, attempted aggravated robbery contrary to section 44(1) read with 311 (1) and damaging property contrary to section 369 (1) of the Crimes Act 2009. By his judgment dated 26 July 2016 the learned Magistrate convicted the appellants on both counts and sentenced them to 7 years and 10 months imprisonment with a non-parole period of 5 years.

Application for leave to appeal

[4] The Appellants jointly filed a timely application for leave to appeal against both conviction and sentence but have on 26 April 2018 filed applications to abandon the appeal against the sentence. In his ruling dated 27 November 2019, the learned single judge had made order that the applications to abandon the sentence appeals are to be listed along with the conviction appeal. Court inquired from the appellants about their application to abandon the sentence appeals and they confirmed their willingness to do so and accordingly that application is hereby allowed.

[5] Four grounds of appeal against the conviction were urged before the single judge. Having observed that the first ground raises an issue of law alone he had allowed the appeal on that ground to proceed. The second ground was dismissed and leave to appeal on the third and fourth grounds were granted.

Grounds of appeal on which this appeal proceeded

[6] At the hearing before this court, learned counsel for the appellants informed court that the appellants were relying only on the third and fourth grounds of appeal in respect of the conviction.

Evidence led at the High Court trial

[7] Both appellants had made cautioned interviews (hereinafter referred to as 'confessions') and the learned Magistrate conducted a voire dire inquiry to determine their admissibility. The two police officers who recorded the confessions and the two appellants gave evidence at this inquiry. By his ruling dated 19 February 2014, the learned Magistrate ruled that both confessions had been made voluntarily and hence admissible in evidence.

[8] At the trial, the prosecution led the evidence of six witnesses whilst the appellants neither gave evidence nor called any witnesses. Both appellants were unrepresented at the voire dire inquiry as well as the trial.

[9] The admission in to evidence of the confessions made by the appellants becomes critical in this case since the prosecution relied solely on the confessions in order to establish the identity of the appellants. The prosecution witnesses had testified that those who took part in the attempted robbery were wearing masks and hence they were not able to identify them. Therefore, I will first refer to the evidence led at the voire dire inquiry and the ruling of the learned Magistrate since the grounds of appeal revolve around the admissibility of the confessions.

The grounds of appeal

[10] The two grounds of appeal to be considered by this court are as follows;

'That the learned trial Magistrate erred in law by not warning himself of the dangers of convicting the appellants solely on the appellants' confession contained in the caution interview'.

'That the learned trial Magistrate erred in law and in fact in that the conviction was unreasonable and cannot be supported by the totality of the evidence, in particular the following;

(a) police fabricated the evidence to prove the charges against the appellants;

(b) State did prove there was attempted aggravated robbery but could not prove beyond reasonable doubt that the appellants had committed the act'.

Voire dire inquiry

[11] At this inquiry, the two police officers who recorded the confessions have testified on behalf of the prosecution. Police Constable Leone has been a police officer for nine years and has recorded the confession of the first appellant at the Samabula Police Station. He stated that the confession was recorded in the English language and that only he and the appellant had been present at the time of its recording. He said that there had been no complaint after the recording of the confession. Cross-examined by the first appellant, he has denied that he assaulted the first appellant while under cross-examination by the second appellant, he has denied holding a hose pipe.

[12] The other witness Police Constable Jone also had nine years of experience as a police officer and has recorded the confession of the second appellant. He says that he explained to the second appellant the rights available to him prior to recording the confession and that the confession had been recorded in the English language. It has been done at the crimes office and nobody else had been present during the time. He has said that there had been no complaint about recording the confession. Cross-examined by the first appellant, he has said that the first appellant had not been present at the time and when cross-examined by the second appellant, he has denied having assaulted him and explained that he was called in only to record the confession. He had not noticed any injuries on the appellant.

[13] The two appellants also gave evidence. The first appellant in his evidence has stated that the police had informed him that he was a suspect prior to his arrest. He has said that the police officers of the crime office had assaulted him at the police station. In cross-examination he has said that he received injuries to the eye and legs. He had further testified that he cannot recall as to when he was produced in court but admitted that he did not complain to the magistrate of having been assaulted by the police officers.

[14] The second appellant in his testimony has said that he was taken to the interview room for the recording of the confession and that he had seen the first appellant locked up there. He further testified that police officer Jone had questioned him and had assaulted him. Police officers Jone and Suki had continued to assault him the next day. Under cross-examination he has said that his confession was recorded by Jone and that both he and the first appellant were in the same room at the time the confessions were recorded. He had re-iterated in re-examination that he was assaulted by all the police officers and that he was not uttering a falsehood.

[15] The position of the learned counsel for the appellants was that the confessions could not have been admitted in evidence by the learned Magistrate since they have not been made voluntarily and that fairness has not been observed in the recording of the confessions. She submitted that the prosecution case rested entirely on the alleged confessions since there was no independent evidence regarding the identity of the appellants and therefore the admission of the confessions had caused grave injustice to them.

[16] The learned counsel for the appellants also submitted that the learned Magistrate has been remiss in not paying attention to an important aspect. She drew our attention to the process of recording the confessions. Recording of confessions had commenced on 28 September 2010, the day the attempted robbery had taken place and the date on which the appellants have been arrested. The recording of the confession of the first appellant had commenced at 15.00 hours and has been 'suspended' at 17.10 hours the same day. The recording of the confession of the second appellant had commenced at 14.55 hours and has been 'suspended' at

15.26 hours on the same day. I find a statement in both confessions entered by the respective police officers, that the recording of the confession is being suspended in order to enable them to rest. As to why it was necessary to enable them to rest after a relatively short period of questioning has not been explained (the first appellant has been questioned for a period of 2 hours and ten minutes while the second appellant has been questioned for a mere 31 minutes). Both appellants had denied any involvement in the crime during the recording of confessions that day. However, when the recording of the confessions resumed the next day (on 29 September 2010 at 10.05 hours and 10.27 hours respectively), at the very commencement itself, both accused had begun to admit their involvement in the commission of the offences (at pages 53-61 and 65-73).

[17] A perusal of the record makes it clear that there has not been a proper caution prior to the questioning of both appellants on the second day. All rights available to them ought to have been explained, including the right to remain silent but that does not seem to have happened. The first appellant had been asked the question *'Do you have to correct anything you said in this interview'* at the very beginning and then he starts to admit his culpability. Similarly the second appellant too starts to confess very early in to the recording on the second day.

[18] What was the reason for this change of mind? Can it be attributed to the alleged assault at the hands of the police officers after the break? That to me is a matter of concern which unfortunately the learned magistrate failed to address.

[19] The learned counsel for the appellants submitted that the appellants had been assaulted prior to the recording of the confessions as well as after the recording had been suspended on the first day. She submitted that on the second day, the police officers had written an account in question and answer form and the appellants had signed them in view of the physical assault. She highlighted that Police Officer Jone who had recorded the confession of the second appellant was part of the investigation team and hence should not have recorded the confession since he was aware as to what the eye witness account had been.

[20] In their evidence, the appellants have not elaborated as to whether they had answered the questions out of fear or whether the police officer had merely written them down and forced them to place their signatures. Whilst the first situation would mean that they infact confessed but as a result of coercion and the second would be a situation where they never made a confession but signed as result of coercion. Either way, it was voluntariness that was assailed and remained to be determined. It was held in the case of **Rokonabete v The State** [2006] FJCA 40; AAU0048.2005 (14 July 2006) that *'If it was induced by some improper practice by the interviewing authorities, it is not admissible irrespective of whether or not those improper methods appear to have revealed the truth'*.

[21] Learned counsel for the appellants submitted that this important aspect has escaped the attention of the learned magistrate and that there is no discussion at all on this point in his ruling. This lapse, she contended, vitiates his finding on voluntariness and amounts to a miscarriage of justice. Having given due consideration to all matters, I am in agreement with that contention.

[22] Learned counsel for the appellants further submitted that the prosecution had failed to produce the station diary or running sheets of the police which would have shed more light on the time of arrest of the appellants, details pertaining to their custody, identity and movement of the investigation officers, date and time of arrests of the appellants as well as the date and time at which they were produced before a Magistrate. She stated that the production of these documents become important particularly since the appellants were unrepresented. She submitted that the Fiji Magistrates' Bench Book specifically requires magistrates to act cautiously when accused are unrepresented and contended that the learned Magistrate should have called for them even though the prosecution did not produce them in order to ensure that the appellants received a fair trial. She also referred to the constitutional safeguards regarding personal liberty and the right to a fair trial. I am inclined to agree with the said submissions. Although it is not mandatory for the station diary or running sheets of the police to be produced and evidence led regarding their contents, in my view it would have been salutory if such step was taken in the interests of justice and fairplay. The

appellants had no legal representation and they had alleged assault at the hands of the police whilst in custody. In such situation, there was a duty cast on the learned Magistrate to scrupulously look in to the aspect of voluntariness of the alleged confessions.

[23] I have also noted the unsatisfactory nature of the testimony of the police officers. Investigating officer Nitesh was asked in cross-examination whether the cane knife or pinch bar were recovered, his answer was that he can not recall. This is not acceptable since police officers are expected to maintain notes in respect of investigations conducted by them and are entitled to refer to them when testifying in court. Further, there had been four persons involved in the attempted robbery and the names of two others are mentioned. However, the investigating officers have not explained as to whether there had been any attempt to apprehend them and if so what the out come was. Police officer Jone under cross-examination by the second appellant has spoken of a person named Emosi (page 37 of the supplementary court record).

[24] It is also important to note that police officer Jone who had recorded the confession of the second appellant has been part of the investigation team. Learned counsel for the appellants submitted that according to the Fiji Police Standing Orders an officer involved in the investigation of a crime is not expected to record a cautioned interview of a suspect. It is necessary to understand the rationale behind that. An officer who has been involved in the investigations becomes aware of what persons who had witnessed the incident have said. As such there is a likelihood that such information may be included in the confession of a suspect if an investigating officer were to record the confession.

[25] The Standing Orders will have the same effect as 'judges' rules' and it is well recognized that they do not have the force of law and hence their noncompliance by itself would not render a particular act or conduct illegal or incapable of being acted upon. Nevertheless, it is important to bear in mind that their compliance is most desirable since they play a crucial role in determining fairness and breaches of them are generally not condoned. The second appellant has also stated that

both he and the first appellant were in the same room when the confessions were recorded. This too is not an acceptable practice and smacks of procedural unfairness.

[26] In the case of **Ganga Ram & Shiu Charan v Reginam**, Criminal Appeal No. 46 of 1983 (13 July 1984), the Court of Appeal, having referred to many leading authorities across several jurisdictions has set out as to how a trial court should determine the admissibility of a confession made by an accused. I do not think it is necessary for me to elaborate them here since they are well known, except to highlight that court has emphasized on the need to consider *'whether the more general ground of unfairness exists in the way in which the police behaved'* even if voluntariness has been established.

[27] In response to the observation of the learned Magistrate in his ruling, that the appellants had failed to complain of any assault to the Magistrate when they were produced in court, learned counsel for the appellants contended that the appellants were 19 and 18 years old respectively at the time, were unrepresented and were still under the custody of the police and hence would not have been bold enough to complain. This to me is understandable.

[28] The State took up the position that the learned Magistrate has adequately dealt with the issue of admissibility and that he has been satisfied of the voluntariness of the confessions. In their written submissions, the State has pointed out that the appellants had pleaded guilty to the charges that had been preferred by the DPP prior to their being amended and that they had challenged the voluntariness of the confessions only when the charge was amended as 'attempted aggravated robbery'. This certainly is not a matter that can be taken into consideration in deciding the voluntariness of the confession. Courts are not expected to base its findings on previous knowledge of an accused.

[29] I consider it apt to quote here the following lucid views expressed in the case of ***Colombe v State of Connecticut*** (367) US 568, with regard to confessions;

'The prisoner knows this – knows that no friendly or disinterested witness is present – and the knowledge may itself induce fear. But in any case, the risk is

great that the police will accomplish behind their closed door precisely what the demands of our legal order forbid: make a suspect the unwilling collaborator in establishing his guilt. This they may accomplish not only with the ropes and rubber hose, not only by relay questioning persistently, insistently subjugating a tired mind, but by subtler devices. In the Police Station a prisoner is surrounded by known hostile forces. He is disoriented from the world he knows and in which he finds support. He is subject to coercing impingements, undermining even if not obvious pressures - of every variety. In such an atmosphere, questioning that is long continued – even if it is only repeated at intervals, never protracted to the point of physical exhaustion – inevitably suggests that the questioner has a right to, and expects, an answer. This is so, certainly, when the prisoner has never been told that he need not answer and when, because his commitment to custody seems to be at the will of this questioners, he has every reason to believe that he will be held and interrogated until he speaks'.

[30] I will now examine the ruling made by the learned Magistrate at the conclusion of the voire dire inquiry. The learned Magistrate has firstly acknowledged that the appellants had objected to the tendering of the alleged confessions on the ground that they had been assaulted whilst in police custody. Thereafter, he has very briefly, referred to the evidence of the two police officers who testified that they had explained the rights available to the appellants prior to the recording of the confessions. He also states that they had denied having assaulted the appellants. He then refers, once again very briefly, to the evidence of the appellants and states that they have alleged that they were assaulted by the police officers whilst in custody. He then goes on say that the appellants have failed to complain to the magistrate although they had alleged that they were injured as a consequence of being assaulted.

[31] On the other hand, the learned Magistrate has referred in detail to the legal principles that are applicable regarding the admissibility of confessions and discussed how voluntariness is to be determined. He also expresses the view that the prosecution has to prove beyond reasonable doubt that the accused have made the confessions voluntarily, the necessity to establish that it has not been made as a result of any threat, promise or inducement as well as the necessity to

ensure that there are no breaches of the rights available to an accused or the 'judges' rules'. He also notes that even if voluntariness is established it is necessary for the prosecution to prove as to whether fairness has been maintained. The dicta of judicial precedent on such matters too have been adverted to (at paragraphs 9, 10, 11, 12 13 of the ruling).

[32] Having done so, he abruptly arrives at the following conclusion; *'Both accused challenged the admissibility on the ground that they were assaulted. Having considered the evidence as well as demeanour of the witnesses I am satisfied about the prosecution's version. Two accused failed to produce any medical report or they failed to inform about these alleged incidents to the court when they were produced in the court'* (para 14 of the ruling).

[33] An examination of his ruling begs the question as to whether the learned Magistrate has engaged in a proper evaluation of the evidence that was placed before him viz a viz the legal principles he himself has alluded to. It is important for a trial judge to firstly understand the statutory provisions, principles of law as well as judicial precedents that are relevant to the matter under consideration. Thereafter, it is important for him to have a complete grasp of the facts of the case through the evidence that has been placed before him and apply such facts to the applicable law and arrive at a reasoned conclusion. Instead, if the legal aspects and the facts are considered in a vacuum as has happened in this instance, court is bound to arrive at a conclusion that will not be legally tenable.

[34] A few observations are called for at this stage in regard to the manner in which the learned magistrate approached the determination of admissibility of the confessions. It was necessary for the learned magistrate to carefully scrutinize the evidence that had been placed before him and in that exercise he had to be extremely cautious since the appellants were not represented by counsel and also since they both being teenagers would not have understood the implications of legal proceedings. It was incumbent on him to consider each step in the process of recording the confession. The burden of proof remained right through out with the prosecution and there was no burden cast on the appellants to disprove anything. If a reasonable doubt was created, the benefit should have been given

to the appellants. However, it does not appear that the learned Magistrate has given due consideration to these factors. As I have observed earlier, he has failed to engage in a judicial evaluation of the facts against the applicable legal provisions.

[35] In **Rokonabete** (supra) it was observed that *'Any error in the manner in which the admissibility of the confession was considered by court must give rise to a possibility of substantial injustice'*. The conduct of the police officers as adverted to by me, creates a grave doubt in my mind as to whether the confession has been made voluntarily. As pointed out by me herein, I have also considered as to whether the more general ground of unfairness exists in the manner in which the police officers have acted and my conclusion is in the affirmative. I therefore hold that the learned Magistrate was in error when he allowed the confessions to be admitted in evidence.

Evidence at the trial

[36] Two lay witnesses and four police officers testified at the trial that was conducted after the voire dire inquiry.

[37] The first witness Livai Toribau was an employee at British American Tobacco and on the day in question, at about 7.30 in the morning, had been visiting this particular shop. When he was coming out of the shop he had seen their vehicle being attacked with a cane knife. The driver of the vehicle had managed to drive away inspite of the damage caused to the vehicle. One of the attackers had tried to attack him with a stone but he managed to escape by running inside the shop. He had come out a little while later and by that time the attackers had fled the scene. Four persons had been involved in the attack and all four had been wearing masks.

[38] The driver of the vehicle Salendra Bawan stated in his evidence that he had parked the vehicle by the side of the shop and had remained inside the vehicle. There had been money inside the vehicle. All of a sudden the rear windscreen had been smashed and the glass of one of the doors too had been broken. The attackers had attempted to block one of the wheels of the vehicle but he had managed to drive

away. He did not identify the attackers since they were wearing masks. He received minor injuries.

[39] The other witnesses were the police officers and their evidence was regarding the confessions and investigations and therefore is of no consequence and I will not refer to them here.

[40] The appellants did not give evidence or call any witnesses.

[41] A perusal of the judgment of the learned Magistrate reveals that he has referred to the ingredients of the offences as well as the applicable legal provisions in respect of the charges and the task of the prosecution. He has thereafter referred to the evidence of the witnesses as regards the manner in which the offence was committed and observed that the evidence of the witnesses does not establish the identity of the appellants. He has then adverted to the fact that the prosecution has relied on the confessions of the appellants in order to establish the identity of the appellants.

[42] He has thereafter gone on to summarize the contents of the confessions of the appellants and concludes that the admissions made by the appellants are consistent with the eye witness account and that he therefore accepts the confessions as true. On that basis he has found both accused guilty and convicted them.

[43] Learned counsel for the appellants also drew our attention to the learned single judge's ruling where he has observed that *'However, it seems that the Magistrate has failed to consider at the trial stage whether the statements, were voluntarily made by the appellants. In whatever way the issue is expressed, it is still essential at the trial stage to determine whether the confessions, were made voluntarily. If they are considered at the trial stage not to have been made voluntarily, then no weight can be attached to that evidence'.* In response, learned counsel for the State submitted that the issue of voluntariness has not been raised by the defence at the trial and hence was not a live issue. In the circumstances, he submitted that it was not necessary for the Magistrate to have revisited that issue at the trial. The position of the State on this issue is not

correct. The appellants have cross-examined the police witnesses with regard to their being assaulted. This was how they challenged the voluntariness of the confessions at the voire dire inquiry and they have renewed that challenge in the same manner at the trial. However, it is not necessary for me to make a pronouncement on that aspect since I have already arrived at a conclusion regarding the admissibility of the confessions.

[44] The only evidence the prosecution had with regard to the identity of the appellants was their confessions. In view of my finding that the confessions have been wrongly admitted into evidence, the prosecution is unable to establish that the appellants had committed the offences and therefore the prosecution has to fail.

[45] In the circumstances, the appeal is allowed and the conviction is set aside. I acquit the appellants on both counts.

The Orders of the Court:

1. *Appeal is allowed.*
2. *Conviction is set aside.*
3. *Appellants are acquitted of both counts.*

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Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Mr. Justice V. Dayaratne
JUSTICE OF APPEAL