IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 0033 OF 2017
[Lautoka Criminal Case No. HAC 015 of 2013]

BETWEEN : **SUDESH MANI NAIDU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, P**
Qetaki, RJA
Andrée Wiltens, JA

Counsel : **Mr. S. Waqainabete & Mr. E. Veibataki for the Appellant**
: **Ms. R. Uce for the Respondent**

Date of Hearing : **5 November 2025**
Date of Judgment : **28 November 2025**

JUDGMENT

Mataitoga, P

[1] I agree with the reasons and the conclusion.

Qetaki, RJA

(A). Introduction

[2] The appellant was charged with 1 count of murder contrary to section 237of the Crimes Decree 44 of 2009 and 1 count of robbery contrary to section 310(1)(a)(i) of the Crimes Decree 44 of 2009.

[3] The assessors were unanimous in finding the appellant not guilty for both counts. The learned trial Judge overturned the opinions of the assessors and convicted the appellant for both offences.

[4] On 27th February 2017 the appellant was sentenced as follows:

(i) Count No. 1 (Murder) Mandatory life imprisonment, with a minimum term of 17 years to be served before a parole may be considered.
(ii) Count No.2 (Robbery) 10 years imprisonment.
(iii) The sentences are to be concurrent.

[5] The appellant filed a timely application for leave to appeal his conviction on four grounds. The learned single Judge (per Calanchini, P), in a ruling delivered on 27 November 2019 granted leave to appeal on grounds 1 and 4 and refused leave on grounds 2 and 3. The appellant's appeal to this Court is on the four grounds placed before the learned single Judge.

(B). Grounds of Appeal

[6] The grounds of appeal are:

Ground 1

That the learned Judge erred in law and in fact when he failed to consider at all in his voir dire judgment and also in his written reasons for judgment and sentence the evidence of Dr. Kelera Tabuaniqili when the medical report shows the injuries in the appellant's left ankle which was consistent with his alleged police brutality.

Ground 2

The learned trial Judge erred in law and in fact when he failed to consider the serious prejudice caused to the appellants when the interview was conducted and recorded in the Hindustani language when expressly stated in his record of interview that he can't read and write in Hindustani language which should made the interviewing office to ask for any other language options which the interview could be conducted and recorded in for verification purposes.

Ground 3

That the trial Judge erred in law when he overturned the unanimous finding of not guilty by the 3 assessors without considering the overwhelming doubts and inconsistencies in the evidence of Ms Savitri on the issue of identity of the person who was seen coming and going from the deceased's residence around the material time and high possibility that she was mistaken.

Ground 4

That the learned trial Judge erred in law and in fact when he disagreed with the opinion of the assessors of not guilty of the two counts of murder and robbery especially when he found that the assessors' opinion were not perverse and that it was open to them to reach such a conclusion on the evidence.

(C). Facts

[7] In Summing Up, at paragraphs 21 – 24, the learned trial Judge set out the prosecution case as follows:

> *"21…….On 13 January 2013, the accused was 40 years old. He was married with 3 children. He was a fisherman and farmer. Vidya Wati was 74 years old and resided with her family at Johnson Road, Drasa, and Lautoka. On 13 January 2013, the accused with his friend, Mr Ganeshwar (also known as Chirkuts) returned from fishing, came to Ganeshwar's house and started drinking liquor from 10:30am. Mr Ganeshwar went to sleep at 3pm, while the accused continued drinking to 4.45 pm.*
>
> *22. He had a meal at Mr Ganeshwar's house and left the same at about 5:30pm. The accused went to Vidya Wait's house to ask for some water. When he arrived at the house, the front door was open and she was in the sitting room. The accused asked Vidya Wati for water, but she did not reply. The accused went into the sitting room and repeatedly assaulted her. The accused allegedly punched her several times in the face and chest. She fell on the floor injured, and the accused went to*

Vidya Wati's daughter Prem Lata's bedroom. The accused stole jewelleries from Prem Lata's bedroom.

23. ……..the accused stole Prem Lata's jewelleries from her bedroom. The details of the jewelleries are itemised in count No.2. After stealing the jewelleries and assaulting Vidya Wati, the accused fled the scene. Bimlesh Lata (PW3), Vaidya Wati's daughter in law, and Savitri Asha Lata (PW2) later came to Vidya Wati's rescue. Vidya Wati was bleeding in the face and lying helplessly in the sitting room. Vidya Wati told PW3 that it was the accused who hit her. Vidya Wati was later taken to Lautoka Hospital by her son where she died from her injuries at 8:30pm on 13 January 2013.

24. The matter was reported to police and an investigation was carried out. The accused was later arrested by police. He was cautioned interview by police at Lautoka Police Station on 16 and 17 January 2013. He was taken to the Lautoka Magistrate Court charged with the murder of Vidya Wati and robbery at her home on 13 January 2013."

(D). The Law

[8] In terms of section 21 (1) (b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of the court. The test for leave to appeal is "reasonable respect of success": **Caucau v State** [2018] FJCA 171; AAU0029.2016 (4 October 2018); **Navuki v State** [2018] FJCA 173; AAU0038.2016 (4 October 2018); **State v Vakarau** [2018] FJCA 173; AAU0052.2017 (4 October 2018); **Sadrugu v State** [2019] FJCA 87; AAU0057.2015 (6 June 2019).

(E). High Court ("Written Reasons for Judgment and Sentence" dated 27 February 2017 ("WRJS") per Temo, J)

[9] A Judge is not bound by the decision of the assessors - section 237(2) of Criminal Procedure Decree 2009. When a Judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, and the Judge is to give cogent reasons which shall be: (a) written down and (b) pronounced in open court.-section 237 (4). The judge's summing up and the decision

of the court together with (where appropriate) the judges' reasons for differing with the majority opinion of the assessors, shall be collectively be deemed to be the judgment of the court for all purposes – section 237(5): **Ram Dulare, Chandra Bhan and Premal Naidu v Reginam** [1956-57], Fiji Law Report, Volume 5, pages 1-6 on the proposition that the trial Judge is the final arbiter of facts and he is not bound by the opinion of the assessors who are there to assist the Judge. Also, **Sakiusa Rokonabete v The State** [2006} FJCA 40, Criminal Appeal No. AAU 0048 of 2005 which stated:

> *"…….In Fiji, the assessors are not the sole judges of facts. 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…."*

[10] The learned trial Judge, also held that the assessor's opinion was not perverse. The trial Judge differed from the assessors' opinion having analysed the evidence and on making his assessment of the credibility of the witnesses. His reasons for disagreeing with the assessors are set out in paragraphs 8 – 12 of the "WRJS", which in paragraph 12 states:

> *"12. On the circumstantial evidence presented by the State as outlined in paragraphs 37 to 48 of my summing up, I accept the same as credible, and when taken together, they lead to the irresistible conclusion that it was the accused who committed the murder and robbery at Ms. Wati's house on 13 January 2013.So, when you combine the effect of the accused's alleged confession to the police and the circumstantial evidence presented by the State, as outlined in my summing up, they lead to the sure conclusion that it was the accused who murdered Vidya Wati on 13 January 2013, and stole her daughter's jewelleries on the same date. I find the prosecutions witnesses more credible than the defence's witnesses, and because of the above, I accepted the prosecution's version of events."* (Underlining is for emphasis)

(F). Appellant's Case

[11] **Ground 1:** The appellant by reference to paragraphs 9, 10 and 11 of the judgment, submits that Dr Kelera's evidence was not analysed at all by the trial Judge. The doctor

had given evidence at the *voir dire* hearing, however, the ruling on *voir dire* did not consider or mention the medical evidence. The medical evidence was consistent with the allegations of police brutality against the appellant during the course of the investigation and interview. That paragraph 10 of the judgment shows that the learned trial Judge is merely highlighting Dr Kelera's evidence and nothing more. He did not consider it, for if did, he would have discussed it. The doctor is independent of the prosecution and the defence. Her evidence carries a lot of weight. Grave miscarriage of justice occurred that warrants this court's intervention.

[12] **Ground 2:** The appellant submits that prejudice was caused by the recording of the interview (in Hindustani) which is evident from the record of interview itself and also from the notes taken at the trial and the transcripts recording when produced.

[13] **Ground 3:** The appellant submits that the trial Judge was wrong in accepting the prosecution's evidence (paragraph 12 on circumstantial evidence) as credible as compared to the defence evidence. See paragraphs 37 to 48 of the Summing Up where the evidence is set out. The appellant submits that relevant evidence will show that there are more than reasonable doubts as to the identity of the person whom **PW2 and PW6** saw. It would also show that the appellant had left Ganeshwar's house towards the river and not to the deceased's residence.

[14] **Ground 4:** The appellant challenges the finding in paragraphs 6 of the judgment, where the trial Judge held he is not bound by the unanimous opinions of the assessors. The appellant relies on **Bavesi v The State** [2017] FJCA 68, where, on this issue the Honourable Justice Daniel Grounder said as follows:

> *"[4]……In paragraph six, the trial judge remarks that the assessors' verdict was not perverse and that it was open to them to reach such conclusion on the evidence, but immediately after making that statement, he disagrees with the assessor's opinion based on his own assessment of the evidence and the credibility of the witnesses. Both parties agree that there is an apparent contradiction in the trial judge's reasoning that on the one hand, the unanimous not guilty opinion was open on the evidence, while on the other hand, it was not,*

based on the judge's assessment of the evidence" (Underlining for emphasis)

[15] In light of the above there was an apparent contradiction. Furthermore, the appellant submits that the unanimous not guilty opinion was open to the evidence that His Lordship overturned which warrants the intervention of this Court.

(G). Respondent's Case

[16] **Ground 1:** The respondent submits that this ground is misconceived. Economy of words is necessity, mindful that the same evidence will be raised again at the trial proper. There is an obligation to ensure that the evidences credibility is determined prior to the trial proper. A detailed reasoning at the *voir dire* could prejudice the appellant at the trial proper.

[17] The learned trial Judge at paragraph 4 of his *voir dire* ruling stated as follows:

> *"The law in this area is well settled. On 13th July 1984, the Fiji Court of Appeal in* ***Ganga Ram & Shiu Charan v Reginam,*** *Criminal Appeal No. 46 of 1983, said the following "……it will be remembered that there are two matters each of which requires consideration in this area. First, it must be established affirmatively by the crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force, threats of prejudice or inducement by offer of some advantage-what has been picturesquely described as the "flattery of hope or the tyranny of fear": **Ibrahim v R** (1941) AC 599, **DPP v Ping Lin** (1976) AC 574. Secondly, even if such voluntariness is established there is also a need to consider whether the more general ground of unfairness exists in the way in which the police behaved, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or by unfair treatment."*

[18] In **Wallace v R** [1997] 1 Cr App R 396, the appellants were convicted for murder solely based on their confessions. They appealed their convictions on the ground *inter alia,* that the judge, when announcing his decision that the statements were admissible in evidence, gave no reason beyond saying that he found the statements voluntary.

The appellants argued that a rule of general application requires that a judge should always express his reasons for any procedural ruling given during a trial. The Privy Council held that there is no rule of general application requiring that a judge should give reasons for any procedural ruling made in the course of a trial within a trial. Further, there may be circumstances where it would not be wise to give reasons in case the accused thinks that he would not be believed on the issue if he chose to give evidence. Furthermore, the Privy Council stated:

> *"The decision of the jury is announced in a non-speaking verdict at the end of the trial. For the judge to expound almost in the beginning of the trial his reasons for preferring one story to the other would wholly unbalance the proceedings."*

[19] In dismissing the appeal in Wallace, the PC held that there could not be a rule of general application such as the appellant propounded. No doubt there would be occasions when good practice required a reasoned ruling. *"In every instance it was for the judge to decide whether the interests of justice called for the giving of reasons, and if so with what degree of particularity.* "Similarly, in **R v Booth** (1982) 74 Cr App R 123, the Court of Appeal held that the trial judge is not obliged to give reasons for ruling confessions admissible in a straightforward case and the judge need only to deliver bear ruling. It added that if the issues in the *voir dire* were complex, that he ought to supply a short statement of his reasons. Also that in summing up trial judge dealt with voluntariness of the confession to the assessors at paragraphs 25-28 and 44 of summing up.

[20] The Respondent submits that the trial Judge have dealt with the issue during the trial within a trial and gave reasonably detailed ruling as to who he found credible based on the evidence adduced in court.

[21] **Ground 2:** The Respondent submits that the ground is not true. From the excepts of the interview it can be deduced that the appellant understood the Hindi language and use the language in conversation during the interview process. The questions were asked in Hindi and were answered in Hindi. Using another language would be absurd under the circumstances. During the trial within a trial the appellant conversed well in Hindi. State submits that the appeal should be dismissed. Appellant was of Indian

descent and used the Hindi language. There was no miscarriage of justice when the appellant could not read back the record of the interview. It was read back to him; he chose not to alter or delete anything.

[22] **Ground 3 and 4:** The respondent submits that the appellant was placed within the crime scene by 3 prosecution and 1 defence witnesses and comprehensive directions were given on the issue of identification in paragraphs 39 to 44 of the Summing Up. The guideline principles in Turnbull were followed. The unanimous opinions of the assessors was rejected due to the detailed confession of the appellant and the cogent circumstantial evidence. Admissibility of evidence is determined by the trial Judge and the truth, reliability of the confession is a matter for them. See **Prasad v R** (1980) 72 Cr.App.R.218, where the Privy Council commented on the role of the assessors and the judge in the Fijian context.

(H). Analysis

[23] This appeal against conviction will be allowed if the Court thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal- section 23 (1) (a) of the Court of Appeal Act. There is a proviso to that, which permits the Court to dismiss the appeal if it considers that no substantial miscarriage of justice has occurred, despite the Court's opinion that the point raised in the appeal against conviction might be decided in favour of the appellant.

Ground 1 - ***The learned Judge erred in law and in fact when he failed to consider at all in his voir dire judgment and also in his written reasons for judgment and sentence the evidence of Dr. Kelera Tabuaniqili when the medical report shows the injuries in the appellant's left ankle which was consistent with his alleged police brutality.***

[24] This ground gives rise to two issues, Firstly, whether the learned trial judge failed to consider the evidence of Dr Kelera Tabuaniqili ("Dr Kelera") in his *voir dire* judgment and in his "WRJS". Secondly, whether the medical report (Defence Exhibit 1), which

Dr. Kelera's evidence attempted to explain and clarify, supports the allegation of police brutality made by the appellant at the *voir dire* hearing and at the trial proper. The issue before the Judge at the *voir dire* was to determine whether the prosecution has established beyond reasonable doubt that the confession was made voluntarily.

[25] At the hearing Counsel for appellant reinforced the appellant's written submissions of police brutality referring to the medical report and Dr Kelera's explanation and clarifications in examination in Chief and Cross-Examination at the *voir dire* hearing and at the trial proper, which counsel submits was completely ignored by the trial Judge. Counsel submits that the trial Judge did not pay much attention to the medical report during the *voir dire* hearing. He did not consider the report by carefully analysing and evaluating the report. As will be evident later in this analysis, the appellant's submissions that the medical report and Dr Kelera's evidence on the medical findings by the late Dr Saroj Kumar Kaul, who did the actual medical examination of the appellant on 18th January 2013, featured in the *voir dire* ruling and in the "WRJS".

[26] Turning to the medical report (Defence Exhibit 1) for the moment, it was authored by the Examining doctor, Dr Saroj Kumar Kaul, Senior Medical Officer, Lautoka Hospital on 18th January 2013. The specific medical findings are: *General Examination-OK. Left lateral malleolus (ankle bony part)-swollen and tender.* "On professional opinion – *"Soft tissue caused by falling down-minor trauma.* " At the trial Dr Kelera gave evidence replacing Dr Saroj Kumar Kaul, who had died 2 years earlier. On the left bony part of the ankle being swollen and painful, Dr Kelera explained that "Apart from falling down, any force of any blunt force like kicks or punches, maybe hit by stick on the particular area would cause swelling and tenderness..." The appellant was prescribed antibiotics and pain killers. Dr Kelera said falling would have caused "soft tissue injury" when Cross-examined by State counsel. On "*General examination Ok"* Dr Kelera explained, that would mean the Doctor (examining) did not see any other swelling or bruising on his body.

[27] Having read and considered Dr Kelera's evidence at the *voir dire* hearing (pages 472-479 HCR,Vol. 2 of 2) and at the trial (Pages 623-631,HCR,Vol. 2 of 2), on the one hand, and the appellant's evidence of police brutality at the voir dire (pages70-92) and at the trial proper (pages 218-233) on the other hand, I am of the view that the injuries

sustained by the appellant and recorded in the medical report , which Dr Kelera explained and clarified, were minor and does not measure up to anything like or near to what the appellant had testified to (against the police officers) in his testimony. Simply put, the allegations of threats, beatings, punches, slaps and kicks by the appellant were not recorded in the medical report. It can be concluded that the examining doctor was not told of and did not detect, notice or was not aware of any other injuries sustained by the appellant apart from those that were recorded in the medical report.

[28] The learned trial Judge had given the *voir dire* ruling on 17 February 2017, and in the written reasons for the *voir dire* delivered on 9 March 2017, the trial Judge at paragraph 3 stated, that the Court will have to decide on whose evidence the Court will base its decision. The ruling also acknowledged (paragraph 5) that the prosecution witnesses denied any allegation of assault, or that they threatened or made false promises to the accused while he was in custody. They said the accused gave his interview statements voluntarily and out of his own free will. The appellant gave a completely opposite account alleging that he was kicked in his left leg 7 to 8 times. Other police officers repeatedly punched him possibly on the head. They rubbed chillies on his anus and penis, which was painful. They repeatedly kicked his back and dragged him to the cell. He was actually saying that the interview statements were nothing but a fabrication.

[29] The trial Judge had carefully considered, analysed and compared the evidence of the prosecution and of the defence, and found the prosecution's witnesses' credible. He accepted them. He found that the police did not assault, threaten or make false promises to the accused during his interview. He found that the accused gave his cautioned interview statements voluntarily, and declared the same admissible evidence at the trial proper. It was open for the trial Judge to make those findings and conclude as he did, in view and consideration of the facts and circumstances of the case, and the totality of the evidence.

[30] In the "WRJS ", the trial Judge had made references to the *voir dire* ruling and the Summing Up. He referred to the medical report in Summing Up and paragraph 50 states, as follows:

"The Defence submitted one exhibit, that is, Defence Exhibit No.1, the accused's Medical Report, dated 18 January 2013.You must consider all the evidence when coming to the decision on whether or not the accused is guilty as charged."

[31] I am of the opinion, having considered the *voir dire* ruling, the evidence of the prosecution witnesses, and the evidence of the defence witnesses, and the "WRJS" that the trial Judge had adequately and properly considered and discussed the medical evidence and in the opinion of the court correctly accepted the evidence of the prosecution witnesses, which is supported by the medical evidence. I am not persuaded that the learned trial Judge had failed to consider and discuss the medical evidence. This ground has no merit. There is no miscarriage of justice.

Ground 2 - ***The learned trial Judge erred in law and in fact when he failed to consider the serious prejudice caused to the appellant when the interview was conducted and recorded in the Hindustani language when expressly stated in his record of interview that he can't read and write in Hindustani language which should made the interviewing office to ask for any other language options which the interview could be conducted and recorded in for verification purposes.***

[32] The Court has carefully considered this ground - it is misconceived. There is some confusion and misunderstanding on the part of the accused on his approach to the matter. The questions and answers recorded in the interview were not in dispute. It is apparent that the appellant stated he wanted to be interviewed in Hindustani because he speaks and understands Hindustani. The appellant admitted he cannot read or write Hindustani. The appellant did not object to being questioned in Hindustani. He did not object to the interview being written in Hindustani. At the end of the interview the interview was read back to the appellant in Hindustani.

[33] The accused is understood to be a person who cannot read or write in the Hindustani. However, he is not a person who cannot speak or comprehend the Hindustani language. If the latter is the case, which it is: what prejudice would be suffered by the appellant if his interview was conducted in the Hindustani language and recorded in Hindustani? What prejudice is there in his caution interview being read to him in the Hindustani? The ground has no merit. There is no miscarriage of justice.

<u>Ground 3</u> - ***That the trial judge erred in law when he overturned the unanimous finding of not guilty by the 3 assessors without considering the overwhelming doubts and inconsistencies in the evidence of Ms Savitri on the issue of identity of the person who was seen coming and going from the deceased's residence around the material time and high probability that she was mistaken.***

[34] This ground relates to the issue of identification of the appellant as the person who committed the offence. It raises two interconnected issues, namely: (1) Whether the trial Judge can in law overturn the unanimous opinions of the assessors in the circumstances of this case; and, (2) Whether there is overwhelming doubt and inconsistencies in the evidence (especially of Ms Savitri) establishing that, it was the appellant who was seen coming and going from the deceased's residence around the material time. Is there a high probability that it was a case of mistaken identity on the part of Savitri (PW2)?

[35] In Commonwealth jurisdictions such as Fiji, the assessors are recognized as arbiters of facts, to assist the final arbiters of facts, but whose opinions will render assistance to the trial Judge to determine the facts in the context of the guilt or otherwise of the accused: **<u>Sakiusa Rokonabete v The State</u>** [2006] FJCA 40, Criminal Appeal No. 0048 of 2005.Section 237(3) of the Criminal Procedure Act 2009, affirms that position also.

[36] The reasons for disagreeing with the unanimous opinion of the assessors are set out in paragraphs 8 to 12 of the "WRJS". The prosecution's case was primarily based on the alleged confession to the police on 16 and 17 February 2013 which was accepted after the *voir dire* hearing as admissible evidence. PW7s and PW 8's evidence that the accused was given his rights to counsel, standard meals and breaks, was formally cautioned and treated well by police while in custody; as well as evidence that they did not assault, threatened or made false promises to accused when he was caution interviewed by police and when he was in their custody. The medical report, the explanation and clarification by Dr Kelera, and the totality of the evidence supports that finding.

[37] The appellant's allegations that he was assaulted repeatedly and threatened by police while he was interviewed and while in their custody was considered. The police did

take the accused for medical examination at Lautoka Hospital on 18 January 2013 before he first appeared in court on the same date. The medical report was produced but it did not assist the accused. The doctor did not find any injuries on him when he conducted a General Examination. He only found an ankle injury which was swollen and tender. Doctor Kelera (DW2), who was called by the defence to give evidence for the examining Doctor Kaul, who had died two years earlier said the injury could be caused by falling down, punches, kicks or being hit by a stick.

[38] The learned trial Judge had carefully examined the evidence of PW7, PW8 and considered the allegations of alleged police assaults. The learned trial Judge concluded that the prosecutions witnesses' evidence was more credible than that of the accused on the issue of alleged police brutality. He accepted PW7s and PW8s evidence as more credible than the accused's evidence. The appellant's allegation that he was assaulted by police while in their custody was rejected. In paragraph 11 of "WRJS "he stated as follows:

> "…..*In my view the accused was very evasive when cross-examined, and more injuries would be found in his body if he was repeatedly assaulted by police. He also did not complain to the Magistrate of any untoward police behaviour when he first appeared in court on 18 January 2013. His evidence on the alleged police brutality were not credible.*"

[39] On Identification of the accused, counsel for appellant submits at the hearing that there is clear evidence that throws doubt on the identification of the appellant to and from the crime scene. The question that is relevant is: How was the appellant recognised? He referred to page 533 on cross-examination of Mr Singh (PW6) by Mr Ratu and the evidence of PW2 Savitri Asha Lata Prasad (from page 491) especially to pages 498 and 507 in cross-examination. Counsel for appellant submits that there is no safe evidence on recognition of appellant going to and returning from deceased's house, and that casts serious doubt on the recognition evidence

[40] A critical consideration of Savitri's whole evidence, including in cross-examination, establishes that she was firm in who she recognized as coming to and returning from Vidya Wari's home at the material time. There were other supporting evidences on

this aspect apart from the confession, for instance, the deceased's dying declaration, the evidence of the JP's evidence, the clothing identification and evidence that the person going to and from Vidya Wait's home previously was the one "selling God's photos". The identification of the appellant cannot be challenged under the circumstances. This ground has no merit. There is no miscarriage of justice.

Ground 4 - ***That the learned trial Judge erred in law and in fact when he disagreed with the opinion of the assessors of not guilty of the two counts of murder and robbery especially when he found that the assessors' opinion were not perverse and it was open to them to reach such a conclusion on the evidence.***

[41] The comment made regarding the finding of fact by the assessors not being perverse, cannot be challenged as in conflict with the ultimate finding of the trail Judge. The comment may be viewed and explained in light of the role of the assessors and the role of the trial Judge. It is well established that in Fiji, the assessors are not the ultimate deciders of fact. It is the Judge who is the final arbiter on fact and guilt or otherwise. The assessors focus on facts and not facts and the law. If the assessors were perverse, it means that they have come to a wrong conclusion on the facts, through omission, commission or carelessness or conflict of interest. The trial Judge had explained why he had taken a view opposite to the assessors - see analysis on Ground 3.

[42] In **Bavesi v State,** Criminal Petition No. CAV 0019 of 2023 (29 October, 2024) the Supreme Court dismissed the Petition in upholding the decision of the trial Judge and the Court of Appeal in **Bavesi v The State** [2022] FJCA 2; AAU 044 of 2015 on the basis including, that despite the disagreement between the assessors and the trial Judge the assessors verdict was not perverse. Arnold JA, stated that the Court having examined the record carefully, had come to the conclusion that there is no doubt on the evidence that the Petitioner committed the offence with which he was charged. Likewise in this case. The ground has no merit, there is no miscarriage of justice.

(I). Conclusion

[43] In view of the forgoing, I am not persuaded the appellant had demonstrated to the Court that his conviction is unreasonable or cannot be supported having regard to the evidence or that the decision was wrong on a question of law or on a ground that there was a miscarriage of justice. I would dismiss the appeal and affirm the conviction.

Andrée Wiltens, JA

[44] I agree and have nothing to add.

Orders of the Court

1. *The appeal is dismissed.*
2. *The conviction is affirmed.*

Hon. Mr. Justice Isikeli Mataitoga
PRESIDENT COURT OF APPEAL

Hon. Mr. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

Hon. Mr. Justice Gus Andrée Wiltens
JUSTICE OF APPEAL

Solicitors
Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the Respondent